

# Free & Equal

## Position paper: A Human Rights Act for Australia



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# A Human Rights Act for Australia

Position paper: Free and Equal

December 2022



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Emeritus Professor  
Rosalind Croucher AM FAAL

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*President  
Australian Human Rights Commission*



## President's foreword

This Position Paper offers a model for an Australian Human Rights Act and associated reforms. It seeks to complete the central, missing piece of our domestic legislative framework for the promotion and protection of human rights in Australia – by bringing rights home.

In doing so, it proposes how to belatedly meet the intended design of the Australian Human Rights Commission itself. When established on a permanent footing in 1986, the Commission was intended to have a complaint handling jurisdiction for human rights complaints through an Australian Bill of Rights Act.

While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in domestic legislation, Australia stands alone in not having introduced a Human Rights Act.

But just because 'everyone else' has one, does that necessarily mean that we need one too? That is a fair question to ask. There is a strong sense of rights and freedoms in Australia and some argue that our rights and freedoms are protected well enough without one. Our experience with COVID-19 responses challenges that assertion. That indefinite administrative detention is not unlawful under our existing laws suggests why our current protections, including the rule of statutory construction, known as the principle of legality, are just not enough.

The Commission has been handling human rights complaints since 1981, through the lens of the international treaties, and we seek to resolve matters through conciliation. However, this process is without any recourse to enforceable remedies through the courts. This stands in contrast to complaints brought under federal discrimination laws that the Commission also administers.

Providing a pathway to enforceable remedies in a Human Rights Act would substantially improve access to justice and accountability for government decision making.

As it stands, our Constitution protects some rights, expressly or impliedly, the principle of legality acts as a handbrake of a limited kind on encroachment of rights, and the parliamentary scrutiny of legislation plays a role. In this Position Paper, the Commission concludes that this is insufficient and does not provide the human rights protection that all people in Australia are entitled to.

The Commission has long supported the introduction of a federal Human Rights Act as the best way to anchor the promotion and protection of human rights in Australia and this Position Paper offers a viable and actionable set of proposals to achieve this.

The model for a Human Rights Act put forward here builds on the excellent work of the National Human Rights Consultation Committee, chaired by Fr Frank Brennan SJ, and its report of 2009, and the research and advocacy of the Human Rights Law Centre, Law Council of Australia and many other community partners, for bringing rights home. It is a model that retains and emphasises the supremacy of the parliament – an entirely different approach to rights protection from jurisdictions such as the United States of America.

The beauty of a Human Rights Act, and other measures that *frontload* rights-mindedness, is that they are expressed in the positive – and they are embedded in decision making and *ahead* of any dispute.

A Human Rights Act *names* rights; it provides an obligation to *consider* them and a *process* by which to do it – together supporting a cultural shift towards rights-mindedness, becoming part of the national psyche, not just an afterthought.

The purpose of such an Act is to change the culture of decision making and embed transparent, human rights-based decisions as part of public culture. The outcome needs to be that laws, policies and decisions are made through a human rights lens and it is the upstream aspect that is so crucial to change.

In leading this *Australian* Conversation on Human Rights, the Commission, as Australia's National Human Rights Institution, is taking seriously – and aspirationally – the statutory mandate given to us by parliaments since 1981.

I commend the proposals in this Position Paper as the second major contribution in this conversation and look forward to an open and rigorous discussion of its merits.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL  
**President**





# Chapter 1: Executive summary

## 1.1 Overview of the Position Paper

**Chapters 2 and 3** of this Position Paper set out the gaps in Australia's current framework and make the case for a federal Human Rights Act.

**Chapters 4-12** outline the Commission's proposed model for a Human Rights Act.

**Chapter 13** considers existing parliamentary scrutiny mechanisms and improvements that can be made with the introduction of a Human Rights Act.

**Chapter 14** focuses on the role of the Commission itself, and the enhanced contributions the Commission can make to promoting and protecting human rights in the light of a federal Human Rights Act.

### (a) Why Australia needs a Human Rights Act

- *Australia does not adequately protect human rights at the present time*

Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal.

The Australian Constitution offers only limited protection for a small number of discrete human rights. This includes the implied right to freedom of political communication; and a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution.

The common law recognises a number of rights and freedoms. The common law protects human rights indirectly through statutory interpretation principles such as the 'principle of legality', which presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'. However, common law protections are fragile, as Parliament can pass a law that overrides them at any time.

While Parliamentary scrutiny measures enable some consideration of human rights during the law-making process, these measures alone have not resulted in an embedded human rights culture within Parliament. Parliament routinely passes laws that are not human rights compliant.

While discrimination laws implement key aspects of the international treaties Australia has ratified, they are only a partial implementation of them, with many key international rights finding no corresponding federal protections.

Human Rights Acts have been passed in Victoria, the Australian Capital Territory and, most recently, Queensland. The lack of an overarching federal instrument means that a person's access to rights protections is wholly contingent on where they live.

The Commission's ability to resolve human rights complaints can be very limited. Unlike complaints alleging unlawful discrimination, if the Commission cannot conciliate a human rights complaint, the person cannot then bring court proceedings, nor obtain any enforceable remedies.

UN Treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system. Many of Australia's commitments to human rights are confined to rhetoric without corresponding domestic protections.

The need for a Human Rights Act can be summed up in one simple statement: people's human rights matter all of the time. Government that is here to serve the people, should consider their impact on people whenever they make decisions.

- *The current rights framework in Australia is not easily explainable, or readily comprehensible, to all people in Australia.*

The above patchwork of rights is difficult to explain to everyday Australians, whose rights are meant to be protected.

Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all.

- *A Human Rights Act for Australia is an evolution not a revolution*

Human Rights Acts have been passed in three states and territories in Australia and been in operation since 2004. Throughout this paper there are references to case studies of how a Human Rights Act has made a positive difference to the protection of human rights in these jurisdictions, as well as in the multiple countries that have introduced such legislation over the past 20 years.

The proposed model for a federal Human Rights Act builds on the success and lessons from these existing models, while also tailoring a Human Rights Act to the specific constitutional requirements of Australia.

The proposed model for a Human Rights Act set out in this paper also seeks to build on the lessons from the Australian Human Rights Commission having administered a human rights and ILO 111 complaints handling stream under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) since 1986. There are deficiencies to how these complaint processes operate, which limit their effectiveness. In the Commission's model for a Human Rights Act, these existing human rights complaint streams would be replaced with a much clearer set of rights in the HRA.

By learning from the lessons of other models, and building on the legacy of the AHRC Act processes that have been in domestic law for 36 years, the Commission's proposal for a Human Rights Act is an evolution not a revolution.

## People's rights matter, all of the time



The impact of laws, policy and practice on people's human rights should always be considered.

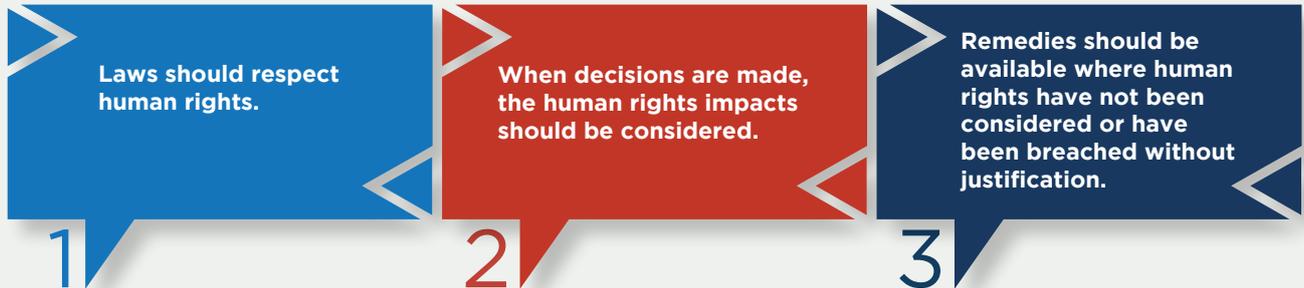


Parliament, governments and public officials should be held to account for how they consider human rights impacts in their decision-making.



This reflects: our commitment to democratic principles, and 'Australian values' that respect civil liberties, rights and fundamental freedoms.

### It means that:



### The legal framework should:

- **Protect** human rights.
- **Prevent** violations of human rights.
- **Provide** effective relief for breaches of human rights.



- *Principles to guide human rights protection in Australia*

The following principles have guided the Commission in designing its model for a Human Rights Act.

**A. Australian:** We need a Human Rights Act that reflects our shared values and embeds rights into our own domestic system.

**B. Democratic:** We need a Human Rights Act to strengthen existing democratic and rule of law principles. The model should be parliamentary, accountable, participatory and balanced.

- **Parliamentary** – by preserving parliamentary sovereignty in a model based on dialogue.
- **Accountable** – by enhancing the rule of law and providing a check on executive power.
- **Participatory** – by improving the quality of public debate and enabling minority and vulnerable groups to have a voice in decisions that affect them.
- **Balanced** – by setting out a framework for navigating the intersection of varied public interests and rights.

**C. Preventative:** We need proactive measures to prevent human rights abuses, through a Human Rights Act that embeds procedural measures to enable early consideration of human rights, and fosters a culture of respect for human rights throughout the whole of government.

**D. Protective:** We need safeguards against human rights abuses, through a Human Rights Act with pathways for individuals to access justice and redress through courts.

**E. Effective:** We need a Human Rights Act that facilitates better decision making based on human rights standards, and equality of access to effective interventions to protect human rights.

- *Australian*

Australian values align with human rights. Many Australians assume that human rights are already protected in Australian law. Despite community expectations, key civil and political rights like freedom of speech and protections against arbitrary detention are not fully protected in Australia. Social, economic and cultural rights such as rights to health and education also reflect important Australian values, yet these are only reflected in laws to a limited extent, and related services can be withdrawn at any time.

A Human Rights Act would enable us to articulate and embrace our values through an Australian instrument. This would recognise the rights and freedoms that Australians already support, providing clarity and certainty. It would mean that Australians will have a shared understanding of what constitutes our rights, clear expectations of government and grounds for holding government accountable to these expectations.

The systems set up by the Human Rights Act would ensure that the rights of all people in Australia are respected in everyday life. All of us deal with government agencies that make decisions that affect our lives. For example, when attending school, accessing healthcare or aged care, obtaining an ID or interacting with the police. A Human Rights Act will apply to all of these areas. It would support decision makers to consider human rights in a way that is more appropriate to individual circumstances and protect against arbitrary or unfair decision making.

- *Democratic*

Without a Human Rights Act in place, laws can be passed, and executive decisions can be made, without consideration for human rights. This has negative implications for democratic principles and the rule of law.

There are relatively few parliamentary or judicial safeguards on the exercise of discretionary executive power in Australia. Parliament routinely passes laws that expand upon executive power, which lessens accountability over decision-making. Examples include counter-terrorism laws that have affected rights to free speech and the right to a fair trial, and delegated decision-making under legislation such as the *Biosecurity Act 2015* during COVID-19.

In parliament and within government, political or economic justifications can easily override human rights, without being tested. Recent public discussions about how far government and private action should be able to limit freedom of speech, freedom of religion, the right to equality and a person's privacy, are examples of areas where there is an inadequate legal framework to resolve complex interactions between fundamental rights and freedoms.

A Human Rights Act would strengthen existing democratic principles, with an emphasis on the role of Parliament in a dialogue model. It would provide accountability for executive decision-making through judicial pathways, without infringing on parliamentary sovereignty. A Human Rights Act would also ensure that laws, policies and decisions affecting human rights are publicly justified and subject to scrutiny and debate. It would provide a coherent framework for managing intersecting rights and freedoms, by requiring parliamentarians and decision-makers to rationally justify limitations on human rights.

Through these mechanisms, a Human Rights Act would increase public participation in decision-making and ensure that transparency and openness are built into government processes. It would help to increase public trust in government and how it operates, at a time when trust in democratic institutions has declined.

- *Preventative*

Without a duty on government to consider and act in accordance with human rights in the early stages of decision-making, human rights breaches may only be apparent after extensive damage has already occurred, resulting in significant human and financial costs. Recent Royal Commissions have highlighted the systemic violations that can occur when human rights are ignored at all levels of government.

A Human Rights Act would ensure that systematic steps are taken to prevent breaches of human rights from occurring in the first place. It would lead to procedures being put in place to ensure that government considers human rights at an early stage in law, policy and administrative processes, which will also filter into operational decision making.

Parliamentary scrutiny would be conducted through the lens of Australian human rights law, with statements of compatibility prepared for Ministers by departments referring to human rights obligations under Australian law, rather than international law. Through such shifts, there would be a greater upstream embedding of human rights principles in laws, policies and practices.

A Human Rights Act would also spread awareness and understanding of human rights throughout government and the public at large, building a human-rights culture that would embed principles of fairness and respect into the fabric of public life in Australia.

- *Protective*

The consequences of Australia's lack of legal human rights protections acutely affect people who experience disadvantage and marginalisation. It is the most vulnerable people who can fall through the cracks in the existing frameworks.

While the capacity to vote politicians out of power is a fundamental aspect of Australia's democracy, the majority view is not always aware of, or sympathetic to, the human rights of vulnerable and marginalised groups. Sometimes public pressure will result in parliament making changes to laws that better protect these groups, but these changes often occur belatedly.

Vulnerable and marginalised people and groups may also be subject to unfair administrative decision making by public bodies. Human rights considerations in government decision-making can mean the difference between being homeless and being housed; being destitute and being able to afford basic necessities; being locked up and being free; being shut away from society and being provided with supports to engage in life; being removed from home and living with family.

A lack of care for human rights can escalate to human rights violations occurring at a systemic level, affecting innumerable vulnerable people.

A Human Rights Act would mean that if a person's human rights were breached or disregarded, there would be pathways to enable them to seek and receive justice. Currently, there are very limited options for people to gain redress for human rights abuses, both formally and informally.

- *Effective*

A Human Rights Act could reduce social and other costs, providing economic benefits for Australians. It would be designed to be effective through the prevention of costly breaches. It would lead to improvements in the quality and accessibility of service delivery through a more considered and flexible approach to service provision. There may be initial upfront costs, but long-term savings to individuals, to government and to the court system.

## **(b) A Human Rights Act based on dialogue**

The Commission proposes a Human Rights Act built on the legislative dialogue model. Dialogue Human Rights Act models incorporate a formal 'dialogue' between the executive, legislature and judiciary, with each branch of government sharing responsibility for respecting and protecting human rights. Dialogue models also strongly focus on the 'upstream' arena of decision making and policy development.

In accordance with this model, there would be a specific 'positive duty' on the executive to act compatibly with human rights, and give proper consideration to human rights when making decisions. Government entities, known as 'public authorities' would be bound by this duty.

Parliament would be required to consider human rights when making and debating laws, through existing parliamentary scrutiny measures. The judiciary would be required to interpret laws in a way that is compatible with the Human Rights Act where it is reasonably possible to do in light of Parliament's intention. The judiciary would also review the executive's compliance with the positive duty in relation to particular decisions and issue remedies for breaches of the Human Rights Act.

Unlike the state and territory models, and the UK model, the Commission's model does not include provision for a formal 'declaration of incompatibility' by a federal court, given some uncertainty about the constitutionality of such a provision.

### **(c) What rights should be included in a Human Rights Act?**

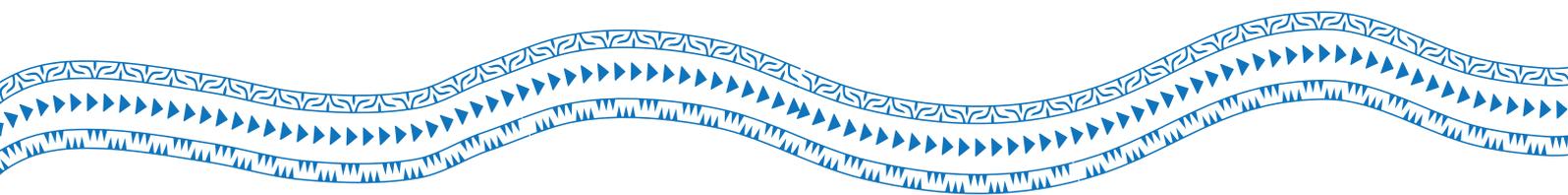
The key function of the Human Rights Act will be to coherently implement Australia's international obligations domestically, and to reflect and codify fundamental common law rights. It would provide the 'bedrock of rights' in Australian law.

The Commission's recommended model primarily incorporates rights derived from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). When formulating the wording of these rights, the Commission has taken into account state and territory human rights instruments, and Australia's specific constitutional and federal structure.

The Commission has also reflected Australia's obligations arising from 'thematic' treaties beyond ICESCR and the ICCPR, relating to particular subsections of the population, such as children (Convention on the Rights of the Child (CRC)) and persons with disability (Convention on the Rights of Persons with Disabilities

(CRPD)); as well as rights and principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), noting Australia's particular obligations to First Nations peoples. The Commission has proposed embedding key overarching principles from these instruments through the inclusion of a 'participation duty' and a related 'equal access to justice duty' in relation to the Executive.

The Commission also proposes that the thematic instruments are reflected through the inclusion of a clause that requires the Human Rights Act to be interpreted in light of international human rights instruments. This clause would reference the seven core treaties that Australia has ratified, and UNDRIP. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act, and considering how the rights in the Human Rights Act may apply to federal legislation that raises human rights considerations.



The Commission's proposed Human Rights Act includes the following rights:



Recognition and equality before the law; and freedom from discrimination



Right to life



Protection from torture and cruel, inhuman or degrading treatment



Protection of children



Protection of families



Privacy and reputation



Freedom of movement



Freedom of thought, conscience, religion and belief



Peaceful assembly and freedom of association



Freedom of expression



Taking part in public life



Right to liberty and security of person



Humane treatment when deprived of liberty



Children in the criminal process



Fair hearing



Rights in criminal proceedings



Compensation for wrongful conviction



Right not to be tried or punished more than once



Retrospective criminal laws



Freedom from forced work



Cultural rights



Cultural rights - First Nations peoples



Right to education



Right to health



Right to an adequate standard of living



Right to a healthy environment



Right to work and other work-related rights



Right to social security

The Commission's proposal also includes the following cross-cutting procedural duties:

- Participation duty
  - » First Nations peoples (embedding UNDRIP principles)
  - » Children (embedding CRC principles)
  - » Persons with disability (embedding CRPD principles)
- Equal access to justice duty.

- *Approach to ICESCR rights*

In order to ensure that ICESCR rights are justiciable and constitutionally compliant, the Commission proposes articulations of ICESCR rights that are somewhat narrower than the full expression of those rights contained in ICESCR. The Commission has focused on including the essential, core and/or immediately realisable aspects of these rights. Importantly, the proposed articulation of ICESCR rights is designed to accord with the Commission's proposal for including a direct cause of action for unlawfulness under the Human Rights Act. All ICESCR rights are implemented through the Commission's proposals, to varying degrees and in a range of ways.

The Commission recognises that ICESCR implementation, particularly with regard to the principle of progressive realisation, occurs primarily outside of the realm of the courts. Progressive realisation is most relevant to 'upstream' decision making about policy and resourcing. Parliamentary scrutiny and Commission reporting would provide opportunities to address the broader aspects of ICESCR rights that extend beyond the narrower articulation of rights in the Human Rights Act to be applied by courts. The Commission also envisions that legal foundations in a Human Rights Act would be complemented by overarching national targets and measurable indicators assessing human rights implementation, enabling the progressive realisation of rights over time.

- *Approach to First Nations rights*

The Commission considers that, in combination with a Human Rights Act, a range of steps should be undertaken to implement the rights of First Nations peoples, particularly as set out in UNDRIP. This includes through introduction of a National Plan to implement UNDRIP, and a constitutional Voice to Parliament as the first step towards the full realisation of the Uluru Statement from the Heart.

Within the Human Rights Act model itself, the Commission proposes that UNDRIP be reflected in the following manner, subject to further consultations with First Nations peoples:

- A 'participation duty' applicable to the executive, to reflect principles of self-determination through practical measures by public authorities, to complement a Voice to Parliament mechanism.
- The inclusion of cultural rights, non-discrimination rights and ICESCR rights, alongside the participation duty, to incorporate key UNDRIP rights within a Human Rights Act. These would be included with a standalone cause of action, and representative standing to enable organisations to bring claims on behalf of communities – recognising the collective aspect of these rights.
- First Nations participation reflected in parliamentary scrutiny processes through the requirement to list in Statements of Compatibility steps taken to ensure that participation of First Nations peoples has occurred, where relevant, which would also be subject to assessment by the Parliamentary Joint Committee on Human Rights.
- A clause enabling human rights in the Human Rights Act to be interpreted in light of UNDRIP in cases where the rights of First Nations peoples have been affected.
- The right to self-determination articulated in a preamble to the Human Rights Act as an overarching principle of the instrument.

## **(d) Positive duty on public authorities**

### *• Nature of the duty*

A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to give proper consideration to human rights when making decisions. This is also known as a ‘positive duty’ applying to public authorities. The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. The requirement to ‘act compatibly’ with human rights is a substantive obligation on public authorities.

Public authorities would also be required to engage in participation processes where the ‘participation duty’ is relevant, as part of the ‘proper consideration’ limb.

Compliance with the positive duty would be reviewable by courts (and possibly by tribunals as discussed below in relation to administrative law remedies).

The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

### *• Scope of public authorities*

The scope of public authorities with obligations to comply with the positive duty includes ‘core’ executive bodies, such as government departments, agencies and offices, and the police. It also includes ‘functional’ public authorities, which are private businesses, non-government organisations and contractors that have functions of a public nature and are exercising those functions on behalf of government. Private entities only have to comply with the Human Rights Act when they carry out public functions.

The Commission has proposed adapting state and territory definitions of ‘public authorities’ to suit the federal context, in a manner that is flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with the Human Rights Act. There is a range of factors included in the definition that indicate whether or not an entity is a functional public authority (for example, whether the function is conferred on the entity under a statutory provision, and whether the entity is publicly funded). The definition also includes examples of functions that are definitively of a public nature. Examples of functional public authorities at the federal level would include a private company operating a federal prison; and a private service provider delivering services through the NDIS.

Not included in the scope of public authorities are the Parliament of Australia, except when acting in an administrative capacity; the courts, except when acting in an administrative capacity and where the Human Rights Act applies to the court’s own procedures; and entities declared by Human Rights Act regulations not to be a public authority.

The Commission also proposes including an ‘opt-in’ clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act.

### *• Implementing the duty*

A positive duty must be accompanied by intensive measures to ensure cultural change and the adoption of a preventative approach to human rights protection within public authorities. There should be a transition period pre-introduction (1 year) to develop proficiency within the public service. Human Rights Act implementation should include an initial whole-of-government education program, followed by permanent routine educational requirements at all levels of government to maintain fluency with the Human Rights Act.

There should also be permanent, dedicated internal departmental teams with human rights expertise and responsibility for consultation and education on Human Rights Act matters; the development and implementation of human rights action plans by federal departments and agencies; the development of tailored guidelines, checklists and resources to enable staff within public authorities to make human rights-compliant decisions within their areas of competence; and respect for human rights included within public sector codes of conduct.

The Commission considers that it would have a central role in providing tailored and general education about the Human Rights Act for public authorities, and would require dedicated ongoing resourcing to do so.

## **(e) Procedural duties**

### **• *Participation duty***

In addition to the positive duty on public authorities to consider and act in accordance with human rights, the Commission proposes that an overarching ‘participation duty’ be introduced into a Human Rights Act. The participation duty would primarily operate as an aspect of the binding positive duty on public authorities.

The participation duty would also apply to proponents of legislation in a non-binding respect, reflected in Statements of Compatibility and assessed by the Parliamentary Joint Committee on Human Rights (PJCHR).

### **Participation duty on public authorities**

The participation duty would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The ‘participation duty’ addresses a fundamental problem in the development of federal policies and decisions – inadequate engagement with the very people to whom those decisions directly apply.

The Commission’s proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures concerning consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in decision-making processes.

International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would be a means of realising key procedural elements of the existing rights in the Human Rights Act, in relation to these three groups.

The duty will apply differently to each of these groups, as defined by the relevant international instruments. However, the same underlying requirement applies — when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions.

- Where decisions of public authorities will affect the rights of First Nations peoples and communities, participation processes should be facilitated in line with UNDRIP principles and standards relevant to consultation and participation.
- When individual children are affected by a decision, the ‘best interests’ principle should be applied, and the child should be heard, with their views given due weight in accordance with their age and maturity. When children as a group are affected by proposed policies or laws, the best interests of children should be proactively considered, and children should be consulted as part of the development process.

- Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. When decisions have an impact upon people with disabilities as a group, persons with disability, including through their representative organisations, should be consulted as part of the process.

The participation duty would arise when public authorities are developing policies, or making decisions, that affect the rights of these three groups. The duty would arise when decisions are being made that directly concern these groups, or where the decision is likely to have a disproportionate impact on the group in question. For example, changes to planning policies may have a disproportionate impact on people with disabilities if they affect accessibility.

Where decisions are made that affect groups of people, the decision maker need only show that there was sufficiently fair and representative consultation, not that participation occurred comprehensively with all relevant bodies or individuals.

The Commission has developed a set of guidelines that encompass key considerations for determining the quality of a general participation process. These include, for example, that consultations should occur at a formative stage; and that the results of the consultation should be conscientiously taken into account.

Such objective criteria can be applied by the courts when determining whether the Human Rights Act was breached due to failure to consult in relation to particular right(s). Where public authorities can show that they enabled affected person(s) to genuinely participate in a decision made about them, this will fulfil the participation duty, and point to the fulfilment of the substantive right under consideration by a court. As with substantive rights in the Human

Rights Act, the participation duty could be justifiably limited through the application of the limitations clause.

### **Participation duty on proponents of legislation**

The participation duty would also apply as a non-binding duty for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in Statements of Compatibility. This would also be subject to scrutiny by the PJCHR. Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question.

- *Equal access to justice duty*

In addition to an overarching participation duty, the Commission proposes a complementary 'equal access to justice duty' for public authorities.

This duty would mean that public authorities have a positive duty to realise access to justice principles – and would require active steps by public authorities to ensure the provision of key elements of a functioning justice system. Specifically, it would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.

This duty would create an obligation to meet minimum requirements associated with the right to a fair hearing, overlaid by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law. This is a principle of *equal* access, in order to overcome current barriers to access faced by particular groups.

The purpose of this duty is not only to codify, but to strengthen and support key principles established by common law courts by linking them to positive human rights obligations as defined by international law. The duty would embed non-discrimination principles

into planning and policy by public authorities associated with the justice system. The duty may arise as part of a consideration of whether related Human Rights Act rights were breached by public authorities due to a failure to implement minimum justice guarantees.

- *Technology and decision making*

Increasingly, public authorities are utilising technology, such as artificial intelligence (AI), when making decisions, including decisions that directly affect people's rights. It is important that the same procedural fairness principles and rights consideration apply to *all* decisions made by public authorities, *regardless of how the decision is made*. This should be explicitly clarified in the Human Rights Act.

#### **(f) Jurisdiction and scope**

A Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination. This reflects the fundamental principle that human rights are universal and apply equally to all human beings.

A Human Rights Act should include individuals under Australia's 'effective control' overseas in order to fully implement Australia's international obligations.

In light of Australia's constitutional structure and the existing Human Rights Act instruments in states and territories, the Commission proposes that a federal Human Rights Act should be restricted to federal laws and federal public authorities. The Human Rights Act instruments in place in Victoria, Queensland and the ACT should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act.

#### **(g) Interpretation of rights in the Human Rights Act**

The Commission proposes that the Human Rights Act provide guidance about how rights in the Human Rights Act should be interpreted. As Human Rights Act rights are derived from international law, it is necessary for courts, tribunals and public authorities to be directed to consider international source instruments and related authoritative international materials, in order to gain context for how the rights are to be understood.

The Human Rights Act should include a clause that references the seven core treaties that Australia has ratified and requires the rights in the Human Rights Act to be interpreted in light of those treaties. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act.

This approach would also encourage consideration of explanatory General Comments and other relevant international materials, ensuring that the Human Rights Act remains a 'living document' that takes into account developments in international law, including after the Human Rights Act is adopted.

#### **(h) Interpretation of federal laws and limitations on human rights**

The interpretive clause provides guidance to courts about how they should interpret legislation in light of the human rights contained within the Human Rights Act. Courts are to prefer an interpretation that is compatible with human rights, provided that this is consistent with the intention of Parliament, as expressed through the statute under analysis.

The limitations clause provides guidance on the ways in which human rights can be permissibly limited. This can be relevant to the task of interpreting statutes in a way that is consistent with human rights. A statutory restriction on human rights may be permissible (and therefore consistent with human rights) if it is justified by the limitations clause, for example because it is proportionate to the achievement of some other public purpose or the fulfilment of a different, competing human right.

The limitations clause will also be relevant in assessing whether decisions or actions of public authorities that limit human rights are permissible. This will be particularly relevant to claims by individuals that their human rights have been breached.

Public authorities will need to have regard to the interpretative clause when making decisions or taking action pursuant to statutory authority. More generally, they will need to have regard to the limitations clause in relation to any decision or action that has the potential to impact on human rights.

- *Interpretive clause*

An interpretive clause requires courts to interpret legislation, where possible, in a way that is consistent with human rights. At the same time, the interpretive clause must require courts to respect the parliamentary intention underlying the statute – noting that, in a dialogue model, parliamentary intention will prevail, due to the ultimate supremacy of Parliament.

The Commission's approach to the interpretive clause is designed to chart a middle ground between a constitutionally suspect approach that would grant too much interpretive power to the courts to alter the meaning of legislation; and an approach that would simply be akin to the existing common law principle of legality. The approach that received the most support in consultations is the following formulation.

All primary and subordinate Commonwealth legislation to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.

In addition to this clause, the Commission also proposes clarifying that courts cannot declare that Acts of Parliament are invalid on the ground that they are incompatible with human rights. However, a statutory instrument that is not compatible with human rights may be invalid if it goes beyond what is authorised by the empowering Act, read in accordance with the interpretive clause.

- *Limitations clause*

A limitations clause describes the circumstances in which human rights may be permissibly limited.

Most human rights are not absolute, and circumstances may require that different rights be balanced against important public interests, and against countervailing rights. For example, it may be necessary to balance the right to freedom of expression with the right to privacy; and the right to access information with national security interests.

The Commission proposes an overarching limitations clause be included in the Human Rights Act. The limitations clause should be based on the 'proportionality' test that is strongly established in international law and applicable to human rights instruments. The wording of the limitations clause should serve a dual purpose of being a straightforward and complete legal test for the courts to apply, and a clear directive to public servants on how to conduct the limitations analysis in their day-to-day work.

A clause of this kind should incorporate an overarching statement to the effect that the rights and freedoms contained in the Human Rights Act may be subject only to such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society. The Commission has not proposed a particular form of words for the limitations clause but has identified its important elements. When deciding whether a limit is reasonable and justifiable, the following factors are relevant:

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, the limitations clause should prescribe that absolute rights such as freedom from torture and freedom from forced work must not be subject to any limitations.

The Commission proposes that the limitations clause include examples that highlight the minimum core of certain ICESCR rights. This will signify that ICESCR rights should not be limited to such an extent as to encroach upon the minimum protection required by the right.

### **(i) Notification to Parliament regarding incompatible laws**

State and territory Human Rights Acts provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights though applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI). DOIs are designed to notify Parliament that a law is considered incompatible with human rights, and trigger a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.

However, the High Court's comments in *Momcilovic v The Queen* have led to legal uncertainty about the constitutionality of DOIs at the federal level. This poses a risk that a federal Human Rights Act could not validly include a provision empowering federal courts to make them.

In light of this uncertainty, the Commission has considered a number of options to address potential constitutional concerns. It does not propose incorporating a formal DOI power for the courts to apply, and instead suggests an alternative approach.

In the course of applying the interpretive clause in the Human Rights Act, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the Human Rights Act or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.

The Commission proposes that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question. This will require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act. It will not require a formal DOI to be issued by the court to Parliament.

### **(j) Cause of action, complaints and remedies**

The integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision making and policy design.

However, sometimes better processes and education will not be enough, and breaches of human rights may occur. In those circumstances a Human Rights Act should provide a cause of action, a complaints pathway, and enforceable remedies.

The Commission recommends that each right should have a direct cause of action, and an associated range of remedies. Currently, individuals can bring human rights complaints through the Commission's existing *Australian Human Rights Commission Act 1986* (Cth) jurisdiction. This is by reference to international instruments that are scheduled to the legislation.

Under a Human Rights Act, individuals will continue to be able to make complaints to the Commission but rather than such complaints referring to international instruments, it would be by reference to the rights enumerated in the Human Rights Act. Consistent with federal discrimination law, there would also be a new pathway to bring claims before the courts alleging a breach of these rights.

- *Cause of action*

The Commission's proposed rights are all amenable to enforcement by complaints bodies and courts. Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action. This would provide clarity and consistency and enable the enforcement of rights in accordance with Australia's international obligations.

The Human Rights Act should also allow for Human Rights Act rights to be raised in the context of another legal proceeding (for example, in a judicial review proceeding or as part of a bail application).



# What happens if my rights are breached?

Where there is an alleged breach of rights, a person has a cause of action.

Administrative review pathways available.

Complaint to the AHRC for conciliation. Focus is on quick, cost-effective resolution of complaint.

This model builds on existing practice in federal discrimination law, and ensures focus of accountability is not on the courts.

When applying the interpretive clause, courts may indicate that the legislation is not compatible with human rights, which must be brought to the attention of Parliament by the Attorney-General.

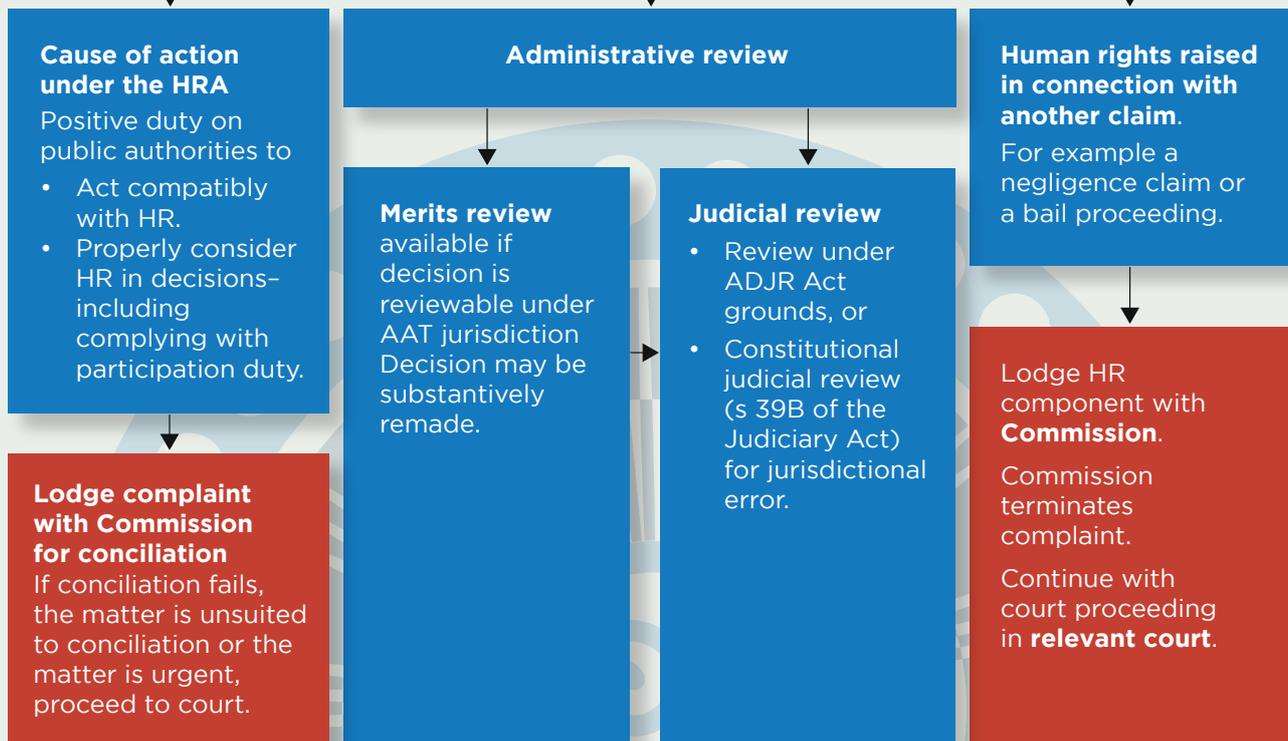
Matters that don't resolve or that are unsuited to conciliation, can proceed to Federal Circuit and Family Court:

- by individuals or representatives
- with cost protections
- courts able to award a range of remedies

Some, limited, matters may go direct to court where there is urgency.

# Pathways through complaints and courts

## Alleged breach of human rights by a public authority



## Federal Court or Federal Circuit and Family Court

When applying the interpretive clause, courts may indicate that the legislation is not compatible with human rights. This does not invalidate the decision or the law under which it was made.

Must be brought to attention of the Parliament by the Attorney-General, for consideration.

### HRA Remedies

**Remedies for HRA breach** may include: injunctions, orders requiring action, declaratory relief monetary damages, admin law remedies – e.g. quashing decision.

### Admin Law Remedies

**ADJR:** quashing or setting aside the decision; referring a decision back to the original decision-maker; declaratory relief; requiring parties to act or refrain from acting.

**Constitutional judicial review:** writ of certiorari, writ of mandamus, writ of prohibition, injunction.

- *Remedies*

The Commission proposes that the Human Rights Act give courts discretion over the range of remedies available, noting the range of different kinds of human rights claims and the importance of flexibility. Available remedies may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.

- *Complaints*

The Human Rights Act should allow a person to make a human rights complaint to the Commission. The Commission's existing unlawful discrimination jurisdiction could be suitably adapted to human rights complaints.

The Commission proposes implementing a Human Rights Act complaint system that mirrors the discrimination law jurisdiction. This would mean that there would be requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then make an application to a court for adjudication.

The same processes that currently exist for unlawful discrimination matters would apply in the human rights context (including all the termination grounds, and representative complaints processes). For example, existing termination grounds would enable a person to proceed to court when there is another claim on foot in a court or tribunal (that the human rights claim will be joined to).

The Commission also proposes one additional termination ground. This would enable a claim to be fast tracked to the court where there is an imminent risk of irreparable harm, to circumvent the complaint process when there is urgency. There would be an adapted and quick internal lodgment and review process, so that the Commission could return a response quickly in urgent cases.

The Commission suggests that the complaints model be subject to review at a future date, through the broader Human Rights Act review process.

An accessible complaints process including conciliation would reduce the impact of a Human Rights Act on the judicial system. Litigation need not be the only port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed.

- *Administrative law*

Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could have an impact on those mechanisms by supplementing existing bases for challenging government decisions.

The Administrative Appeals Tribunal (AAT) has the function of conducting a merits review of many kinds of government decisions. In doing so, the AAT reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. This process is often described as 'stepping into the shoes' of the original decision maker. A 'correct' decision is one made according to law. A 'preferable' decision is the best decision that could be made on the basis of the relevant facts. If human rights (either consideration of, or substantive compliance with) were a requirement for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider those human rights issues again independently.

In the Commission's Position Paper, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (December 2021), the Commission recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts, in relation to unlawful discrimination matters. This could also be extended to the resolution of disputes in relation to Human Rights Act matters.

A person who considers that a statutory decision maker did not give proper consideration to a relevant human right, as required by a Human Rights Act, could seek judicial review of the decision through the courts. Under existing grounds for review, a person may be able to argue that the decision was affected by jurisdictional error, that the decision involved an error of law or that the decision was an improper exercise of power because of a failure to take into account a relevant consideration that the decision maker was bound to take into account. Principles of administrative law, and administrative remedies should apply as usual to decisions that require adherence to the Human Rights Act.

- *Standing and costs*

The Commission proposes that standing under the Human Rights Act be afforded to individuals who claim that their human rights were breached by public authorities, and organisations or entities acting in the interest of a person, group or class affected by human rights breaches (representative standing).

It is important that representative standing be circumscribed to ensure that claims address a specific breach of human rights in relation to a particular individual or a clearly defined and identified group of individuals. The organisation initiating a claim should also have some kind of subject matter connection and/or representative interest in the matter at hand.

An additional means of enhancing access to justice is to include protections against adverse cost orders.

### **(k) Periodic reviews**

The Human Rights Act should include a provision for a periodic statutory review process within a set timeframe. The Commission proposes that an initial review be undertaken at the five-year mark, with the timeline for subsequent reviews assessed at that stage.

### **(l) Parliamentary scrutiny**

The Commission has made recommendations designed to improve the operation and effectiveness of parliamentary scrutiny of laws for compatibility with human rights. These proposals would strengthen mechanism of accountability for human rights protection provided by the PJCHR, ensuring early consideration of human rights in the development of legislation and embedding human rights in primary legislation against which the scrutiny is conducted.

The principal recommendation of this Position Paper is for a Human Rights Act. The work of the PJCHR will then complement this legislation in its role of review. The range of matters to be addressed in a statement of compatibility will principally focus on the rights and freedoms in the Human Rights Act. The Commission advocates that the PJCHR also continue a wider scrutiny role, referable to all the international treaty obligations and UNDRIP.

The Commission also sets out practical and procedural suggestions to strengthen the operation of the PJCHR.

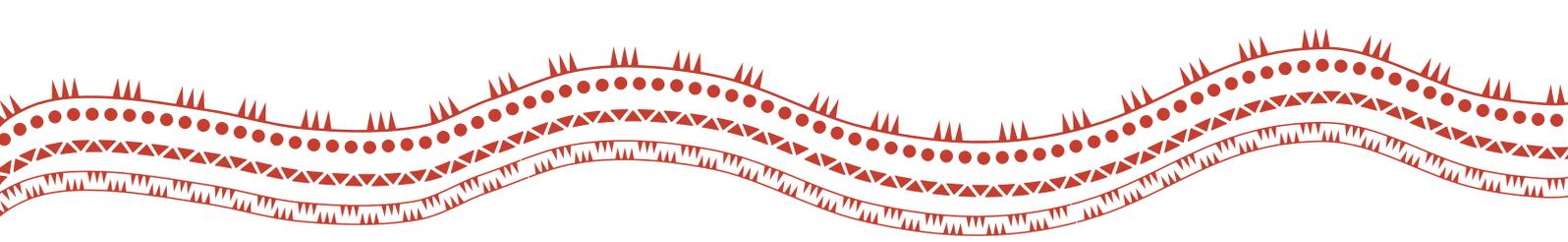
### **(m) Role of the Commission**

In addition to complaints-handling functions, the Commission proposes that it have the following specific functions in relation to a Human Rights Act.

- Reporting, reviews and oversight. This would include powers to conduct own-motion systemic inquiries in relation to human rights breaches; and to review the policies and practices of public authorities to assess their compatibility with the Human Rights Act.
- Annual reporting.
- Extension of existing intervention powers to enable the Commission to intervene in court or tribunal proceedings involving the interpretation or application of the Human Rights Act.

- Education and public awareness.
- Public sector training and guidance, including support for the initial roll-out, ongoing education programs to improve human rights compliance, and the development of public sector guidelines and protocols.

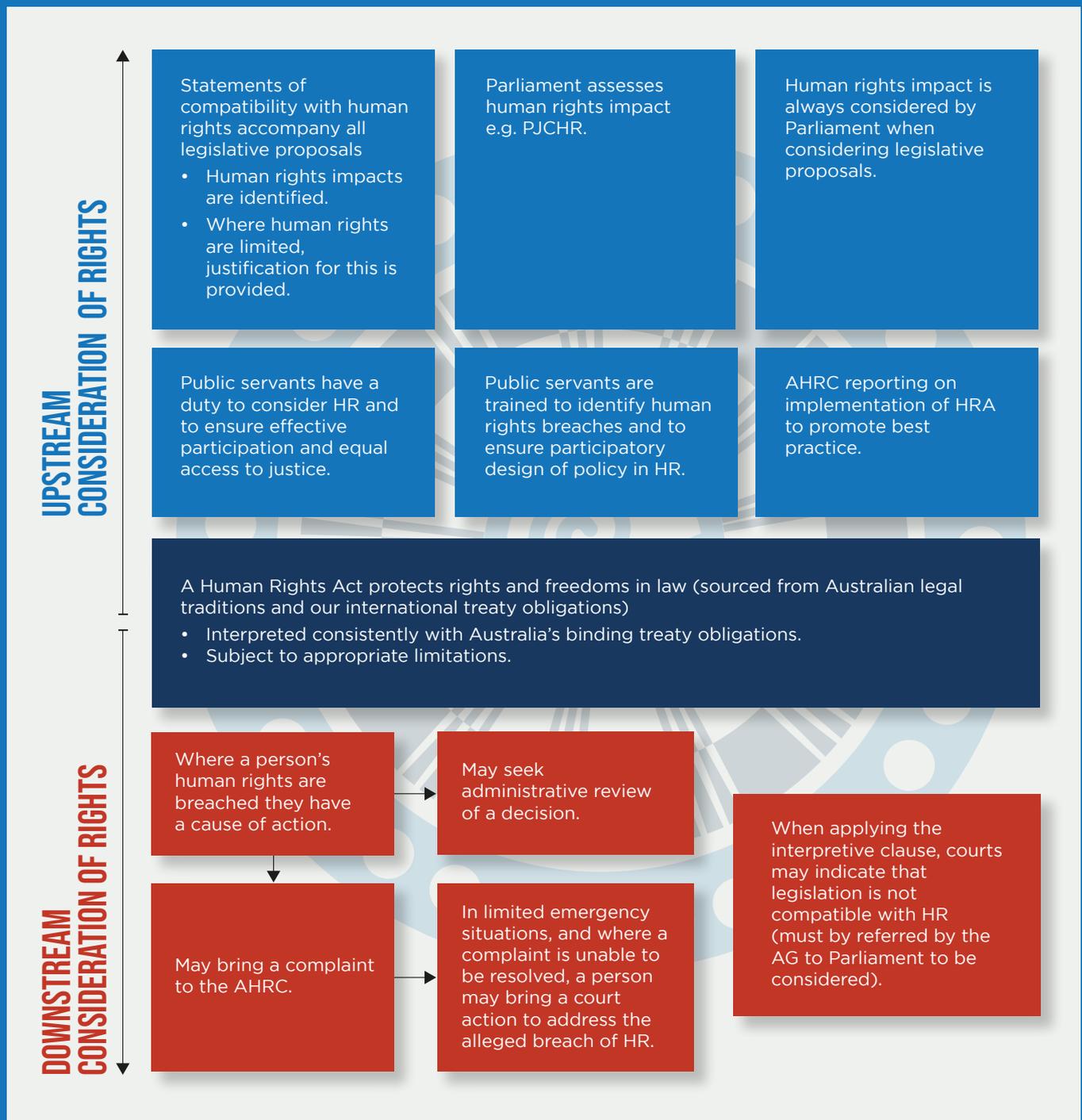
The Commission must be equipped with the necessary tools and resources to protect and promote human rights in line with the Paris Principles. The Paris Principles set out internationally accepted standards that must be met by National Human Rights Institutions such as the Commission.



## 1.2 Recommendations

The Commission’s model for a Human Rights Act seeks to ensure appropriate consideration of human rights upstream – namely, in a preventative manner and in advance – by also

ensuring that there are protections and remedies for when human rights are not appropriately treated. The balance between upstream and preventative measures and remedial elements is summarised in the diagram below



The Commission makes the following recommendations for improved human rights protection at the national level in Australia.

**1. The Commission recommends that the Australian Parliament enact a federal Human Rights Act. The Human Rights Act should include the elements proposed in this Position Paper.**

**2. The Commission recommends the following measures to improve the parliamentary scrutiny processes.**

- The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.
- Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended, along the lines of the power of the UK Human Rights Committee, to allow it to ‘make special reports on any human rights issues which it may think fit to bring to the notice of Parliament’ (but excluding consideration of individual cases). The resourcing of the PJCHR should be increased to enable it to perform this wider inquiry role.
- Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to require statements of compatibility for all legislative instruments.
- The range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken in accordance with the participation duty proposed in the Commission’s model for a Human Rights Act.

- Statements of Compatibility should include consideration of compliance with UNDRIP.
- With the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could be amended, or an accompanying legislative instrument drafted to provide greater clarity on expectations in statements of compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.
- A public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.
- Consideration should be given to having designated human rights advisers in Departments.

### 1.3 Free & Equal inquiry process

The Free and Equal project was announced on 10 December 2018, Human Rights Day, and commenced in early 2019. The project aims to set out the Australian Human Rights Commission’s proposed reform agenda for the better protection of human rights at the national level in Australia. From 2019–2021, the Commission’s consultative process included:

- the release of an Issues Paper<sup>1</sup>
- three Discussion Papers, including a submissions process<sup>2</sup>
- the Free and Equal national conference on human rights<sup>3</sup>
- a visit and conduct of technical workshops with the United Nations High Commissioner for Human Rights, and
- a series of roundtables, technical workshops and stakeholder consultations.<sup>4</sup>

The project is culminating with the release of three papers – two position papers on key reform priorities, and a final report.

The first Position Paper was released in December 2021: *Free & Equal: A reform agenda for federal discrimination laws*. It set out a reform agenda to modernise our federal discrimination laws, including by remedying deficiencies in the current laws, by placing a greater focus on prevention of discrimination and by introducing co-regulatory approaches<sup>5</sup> that enable governments and businesses in particular to be better equipped to prevent and/or deal with discrimination.

But addressing discrimination alone is not enough to ensure that people's human rights are protected.

This second Position Paper sets out reforms to improve the protection of human rights in Australia, designed to complement protections against discrimination and dealing with issues that discrimination laws are not capable of addressing. A positive framing of human rights through a Human Rights Act is needed to ensure cohesive protections are in place in Australia, and it would complement the existing discrimination law framework.

It sets out the Commission's case for the introduction of a federal Human Rights Act in Australia; and an outline of the Commission's proposed model.

Indeed, for many years, some have asserted that alternative ways of protecting human rights render a Human Rights Act unnecessary in Australia – but we have not seen a noticeable improvement in the protection of human rights in Australia over the past generation. These alternative measures to a Human Rights Act have had more than enough time to show if they can ensure that there is always a fulsome consideration of human rights in the way we design, implement and talk about laws and policies.

The Commission's model has been tested through consultations with *Free & Equal* stakeholders. It draws on comparative international models, international instruments and the recommendations of previous inquiries, including the 2009 Report of the National Human Rights Consultation Committee, chaired by Fr Frank Brennan SJ.<sup>6</sup> Domestic human rights legislation in the ACT, Victoria and Queensland has also provided important guidance and lessons as to how a Human Rights Act could operate federally.<sup>7</sup> The experience of COVID-19 has tested their particular design and suggested where improvements could be made.

The Commission's model takes into account this experience, Australia's constitutional and federal structure, Australia's international obligations, Australian values and our legal system.

## 1.4 Outcomes – the value of human rights

*All human beings are born free and equal in dignity and rights* – Article 1, Universal Declaration of Human Rights

Australian society prides itself on being built on values that underpin human rights.

We believe that everyone should be treated fairly and equally.

We value a free, open and just society, one that enables us to make our own decisions about how we live and express ourselves, individually and in association with others.<sup>8</sup>

We are opposed to cruelty and the abuse of power.

Australia is a strong democracy with a robust electoral and parliamentary system, an independent judiciary and respect for the rule of law. For this reason, many people perceive that their human rights are legally protected when in fact they are not.

Australia has not implemented key rights contained in human rights treaties through a cohesive legislative instrument or the Constitution. This renders Australia an anomaly among all other liberal democracies.<sup>9</sup>

There is a gap between what we expect from government, and how our laws and administrative systems operate in practice.

Human rights are not always respected and protected by governments in Australia. Failures to protect human rights can affect all kinds of people, and any lack of respect for human rights degrades society at large. Often, those most harmed by human rights breaches are the most vulnerable among us.

The need for better human rights protections in Australia can be summarised by one simple proposition: we should have proper protection of human rights at the national level because everybody's human rights matter, all the time.

To do so requires that human rights are embedded within the laws of our country, so that they have practical effect for individuals, and are consistently and coherently applied by government. A Human Rights Act would ensure that the rights and freedoms that Australians rightly expect – and assume – are protected,<sup>10</sup> are in fact protected.

There is nothing exceptional about the idea that when making laws, or taking actions or decisions under them, parliamentarians and public officials should consider the human rights impact of their actions and should favour options that positively protect human rights or cause minimal harm to them.

Where parliamentarians or public officials make decisions or take actions that may harm a person (by infringing their human rights) they should transparently justify this choice, by identifying whether limitations on human rights are necessary, reasonable and proportionate to achieving the intended purpose.

A Human Rights Act as proposed by the Commission would mean that the following is reflected in our federal laws:

- assurance of fairness in government, legal and administrative decisions that affect rights
- priority given to respecting and protecting human life
- freedom to speak, create, protest, travel and organise
- freedom to live in accordance with your own beliefs, values and ideals
- freedom to make personal choices without interference, coercion or surveillance, including medical decisions and decisions about your family life
- protections against cruel treatment, arbitrary detention, and unjust court processes
- recognition of the essential standards required for a dignified life – including the provision of access to basic healthcare, housing, education and work; and protections against homelessness, hunger and poor working conditions
- assurance of equal treatment and respect, regardless of your sex, gender, sexuality, disability, age, nationality, race or religion
- embedding of supports to ensure the full autonomy of people with disabilities
- recognition and respect for the self-determination of First Nations peoples
- ensuring that the best interests of children are prioritised in decisions that affect them
- opportunities for disadvantaged, disenfranchised and vulnerable people and groups to participate more fully in the democratic process.

The COVID-19 pandemic has highlighted how important human rights protections are in times of emergency and uncertainty. They help us to discern our priorities, and make difficult decisions that respect human life and ensure that other rights are not unnecessarily restricted. As we emerge from the pandemic, it is clear that strong rights protections are needed and wanted to help us navigate our collective future, through both times of calm and times of crisis.

## 1.5 Responding to COVID-19 – a case study

### (a) Role of human rights in times of crisis

Human rights law provides a framework for making decisions in times of crisis.<sup>11</sup> It provides a mechanism that can ensure that the usual rule of law principles and political norms are not secondary when responding efficiently and effectively to emergencies. Human rights not only provide an important check on executive power; they *help* us make emergency decisions that are rational, balance multiple factors, minimise human cost, and prioritise human life.

In the case of COVID-19, the human rights framework enables unprecedented measures to protect human life. The right to life is absolute and the right to health requires government to ensure access to healthcare and to prevent the spread of epidemics.<sup>12</sup> In some cases, this will mean that important rights are justifiably limited in order to protect public health – for example, freedom of association and freedom of movement.

Wherever rights are balanced against each other or limited, the human rights framework provides guidance on how to approach the assessment. All limitations on rights must be:

- Lawful, namely prescribed by law and accessible to the public.

- In pursuit of a legitimate aim, such as the promotion of other human rights and public interests (for example, public health).
- Reasonable, necessary and proportionate. This means that interferences with rights must be
  - » A rational means of achieving the legitimate aim
  - » Necessary to achieve the aim (including in light of other options)
  - » Proportionate to the aim (no more than what is required to achieve the aim, and the least intrusive option possible).
- All measures taken must also be non-discriminatory.

When applying these criteria to COVID-19 measures such as lockdowns, we can come to conclusions about appropriate courses of action that align with human rights. Each measure must be lawful and clearly communicated to the public. COVID-19 measures are in pursuit of public health outcomes, and therefore have a legitimate aim. Whether a measure is reasonable, necessary and proportionate depends on the circumstances, including the level of risk to health (which changes over time), the necessity of the measure to addressing the health risk, and the extent of the impact on other important rights.

For example, restrictions on the right to protest may be justified when the population is unvaccinated and COVID-19 is prevalent in the community, but may be less justifiable when there are high vaccination rates and precautionary measures are taken by the protest organisers to mitigate COVID-19 risks. The implementation must also be proportionate – for example, excessive or criminal sanctions for peaceful protesting would be unnecessary to realising the goal of the restrictions – protecting health.

The human rights framework also requires safeguards such as time constraints and reviews on any steps taken to limit human rights. If the measures are no longer necessary, they should cease. It has been noted that ‘infrastructure deployed as a temporary measure tends to persist after crises’.<sup>13</sup> This must be avoided.

Additionally, measures taken must be equitable and should not discriminate; for example, a person’s nationality should not affect their access to social security and health services during a pandemic.

Australia’s COVID response was relatively effective in protecting rights to life and to health, compared to many other nations. However, there were key failures which resulted in human rights breaches, and insufficient consideration for certain vulnerable and marginalised groups throughout the COVID response. A domestic Human Rights Act would have provided law and guidance that may have improved Australia’s response in certain key respects.

### **(b) Some key human rights concerns associated with Australia’s COVID-19 response**

- *Lack of lawful basis for measures*

Many restrictions on rights and penalties were introduced to combat the COVID-19 pandemic through delegated legislation, without legislative oversight or review.<sup>14</sup> Many of these measures were also implemented without sufficient transparency about government decision-making process, including regarding the evidence upon which decisions were based.<sup>15</sup> They were often accompanied by increased police enforcement powers.

- *Border closures*

Australia implemented international and internal border closures and restrictions for extended periods of time during COVID-19. This included the unprecedented step of travel caps effectively preventing thousands of Australian citizens from re-entering Australia;<sup>16</sup> and an outright ban on citizens returning from India (with penalties of 5 years imprisonment or a \$66,000 fine) during the Delta outbreak, which drew concern by the Office of the High Commissioner for Human Rights.<sup>17</sup> These policies resulted in the potential for physical endangerment of Australians overseas;<sup>18</sup> extended periods of family separation; high financial costs associated with inflated travel prices, accommodation abroad and mandated hotel quarantine upon return to Australia; lost employment opportunities; and mental health impacts. The Senate Select Committee on COVID-19 found that

The government’s pandemic plan should have provided a workable means of repatriating citizens early in the pandemic. Instead, when Australia’s international border closed, Australian citizens stranded overseas were effectively abandoned.<sup>19</sup>

- *Vaccine rollout*

Australia has a high vaccination rate against COVID-19.<sup>20</sup> However, Australia’s initial vaccine rollout was plagued with problems and lengthy delays, affecting the right to health for all Australians.<sup>21</sup> There were also inequities associated with vaccination of certain vulnerable groups.

- *Lack of consideration for vulnerable groups*

First Nations peoples have lower vaccination rates compared to the overall population despite being classified as high priority at the commencement of the rollout, and there have been several outbreaks in remote First Nations communities.<sup>22</sup>

The needs of children have not been prioritised in COVID-19 policy and children have faced difficulties regarding their mental health, learning and social life,<sup>23</sup> exacerbated by the slow vaccination rollout. This was 'disproportionately borne by the most vulnerable' children and families, including those with low income.<sup>24</sup>

Available reporting indicates that prisoners have lower vaccination rates and limited access to testing, despite prisons being particularly susceptible to COVID-19 outbreaks.<sup>25</sup>

Insufficient steps were taken to reduce the number of people in immigration detention who did not pose any threat to public safety, despite outbreaks and the high risk of COVID-19.<sup>26</sup> By contrast, the UK reduced the number of people held in immigration centres by more than two thirds in March 2020.<sup>27</sup>

A disproportionate number of deaths from COVID-19 occurred in residential aged care facilities. The Senate Select Committee on COVID 19 found that 'the crisis in aged care was entirely predictable and — to a large extent — avoidable'.<sup>28</sup>

The Senate Select Committee on COVID-19 commented that 'many countries vaccinated people with a disability first. This was not the case in Australia where the government failed to implement strategies which would protect this vulnerable group.'<sup>29</sup> The Disability Royal Commission also expressed concern about the treatment of persons with disability living within closed residential settings, finding that steps taken to lockdown facilities or restrict visiting may have reduced formal and informal oversight mechanisms.<sup>30</sup>

### (c) The role of a Human Rights Act

The Senate Select Committee on COVID 19 released its final report in April 2022. It made the following key recommendation:

All Australian Governments ensure that restrictions enacted to combat the COVID-19 pandemic are proportionate, the minimum necessary intrusion on rights at all times and are removed fully as soon as the public emergency is over.<sup>31</sup>

The Committee also recommended that

the Australian Government urgently review its pandemic planning to deliver immediate improvements including:

...

1. a plan for timely repatriation of Australians overseas in the event of border closures or restricted international travel;
2. evaluate the effectiveness of plans for working with and responding appropriately to the needs of vulnerable people during a pandemic and implement updated plans accordingly, including for older Australians, Aboriginal and Torres Strait Islander Australians, people living with disability and children; and
3. principles for addressing related health impacts, including the social determinants of health, mental health service delivery, and ensuring the health and welfare requirements of people experiencing family, domestic, or sexual violence are met.<sup>32</sup>

If a Human Rights Act had been in place at the federal level at the time of the COVID-19 outbreak, these recommendations would have been *built into* the decision-making responses of the Federal Government from the *outset* of the pandemic.

This is the key value of a human rights framework. It ensures that human rights are considered in the planning phase, encouraging greater due diligence, transparency and accountability.

It requires decisions about prioritising resources and policy responses to be justified publicly with reference to human rights so that the public can properly assess them.

It ensures that the stringent effects of emergency measures are mitigated through the provision of supports and the embedding of safeguards. It prevents emergency measures from becoming the ‘new normal’.

It sets out a balancing process that takes into account the needs of *everyone* in the community and prevents the most vulnerable from falling through the cracks. It prevents arbitrary decisions and blanket rules by requiring sufficient flexibility to respond to individual circumstances: for example, allowing a person to cross a border to bury a family member, or an elderly person to receive a visitor.

It provides a check on executive power by drawing lines that should not be crossed — such as locking vulnerable citizens out of their own country. It ensures that responses to emergencies are humane.

A Human Rights Act may not lead to perfect results, but it would help us make better decisions. COVID-19 has highlighted the need for a shared set of rights and values to guide us through difficult times.

#### **(d) Examples of how Human Rights Acts have been used to address COVID-19**

The following case studies provide examples of how Human Rights Acts have helped protect rights during COVID-19.

#### **UK: Protecting the rights of those in care facilities**

Edna is 83 and lives in residential care, her daughter Emily visits most days after work. Following a COVID-19 outbreak, the home put a ‘no visiting’ policy in place. It has now been 34 days, and Edna is isolated and lonely, missing Emily hugely. Emily had accessed some support on the Human Rights Act and speaks to the care home manager about her mother’s right to privacy, family life, home and correspondence, which the home is legally obliged to respect. Emily discusses how this right includes mental and physical wellbeing, family and other relationships, and while it can be restricted to protect her mum and/or others from harm, this needs to be proportionate.

With no consideration of Edna’s ability to keep in touch with Emily, the manager recognises that a blanket ban on visiting is not the least restrictive option. Knowing that they have legal duties to act in accordance with human rights,<sup>33</sup> a meeting is called to agree what alternatives can be put in place whilst they deal with the current outbreak. After the meeting, staff put in place several measures which are less restrictive to support people’s mental and physical wellbeing while still protecting the right to life.

The measures vary, as staff know the same measure will not work for everyone but include video calls, PPE provision for visitors of those for whom video calls not possible, a gazebo in the garden and a floor-to-ceiling screen. Some restrictions are still needed, but applying the Human Rights Act in practice has ensured this is based on each individual and is more proportionate. Emily now visits her mum every Sunday, wearing full PPE, until the outbreak is contained. The Human Rights Act helped keep a family together at a time when they need each other the most.

Sourced from British Institute of Human Rights.<sup>34</sup>

## Victoria: Accountability for public housing lockdown

In 2020, after COVID-19 cases began emerging in nine high-rise public housing towers in inner north Melbourne, the Victorian Government imposed, without notice to residents, an extremely hard lockdown, detaining around 3,000 people in nine public housing towers. Restrictions were eased in several days for most of the towers, however, 400 people in one tower remained in hard lockdown for two weeks in total, unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise. People subjected to the lockdown complained to the Victorian Ombudsman which investigated whether the lockdown complied with the Victorian Charter.

Despite the obvious risk posed by COVID-19 in high-rise public housing towers, the Victorian Government had not prepared a COVID-19 outbreak management plan for the relevant public housing estates or for high-density public housing more broadly. When cases began emerging, senior health officials were worried about the situation and began discussing using public health powers to put the towers into quarantine with notice to the residents. Following a crisis cabinet meeting, the timeline for the quarantine was brought forward and no notice was proposed. The Deputy Chief Health Officer, who had the power to detain people in quarantine, was given 15 minutes before a press conference to consider the potential human rights impacts and sign the directions imposing the lockdown. The immediacy of the lockdown was not on her advice.

The Victorian Government had no contingency plans for the imposition of a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the Victorian community, let alone one imposed without notice late on a Saturday afternoon. When the lockdown was announced to the media, hundreds of police officers were immediately deployed to the public housing estates and directed people to remain in their homes. Chaos followed. People did not have access to food or medication. Urgent requests

for medication were delayed or neglected. Information was confused, incomprehensible, or non-existent, especially for people from culturally diverse backgrounds. People did not know who was in charge. No access to fresh air and outdoor exercise was provided for over a week.

The Ombudsman concluded that while swift action to address the public health risk in the towers was necessary, the immediacy of the lockdown was not justified, was not based on the advice of public health officials and led to many of the problems in the treatment of the residents. By imposing the lockdown without notice, the Ombudsman concluded that the Victorian Government had breached the residents' right to humane treatment when deprived of liberty. The Ombudsman stated that proper consideration was not given to the residents' rights when imposing the restrictions, as required by the Charter.

The Ombudsman made recommendations including that the Victorian Government apologise to the residents and introduce greater detention review safeguards into public health legislation. While the Victorian Government refused to apologise, it did support amendments to public health legislation.

Inner Melbourne Community Legal provided legal support to residents of the towers during the hard lockdown and has monitored Victorian Government responses to subsequent outbreaks in the towers in 2021. It reports that, while the government's refusal to apologise continues to impede the rebuilding of trust required to respond to the pandemic, and accessible timely communication in community languages remains problematic, there have been significant improvements in the way government has responded to concerns about outbreaks in the last year. Notably, government has favoured a health response driven by community organisations and abandoned the heavy-handed police response that was a feature of the 2020 lockdown.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>35</sup>

### **Queensland: Quarantine exemption for woman with disability**

A woman planned to visit Queensland from interstate to pick up her assistance dog, with her mother and her carer, during a period of COVID-19 border restrictions. She was granted an exemption to enter Queensland where she agreed to isolate for 14 days and then spend a week receiving placement of the dog. However, when they tried to arrange for accessible quarantine accommodation, they were told the woman's needs could not be met and her exemption approval was withdrawn. The assistance dog had been trained specifically for the woman's needs at substantial cost and

they were concerned that she would lose the dog allocated to her if she was unable to visit Queensland.

The complainant chose to have this matter dealt with under the Queensland Human Rights Act. Through early intervention, the complaint was successfully resolved for the woman. Her exemption application to enter Queensland was re-approved. Queensland Health organised suitable accommodation for her, her mother and her carer to complete 14-day hotel quarantine.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>36</sup>



## Chapter 1: Endnotes

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- 13 European Parliament, *EU Covid-19 Certificate: A Tool to Help Restore the Free Movement of People across the European Union* (Briefing Paper, May 2021) 2, 3.
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# Chapter 2: Context: the current Australian framework for protecting human rights

## 2.1 What are human rights?

Human rights are the basic rights that all people are born with, no matter who they are or where they are from. Human rights recognise the inherent dignity of human beings. They are based on principles of fairness, equality, autonomy and mutual respect. They are about being treated fairly, and having the ability to make genuine choices in our daily lives. Human rights are universal and inalienable, applying to everyone, everywhere, all the time. They work to improve our lives as individuals, build strong and socially cohesive communities, and enhance the quality of our democracy.

Prior to the modern international legal system, human rights were recognised through law and practice over many centuries in various forms. Key human rights are rooted in the common law tradition that Australia inherited from the United Kingdom,<sup>1</sup> and developed from theories of natural rights that are foundational to modern democratic societies.<sup>2</sup>

Since the horrors of World War II human rights have been codified in international instruments, including declarations and treaties. Australia was a key participant in the development of human rights instruments through involvement in international forums.<sup>3</sup>

By ratifying human rights treaties, the Australian government has voluntarily made pledges that it will uphold people's rights. This pledge has been made to other countries – by governments on both sides of Australian politics. But more importantly, it has been made to the people of Australia.

### Human rights instruments

Australia is a party to seven of the major international human rights treaties. Two core treaties, adopted by the UN General Assembly in 1966, are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together with the Universal Declaration of Human Rights, adopted in 1948, these three instruments form the 'International Bill of Rights'.<sup>4</sup>

Australia has also ratified five treaties that identify specific obligations to certain groups of people and in relation to particular thematic areas:

- *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) 1965
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) 1979
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) 1984
- *Convention on the Rights of the Child* (CRC) 1989
- *Convention on the Rights of Persons with Disabilities* (CRPD) 2008

The Australian Government's obligations to uphold human rights are multi-faceted. It is the Government's responsibility to ensure that rights are respected, protected and fulfilled:

- The obligation to *respect* human rights requires that governments, through their own actions, do not breach human rights.
- The obligation to *protect* human rights requires governments to take actions to prevent others from breaching human rights. Where a person's rights have been breached, the obligation to protect also requires governments to ensure accessible and effective remedies are available to that person.
- The obligation to *fulfil* human rights requires governments to take positive actions to fully realise the equal enjoyment of human rights.

These different obligations reflect that there should be a mixture of actions ranging from legal protections, complaint and compensatory processes, educational measures, community-based programs and social services to properly protect human rights.

Human rights are relevant to all aspects of government and public life, including all interactions that public authorities have with individuals and communities. For example, they apply when individuals access healthcare, welfare and education; when individuals are in prisons, immigration facilities and residential care homes; and when they engage with police, child protection and housing authorities.

## 2.2 Patchy human rights protections

### (a) Lack of cohesive human rights protections

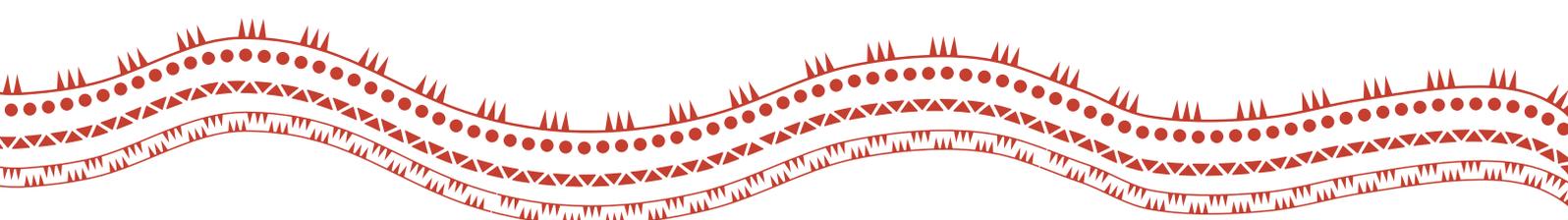
Although Australia has expressed its commitment to rights and freedoms by ratifying key international treaties, it has not taken the step of implementing those obligations fully into domestic law. Australia has no overarching Human Rights Act or Constitutional Bill of Rights, unlike all other liberal democracies.<sup>5</sup>

This leaves a significant hole in our legal architecture. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law, forming an incomplete and piecemeal framework, with many gaps.

Civil and political rights (as reflected in the ICCPR) are often taken for granted as given protections in a democratic society, yet they cannot always be relied upon by individuals when they are infringed.

For example, rights to freedom of religion, privacy and freedom of association are not fully protected in Australian law.

Australia has also ratified the ICESCR and other instruments, including the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), which contain education, health, equality and participation rights, among others, that reflect important Australian values and expectations. Yet the rights within these instruments are only reflected in domestic laws to a limited extent, and related services can be withdrawn at any time.<sup>6</sup>



The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) provides some limited protection against unjustified legislative encroachment on rights. The Act provides for the appointment of the Parliamentary Joint Committee on Human Rights and requires a ‘Statement of Compatibility’ with human rights obligations to accompany Bills and legislative instruments. But in the absence of legal protections for breaches of human rights, this is scrutiny that exists without consequence.

The gaps in our legal coverage of human rights mean that there is not a consistent, principled and complementary framework for protecting human rights. Decision makers are not required to consider and act in accordance with human rights. There are limited avenues to seek review of government decisions or actions that violate a person’s human rights. A full overview of the gaps in the framework is provided below in section 2.3.

### **(b) Human rights should be comprehensible to all Australians**

The existing, patchy implementation of human rights in Australia occurs through a complex mixture of provisions in the Constitution, in our common law (or judge made law) and legislation. Sometimes human rights are protected, and other times they are not.

The different types of protections are accompanied by different pathways for seeking to enforce rights, and different levels of enforceability.

This is not easily explainable, or readily comprehensible, to all people in Australia.

Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all. It is difficult to stand up for your rights and have them protected, if it is unclear how they are in fact protected in practical terms.

In Australian law:

- Australian common law allows judges to interpret legislation in a way that is consistent with human rights, but not if the Parliament has clearly indicated that it is deliberately intending to breach your human rights.
- You can bring a complaint to the Australian Human Rights Commission about your human rights being breached in relation to some human rights but not others.
- If you bring a complaint to the Australian Human Rights Commission against the government and it does not agree to take action to address the breach of human rights, there is nothing else you can do. You are not entitled to take your complaint any further – such as to court.
- Freedom of expression is protected by the Australian Constitution if the government seeks to limit forms of political communication, but you do not have an individual right to protect your freedom of expression.

These statements reveal contradictory and complex messages about how human rights are protected, and when they matter in Australian law.

Grounding human rights protection in a federal Human Rights Act would contribute to greater comprehension about human rights and increase awareness of human rights.

### **(c) Negative framing**

Existing legislative protections often frame human rights in the negative rather than the positive. That is, the law narrowly sets out what the government or others *cannot* do – as in our federal discrimination laws.

Federal discrimination laws make discrimination on the grounds of race,<sup>7</sup> sex,<sup>8</sup> disability,<sup>9</sup> age,<sup>10</sup> and sexuality, gender identity and intersex status,<sup>11</sup> unlawful in areas of public life – including employment, education and the provision of goods and services.<sup>12</sup> The Commission's first *Free & Equal* Position Paper, *A Reform agenda for federal discrimination laws*, closely analysed the Australian discrimination law regime, and made recommendations for reform, framed through four outcome pillars: building a preventative culture; modernising the regulatory framework; improving the practical operation of laws; and enhancing access to justice.<sup>13</sup>

While discrimination laws implement key aspects of the international treaties Australia has ratified, they are only a *partial* implementation of the relevant treaties. Some discrimination grounds contained in treaties receive no protection in Australia, or are protected primarily through the use of exemptions from the discrimination provisions – such as the ground of religion.<sup>14</sup>

Treaties such as the CRPD and the CRC extend beyond purely negative protections against discrimination found in Australian law, and include a range of related positive rights, such as the right to access justice<sup>15</sup> and the right to be heard in decision-making processes.<sup>16</sup>

The incorporation of non-discrimination rights, without the incorporation of other human rights, creates a 'lopsided' legal framework.<sup>17</sup> The balancing process between discrimination protections and other rights and freedoms can become distorted,<sup>18</sup> leading to confused public debate and confused public policy.

A recent example of this was the heated and often counter-productive discourse around the proposed Religious Freedom Bills.<sup>19</sup> A Human Rights Act would protect all rights. In those circumstances where rights are in conflict, a Human Rights Act would provide a comprehensive framework for the balancing of rights through the application of clear principles.

The absence of such a framework means our fundamental rights and freedoms are not fully protected or realised. At times, this has led to unfair, unjust or unequal treatment without appropriate recourse or consequences.

#### **(d) Falling through the cracks**

The consequences of Australia's lack of legal human rights protections acutely affect people who experience disadvantage, marginalisation and discrimination. It is the most vulnerable people who can fall through the cracks in the existing frameworks. Some examples of key human rights concerns include the following.

- Australia's treatment of First Nations peoples, throughout its history, including through legal discrimination,<sup>20</sup> manifest in ongoing health, social and justice disparities.<sup>21</sup> For example, First Nations peoples comprise 2% of the Australian population and 30% of the total Australian prison population.<sup>22</sup> This overrepresentation in prisons results in high numbers of First Nations people dying in custody, particularly when considered in light of their overall proportion of the Australian population.<sup>23</sup> Many of these deaths are preventable. In 2014, Ms Dhu, a 22-year-old First Nations woman died in police custody after she had been arrested for unpaid fines – her complaints of pain were dismissed as exaggerations by officers.<sup>24</sup> When addressing the causes of Ms Dhu's death, the Coroner found that, while the individual officers were not consciously motivated by racism, 'it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons'.<sup>25</sup> Many recommendations have been made to address systemic issues of over-incarceration and deaths in custody, most of which have not been implemented.<sup>26</sup> The UN Special Rapporteur on the Rights of Indigenous Peoples described

Australia's Indigenous incarceration rate as a 'major human rights concern'.<sup>27</sup>

- Australia's treatment of asylum seekers, including its mandatory detention regime,<sup>28</sup> has been repeatedly found to breach international human rights obligations.<sup>29</sup> Mandatory detention can result in prolonged and/or indefinite detention that is often arbitrary. Asylum seekers held in offshore detention have been subject to unsafe and unsanitary conditions,<sup>30</sup> as well as physical and sexual abuse.<sup>31</sup> Asylum seekers in detention have extremely high rates of mental illness, and there have been many incidents of self-harm and suicide.<sup>32</sup> For example, in 2016, Omid Masoumali a 23-year-old Iranian refugee set himself on fire, shouting 'I cannot take it anymore'. He died of his injuries.<sup>33</sup> There is no domestic right to protection from arbitrary detention, and the regime has been found to be lawful by the High Court.<sup>34</sup>
- Persons with disability in Australia experience high rates of violence, abuse, neglect and exploitation, an issue that is currently being explored by a Royal Commission.<sup>35</sup> There is a lack of consistent protections against the use of restrictive practices on persons with disability,<sup>36</sup> and insufficient safeguards around the imposition of compulsory treatment and involuntary hospitalisation.<sup>37</sup> One of the most concerning aspects of Australia's treatment of persons with disability is the 'unfitness to stand trial laws'. Under these laws people with mental illness who have been found to be unfit to stand trial due to impairment, can face indefinite periods of detention without ever being convicted of a crime.<sup>38</sup> For example, the Commission has reported on the detention of four First Nations men with disability who were detained for several years longer than they would have been had they been found guilty for the charged offence.<sup>39</sup>

## 2.3 Overview of the gaps in Australia's rights framework

### (a) The Australian Constitution

The Australian Constitution offers only limited protection for a small number of discrete human rights.

The Australian Constitution dates back to Federation in 1901. It was drafted in the 1890s, before the time of international human rights treaties that recognised the rights of all people equally.<sup>40</sup> Its concerns were largely about the relationship between the Commonwealth and the States. One of the key arguments against the inclusion of individual rights in the Constitution at Federation was that they would 'usurp the power of the States'.<sup>41</sup> Further, the drafters were also 'concerned to maintain the power of colonies, once they became the Australian states, to discriminate between people on the ground of their race'.<sup>42</sup>

At the Constitutional Conventions in the 1890s, the delegates did not include First Nations peoples, women or working men. Those who drafted the Constitution were confident that 'the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society'.<sup>43</sup> While intended to be a living document, the Constitution does not always keep pace with changes to Australian society since that era.

Fundamental human rights were considered best left to the protection of the common law and Parliament. The Hon Sir Anthony Mason AC ABE GBM KC explained as follows:

Because the founders accepted, in conformity with prevailing English legal thinking, that the citizen's rights are best left to the protection of the common law and because they were not concerned to protect the individual from oppression by majority will, the Constitution contains very little in the way of provisions guaranteeing new rights.<sup>44</sup>

- *Limited protection of rights*

The Australian Constitution provides only limited safeguards for individual rights and freedoms. These are framed, however, through the lens of limitations on legislative power – and largely through arguing about the implications of such limitations. They are not about personal rights.<sup>45</sup>

These include:

- the right to compensation on just terms in the event of a compulsory acquisition of property by the Commonwealth<sup>46</sup>
- the right to trial by jury for a federal indictable offence<sup>47</sup>
- the right to challenge the lawfulness of decisions of the Australian Government in the High Court<sup>48</sup>
- a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion<sup>49</sup>

- a prohibition on making federal laws that discriminate against a person because of the state in which they live<sup>50</sup>
- the implied right to freedom of political communication<sup>51</sup>
- the implied right to vote.<sup>52</sup>

The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution.<sup>53</sup> Even for those rights that are protected by the Constitution, either expressly or by implication, the Australian judiciary has generally interpreted them narrowly.<sup>54</sup> The High Court has not supported the proposition that, in cases of ambiguity, the Constitution should be interpreted consistently with human rights.<sup>55</sup>

In combination, these factors mean that the Australian Constitution offers very limited protection for human rights, and few constraints on the ability of the federal Parliament to pass laws that breach human rights.

### **The Constitution does not protect against authorised indefinite detention**

In the 2004 case of *Al-Kateb v Godwin*,<sup>56</sup> the High Court of Australia was asked to decide whether the *Migration Act 1958* (Cth) (Migration Act) authorises the indefinite detention of an unlawful non-citizen when there is no real prospect of their removal from Australia. The Court found that a law that resulted in a person being held in immigration detention indefinitely was constitutionally valid.

Mr Al-Kateb was twenty four when he arrived in Australia by fishing boat, without a valid visa. He was taken to Curtin Immigration Detention Centre in the Western Australian desert. Mr Al-Kateb's application for a protection visa to stay in Australia was rejected. The Department

of Immigration tried to remove Mr Al-Kateb without success. Mr Al-Kateb was held in immigration detention for years, with no idea when he would be freed.

In the High Court, Mr Al-Kateb argued that the Migration Act should be interpreted consistently with Australia's obligations under the ICCPR, which protects the right to liberty and prohibits arbitrary detention.<sup>57</sup>

The majority of the High Court found that the words of the Migration Act clearly required Mr Al-Kateb to be detained until he could be removed from Australia, regardless of the fact that there was no reasonable prospect of this happening in the foreseeable future. Because the majority decided the words were unambiguous, they did not consider

Mr Al-Kateb's human rights. Justice McHugh recognised that the situation was 'tragic' but said:

It is not for courts ... to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.<sup>58</sup>

According to Justice McHugh, the case illustrated that a judge 'may be called upon to reach legal conclusions that are applied with "tragic" consequences'.<sup>59</sup> This observation could also be made about other cases – in the same year as the Al-Kateb case, the High Court also upheld the legality of the long-term detention of children and confirmed that immigration detention remains lawful even if the conditions are harsh or inhumane.<sup>60</sup>

### **Australia's Constitution permits discrimination on the basis of race**

While the *Racial Discrimination Act 1975* (Cth) provides some protection against racial discrimination, the Australian Constitution does not include protection for the right to racial equality. This means the Federal Parliament can override the legislative protection offered by the Racial Discrimination Act and adopt laws that discriminate on the basis of race.

The Federal Parliament did this in 2007, when it suspended the operation of the Racial Discrimination Act in order to pass the Northern Territory Emergency Response (NTER) legislation. The NTER legislation introduced measures to address child sexual abuse and family violence in 73 prescribed First Nations communities in the Northern Territory.

The NTER legislation measures that discriminated or allowed discrimination on the basis of race included:

- suspending the application of the Racial Discrimination Act
- controlling how a person spends their money through income management measures, a significant interference with the right to privacy
- applying parts of the social security legislation retrospectively
- excluding some aspects of social security administrative decisions from review
- acquiring property on a different basis from other property holders in the Northern Territory.

The UN Human Rights Committee criticised the NTER as being inconsistent with Australia's obligations under the ICCPR, and expressed particular concern about the suspension of the Racial Discrimination Act and the lack of consultation with First Nations peoples in designing the NTER measures.<sup>61</sup>

The implementation of NTER was rushed through Parliament. At the time, journalist Alan Ramsey described the passage of the relevant:

In the House, which met at 12.30pm, Malcolm Thomas Brough, 45, cabinet minister, introduced a package of five bills totalling some 700 pages, including explanatory memoranda. He began speaking at 12.30. He sat down at 1.51pm after reading five speeches end on end, like sausages. It had taken him 10 minutes short of two hours just to introduce his five bills. At 9.34 that night it was all over.

That is, the people's house passed Brough's five bills of 600 pages of legislative detail just nine hours after the Prime Minister's delegate introduced them. Debate had lasted four hours and 16 minutes. Fourteen politicians had spoken, including Brough a second time. Thus in a legislature of 150 MPs, only 13 were allowed only twice as long, collectively, to debate the bills as it had taken the minister to read his five speeches introducing them.<sup>62</sup>

## (b) The common law

The common law recognises a number of rights and freedoms. The common law system was inherited by Australia from the UK, developed over many centuries, and viewed as 'origin and promoter of individual rights'.<sup>63</sup> The common law is often cited as one of the reasons why Australia's current system of human rights protection is sufficient. This is simply not the case. Common law protections are fragile, as Parliament can pass a law that overrides them at any time. Additionally, many of the human rights the Australian Government has agreed to uphold are not protected at all by the common law.

Some key common law rights and protections include:

- fair trial rights, including:
  - » the right to legal representation in serious criminal cases
  - » the privilege against self-incrimination
  - » a presumption of innocence in criminal trials
  - » a presumption that the standard of proof in criminal cases is beyond reasonable doubt
- freedom of movement
- prohibitions on trespass (which partially protect the right to privacy)
- the right to sue in tort (for example for false imprisonment)
- a presumption against retrospective laws
- the rules of procedural fairness.<sup>64</sup>

The common law protects human rights indirectly through two key principles of statutory interpretation. First, the 'principle of legality' presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language' and that 'statutes be construed ... to avoid or minimise their encroachment upon rights and freedoms at common law'.<sup>65</sup> Secondly, if there is ambiguity in a statute, interpretation must 'favour construction [of a statute] which is in conformity and not in conflict with Australia's international obligations'.<sup>66</sup>

It is possible for the common law to evolve over time to develop stronger rights protections, and

international human rights law can influence the development of the common law. In *Mabo (No 2)*, Justice Brennan said that, while the

common law does not necessarily conform with international law ... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>67</sup>

However, the common law cannot offer protection where common law rights have been clearly restricted by legislation. Therefore, as the Hon Michael McHugh AC KC has observed,

the development of the common law by an independent judiciary by no means provides an adequate safeguard for human rights. It cannot provide the same level of protection as a national Bill of Rights can do.<sup>68</sup>

The evolution of the common law over time also depends on individuals bringing cases to court, which leads to ad hoc developments arising from individual injustice, rather than a holistic (and prevention-focused) approach to human rights protection.

Professor Conor Gearty has argued, drawing upon modern UK caselaw up to the passage of the UK Human Rights Act, that the common law can be 'blind to power and privilege, and therefore to the commitments of equality and non-discrimination' and has been relied upon to protect political and moneyed interests, including to the detriment of individual rights.<sup>69</sup>

With the passage of the UK Human Rights Act, the UK Government recognised that traditional common law rights provided insufficient coverage and cannot be relied upon to protect human rights in the absence of a statutory instrument. In the time since the UK Human Rights Act was passed, the UK common law has developed in tandem, leading to the enrichment of an already strong tradition, through the infusion of standards that complement and fortify existing rights and principles.<sup>70</sup>

In the UK, and in Australian jurisdictions, Human Rights Acts have been used to protect traditional rights and freedoms that are also human rights. The following are a few examples.

## Freedom of assembly

In the UK case of *R (Laporte) v Chief Constable of Gloucestershire*,<sup>71</sup> the claimants were protesters who were stopped by police while on their way to protest the Iraq war at an airbase. There were no arrests, however the police decided the coaches could not proceed to the protest and escorted them back to London.

The protesters brought a legal challenge, arguing in part that the police had breached their right to freedom of assembly and association under the UK Human Rights Act.<sup>72</sup> On appeal, the House of Lords agreed. It ruled that there had been no imminent threat to a breach of the peace and the police's decision to limit the protesters was indiscriminate, disproportionate, and therefore unlawful under the UK Human Rights Act. The court issued a declaration that the police's actions were unlawful.

## Freedom of movement and privacy

In the Victorian case of *DPP v Kaba*,<sup>73</sup> Mr Kaba, a black man, was a passenger in a vehicle that was subject to a random stop and search by the police. Mr Kaba walked away from the car and the police, without suspecting him of any wrongdoing, followed him while repeatedly asking for his name and address. Mr Kaba refused these requests, used offensive language and protested about racial harassment. He was then arrested for using offensive language and failing to state his name and address.

The Supreme Court of Victoria found that while the police did have the power to conduct a random stop and licence check of Mr Kaba, the officers' subsequent coercive questioning of him disproportionately limited his rights to privacy and freedom of movement under the Victorian Charter and was therefore unlawful. Mr Kaba was made to feel that he could not choose to leave or refuse to co-operate, and this was in breach of Mr Kaba's Charter rights and Victoria Police's obligation to act in a way that is proportionate and compatible with human rights.

Justice Bell held that, up to a certain point, police questioning does not unlawfully interfere with the rights and freedoms of individuals. Police questioning does unlawfully interfere with these rights and freedoms, however, when the questioning becomes coercive, which is when the individual is made to feel that they cannot choose to leave or refuse to co-operate.

In Mr Kaba's case, the line of permissible questioning had been crossed. The actions of the police infringed rights to freedom of movement and privacy, and the police reasonably could have acted differently in the circumstances. On this basis, Justice Bell held that the coercive questioning of the police was unlawful.

Extracted from Human Rights Law Centre, Case summaries, 2014.<sup>74</sup>

## Freedom of religion

In the UK case of *Adath Yisroel Burial Society v HM Senior Coroner for Inner North London*<sup>75</sup> the Inner North London Coroner had a ‘cab rank’ policy for releasing bodies for burial: *No death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner’s officers or coroners.* This policy was challenged on the basis that religious Jews and Muslims hold religious beliefs requiring speedy burials, usually within 24 hours after death. The policy was found to be overly inflexible, because it failed to allow for consideration of Jewish and Muslim beliefs in coronial decisions (affecting freedom of religion) and resulted in indirect religious discrimination against those groups. Justice Singh explained:

The fundamental difficulty with the Defendant’s policy is that it does not strike a fair balance between the rights concerned at all. Rather, as a matter of

rigid policy, it requires the Coroner and her officers to leave out of account altogether the requirements of Jewish and Muslim people in relation to early consideration of and early release of bodies of their loved ones.<sup>76</sup>

...

This also underlines the point that what Article 9 requires is not that there should be any favouritism, whether in favour of religious belief in general or in favour of any particular religious faith, but that there should be a fair balance struck between the rights and interests of different people in society. The fundamental flaw in the present policy adopted by the Defendant is that it fails to strike any balance at all, let alone a fair balance.<sup>77</sup>

The court issued a declaration that the policy was unlawful; and a quashing order to set aside the policy. The coroner’s new policy flexibly incorporated religious considerations, alongside other considerations.

## Freedom of expression

Ian Simms and Michael O’Brien were convicted of separate murders. They persistently protested their innocence. They ran out of options in the courts and decided to try and get a journalist to investigate, so they could tell their side of the story. However, the prison refused to let them speak to a journalist.

Simms and O’Brien took the prison to court in *Regina v Secretary of State for the Home Department Ex Parte Simms (A.P.) Secretary of State for the Home Department Ex Parte O’Brien*.<sup>78</sup> They argued that the ability of the prison to refuse to allow journalists to visit and interview prisoners was in breach of their freedom of speech.<sup>79</sup>

The Court agreed with them, saying that journalists should be able to interview prisoners as a way of making sure there were no miscarriages of justice. The judge said that freedom of speech was necessary in the ‘exposure of errors’ of the criminal justice system. Lord Hoffman delivering the judgment, discussed the existing common law principle of legality, and noted that the Human Rights Act supplemented and strengthened this principle. He explained:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the

principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

After this case, prison policy in the UK was changed. Journalists are now allowed to interview prisoners so that they can help them investigate and challenge any miscarriages of justice. Meanwhile, O'Brien was released and exonerated of murder. Simms, however, was not.

Sourced from: Amnesty International submission to *Free & Equal*

### (c) Role of Parliament

- *Ability to override rights and freedoms*

The Australian Parliament routinely passes laws that are not human rights compliant and common law rights are routinely overridden by legislation – frequently without sufficient scrutiny or public debate. The scrutiny that may be undertaken is often not through the lens of a human rights proportionality analysis.<sup>80</sup>

In 2015, the Australian Law Reform Commission's inquiry into *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* identified many laws that engage and potentially unjustifiably interfered with traditional common law rights, including freedom of speech, religion, movement, association and the right to fair trial.<sup>81</sup>

Professor George Williams conducted his own survey of laws in 2016, identifying 350 examples of laws that 'arguably encroach upon rights and freedoms essential to the maintenance of a healthy democracy'.<sup>82</sup> He found that executive power has rapidly increased since 9/11 and 'since that time parliamentarians have been less willing to exercise self-restraint by not passing laws that undermine Australia's democratic system'.<sup>83</sup>

Some opponents of stronger legal protections for human rights suggest that robust Parliamentary mechanisms provide sufficient protection.<sup>84</sup> However this ignores political realities of lawmaking, and the role of all three branches of government in protecting human rights.

Where Parliament makes laws for the mainstream voting public, socially excluded or under-represented groups may fall through the cracks in the law-making process.<sup>85</sup> These groups also lack legal recourse if their rights are subsequently infringed.<sup>86</sup> This point is discussed further in chapter 3.5.

While, ideally, Parliamentarians would debate every law thoroughly, and pass the best possible laws, in reality, law making may often be a rushed and politicised process. Without human rights entrenched in Australia's domestic law, Parliamentarians may overlook them in practice, leading to many laws on the books that are not human rights compliant.

For example, where legislation has bipartisan support, Parliament may be less likely to prioritise relevant human rights implications. This has occurred in relation to national security issues under time pressures to meet perceived security risks.

For example, mandatory metadata retention legislation was passed in 2015 with bipartisan support,<sup>87</sup> despite concerns about its implications for privacy, procedural fairness and freedom of expression.<sup>88</sup> Since 2015, a suite of other surveillance measures have been passed into law, vastly expanding executive power and limiting the right to privacy for Australians.<sup>89</sup> There have been subsequent reviews of metadata retention and surveillance laws by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Independent National Security Legislation Monitor (INSLM) but, when these bodies have recommended the mitigation or removal of overreaching surveillance powers, these recommendations are often not implemented.

For example, in 2020 the PJCIS recommended stronger reporting requirements, and tighter restrictions on authorisation for accessing metadata.<sup>90</sup> That same year, the INSLM recommended amendments to powers of security agency heads and the Attorney-General to issue certain requests to communications companies for assistance – including mandatory requests to provide decrypted communications.<sup>91</sup> However these amendments have not been made.

This highlights the importance of upstream processes to address human rights issues *prior* to the passage of legislation.

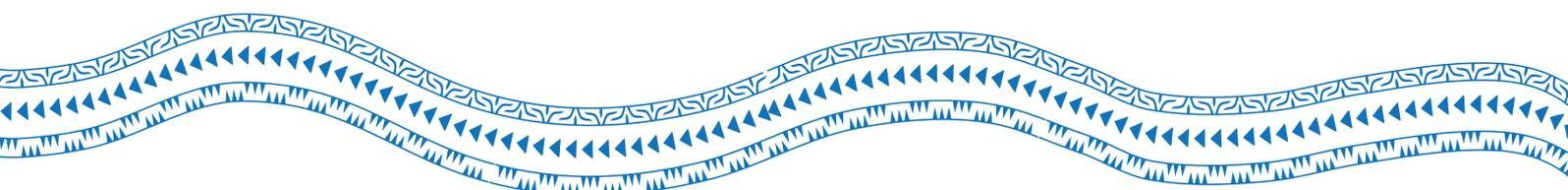
- *Parliamentary scrutiny of compliance with human rights*

Parliamentary scrutiny, prior to the passage of legislation, occupies one point on the spectrum of consideration of encroachments on rights and freedoms. It has a long history in Australia, since the establishment of the first scrutiny committee, the Senate Standing Committee on Regulations and Ordinances (now the Senate Standing Committee on Delegated Legislation) in 1932.<sup>92</sup>

The Senate scrutiny function was expanded with the introduction of the Senate Standing Committee for the Scrutiny of Bills, in 1981. Then, in 2011, the Parliamentary Joint Committee on Human Rights (PJCHR) was established with a specific mandate to examine Bills and legislative instruments for compatibility with human rights, by reference to the ICCPR, ICESCR and a number of other international instruments.<sup>93</sup>

Since the establishment of the PJCHR, the proponent of a Bill must prepare a Statement of Compatibility, justifying any limitations on individual rights and freedoms. This is an important mechanism which helps Parliament consider the human rights impacts of a law before it is passed. Statements of Compatibility do not affect the validity, operation or enforcement of a Bill,<sup>94</sup> but should be a factor in Parliament's consideration of whether to pass or amend the Bill. The PJCHR process can assist Parliament to consider the human rights impact of a Bill in more depth.<sup>95</sup>

The Commission's proposal for a Human Rights Act includes recommendations designed to strengthen the scrutiny process, which should be undertaken alongside the Human Rights Act. This is considered in chapter 13.



Importantly, the PJCHR and Statement of Compatibility process was created on the basis of recommendations of the 2009 National Human Rights Consultation Committee (NHRCC).<sup>96</sup> However the NHRCC *also* recommended that a federal Human Rights Act be passed, and this was never implemented. A Human Rights Act would bring human rights from the non-enforceable international realm into domestic law.

In the absence of a Human Rights Act with ‘teeth’ in relation to the executive, and domestic relevance, parliamentary scrutiny measures *alone* have not resulted in sufficient embedding of human rights thinking by parliamentarians, nor the development of a sufficiently strong human rights culture upstream in decision making and the design of Bills and legislative instruments.

#### **(d) State and territory human rights instruments**

Human Rights Acts have been passed in Victoria,<sup>97</sup> the Australian Capital Territory<sup>98</sup> and most recently Queensland.<sup>99</sup> These acts bind the relevant state and territory public authorities, including government departments, statutory authorities and public servants. They have worked to protect individual rights and improve the human rights culture within those jurisdictions. Case studies illustrating the role of these Human Rights Acts are included throughout this Position Paper. Many of these case studies are drawn from the Human Rights Law Centre’s 2022 collation of *101 case studies* illustrating how these instruments have improved people’s lives.<sup>100</sup>

State and territory Human Rights Acts provide an important example for the Federal Government. They show that international human rights are well capable of being protected in line with Australia’s particular democratic structure, becoming Australian laws. The Commission has drawn on these existing Human Rights Acts in its proposal for a federal Human Rights Act.

Currently, the lack of an overarching federal instrument means that a person’s access to rights-protections is wholly contingent on where they live. A person in the ACT can enforce their human rights against government through a Human Rights Act, while a person in South Australia cannot. A federal Human Rights Act would provide comprehensive protections at the federal level, and also provide a template for those states without a Human Rights Act to adapt for implementation in their own jurisdictions. This would ensure full human rights coverage and the equal application of the law to all Australians.

#### **(e) Australian Human Rights Commission**

The Commission has jurisdiction to consider complaints based on human rights instruments scheduled to, or declared for the purposes of, the AHRC Act. Without domestic implementation of those international instruments, it is a jurisdiction based on international law.

Presently, the Commission can inquire into and attempt to conciliate individual complaints of unlawful discrimination,<sup>101</sup> equal opportunity in employment (the ILO 111 jurisdiction)<sup>102</sup> and other breaches of human rights.<sup>103</sup> It can also hold public inquiries and consultations, including to address systemic human rights or discrimination issues of national importance. It can undertake research and education to promote human rights.

The Commission may report to the Minister on laws that should be made or action the government should take on human rights<sup>104</sup> or compliance with Australia’s international human rights obligations.<sup>105</sup> In legal cases involving human rights issues, the Commission has a power to intervene and make submissions with the leave of the court.

However, the Commission's ability to resolve *human rights* complaints can be very limited. Unlike complaints alleging unlawful discrimination, if the Commission cannot conciliate a human rights complaint, the person cannot then bring court proceedings. Rather, if the Commission finds a breach of human rights it can report to the Attorney-General.<sup>106</sup>

Any recommendations made by the Commission are non-binding and are not enforceable by the courts. The Federal Government is not required to respond to a Commission report about non-compliant laws or policies, or to recommendations by the Commission that the government should provide remedies to an individual victim of human rights violations.

Up until amendments to the Commission's Act in 2017, the Attorney-General was obliged to table these reports in Parliament within 15 sitting days. For complaints received since 2017, the Attorney-General is no longer required to table the reports.

When the inquiry function was first conferred on the Commission, the then Attorney-General, the Hon Senator Durack, said that the Commission would not need enforcement powers 'of the kind vested in courts'.<sup>107</sup> Rather, the process itself would promote increased recognition and observance of human rights; as would the attendant publicity and government awareness that would result from the reporting to the Minister. The Attorney concluded that the Commission's reports would 'ensure that governments and parliaments are aware of situations in which there needs to be a redefinition of the rights of different individuals and will stimulate them to take appropriate action'.<sup>108</sup>

A range of reports that have resulted in positive outcomes in addressing the human rights violations identified through the reporting process. For example:

- As recommended in report 40, the Australian Government paid compensation to 25 Chinese people in immigration detention who were interviewed by Chinese authorities while detained or subject to separation detention.<sup>109</sup>
- Report 80 led to a parliamentary inquiry into the detention of people unfit to plead to criminal charges.<sup>110</sup>
- Following Report 56, dealing with the prospect of indefinite detention for immigration detainees with adverse security assessments, the Government established the Independent Reviewer of National Security Assessments.<sup>111</sup>
- Report 141 dealt with the situation of people who had had their visas cancelled on character grounds, and made a number of recommendations including an improved risk assessment process and the establishment of an independent body to advise on the release of people from immigration detention.<sup>112</sup> These initiatives are currently being considered by the Department of Home Affairs.<sup>113</sup>

However, these outcomes are discretionary responses to recommendations by the Commission. There is no requirement on the Government to take action in response to a finding by the Commission that there has been a breach of human rights. In many cases, no action is taken, particularly where the findings of the Commission conflict with Government policy, such as the mandatory and indefinite detention of asylum seekers.

In effect, human rights complainants can be left at the end of a pathway with nowhere to go. While they have been able to make a complaint to the Commission, the result is a non-binding report which may not be effective in achieving individual justice or reform.

The Commission's model for a Human Rights Act would result in the adaptation of the Commission's complaints jurisdiction, so that human rights complaints would be managed by reference to the Human Rights Act rather than by reference to international instruments.

If conciliation fails or is inappropriate in the circumstances, individuals could then proceed to court for a binding judgment and access to appropriate remedies, as is the case with unlawful discrimination complaints. This would close a significant gap in the human rights complaints architecture, and would greatly improve access to justice for those who have suffered from human rights breaches.

#### **(f) International law obligations**

Legislative implementation of Australia's international human rights obligations has been described as 'faltering, sporadic and inconsistent', and the ICCPR as having 'a small and almost random presence in Australian law'.<sup>114</sup>

UN Treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system. For example in 2017, the Human Rights Committee noted 'gaps in the application of the ICCPR' and recommended that Australia 'adopt comprehensive federal legislation giving full legal effect to all covenant provisions'.<sup>115</sup> In the same year, the Committee on Economic, Social and Cultural Rights recommended that Australia consider introducing a federal Human Rights Act due to the limitations of the existing system.<sup>116</sup> Australia's 2020 Universal Periodic Review also resulted in similar recommendations from multiple countries.<sup>117</sup> There have been many other treaty body calls for full incorporation of treaty obligations, dating back many years.<sup>118</sup>

A Human Rights Act would ensure that Australia's practice aligns with international law, and with Australia's own statements and commitments.

When the Commission was put on a permanent foundation in 1986,<sup>119</sup> an 'Australian Bill of Rights Bill' was introduced into Parliament at the same time, and the Commission was to be the body that administered this law.<sup>120</sup> Together, these steps were supposed to provide cohesive domestic implementation of Australia's obligations under the ICCPR. However, a statutory Bill of Rights was not ultimately adopted, leaving a gap in the architecture and work of the Commission.<sup>121</sup>

Australia's limited approach to human rights implementation leads to incongruity between the Commission's mandate to protect human rights and the government's lack of legal accountability for human rights.

Australia also has a history of being closely involved in the development of international human rights law. For example, Australia was one of eight nations involved in drafting the Universal Declaration on Human Rights.<sup>122</sup> However, without a Human Rights Act, Australia has been increasingly isolated from shared legal standards developed in countries with domestic rights instruments – such as Canada, the UK and New Zealand. A Human Rights Act would bring Australia into alignment with these countries. With a Human Rights Act in place, Australia would also have better standing and credibility on the international stage, including when encouraging other countries to comply with human rights.<sup>123</sup>



## Chapter 2: Endnotes

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- 3 'Australia and the Universal Declaration of Human Rights', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights>>.
- 4 'International Bill of Human Rights: A brief history, and the two International Covenants' *OHCHR* (Web Page) <<https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>>.
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- 6 Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press: 2011) 354.
- 7 *Racial Discrimination Act 1975* (Cth).
- 8 *Sex Discrimination Act 1984* (Cth).
- 9 *Disability Discrimination Act 1992* (Cth).
- 10 *Age Discrimination Act 2004* (Cth).
- 11 In 2013, amendments were made to the *Sex Discrimination Act 1984* (Cth) by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The amendments replaced discrimination based on 'marital status' throughout the *Sex Discrimination Act 1984* (Cth) with discrimination on the basis of 'sexual orientation, gender identity, intersex status, marital or relationship status': *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) Sch 1, Pt 1.
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- 14 See discussion in Australian Human Rights Commission, *Free and Equal: A reform agenda for discrimination laws* (December 2021) 277–78 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
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- 16 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Art 12.
- 17 See Australian Human Rights Commission, submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill*, 4 August 2021 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/ConstitutionAlteration/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ConstitutionAlteration/Submissions)>.
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- 42 George Williams and David Hume, *Human Rights under the Australian Constitution* (2<sup>nd</sup> ed, Oxford University Press, 2013) 41.
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- 45 *McCloy v New South Wales* [2015] HCA 34 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36].
- 46 *Australian Constitution* s 51(xxxi).
- 47 *Australian Constitution* s 80.
- 48 *Australian Constitution* s 75(v).
- 49 *Australian Constitution* s 116.
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- 55 See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224-225 (Heydon J) and the authorities cited therein. A contrary view has been expressed by Kirby J: see, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-658 (Kirby J).
- 56 *Al-Kateb v Godwin* (2004) 219 CLR 562.
- 57 ICCPR art 9.
- 58 *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).
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- 60 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.
- 61 UN Human Rights Committee, *Concluding Observations: Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 April 2009 [14]. See also, Human Rights Council, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *Observations on Northern Territory Emergency Response in Australia*, 15<sup>th</sup> Sess, UN Doc A/HRC/15/23 February 2010.
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- 65 *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ). See Lord Hoffmann's explanation of the rationale for the principle in *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115, 131. For further analysis of the principle of legality, see Dan Meagher, 'The Common Law Principle of Legality in an Age of Rights' (2011) 35 *Melbourne University Law Review* 449-478.
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- 67 *Mabo v Queensland (No 2)* (1991) 175 CLR 1, 42 (Brennan J) (*Mabo (No 2)*).
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- 73 *DPP v Kaba* [2014] VSC 52.
- 74 Tamar Hopkins, 'Random stops and license checks by police lawful: coercive questioning not' *Human Rights Law Centre* (Web Page, December 2014) <<https://www.hrlc.org.au/human-rights-case-summaries/random-stops-and-license-checks-by-police-lawful-coercive-questioning-not>>.
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- 94 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(5), 9(4).
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  - 117 Human Rights Council, *Report of the Working Group on the Universal Periodic Review-Australia*, 47<sup>th</sup> sess, 24 March 2021, UN Doc A/HRC/47/8, Recommendations 146.48, 146.49.
  - 118 See eg, UN Human Rights Committee, *Concluding Observations: Australia*, 2 April 2009, UN Doc CCPR/C/AUS/CO/5, [8]; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* 2009 UN Doc no E/C.12/AUS/CO/4 [11]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, 2000, UN Doc E/C.12/1/Add.50 [14], [24].
  - 119 The legal history of the Australian Human Rights Commission and its complaint handling functions are discussed in detail in: Rosalind Croucher, 'Seeking Equal Dignity without Discrimination: The Australian Human Rights Commission and the Handling of Complaints' (2019) 93 *Australian Law Journal* 571.
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# Chapter 3: The case for a federal Human Rights Act

## 3.1 Principles underpinning arguments for reform and the reform proposals

The Commission's case for reform are framed by the following principles, which also underpin its proposals for a Human Rights Act:

**A. Australian:** We need a Human Rights Act that reflects our shared values and embeds rights into our own domestic system.

**B. Democratic:** We need a Human Rights Act to strengthen existing democratic and rule of law principles. The model should be parliamentary, accountable, participatory and balanced.

- Parliamentary – by preserving parliamentary sovereignty in a model based on dialogue.
- Accountable – by enhancing the rule of law and providing a check on executive power.
- Participatory – by improving the quality of public debate and enabling minority and vulnerable groups to have a voice in decisions that affect them.
- Balanced – by setting out a framework for navigating the intersection of varied public interests and rights.

**C. Preventative:** We need proactive measures to prevent human rights abuses, including through a Human Rights Act that embeds procedural measures that enable early consideration of human rights, and through the fostering of a culture of respect for human rights throughout the whole of government.

**D. Protective:** We need safeguards against human rights abuses, through a Human Rights Act with pathways for individuals to access justice and redress through courts.

**E. Effective:** We need a Human Rights Act that facilitates better decision making based on human rights standards, and equality of access to effective interventions to protect human rights.<sup>1</sup>

## 3.2 Australian

### (a) A values statement

Australia has a strong tradition of common law rights, a history of engagement with international human rights mechanisms, and a rich cultural tradition that values fairness and freedom. Australians are rightly proud of these values, and they should find strong reflection in our legal system.

The adoption of a Human Rights Act would be an opportunity for us to articulate and embrace our values through an *Australian* instrument. This will recognise the rights and freedoms that Australians already support, providing clarity and certainty. It will mean that Australians will have a shared understanding of what constitutes our rights and clear grounds for holding government accountable. Politicians will have a strong public mandate to act in accordance with rights, and in line with shared values.

A Human Rights Act would lead to the general public having general awareness and understanding of their own human rights, and being empowered to stand up for them. It would also improve awareness of the experiences of vulnerable members of society. Ideally, this will result in a willingness to face the ongoing human rights issues within Australia head on, through our democratic processes. In this regard, a Human Rights Act would be a positive statement of who we are as Australians, what we expect from our government and a framework for realising our values in practice.

There is significant public support for the introduction of a Human Rights Act in Australia.<sup>2</sup> In 2009, the National Human Rights Consultation Committee (NHRCC) conducted the largest ever nationwide consultation on human rights protections. Almost 9 out of 10 Australians consulted supported a Human Rights Act.<sup>3</sup> A Human Rights Act was recommended by the NHRCC report, but has not yet been implemented.

Recent debates on religious freedom and discrimination legislation, and about the COVID-19 emergency, indicate that there is a desire to embed human rights in Australia from many sectors within society, across the political spectrum. This conclusion is supported by Human Rights Law Centre data which shows that the appetite for a Human Rights Act remains strong within the community. A 2021 opinion poll of over 1,000 people across Australia found that 83% of people consider that there should be a document that sets out in clear language the rights and responsibilities that everyone has here in Australia – an increase from 66% in 2019. Additionally, 74% agreed that a Charter of Human Rights would help people and communities to ‘make sure the government does the right thing’, compared to 56% two years earlier.<sup>4</sup>

Meanwhile, a 2021 Amnesty International survey found that

more than half of Australians believe we *already have* a national Human Rights Act and when told we’re the only Western liberal democracy without one, 76% said they would support its introduction.<sup>5</sup>

The Commission itself has also recorded renewed interest in human rights issues related to COVID-19 measures, evidenced by a dramatic increase in human rights related complaints and inquiries, and high engagement with online materials about COVID-19 and human rights issues.<sup>6</sup>

This data indicates that there is a strong democratic base in support of implementing a Human Rights Act that reflects our core values; and that the time for change is now.

### **(b) Applies to all**

A Human Rights Act would not only benefit vulnerable individuals and minority groups. It would help to ensure that the rights of *all* people in Australia are properly understood and protected. A Human Rights Act will benefit *anyone* who relies upon or deals with government services or agencies.

It may be that, in practice, members of the ‘majority’ will have limited need to enforce their rights through courts. However, the systems set up by the Human Rights Act would ensure that the rights of all people in Australia are respected in everyday life. It is the effect on decision making that will ultimately have the most impact in protecting people’s human rights.

Regardless of our level of vulnerability, all of us deal with government agencies that make decisions that affect our lives. For example, when attending school, accessing healthcare or aged care, obtaining an ID, interacting with the police, paying off a fine, claiming benefits, traveling in and out of the country, using public transport and so on. A Human Rights Act will apply to all of these areas. It would support decision makers to consider human rights in a way that is more appropriate to individual circumstances, rather than taking an inflexible, blanket approach to administration. It would protect against arbitrary or unfair decision making.

A Human Rights Act would also set up a safety net in case a member of the ‘majority’ should slip into a more vulnerable group – due to unemployment, accident, mental health issues, family circumstances, or any other reason. Indeed, we all experience various forms of ‘vulnerability’ throughout our lifetime – for example, we all experience childhood, and expect to grow old. A Human Rights Act would be there to protect us, our family members and our communities during periods of vulnerability and disadvantage, safeguarding us from inequity, disregard or maltreatment at the hands of public entities with power over us.

New human rights challenges will also continue to emerge, for example in relation to technological change, Australia’s ageing population, and the effects of climate change. Importantly, as COVID-19 has highlighted, there are times when the rights of every single person may be directly affected by government decisions for an extended period of time in response to an emergency. This also happens on a smaller scale in the context of responses to floods and fires. We must be prepared for the impacts of these eventualities on people and communities – by building in consideration for human rights at all levels of government.

The two following case studies collected by the Human Rights Law Centre show how Human Rights Acts at the state and territory level have improved decision making regarding renting, an issue that affects many Australians.

### **Family violence and renting**

Tenants Queensland used the Queensland Human Rights Act to help a single mother who had experienced domestic violence to avoid eviction. The tenant’s housing provider had sought to terminate her lease for serious breaches caused by her ex-partner who refused to leave the premises. Tenants Queensland assisted the mother to draft a letter of complaint under the Human Rights Act and submissions in response to the application for termination. The tribunal granted an adjournment which allowed the parties to negotiate a transfer of tenancy. The housing provider then withdrew the application for termination.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>7</sup>



### Older woman facing eviction

A 96-year-old woman was given a 60 day notice to vacate the home she had lived in for 21 years. She was unable to find alternative accommodation in this period of time. An advocate helped her to contest the notice to vacate in a tribunal. The advocate argued that it was a breach of Charter rights. As a consequence, she was given an additional 30 days and was assisted in finding appropriate accommodation.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>8</sup>

## 3.3 Democratic

### (a) A parliamentary model based on dialogue

The Commission proposes that a federal Human Rights Act be based on the legislative dialogue model. This is a model that has been adopted in comparable jurisdictions, including the UK and New Zealand, as well as in Australian jurisdictions: the ACT, Victoria and Queensland.<sup>9</sup>

Dialogue models are based on each branch of government having a distinct role to play, in line with the ordinary institutional functions each performs:

- Parliament considers human rights when it makes laws,
- the Executive considers human rights when it formulates policies and makes decisions in accordance with those laws, and
- the Judiciary considers human rights when it interprets laws.<sup>10</sup>

The 'dialogue' occurs through mechanisms of mutual oversight and interaction. The dialogue Human Rights Act would work to enhance, not disturb, Australia's existing democratic structure, and the Commission's proposal has been designed to respect key constitutional principles such as the separation of powers, and the distinctions between federal and state governments.

The key factor of the dialogue model is that it maintains the supremacy of Parliament and is therefore entirely compatible with parliamentary democracies like Australia.<sup>11</sup>

Dialogue between the branches increases comprehension and accountability for human rights across the whole of government,<sup>12</sup> and embeds a shared human rights culture, through mechanisms of mutual oversight and interaction.

Dialogue models also ensure that the public is informed about parliamentary decisions that affect their human rights, thereby promoting greater accountability among elected leaders, and embeds rights considerations within the broader public discourse.<sup>13</sup>

A further key characteristic of the dialogue model is its prioritisation of a preventative approach to human rights protection – by requiring law makers and decision makers to consider human rights early in the process, subsequent human rights breaches and associated litigation may be avoided altogether.<sup>14</sup>

## Human Rights Acts and the principle of parliamentary sovereignty

The principle of parliamentary sovereignty as explained by Dicey guarantees Parliament, as the democratically elected body, the right to ‘make or unmake any law’ and obliges courts to ‘uphold and enforce it’.<sup>15</sup>

Parliamentary sovereignty is maintained through a Human Rights Act based on the dialogue model in several ways. First, if Parliament wishes, it is able to pass laws that contravene human rights, in line with its democratic mandate. If it chooses to do so, then it must publicly justify why through parliamentary processes. Secondly, the judiciary must interpret legislation consistently with Parliament’s intent. Thirdly, the judiciary cannot invalidate legislation for incompatibility with human rights. Fourthly, while Parliament may be prompted to reconsider legislation in light of court judgments, Parliament always has the ‘final say’ about laws.<sup>16</sup> Finally, legislative dialogue instruments are ordinary Acts of Parliament. They are not entrenched in the Constitution and may be amended or repealed by Parliament. Any institutional power that flows to the judiciary is granted by Parliament itself and can be adjusted by Parliament.

Other domestic human rights instruments draw a different balance between the powers of the legislature and the judiciary. For example, in the USA and South Africa, rights are entrenched in the Constitution, and courts have greater institutional power to enforce human rights. If the legislature passes laws that are inconsistent with human rights, courts are empowered to invalidate the legislation.

The distribution of responsibility between the judiciary and the Parliament in the dialogue model recognises the dual role each branch has in fulfilling democratic principles. The courts are essential to maintaining the rule of law and protecting individuals against injustice –

both fundamental democratic requirements. Legislation is usually drafted in a manner that is intended to be generally applicable to the broader population. Sometimes individuals or groups whose interests are not represented by majority concerns, slip through the cracks in these laws.<sup>17</sup> Providing the courts with the ability to consider human rights in relation to individuals, while maintaining the intent of Parliament, helps to ensure that legislation applies fairly and inclusively to all, even those who may be low on the list of parliamentary priorities. In this regard, former UK Supreme Court Justice, Lady Hale, succinctly explained that ‘democracy values everyone equally, even if the majority does not’.<sup>18</sup>

In the pivotal case under the *Human Rights Act 1998* (UK) (UK Human Rights Act), *Belmarsh*, Lord Bingham elaborated on the broader role of the judiciary in a democracy, in light of its functions under the UK Human Rights Act:

It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.<sup>19</sup>

Lord Bingham’s comment highlights that the court’s role under a Human Rights Act does not stand in opposition to democratic government, rather it is fundamental to its functioning to the fullest of democratic ideals. All three branches of government support a common cause – and the dialogue model recognises this intersection, encouraging the development of shared norms.

## **(b) Strengthening accountability and the rule of law**

Democracy relies on a system of constraints on executive power. The executive branch is empowered to use executive power by the Constitution,<sup>20</sup> which also ensures that the exercise of executive power is checked by the other two branches of government: the judiciary and legislature. Rule of law principles provide that the executive should be both separate from, and accountable to, those branches, and it must act within the law.<sup>21</sup> Executive power should not be so broad as to extend to arbitrary action – particularly where people’s rights and freedoms are affected by discretionary decisions.

However, in practice, there are relatively few parliamentary or judicial safeguards on the exercise of discretionary executive power.<sup>22</sup> The common law, the ‘traditional check on executive abuse’, can simply be overridden by the clear and unambiguous intention of Parliament.<sup>23</sup> Parliament routinely passes laws that expand upon executive power and grant broad ministerial discretion.

A similar pattern has arisen regarding the extent to which Parliament has delegated decision-making power to Ministers, with the Centre for Public Integrity estimating that delegated legislation has doubled in the past 30 years.<sup>24</sup> This pattern was exacerbated during the COVID-19 pandemic, with Parliament taking long recesses during this period.<sup>25</sup> Nearly 20% of the executive actions taken since the pandemic began are exempt from parliamentary oversight altogether.<sup>26</sup>

A concern about how much decision making was being delegated with exemption from disallowance,<sup>27</sup> prompted a specific inquiry by the Standing Committee for the Scrutiny of Delegated Legislation.

The Committee noted an increasing volume of delegated legislation over time: ‘from an average in the mid-1980s of around 850 disallowable instruments tabled each year, it currently sits

around 1,500 each year’.<sup>28</sup> In addition, there is a trend for increasing amounts of delegated legislation to be exempt from disallowance. In 2019, 20% of the 1,675 laws made by the Executive were exempt from disallowance; in 2020 it was 17.4%; but since 2014 there had been a general upward trend.<sup>29</sup>

The Institute of Public Affairs, in its own report on this issue, observed that

The volume of delegated legislation exempt from parliamentary scrutiny reveals a deeper vulnerability to our liberties. A weakening of parliamentary oversight has led to a reduction in scrutiny of and transparency over law-making. This has concomitantly removed an important check and balance on the exercise of government power, intervention, and authority, leaving the Australian’s rights and liberties exposed to government overreach.<sup>30</sup>

Examples of laws that have increased executive powers include:

- Counter-terrorism laws, for example preventative detention orders enabling a person to be held in secret without arrest or charge,<sup>31</sup> control orders, and surveillance laws – including metadata retention laws enabling access to data by law enforcement agencies without a warrant.<sup>32</sup> Kieran Hardy and George Williams, in a recent analysis of Australia’s counter-terrorism laws, found that the Australian Government has enacted 92 counter-terrorism laws in the two-decades since 11 September 2001.<sup>33</sup> Despite recommendations for reforms of problematic laws, the authors found that the ‘framework laid out by laws from the first decade after September 11 remains almost entirely in place. In fact, many of these laws exist in the same form in which they were enacted, except where their reach has been expanded’.<sup>34</sup>

- Almost 500 government secrecy provisions, including general secrecy offences.<sup>35</sup>
- Immigration laws including mandatory immigration detention,<sup>36</sup> and the cancellation of visas and mandatory detention on character grounds.<sup>37</sup>
- COVID-19 involved a vast expansion of executive power via legislation such as the *Biosecurity Act 2015* (Cth).<sup>38</sup> Under

s 477(1), the federal Health Minister ‘may determine any requirement that he or she is satisfied is necessary to prevent or control’ the emergence or spread of disease listed under the Act. The former Health Minister used this power for a wide range of purposes, including to impose travel bans, impose emergency requirements for remote communities and prohibit cruise ships from entering Australia.<sup>39</sup>

### Freedom of expression

Since 2001 there have been concerning steps taken to limit freedom of expression in Australia. In 2015, the Australian Law Reform Commission identified numerous laws interfering with freedom of speech, many of which related to terrorism and national security offences.<sup>40</sup>

A notable example occurred in 2019 when the Australian Federal Police raided the homes of two journalists. These raids were conducted on the basis of broad *Crimes Act* provisions protecting sensitive information. The information in question related to leaked revelations of alleged misconduct of Australian soldiers; and plans to enable the Australian Signals Directorate to covertly monitor Australian citizens.<sup>41</sup>

The Human Rights Watch’s *World Report 2020* identified that ‘freedom of expression [has] come under unprecedented pressure’ in Australia, including through ‘overly broad national security laws [that] are open to misuse’.<sup>42</sup> In 2019, the CIVICUS monitor (a global civil society democracy monitor) also downgraded Australia’s democracy from open to narrow, citing the Australian Federal Police’s raid on the home of a journalist, among other free speech-related indicators.<sup>43</sup>

The existence of a Human Rights Act would be key to preventing free speech encroachments. The case of *Comcare v Banerji*<sup>44</sup> addressed the decision to fire an Australian Public Service employee for comments made via an anonymous Twitter account that were critical of the immigration policies of both major parties, on the grounds of speech restrictions in the APS Code of Conduct. The High Court unanimously found that the termination of a public servant’s employment did not contravene the implied freedom of political communication right in the Constitution. The Commission intervened in this case and pointed to caselaw from the United States that recognised the specialised knowledge of public servants and the value of the public being allowed to hear what they have to say.<sup>45</sup> Justice Edelman referred to those cases and said that Australian restrictions on the speech of public servants ‘would be struck down as unconstitutional in a heartbeat’ in the United States. Justice Edelman also recognised that the APS Code of Conduct ‘casts a powerful chill over political communication’.<sup>46</sup> However, in the absence of stronger constitutional or other legislative protections, the wide laws limiting the free speech of public servants in Australia were upheld.

Former Chief Justice of the High Court, the Hon Robert French AC, has commented on the effect of incursions on rights over time:

Many such encroachments, taken individually, arguably have little effect. Taken cumulatively over time and across State, Territory and Commonwealth jurisdictions they can be the death by a thousand cuts of significant aspects of those rights and freedoms.<sup>47</sup>

Courts and tribunals can review administrative decisions to ensure the decision maker is acting fairly, within their powers and in accordance with the law.<sup>48</sup> Yet courts tend to defer to the executive where provisions enable discretionary decisions in the 'national interest'. For example, in the context of immigration powers, the High Court has held that 'what is in the national interest is largely a political question'.<sup>49</sup> Decisions made in the 'national interest' can incorporate decisions made to pursue 'national security, defence, economy, environment, society and culture'.<sup>50</sup> The Law Council submitted that:

While such [national interest] provisions may be justifiable with respect to nationally significant decisions which are subject to public scrutiny and stringent parliamentary accountability, unease is caused where they are increasingly attached to decisions which are unlikely to attract such attention, are geared primarily towards individuals, are privately exercised and lack accountability.<sup>51</sup>

### **Discretionary powers of the Home Affairs Minister**

The Law Council noted that the Home Affairs Minister has upwards of 47 kinds of discretion that 'for practical purposes are not judicially reviewable', including powers to:

- issue conclusive certificates so that certain decisions are not subject to merits review<sup>52</sup>
- refuse or cancel a visa on 'character test' grounds without notice<sup>53</sup>
- set aside a delegate/Administrative Appeals Tribunal (AAT) 'character test' decision against visa refusal/cancellation and refuse/cancel the visa, choosing whether to afford natural justice<sup>54</sup>
- determine that certain persons are to be excluded from Australia
- determine that certain information is non-disclosable<sup>55</sup> (e.g. visa refusal reasons)
- determine that certain maritime safety/navigation laws do not apply in the exercise of maritime powers<sup>56</sup>
- lift the bar precluding visa applications by unauthorised maritime arrivals.<sup>57</sup>

Extracted from: Law Council submission to *Free & Equal*

The introduction of a Human Rights Act would provide more robust checks on executive power by placing a duty on public authorities to make decisions and act in accordance with human rights. Non-human rights compliant decisions could be reviewed and set aside by a court. This would help to strengthen accountability over executive decisions, and create an important recourse for people subject to arbitrary decisions that breach their human rights. As the Australian Law Association submitted:

A charter of human rights would ensure that those who wield power within Australia's federal institutions are subjected to a code of conduct in accordance with the rule of law which operates to prevent them from exercising power in such a way as to infringe upon the rights of people.<sup>58</sup>

The following UK case study illustrates how the UK Human Rights Act has led to increased accountability for human rights abuses, in line with democratic principles.

### **Belmarsh Case**<sup>59</sup>

In the UK, a detention regime was introduced in the aftermath of 9/11 that targeted for indefinite incarceration only suspected international terrorists who had not been granted a criminal trial. The regime did not extend to suspected national terrorists.

Those detained under this regime were suspected international terrorists who lived in Britain but who could not be sent back to their home countries because of a risk that they would be tortured or killed (under *non-refoulement* rules). However, they could not be tried in court following ordinary criminal law rules, because of a lack of evidence. Instead they were detained indefinitely in Belmarsh prison.

The detainees' case was taken before the House of Lords. The control orders were challenged on the grounds that they breached rights to liberty and non-discrimination. The Government argued that the orders were a necessary measure to protect the nation during public emergency.<sup>60</sup>

The House of Lords held that the provisions under which detainees were being held at Belmarsh prison were incompatible with the right to liberty. The measures were unjustified, including because they did not rationally address the threat to security and they were not a proportionate response.

Importantly, indefinite detention powers that apply only to some of those who pose a threat (namely, only *international* suspected terrorists and not nationals), could not be said to be 'strictly required' noting that the terrorist threat in the UK was also posed by national terrorists. The regime was also found to have the effect of discriminating between foreigners and nationals of the state. The regime was replaced with a new 'control order' scheme that did not distinguish based on nationality. This new regime also attracted judicial scrutiny and was made (somewhat) more human rights compliant over time.<sup>61</sup>

Conor Gearty comments on the impact of this case:

The Human Rights Act had passed an early and great test ... Parliamentarians, cabinet Ministers, and civil servants proved themselves inclined to take human rights seriously even when the human rights law itself did not require that they should ... The result is surely a better form of human rights protection, precisely because it is democratically entrenched.<sup>62</sup>

### (c) Enhancing participation and trust

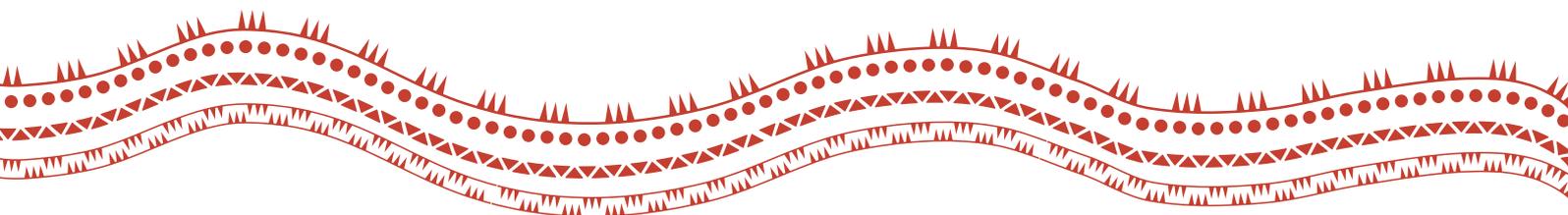
The dialogue Human Rights Act model ensures that laws, policies and decisions affecting human rights are publicly justified and subject to scrutiny. For example, legislative proponents must outline the human rights implications of new Bills to Parliament; and public authorities must justify their decisions by reference to human rights criteria. This leads to the public becoming better informed about decisions made by government to limit human rights and of the justifications behind those decisions. Armed with this information, the public is better prepared to participate in democratic processes.

The role of parliamentary scrutiny, and particularly that of the Parliamentary Joint Committee on Human Rights, established in 2011, in partial implementation of the recommendations of the NHRCC report, is a positive step. The 'dialogue' that is engendered is limited, however, while the reference point of scrutiny remains outside domestic laws.

A Human Rights Act would encourage greater public participation, including via consultation with communities. As a principle, participation is central to good decision making and good governance. The OHCHR has observed that,

While the responsibility and accountability for taking decisions ultimately rests with public authorities, the participation of various sectors of society allows the authorities to deepen their understanding of specific issues; helps to identify gaps, as well as available policy and legislative options and their impact on specific individuals and groups; and balances conflicting interests. As a consequence, decision-making is more informed and sustainable, and public institutions are more effective, accountable and transparent. This in turn enhances the legitimacy of States' decisions and their ownership by all members of society.<sup>63</sup>

As the OHCHR highlights, participation processes ensure that decision makers are fully informed about the implication of their proposals on affected groups and individuals, which aids government planning and improves the overall quality of resulting laws and policies. The Commission's proposed Human Rights Act model emphasises participation as a key element, noting that many of the worst (and most financially costly) human rights failures in Australia arise out of a failure to consult with affected groups. This is illustrated by the following case study.



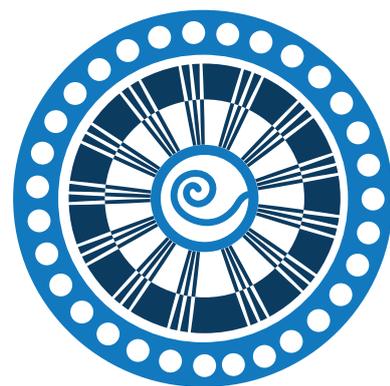
## Robodebt

The so-called 'Robo-debt' scheme, implemented in 2017, resulted in thousands of welfare recipients being sent inaccurate Centrelink debt notices following the introduction by the Department of Human Services of a new online compliance intervention (OCI) system for raising and recovering debts. The debt notices caused anguish and stress for many vulnerable and disadvantaged recipients (including people with mental illness and other disabilities) and led to a class action resulting in a record \$1.8 billion settlement, as well as a Royal Commission.<sup>64</sup> Media reports indicate that the debt notices may have contributed to the death by suicide of some recipients.<sup>65</sup> The Commonwealth Ombudsman found that, among other factors, a lack of consultation was key to the resulting failure:

The project management team failed to ensure that key external stakeholders were effectively consulted during key planning stages. It also failed to effectively communicate with stakeholders after the full rollout of the OCI in September 2016, resulting in confusion and inaccuracy in public statements made by key non-government organisation stakeholders, journalists and individuals. Proper communication with key NGO stakeholders ... could have ensured that better information about the OCI was more effectively communicated.<sup>66</sup>

The UN has found that trust in government has declined in recent years on a global scale, with the UN Secretary-General warning of a 'trust deficit'.<sup>67</sup> In Australia, research by the Australian National University indicates that trust in government is at record lows, with many Australians losing confidence in democratic institutions and political leaders.<sup>68</sup>

A Human Rights Act would improve trust in government decision making, due to guaranteed rights protections, and the increased transparency and accountability it would bring. Public trust enhances respect for the law, provides greater legitimacy for authorities and institutions, and deepens social cohesion.<sup>69</sup> Participation and consultation measures also enhance trust — being included in the democratic process has been found to increase ownership over outcomes and responsible citizenship.<sup>70</sup> As responses to COVID-19 have illustrated, public trust is essential for the widespread adoption of public policy initiatives designed to benefit the public at large.



## Trust in policing: Western Sydney

Western Sydney, an area with a high percentage of migrants and a high degree of socio-economic disadvantage, had disproportionate rates of COVID-19 deaths.<sup>71</sup> Sections of Western Sydney were given strict curfews and other restrictions, and experienced a heavy police and military presence.<sup>72</sup>

The NSW Bureau of Crime Statistics and Research (BOCSAR) found that while the majority of Sydney residents 'strictly complied' with public health orders, police acted on 36,597 breaches of public health orders in the two-month period between July and August 2021.<sup>73</sup> About 13,292 breaches occurred in the Local Government Areas of concern (primarily in Western Sydney).<sup>74</sup> BOCSAR concluded that:

there is no evidence that people in areas of concern or young people are engaging in more noncompliant activities. Overall, our results suggest that breaches are largely enforcement-driven rather than reflecting underlying patterns of non-compliance.<sup>75</sup>

In Western Sydney suburbs of Liverpool and Mount Druitt there were \$2.5 million in COVID-19 fines handed out since June 2021.<sup>76</sup>

The different rules and stricter police enforcement applying to Western Sydney led to a breakdown of trust, with community leaders pointing out these discrepancies, and residents stating that they felt 'scapegoated'.<sup>77</sup> This paralleled the treatment of people high-rise public housing towers in inner north Melbourne, discussed in the COVID-19 case study in section 1.5. Associate Professor Stuart Ralph and Mark Stoové made the following observations on the decision to use the military in Western Sydney:

It's incongruous that this same military is simultaneously being used to deliver public health messages that rely on engagement, trust and transparency.

South Western Sydney is rich in culturally and linguistically diverse communities ... . Many of these people have good reason to regard armed forces as unreliable sources of public assistance. In these communities the use of the army in enforcing lockdowns will inevitably undermine its dual role as a source for trusted health-care messages. This may also resonate poorly with migrants from countries where authoritarian governments use the military and police to control and intimidate communities.<sup>78</sup>

NSW does not have a Human Rights Act, and this example illustrates why a human rights approach is needed to ensure that individuals and communities can trust that government decisions are made and applied fairly.

A human rights-based approach would have required the government and the police to transparently justify why stricter measures were being utilised in certain areas, and how human rights affects would be mitigated. Stricter measures in Western Sydney may well have been justified from a public health perspective in accordance with human rights principles – but it would have been necessary for government and police to show that the chosen response was proportionate and appropriately tailored to the public health risk; and to change tack if unnecessary or potentially discriminatory outcomes occurred. A human rights-based approach would also have required a recognition of cultural differences in the affected communities, and pointed to a need to directly engage with those communities, beyond an enforcement-focused approach.

The absence of this human rights-based process may have led to suspicion of government decisions that were ultimately intended to be in the public good, with potential negative implications for police legitimacy and social cohesion in Western Sydney.

#### **(d) Balancing rights and interests**

A Human Rights Act would provide a roadmap for making difficult decisions in light of intersecting rights and interests.<sup>79</sup>

A central principle of human rights law is there is no hierarchy of rights.<sup>80</sup> Rights co-exist, with overlapping applications and inbuilt limitations to accommodate other human rights and interests.

A comprehensive rights framework would include a 'limitations clause' to govern when limitations on human rights are permitted. The clause would set out a balancing process to be conducted by decision makers based on recognised international proportionality principles.<sup>81</sup> The application of these principles would engender a consistent and principled approach to navigating the intersections between different individual rights and countervailing public interests that inevitably arise in a democracy.

For example, a right to freedom of speech and a right to privacy would help ensure that national security measures are legitimate, proportionate and limit our free press to the least restrictive degree.

A fragmented rights landscape breeds confusion and stokes unnecessary, artificial conflicts between perceived clashes of rights and between different sectors of the community.<sup>82</sup> As the Law Council observed:

it may not always be well understood that while some human rights are absolute, others may be limited provided that certain conditions are met. Instead, specific rights are sometimes raised by different community sectors in isolation, to the detriment of other rights and in a manner which can distort the debate. This reinforces the need for rights and freedoms to be protected in a coherent legal framework.<sup>83</sup>

Human rights are robust and flexible, and are capable of applying to a range of circumstances, including emergencies. A Human Rights Act would ensure that human rights are not an afterthought in times of crisis.

### **3.4 Preventative**

#### **(a) Procedural measures enable early consideration of human rights**

A Human Rights Act would improve law and policy development by requiring proactive, upfront consideration of human rights at an early stage. This would help ensure that the human rights implications of decisions are properly considered, and improve the quality and accountability of decision making.

At the centre of a dialogue Human Rights Act would be a positive duty on public authorities (the executive) to respect and protect human rights. This means that processes must be in place to consider human rights when making decisions and to prevent breaches. This in turn results in the embedding of internal protocols, guidelines, training, oversight and consultation requirements within public authorities, that guide decision-making processes. These procedural measures lead to substantive outcomes. Crucially, potential human rights breaches could be prevented or mitigated before they occur. Regarding the Victorian Charter, Professor George Williams explained that,

the Victorian Charter of Rights is designed to prevent human rights problems arising in the first place by improving the work of government and Parliament in the making and application of laws and policies. It does so by ensuring that human rights principles are a mandatory part of governmental decision-making ... The Victorian Charter of Rights demonstrates that it is possible to look again at some of the most basic assumptions and beliefs that underlie our system of government, and as a result, to bring about legal reform.<sup>84</sup>

Similarly, in 2022 the ACT Minister for Human Rights observed:

The Human Rights Act actively influences us. Section 40B in particular creates a specific obligation for public authorities to act consistently with human rights ... Human rights considerations occur in formulating policy and legislation and in scrutiny, so really, right at the outset. Essentially we prevent rights infringing laws being enacted in the first place and we are strengthening agencies' understanding and engagement with this all the time.<sup>85</sup>

These sentiments are also reflected in reviews of the existing Human Rights Acts at the state and territory level. For example, the five year review of the ACT Human Rights Act found that its impact on policy-making and legislative processes

has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government.<sup>86</sup>

*Free & Equal* stakeholders confirmed that the key success of state and territory human rights instruments has been the diversion or alteration of government policy and practices as a result of the procedures in place.<sup>87</sup>

Compliance with the positive duty would result in the reduced need for people to apply to make a complaint to the Commission or apply to a court to enforce their rights.

In addition to ensuring upstream consideration of rights-impacts, Human Rights Acts also enable advocates to work directly with public authorities to prevent human rights issues from escalating, by finding ways for people to resolve the issues without the need for court action. Indeed, the biggest impact of a Human Rights Act would be felt outside the courtroom,

often by people who cannot afford lawyers. For example, Victoria Legal Aid submitted that

The cases in which hardship has been avoided, or court action is no longer necessary, are an often overlooked but essential element of the Victorian Charter's effectiveness. For example, VLA has assisted tenants to avoid being evicted from their homes by negotiating with community housing providers and emphasising the rights and obligations which apply under the Victorian Charter. In our experience, community housing providers are open to discussing the parties' Victorian Charter rights and obligations, and frequently agree to take further steps to address the issues which gave rise to the eviction notice rather than unfairly evicting our clients into homelessness.<sup>88</sup>

The positive duty is also made effective by the *potential* of court action via the Human Rights Act. In 2020, the UK law firm, Bindmans, observed that

The effective enforcement machinery of the Human Rights Act has made an internal dialogue within public authorities about human rights considerations far more common than it was 20 years ago. When we are asked to advise such authorities on their decision-making on difficult issues, human rights issues often feature. However, all of this is spurred by the knowledge that human rights breaches can be litigated and so lead to judicial scrutiny with meaningful consequences.<sup>89</sup>

There are many other examples of dialogue model Human Rights Acts having a preventative impact, and leading to non-human rights compliant behaviour being addressed without the need for court action. The following case studies are illustrative.

### **Raising issues directly with a school**

A Victorian student with a learning disability was threatened with expulsion by his school due to his behavioural issues. His advocate outlined to both the school and to the Department of Education and Early Childhood Development the student's relevant human rights as protected in the *Victorian Charter*. As a result of the communication, the boy was provided with support, which reduced his behavioural issues, and consequently, he was allowed to stay on at the school.

Extracted from Human Rights Alliance for NSW submission to *Free & Equal*

### **Raising issues with a Government department**

Amendments to the law in Victoria allowed same sex couples to access superannuation death benefits from one another. Because the amendments operated prospectively, they discriminated against older people in same sex relationships. An older woman and her advocate wrote to the Human Rights Unit at the Department of Justice advocating for an amendment to the law based on the claim that the amendments should be consistent with the Charter of Human Rights and Responsibilities Act. As a result an amendment to the law was made so that same sex couples could access superannuation death benefits both retrospectively and prospectively.

Extracted from the PIAC submission to the 2006 Victorian Charter Review.<sup>90</sup>

### **Systemic changes to policing in Victoria**

Victoria Police conducted a major human rights project to assess risks arising from the detention of people in police cells across Victoria. As a result of the review, Victoria Police introduced standard policies, informed by human rights considerations, across all its police cell complexes. The policies focused on reforms including installation of drinking water facilities; removal of hanging points; rules around professional and personal visits; appropriate exercise yards and seating; dimming lights overnight; natural light and exercise. The review also involved physical assessment of cell complexes and upgrades, including installing smoke detectors and duress alarms. These reforms promote the humane treatment of people detained in police cells. In turn, they help to reduce the risk of self-harm, deaths in custody and mistreatment.

Extracted from Human Rights Law Centre, 101 Charter Cases.<sup>91</sup>



## Systemic changes to protect young people in the ACT

The ACT Human Rights Act influenced the legislative process in the development of the *Children and Young People Act 2008* (ACT). This was a comprehensive updating and codifying statute that is the primary law in the ACT providing for the protection, care and wellbeing of children and young people.

The government released an exposure draft of the legislation and the Human Rights Commissioner and the Children and Young People's Commissioner made submissions. Human rights issues were raised by practices such as therapeutic protection orders, pre-natal reporting of children at risk, strip-searching of detained children, and behaviour management schemes proposed for a youth detention centre. These human rights issues were considered extensively by policy officers involved in the preparation of the legislation, with assistance from the Human Rights Unit. This is reflected in the lengthy Explanatory Statement presented with the Bill, which refers not only to the provisions of the ACT Human Rights Act, but also to an array of relevant international standards, including the Convention on the Rights of the Child and United Nations principles relating to juvenile justice. It also draws on the audit reports of the ACT Human Rights Commissioner.

Extracted from the ANU five year review of the ACT Human Rights Act.<sup>92</sup>

## (b) Prevention through cultural change

A Human Rights Act would help embed a fair, respectful and inclusive culture of human rights across the whole of government. Through the dialogue Human Rights Act model, all arms of government have a role to play – the Human Rights Act would not be siloed within any one area. Human rights touches all aspects of public life so this is appropriate.

## Understanding how to use human rights in the family violence context

A female family violence worker at Women's Health West has stated that the Victorian Charter had a prominent impact in not only the way in which human rights issues are framed and tackled but also the practical realisation of these rights across various sectors.

We frequently refer to the Charter to educate clients about their rights and responsibilities, such as the right to live free from violence and the right to be safe. Often women are surprised to hear this and respond that this is the first time they've had their experiences framed in this way. At times, workers will refer back to legislative changes that reflect these rights, such as police power to temporarily remove suspected perpetrators of family violence from the house, issue safety notices and apply for intervention orders on behalf of the affected family member and the requirement to make relevant referrals to regional family violence services, men's referral services and the Department of Human Services. So the rights are backed up by actions that actually make a difference.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>93</sup>

Over time, the obligations within the Human Rights Act and the associated training should result in a transformative cultural shift within government. Rights protection would become a core part of government business, not just an afterthought. It would be a continuous process of improvement, rather than a box ticking exercise. Embedding human rights thinking would mean that meaningful and comprehensive

human rights reform is possible, even regarding some of the most persistent and difficult human rights problems.

The following example from the UK illustrates the reach and importance of the Human Rights Act with respect to a key policy area, noting the role of a responsive public service.

### **Practical effect of the UK Human Rights Act on aged and disability care in the UK**

In the UK, the Human Rights Act has been used to secure better treatment for people in care homes. This has largely been based on the prohibition of inhumane and degrading treatment, and respect to privacy, and has ‘forge[d] a new set of obligations to the aged’.<sup>94</sup>

Practical changes have occurred through:

- A human rights-based approach being adopted by the Care and Quality Commission, which regulates care homes
- Human rights issues being raised early with public authorities and used as a tool to achieve changes to policies and practices without needing to go to court
- Case law setting important precedent
- Systemic own-motion report made by the Equality and Human Rights Commission that has brought attention to problematic practices.

Some examples of each are discussed below.

#### *Role of the Care and Quality Commission (CQC)*

- The CQC adopted a human rights-based approach to the regulation of care services in 2014 that was reviewed and strengthened in 2018.<sup>95</sup> The 2018 changes were a result of a partnership between the CQC and the Equality and Human Rights Commission. The human rights approach is reflected in practical measures, such as:
  - » Embedding human rights considerations in the process for registering service providers.

- » Monitoring risks to human rights, including taking into account service provider’s compliance with human rights legislation through information gathering.
- » Inspecting facilities for human rights breaches.
- » Providing education and training on human rights to the sector.<sup>96</sup>

- The Care Quality Commission (CQC) is also a public authority under the Human Rights Act and so must comply with human rights when carrying out its functions as the regulator of the home care sector.<sup>97</sup>

Example:

Through a surprise inspection the CDC found that the Admiral Court Care Home had been depriving some of the residents of the care home of their liberty without invoking the proper safeguards under the Mental Capacity Act. This breaches the right to liberty, protected by the Human Rights Act (Article 5). Residents were effectively ‘unlawfully detained at the home’ and some residents were denied food and water, while the temperature was kept ‘uncomfortably hot’.<sup>98</sup>

As well as breaching its residents’ human rights, the CQC found that the home had breached Regulations used by the CQC to inspect care homes (as set out in the Health and Social Care Act 2008). Due to the CQC’s human rights approach the Regulations are built upon human rights principles.

On this basis, the CQC launched enforcement action against Admiral Court Care Home, banning the home from taking more residents and helped the residents obtain alternative accommodation.

CQC case study extracted from British Institute of Human Rights blog.<sup>99</sup>

*Raising human rights directly with public authorities leading to changes 'behind the scenes'*

- An NHS nursing home in London had a practice of routinely placing residents in special 'tilt-back' wheelchairs, regardless of their mobility needs. As a consequence, residents who were able to walk unaided were stopped from doing so. This had a severe impact on their ability to make choices about everyday activities, as well as their capacity to feed themselves and use the bathroom. A consultant pointed out to staff that their failure to consider the different mobility needs of individual residents was contrary to human rights principles. She drew particular attention to the right to respect for private life (Article 8), which emphasises the importance of dignity and autonomy, and the right not to be treated in a degrading manner (Article 3). The blanket practice was stopped as a result. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.
- A disabled woman was told by her occupational therapy department that she needed a special ('profile') bed. She was unable to leave her bed and this new arrangement would allow carers to give her bed baths. She requested a double bed so that she could continue to sleep next to her husband. The authority refused her request, even though she offered to pay the difference in cost between a single and double bed. A stalemate ensued for 18 months until the woman was advised by the Disability Law Centre to invoke her right to respect for private and family life. Within three hours of putting this argument to the authority, it found enough money to buy the whole of her double profile bed. The woman later explained that '[this] has made a phenomenal difference to my life. If something similar happened in future, I would have no hesitation in using the [Human Rights Act] again.'
- A couple in the UK were living in an assessment centre so the Department of Social Services could examine their parenting skills. The couple both had learning disabilities. CCTV cameras had been installed, including in their bedroom. Social workers explained that the cameras were there to observe them performing their parental duties and for the protection of their baby. With the help of an advocate, the couple used the UK's Human Rights Act to challenge the use of the cameras. They said that the Department had not given proper consideration to their right to family and private life. The couple explained that they did not want their intimacy to be monitored. Besides, the baby slept in a separate nursery so it was not necessary to monitor the couple in their bedroom at night. As a result, the Department agreed to switch off the cameras during the night so that the couple could enjoy their evenings together in privacy.
- A physical disabilities team at a local authority had a policy of providing support to service users who wanted to participate in social activities. A gay man asked if a support worker could accompany him to a gay pub. His request was denied even though other heterosexual service users were regularly supported to attend pubs and clubs of their choice. During a human rights training session, the man's advocate realised that the man could invoke his right to respect for private life and his right not

to be discriminated against on grounds of sexual orientation to challenge this decision, and helped him to do so.

Case studies extracted from British Institute of Human Rights report, *Changing Lives*.<sup>100</sup>

#### *Public pressure resulting in change to policy*

- Mr and Mrs Driscoll had lived together for over 65 years. Unable to walk unaided, Mr Driscoll relied on his wife to help him move around. She was blind and relied on her husband as her eyes. When Mr Driscoll was moved into a residential care home, Mrs Driscoll wanted to move to the home with her husband but was told she didn't meet the criteria. This was a breach of the couple's right to a family life as protected by the Human Rights Act, and a public campaign was launched to encourage the public authority to change their policy. As a result, Mrs Driscoll's needs were reassessed and the couple were reunited – setting a precedent for elderly couples to be kept together in the same care home.

Case study extracted from Amnesty International submission.<sup>101</sup>

#### *Case law*

The following is an example of how the right to privacy was used as a means of obtaining appropriate housing for a woman with disability and her family:

#### *R (Bernard) v Enfield LB*<sup>102</sup>

- This case concerned a claim for damages by a woman with severe disabilities. Mrs Bernard and her husband, Mr Bernard, her sole caregiver, alleged that the local Housing Department did not provide them with accommodation suitably adapted for her disability.
- Mrs Bernard is confined to a wheelchair most of the time. The Department had accommodated the claimants in a home that was not wheelchair accessible. This

required that Mr Bernard be present in the home for the majority of the time, because he had to lift his wife for all transfers from the chair, including using the restroom and bathing. Many additional consequences followed, including adverse effects on their children's lives and on their ability to enjoy a typical private family life. The claimants made many requests to the Housing Department for appropriate housing, which were largely ignored or delayed. The Social Services Department filed a detailed report with the Housing Department detailing the ways in which their current home was unsuited to their needs. This report went largely unaddressed.

The Court found that the Housing Department was in violation of Article 8, which requires that governments respect the private and family lives of persons. The decision stated that article 8 may require that positive steps be taken to ensure that such respect is provided, particularly when a case concerns particularly vulnerable groups like persons with disabilities. Here, such positive steps would include the provision of suitably adapted accommodation to enable the claimants and their children to lead as normal a family life as possible. The Court held that the Department's inaction displayed a singular lack of respect for the private and family life of the claimants. Appropriate accommodation would have 'restored her dignity as a human being'.

- A record damages award of £10,000 under the Human Rights Act was made in this case.

Case summary extracted from ESCR-NET.<sup>103</sup>

#### *Systemic reporting*

The Equality and Human Rights Commission has used its power to conduct systemic reporting to address human rights issues in the aged sector. For example, it launched a 2011 report that was based on a broad evidence base, with involvement of 1,254 individuals, local authorities and care providers.<sup>104</sup>

## 3.5 Protective

### (a) Marginalised and vulnerable people and groups

The true measure of any society can be found in how it treats its most vulnerable members.<sup>105</sup>

The consequences of Australia's lack of legal human rights protections acutely affect people who experience disadvantage, marginalisation and discrimination. It is the most vulnerable people who can fall through the cracks in the existing frameworks.

- *Overlooked in lawmaking*

Parliamentarians are largely concerned with the will of the majority population that makes up the voting public. Parliamentarians propose laws that are generally applicable to the population, debate issues that are of most concern to constituents and vote along party lines. As a result, the rights of socially excluded members of the population, minority groups, or those excluded from participating in the electoral system (such as children and migrants), may not be properly considered by Parliament. Leaving human rights entirely to the domain of Parliament means that those who *most* need human rights protections may be overlooked – or even scapegoated – by parliamentarians and the general voting public.<sup>106</sup>

Parliamentarians may advocate for and pass legislation that limits the rights of marginalised groups in order to score political points with the broader population. The Hon Jim McGinty observed that

From time-to-time legislators are tempted to bring in legislation which deals harshly with marginalised or unpopular people so that the politician will look 'tough' in the eyes of the community. This is frequently the case when laws deal with indigenous people, asylum seekers, prisoners, criminals and others who are not seen as 'mainstream'. Such legislation

has a detrimental effect on the community in two ways. Firstly, the human rights of all are debased, and secondly, the community becomes accustomed to accept human rights breaches as normal and acceptable.<sup>107</sup>

As discussed above, Parliament has voted to suspend existing human rights. This occurred in 2007, when the *Racial Discrimination Act 1975* (Cth) was suspended and the NTER introduced.

The Law Council noted that Parliament's willingness to ignore or impinge on human rights

means that the [human rights] system only applies at the discretion of parliament, which is highly problematic when parliament is the organ of the law from which protection is needed.<sup>108</sup>

Because the affected groups are in the minority, and do not have a strong voice in the public discourse, many Australians may not even be aware of the extent of the human rights problem, and are therefore less likely to put pressure on their elected representatives to act.

Sometimes public pressure will result in Parliament making changes to laws that better protect vulnerable and minority groups, but these changes often occur belatedly, after significant damage may have been done. For example, it was only in 2013 that federal law made it unlawful to discriminate against a person on the basis of their sexual orientation, gender identity or intersex status.<sup>109</sup> This law still allowed the prevention of same-sex marriage, which only became lawful in 2017. Until Parliament decided to change the law, LGBTIQ+ Australians could not marry. They may have also faced different legal and financial treatment with no avenue for challenge. Prior to the amendments, a legal right to equality and non-discrimination in a Human Rights Act would have provided stronger protections for same-sex couples and families.

Public pressure also eventually led to the removal of many asylum-seeking children from immigration detention centres – but only after hundreds of children were held in detention centres for long periods of time, during which the mental health of many children was severely damaged.<sup>110</sup>

- *Overlooked in decision making*

In addition to being overlooked in the law-making process, vulnerable and marginalised people and groups may be subject to unfair decision making by public authorities. As noted above, executive power has expanded in recent years, and public authorities are not obligated to consider human rights impacts on individuals or groups when making decisions.

Those most likely to be subjected to administrative decisions that adversely affect their rights are vulnerable members of the population, as they have increased interaction with public services and institutions compared with the rest of the population. Welfare recipients, persons with disability, prisoners, homeless people, migrants and children in care are all *directly* affected by administrative decision making, often on a daily basis. The impacts of these administrative decisions can be the difference between being housed and being homeless; being able to afford basic necessities and being destitute; being free and being locked up; being provided with supports to engage in life and being shut away from society; living with family and being taken away from home.

When officials do not have a clear responsibility to respect human rights, an important safeguard is missing from the decision-making process, which can lead to unnecessary suffering. Vulnerable people are also less likely to have the information or means to challenge administrative decisions and may entirely slip through the cracks in public systems. A lack of care for human rights can escalate to human rights violations occurring at a systemic level, affecting innumerable vulnerable people,

violations that may only be uncovered years later through Royal Commissions.<sup>111</sup>

Concern about the lack of, or limited, protections for vulnerable and minority groups was perhaps the most consistent theme of *Free & Equal* submissions and consultations. For example, Professor Liz Curran submitted that,

While many of our politicians do not see a need for better protection of human rights, the lived experience for people without their privilege, is that human rights intrusions are commonplace. This is especially the case if you are Aboriginal or Torres Strait Islander with a daily grind of racial prejudice that becomes just a normal part of lived experience, for the poor, for the elderly, children in out of home care and people with a disability and refugees (to name just a few sections of society).<sup>112</sup>

The Uniting Church supported a Human Rights Act,

particularly because of the protections it would provide to the most vulnerable, marginalised and disadvantaged in our community, who currently have few avenues for remedy when their rights are violated ... These groups in our community generally struggle to have their experiences heard and are often marginalised from the political process. This means that abuses of their human rights often go unnoticed or unaddressed and leave people with little option for redress or for the realisation of their rights.<sup>113</sup>

- *Role of the Human Rights Act*

A Human Rights Act would transform how public authorities interact with individuals in their everyday decision making.<sup>114</sup> Public authorities would be required to actively take into account the effect of policies and decisions on the human rights of affected individuals.<sup>115</sup> This would result in more administrative

flexibility, deeper decision-making processes, and better outcomes for vulnerable people — including on a systemic level.

A Human Rights Act would provide individuals with an avenue for recourse to enforce their rights. This would help to ensure that legislation applies fairly and inclusively to all.

A Human Rights Act would provide opportunities for individuals and their advocates to raise complaints about human rights, to the Commission and to the courts. The Commission is a low-cost forum that conciliates complaints. This means that human rights concerns can be resolved in a manner that is acceptable to both parties, without the need to go to court.<sup>116</sup> However, sometimes complaints are not amenable to conciliation. Access to the courts in these circumstances is essential.

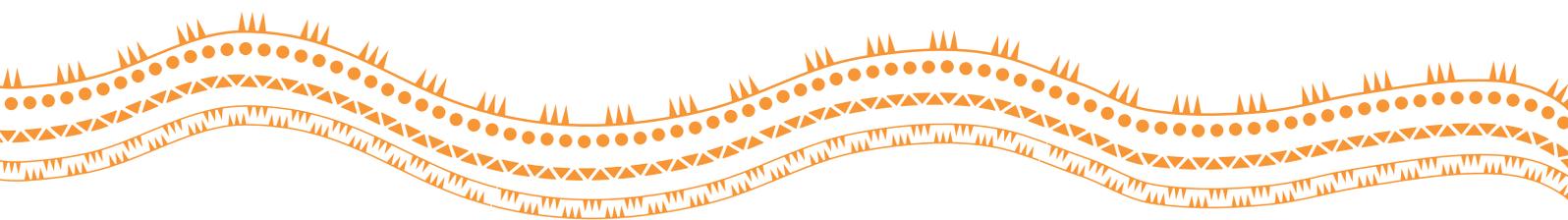
In a democracy, the judiciary enforces the rule of law and protect individuals against government abuses. Parliament makes laws that have general application, and the courts ensure that specific applications of the law are fair and just.<sup>117</sup> The judiciary therefore ensures that laws, policies and decisions do not run roughshod over people's rights, even where they do not affect the majority of the population. A Human Rights Act would enable courts to consider how human rights apply in relation to individuals and in specific circumstances, while maintaining the intent behind particular laws.

Further, when considering how a law applies in light of the Human Rights Act, courts could help reveal human rights implications that were not at first apparent and only emerged in the application of the law to an individual. This would give Parliament the opportunity to reconsider laws in a fresh light. A Human Rights Act could therefore enhance the ability of Australia's democratic institutions to respond to human rights problems when they do occur.

Indeed, human rights legislation at state and territory levels and overseas have had tangible benefits for vulnerable people.<sup>118</sup> Julian Gardner noted that

The protection of rights that a Charter would afford is particularly important for those who have less power and are more vulnerable. For example, in my former role as Victoria's Public Advocate I encountered people with behavioural issues arising from their disabilities who were locked up without any power under relevant legislation to do so and with no legal oversight. Had the Victorian Charter been in force this would not have been allowed.<sup>119</sup>

The following case studies further illustrate how Human Rights Acts help to protect the rights of vulnerable and marginalised people.



## Asylum seekers

In the UK, legislation was enacted that meant that late claimants for asylum could not access welfare while their applications were considered. They were also prevented by law from working, 'paid or unpaid, or engaging in any business or profession'.<sup>120</sup>

Three men whose asylum claims were rejected took their cases to the House of Lords in the case of *R (Limbuella, Adam and Tesema) v Secretary of State for the Home Department*.<sup>121</sup> Due to their inability to either work or gain welfare support, they had been forced into rough sleeping and begging for food.<sup>122</sup> The Court unanimously found a breach of the prohibition on inhuman and degrading treatment<sup>123</sup> and used a provision which explicitly referenced the need to comply with the Human Rights Act in the relevant legislation to insist that they be provided with support.<sup>124</sup>

Discussing the types of treatment falling within this prohibition against inhuman treatment, the court found that, 'where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish ... it may be characterized as degrading and also fall within the prohibition'.<sup>125</sup> By denying the asylum seekers state support, at the same time as effectively cutting off the ability to work, the UK government's actions resulted in treatment that was severe enough to be considered 'inhuman' or 'degrading'.

Lady Hale noted in relation to this judgment that by requiring asylum seekers to be treated consistently with the Human Rights Act, 'we are respecting, rather than challenging, the will of Parliament'.<sup>126</sup>

## Prisoners

The Commissioner for Social Housing in the ACT served a 'no cause' termination notice on a tenant in jail, and then sought orders to evict him from his home just prior to his expected release on parole. Eviction in these circumstances would have meant the tenant was facing losing his personal belongings with nowhere to store them, homelessness upon release, and the possibility of delaying parole due to not having somewhere stable to live. The ACT Civil and Administrative Tribunal declined to terminate the tenancy and referred, among other considerations, to the ACT Human Rights Act in the exercise of its discretion. The Tribunal quoted the tenant:

My home is the most important thing to me. It's important for my recovery and to enable me to get parole but more importantly because it's the first place that I can call my own for very many years. It would be completely devastating to me to lose it now after so much I feel I have achieved while in prison.

Shortly after the decision the tenant was released on parole back to his own home.

Extracted from Human Rights for NSW Alliance submission to *Free & Equal*.

## Children in juvenile detention

After riot damage to a youth justice centre, the Victorian Government set up a new youth justice centre in a unit in the maximum security adult Barwon Prison and started transferring children as young as 15 there. The conditions in the unit were extremely harsh and children were subjected to extended solitary confinement, regular handcuffing and denied proper education.

A number of First Nations children took legal action using the Charter and other laws to challenge their transfer to the prison. In response, the Victorian Government agreed to remove all First Nations children from the adult prison. A number of non-Indigenous children then brought a similar legal action challenging the decision to set up the unit in the adult prison and transfer children there. Both the Supreme Court, and the Court of Appeal, ruled that the decision was unlawful because the Minister failed to properly consider the children's human rights under the Charter, including the right to humane treatment and the right to protection of children as is in their best interests.<sup>127</sup>

When the Minister then made a fresh decision that kept the children in the adult prison, certain children brought a final challenge using the Charter and other laws. The Supreme Court again ruled that the government's actions breached the children's rights to humane treatment in detention and protection as is in their best interests. The Court ordered that the Minister stop detaining the children at the prison and all children were transferred back into existing youth justice centres. The Court also ruled that a decision approving the use of capsicum spray in the unit in the adult prison was unlawful.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>128</sup>

## People with mental health conditions

The ACT Civil and Administrative Tribunal decided a person with a cognitive disability, whom the Tribunal had previously found to lack capacity under guardianship law, could not automatically be assumed to lack capacity to consent to psychiatric treatment orders.

The ACT Human Rights Commission had made submissions to the Tribunal on the interpretation of ACT law in light of the ACT Human Rights Act and international law, including the Convention on the Rights of Persons with Disabilities. The submissions emphasised the presumption in international law that a person has capacity for all decisions and a person seeking to overturn that presumption bears the onus of doing so. Further, each decision affecting an individual's rights required its own assessment of capacity. The Tribunal noted the Commission's submissions on human rights law reinforced common law principles.

The Tribunal's decision confirmed that someone's capacity must be determined on a decision by decision basis, assessed on a spectrum and must not be automatically negated because of a prior finding of loss of capacity for a different area of a person's life.

The ACT later substantially amended its mental health legislation. To ensure consistency with human rights law, the new provisions place greater weight on a person's ability to consent and wishes regarding the treatment.

Extracted from Human Rights Law Centre, 101 Charter Cases.<sup>129</sup>

## (b) Domestic remedies

The passage of a Human Rights Act would ensure that human rights actions can be heard and determined in Australia, in accordance with Australian law and procedures.

In many cases, a person in Australia who claims that the government has breached their rights under one of the core international treaties cannot obtain an enforceable remedy.

Currently, Australians need to rely on complaints to the Commission, as a precursor to complaining to certain international bodies if the Commission cannot resolve the complaint (a 'communication'). Without the option of proceeding to a court or tribunal, there is no Australian body capable of providing appropriate, binding remedies at the federal level. The UN Human Rights Committee has confirmed that Commission processes cannot be characterised as 'effective remedies' under the ICCPR because the Commission's recommendations are not binding.<sup>130</sup>

An increasing number of people have resorted to making human rights complaints to UN treaty bodies. It is incongruous that Australians must go to New York or Geneva to get their domestic rights claims heard. This was recognised by the New Zealand High Court in *Beigent's Case*, when it held that there was a right to remedy under the New Zealand Bill of Rights. Justice Casey commented:

It would be a strange thing if Parliament ... must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts.<sup>131</sup>

In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction.<sup>132</sup> However, the decisions of such bodies are not binding on Australia and can, and have been, ignored. Remedy Australia reports that Australia has met its obligations to remedy human rights breaches in only 12% of individual communications decided against Australia by the Human Rights Committee.<sup>133</sup> This means that a person's efforts to seek a remedy for a human rights breach may be extremely time-consuming, expensive and ultimately fruitless.

Other international processes also offer little recourse for victims of human rights violations by Australia. Recommendations made by United Nations special rapporteurs and resolutions passed by the United Nations Human Rights Council are unenforceable.

The following case studies are examples of complaints made by individuals to international human rights mechanisms, with mixed results.

### **Toonen v Australia (1994)**<sup>134</sup>

In 1991, Nicholas Toonen, a homosexual man from Tasmania, sent a communication to the Human Rights Committee. At that time, homosexual sex was criminalised in Tasmania. Toonen argued that this violated his right to privacy under Article 17 of the ICCPR. He also argued that, because the law discriminated against homosexuals on the basis of their sexuality, it violated Article 26. As a result of his complaint to the Human Rights Committee,

Toonen lost his job as General Manager of the Tasmanian AIDS Council (Inc), because the Tasmanian Government 'threatened to withdraw the Council's funding' unless Toonen was fired.<sup>135</sup> The Human Rights Committee did not consider Toonen's communication until 1994, but it ultimately agreed that, because of Tasmania's law, Australia was in breach of the obligations under the treaty. In response to the Committee's view, the Commonwealth Government passed a law overriding Tasmania's criminalisation of homosexual sex.<sup>136</sup>

### ***Noble v Australia (2016)***<sup>137</sup>

A court decided that a teen with intellectual disability facing criminal charges was unfit to plead. He was imprisoned indefinitely without trial. A psychologist determined that, with appropriate assistance, the teen was capable of standing trial, but the charges were dropped owing to insufficient evidence. After 10 years in prison, the man was released on restrictive conditions of unlimited duration and with no avenue of appeal to have them lifted.

The Committee on the Rights of Persons with Disabilities considered that Mr Noble was denied a fair trial, equal protection under the law, and the support he required to exercise his legal capacity. The Committee found his disability was the ‘core cause’ of his deprivation of liberty, which it concluded was ‘arbitrary’ and a form of ‘inhuman and degrading treatment’.

In response, Australia admitted failures, but denied violating Mr Noble’s rights and declined to comply with any of the Committee’s recommendations.

Extracted from Remedy Australia.<sup>138</sup>

### ***Nystrom v Australia (2011)***<sup>139</sup>

Stefan Nystrom was born in Sweden and entered Australia when only 27 days old. His family assumed he was a naturalised Australian. Mr Nystrom began hearing voices in childhood and had suffered psychiatric symptoms throughout his life. From the age of ten, he began offending, usually under the influence of alcohol. At the age of 30, seven years after his last offence, during which time he had been law-abiding, steadily employed and recovering from his alcoholism, Mr Nystrom’s permanent visa was cancelled on character grounds.

An appeal to the Federal Court found him to be ‘an absorbed member of the Australian community with no relevant ties elsewhere’. The Immigration Minister appealed successfully to the High Court. Mr Nystrom was deported to Sweden in 2009 and has since been living at different points in homeless shelters, in prison and in psychiatric care.

The Human Rights Committee found Mr Nystrom’s deportation constituted arbitrary interference with his right to family and his ‘right to enter his own country’, which is Australia. Further, his expulsion was arbitrary – occurring so long after his offending. He should be permitted and materially assisted to return to Australia. Australia has refused to allow Mr Nystrom back into Australia, but said it has made policy reforms to guard against repetition.

Extracted from Remedy Australia<sup>140</sup>

## **3.6 Effective**

A Human Rights Act could reduce social and other costs, providing economic benefits for Australians.

Social policies that are compliant with human rights can improve equality of access and quality of service, for example to health services and social security, in turn reducing longer-

term costs. Improved access to education and employment can aid workforce participation and economic growth.<sup>141</sup> By considering the human rights impacts of a proposed law or policy upfront, there is also a reduced likelihood that decisions will breach human rights and therefore the risk and costs of court action are avoided. There may be initial upfront costs, but long-term savings to individuals, to government and to the court system.<sup>142</sup>

Currently, Australia tends to deal with human rights breaches after the fact, for example through Royal Commissions and the limited pathway of AHRC Act complaints. Sometimes, vast, unexpected costs arise as a result of a failure to consider human rights at an early

stage. An example of this is Robodebt which led to a class action resulting in a record \$1.8 billion settlement, and prompted its own Royal Commission.<sup>143</sup> Dealing with human rights issues early has obvious economic benefits.

### Cost of Royal Commissions vs Cost of Victorian Charter

Royal Commissions are very costly. The Law Council submitted the following figures.

- the Royal Commission into Aged Care will cost the Australian Government \$104 million over four years.<sup>144</sup>
- the Royal Commission into Institutional Responses to Child Sexual Abuse cost about \$500 million.<sup>145</sup>
- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission) will cost \$527 million.<sup>146</sup>
- the Royal Commission into the Protection and Detention of Children in the Northern Territory (NT Royal Commission) jointly cost the Northern Territory and Federal Governments \$54 million.<sup>147</sup>

Meanwhile, the costs of implementing the Victorian Charter was submitted by Queensland Advocacy Incorporated.

The 2011 review of the Victorian Charter was the first review for a human rights act in Australia. It provided detailed information regarding economic costs, found that, over the first five years of its operation (from 2006–7 to 2010–11 financial years), the total economic cost of the Charter was \$13,488,750.<sup>148</sup>

This was comprised of the following:

- Charter implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services and Victoria Police) (\$2,549,000)

- Establishment of the Human Rights Unit within the Department of Justice (\$3,405,185)
- Funding for VEOHRC's (Victorian Equal Opportunity Human Rights Commission) charter-related work (\$3,326,000)
- Grants provided by the Department of Justice for Charter education and legal advice (\$971,362)
- Other identified human rights staff in the Victorian Public Service (\$754,379)
- Charter-related training and the development of resources (\$160,665)
- Legal advice obtained for the initial audit of legislation in preparation for the introduction of the Charter and drafting of statutory provisions or general legal advice in relation to the Charter (\$272,971)
- Legal advice obtained for the preparation of statements of compatibility (\$470,339)
- Charter-related litigation involving the Department of Justice, DHS and Victoria Police (\$952,373)
- The cost of conducting the review of the Charter was estimated at \$130,000. This amounts to a total cost of \$0.50 per Victorian resident.<sup>149</sup>

Extracted from Law Council of Australia and Queensland Advocacy Incorporated submissions to Free & Equal

### Chapter 3: Endnotes

- 1 The Commission notes the Australian Government's 2009 Access to Justice Framework described the key principle of 'effectiveness' in that framework as follows: 'The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law'. Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.
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# Model for a federal Human Rights Act

## Recommendation:

**The Commission recommends that the Australian Parliament enact a federal Human Rights Act.**

Chapters 4 to 12 outline the Commission's proposed model for a federal Human Rights Act.

## Chapter 4: Federal dialogue model

### 4.1 Nature of dialogue models

The Commission proposes a federal Human Rights Act built on the legislative dialogue model.

Dialogue Human Rights Act models incorporate a formal 'dialogue' between the executive, legislature and judiciary, with each branch sharing responsibility for respecting and protecting human rights.

Dialogue models grant each branch of government a distinct role to play, in line with the ordinary institutional functions each perform. Parliament considers human rights when it makes laws, the executive when it applies laws and policies, and the judiciary when it interprets laws.<sup>1</sup>

Dialogue models have been adopted in comparable jurisdictions, including the UK and New Zealand, as well as in Australian jurisdictions in the ACT, Victoria and Queensland.<sup>2</sup> A dialogue model was recommended by the National Human Rights Consultation Committee (NHRCC) report in 2009, and strongly supported in *Free & Equal* submissions and consultations.<sup>3</sup>

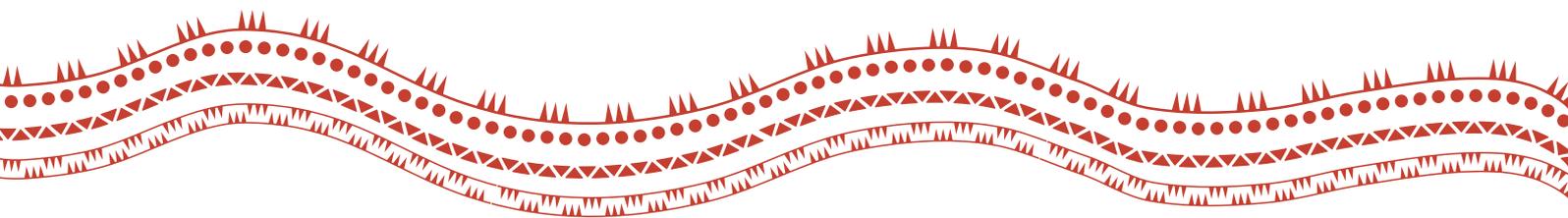
The model distributes responsibilities as follows.

- **Parliament:** Parliamentary committees scrutinise new legislation for compliance with human rights. Proponents of legislation must provide a statement indicating compatibility with human rights when introducing new legislation. If a court finds that legislation is incompatible with human rights, Parliament chooses whether or not to amend the legislation.
- **Executive:** The executive is obliged to act compatibly with human rights when implementing laws and policies, and must consider human rights when making decisions. It may face court action if it fails to do so.
- **Judiciary:** The judiciary interprets laws in accordance with human rights where possible (in light of Parliament's intention). When a court finds that legislation is incompatible with human rights, there is a mechanism in place to inform Parliament, but this does not affect the law's validity. The judiciary considers allegations of breaches by the executive and may provide remedies for human rights breaches.

The Commission's proposed model has most of the attributes of the dialogue model, with one key departure – the Commission is not proposing a *formal power* enabling courts to notify the Parliament about laws that breach human rights, and is instead proposing an alternative informal notification process. This is due to constitutional concerns that have been raised in relation to such a formal power in Australia, discussed in chapter 10. As such, the model may not be viewed as a 'pure' dialogue model, although it shares other key features of the model.<sup>4</sup>

Some *Free & Equal* stakeholders expressed support for a constitutionally entrenched Bill of Rights in preference to a legislative model.<sup>5</sup> However, the Commission considers that a legislative model is the most pragmatic and compatible model with Australia's government structure and political norms.

A constitutional model provides stronger, less easily reversible human rights protections. However comparable legislative models have successfully embedded human rights into the fabric of parliamentary democracies, and none have been repealed once introduced. Further, the Commission notes that the passage of a legislative model does not exclude the entrenchment of those rights in the Australian Constitution at a future date.



## Chapter 4: Endnotes

- 1 See eg, Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (2016) [1.2. Structure and Operation] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57245.htm>>.
- 2 *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).
- 3 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009) xxxiv (Recommendation 19); See, eg, Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; NSW Young Lawyers, Submission 35, *Free & Equal Inquiry*; Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*; Human Rights Law Centre, Submission 65, *Free & Equal Inquiry*; Julian Gardner, Submission 79, *Free & Equal Inquiry*; Amnesty International Australia, Submission 103, *Free & Equal Inquiry*; Human Rights Alliance for NSW, Submission 107, *Free & Equal Inquiry*; Canberra Community Law, Submission 111, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Victoria Legal Aid, Submission 141, *Free & Equal Inquiry*; ACT Human Rights Commission, Submission 152, *Free & Equal Inquiry*; Law Council of Australia, Submission 166, *Free & Equal Inquiry*.
- 4 Other potential terms that describe the overarching approach taken by the Commission to the proposed model include a 'weak-form review' model, or a 'responsive' model. For further discussion, see, eg, Aileen Kavanagh, 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998' (2016) 13(4) *International Journal of Constitutional Law*, 1008; Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford Comparative Constitutionalism, 2022).
- 5 Julian Gardner, Submission 79, *Free & Equal Inquiry*; Public Interest Advocacy Centre, Submission 69, *Free & Equal Inquiry*; Positive Life NSW, Submission 72, *Free & Equal Inquiry*; Lisa Ho, Submission 11, *Free & Equal Inquiry*; Lisa Ho, Submission 11, *Free & Equal Inquiry*; Rape and Domestic Violence Services Australia, Submission 77, *Free & Equal Inquiry*; NSW Centre for the Treatment and Rehabilitation of Torture and Trauma Survivors, Submission 95, *Free & Equal Inquiry*; Australian Privacy Foundation, Submission 119, *Free & Equal Inquiry*; Sean Stimpson et al., Submission 158, *Free & Equal Inquiry*; ACT Disability, Aged and Carer Advocacy Service, Submission 134, *Free & Equal Inquiry*.



# Chapter 5: What rights and fundamental freedoms should be protected in a Human Rights Act?

## 5.1 Introduction

### (a) Source of rights

Australia is a party to seven of the major international human rights treaties:

- *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) 1965
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966
- *International Covenant on Civil and Political Rights* (ICCPR) 1966
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) 1979
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) 1984
- *Convention on the Rights of the Child* (CRC) 1989
- *Convention on the Rights of Persons with Disabilities* (CRPD) 2008

The two core treaties, adopted by the UN General Assembly in 1966, are the ICCPR and ICESCR. Together with the Universal Declaration of Human Rights (UDHR) these instruments are regarded as the 'International Bill of Rights'. The ICCPR protects a broad range of civil and political rights. Many aim to ensure that all people are able to participate in public and political affairs – for example, the right to vote, and freedom of speech, association and assembly. Other rights aim to protect people's physical liberty and safety – for example, the right to life and to be free from torture, as well as freedom of movement, freedom from arbitrary detention, and the right to a fair trial.

ICESCR sets out the basic necessities that people need to lead a healthy and dignified life – for example, the right to adequate housing, food and clothing and the right to adequate health care, as well as equitable access to education. Other rights in ICESCR aim to ensure that all people can develop to their full potential and have access to economic opportunities – for example, the right to work and to fair and safe conditions at work.

All of the human rights treaties require Australia to take concrete measures, including changing or adopting laws, to implement the terms of the treaty domestically.<sup>1</sup> In Australia, a treaty is not binding domestically unless it is incorporated through domestic legislation.<sup>2</sup>

Australia has also expressed support for a number of international declarations relating to human rights. Unlike an international treaty, a declaration does not create binding legal obligations. However, declarations do carry significant political and moral weight because they are adopted through agreement by the international community. They therefore act as key standard-setting documents, or as a codification of existing standards. Some declarations contain customary international law, namely parts or all of it have become widely adopted through international practice and reach the status of binding international law.

A particularly important international declaration for the Australian context is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in 2007, and supported by Australia in 2009.<sup>3</sup> The declaration does not 'create' new rights. Rather, it elaborates existing human rights as they apply to Indigenous peoples.

The key function of the Human Rights Act will be to coherently implement Australia's international obligations domestically, and to codify fundamental common law rights that are also reflected in these international instruments.

The Commission's recommended model primarily incorporates ICCPR and ICESCR rights, as these are core international treaties with general application to all people. It also incorporates overarching principles derived from the 'thematic' treaties, relating to particular subsections of the population, such as children (CRC) and persons with disability (CRPD); as well as principles from UNDRIP, noting Australia's particular obligations to First Nations peoples. The core treaties would also remain part of the function of parliamentary scrutiny by the Parliamentary Joint Committee on Human Rights (PJCHR).

Key rights and freedoms are also sourced within the common law. Australia inherited its common law tradition from the United Kingdom. Rights and freedoms sourced within this tradition have been developed over centuries by Parliament and the courts, and reflected within the Magna Carta of 1215.<sup>4</sup> They are part of a heritage that continues today, applied by modern courts and reflected in modern statutes.

Many traditional rights and freedoms are also now recognised as human rights. Common law rights informed the development of the core treaties, and many are directly reflected within the ICCPR. These include, for example, freedom of association, freedom of expression and freedom of movement. As noted by the Australian Law Reform Commission (ALRC), 'human rights have been said to incorporate or enhance rights in the common law. In their history and development, common law rights and human rights clearly influenced each other'.<sup>5</sup>

As discussed in chapter 2, common law rights are routinely overridden by legislation, and are only minimally protected within Australia's Constitution. The COVID-19 pandemic shed light on the tenuous nature of existing protections, and saw repeated public calls for stronger reflection and respect for fundamental freedoms within Australia's legal and political system. A Human Rights Act would reflect and strengthen important common law rights and fundamental freedoms, alongside those human rights that are primarily sourced in international law.

## **(b) Nature of rights**

Human rights are grounded in principles of dignity, equality and autonomy.<sup>6</sup> They are key to the functioning of a democratic society and the maintenance of the rule of law. Australian values of fairness, inclusivity and freedom are realised through human rights protections.

Human rights law recognises that 'all human rights are universal, indivisible and interdependent and interrelated'.<sup>7</sup> Universality means that human rights are not contingent on citizenship or behaviour; they belong to everyone and they cannot be taken away. They apply to all human beings from the time they are born. The 'indivisibility' of rights means that there is no hierarchy of human rights, as all are important. The fulfilment of one right is often dependent on the fulfilment of other rights (they are 'interrelated' and 'interdependent'). In this regard, many civil and political rights cannot be realised unless economic, social and cultural rights are also secured, and vice versa. For example, if a person does not enjoy their economic right to adequate housing, they might be prevented from enjoying civil and political rights including the right to privacy and the right to vote. The realisation of all human rights is necessary for individuals to live with dignity and to enjoy equality.

Most human rights are not absolute. Limitations on rights are an inevitable part of a democratic society, where there are intersecting public interests, as well as individuals and groups with different needs and priorities. Government transparency about limitations and public debates focused on weighing rights and interests are a sign of a healthy democracy. Human rights law provides guidance on how different rights and public interests are to be balanced with each other when they intersect, including that all limitations on rights should occur through an open, democratic and rational process of justification.<sup>8</sup>

The above principles have influenced the development of international law and democratic standards, and they underpin all human rights. They could usefully be included in the preamble to the Human Rights Act, guiding interpretation. For example, the preamble should specify that human rights apply from the time a person is born, and that they are universal, indivisible and interdependent and interrelated.

### **(c) Approach to rights content in context with the broader Human Rights Act**

The Commission's recommendations are designed to implement the ICCPR and ICESCR into domestic law, as well as key aspects of the thematic treaties, as discussed above.

The Commission has also assessed comparative models in the United Kingdom, Canada and New Zealand. Each of these models are dialogue models that implement international standards, and although they differ in key respects, there are many commonalities between the rights chosen for incorporation and how rights are worded, amongst these instruments.

In addition to international models the Commission has drawn upon the state and territory instruments as a base for determining how best to embed key rights through an Australian model at the federal level. The ACT, Victorian and Queensland models are very similar to each other in terms of rights-content.

The *Human Rights Act 2004* (ACT) (ACT Human Rights Act) was introduced first, setting out key ICCPR rights. It has been updated to include additional rights in the years since. The ACT Human Rights Act influenced the *Charter of Human Rights and Responsibilities 2006* (Vic) (Victorian Charter), and the *Human Rights Act 2019* (Qld) (Queensland Human Rights Act) was influenced by both ACT and Victorian models.

In the ACT and Victoria, there have been 18 and 16 years of human rights jurisprudence respectively, resulting in a wealth of precedent and practical knowledge about the application of rights within the public service and the legal profession in those jurisdictions. A series of reviews in Victoria and the ACT has also led to incremental changes over time, and areas highlighted for future improvements.

The Commission considers that the federal Human Rights Act should be part of this legislative and jurisprudential tradition, reflecting the work of state and territory jurisdictions, and enabling consistency wherever possible.

A federal Human Rights Act should build from the lessons learned in these jurisdictions and make improvements, developing from a solid foundation of tested law. The Commission also has the benefit of previous inquiries and proposals for the development of a federal Human Rights Act, most notably the 2009 NHRCC report, which involved widespread consultations with the Australian public on the rights that were considered most important.<sup>9</sup>

While it is important that the federal model complement existing human rights law developed at the state level, it is also important to recognise that the Federal Government has particular responsibilities regarding human rights and can be distinguished from the states due to its responsibilities arising from voluntarily committing to human rights treaties.

The constitutional system in Australia permits the Executive Government to commit Australia to international treaties. The 'External Affairs' power in the Constitution (section 51(xxix)) enables Parliament to enact legislation that may otherwise be outside its legislative power in relation to the obligations arising from the treaties.

It is the Federal Government's role to ratify international treaties, and to take responsibility for respecting, protecting, and fulfilling human rights. It is also the Federal Government's role to report internationally on Australia's human rights progress to Treaty Bodies and other UN mechanisms.

Human rights responsibilities are voluntarily adopted by the Federal Government, and it is the Federal Government's role to lead implementation of those responsibilities. Currently, the lack of legal implementation of core human rights treaties means that Australia is not fully realising its international obligations and, as Professor George Williams notes, it is behind all other democratic countries in this regard.<sup>10</sup> The direct obligation to implement treaties at the federal level is a factor that has influenced the Commission's approach to developing this Human Rights Act model, and it explains some of the key advances in the Commission's model that depart from state and territory approaches.

The Commission recommends that each right within the federal Human Rights Act should have a direct cause of action, and the associated range of judicial remedies. This means that breaches of human rights will enable individuals to bring a claim before the courts (and to make complaints to the Commission) without the need for a separate cause of action arising externally to the Human Rights Act.

This is similar to the approach taken by the ACT Human Rights Act, which also includes a direct cause of action for rights breaches. By contrast, Victoria and Queensland adopt a 'piggy-backing' approach, requiring an additional non-Human Rights Act cause of action, that falls short of international standards, and has caused unnecessary complications and confusion regarding the application of those laws.<sup>11</sup>

The Commission's proposed approach to the federal Human Rights Act, implements Australia's obligations in a straightforward manner with a less cumbersome enforcement mechanism. This approach reflects the right to an effective remedy as an essential element of the ICCPR.<sup>12</sup> This is discussed in chapter 11.

The Commission has also taken into account Australia's obligations arising from 'thematic' treaties beyond ICESCR and the ICCPR. Key elements of these treaties have already been implemented federally through anti-discrimination laws, including the CERD via the *Racial Discrimination Act 1975* (Cth) and CEDAW via the *Sex Discrimination Act 1984* (Cth). However, discrimination laws only reflect a partial implementation of these thematic instruments.

The Commission has therefore proposed embedding key principles from thematic instruments through the inclusion of a 'participation duty' and a related 'equal access to justice duty' on the Executive. The participation duty addresses a fundamental problem in the development of federal policies and decisions - inadequate engagement with the very people to whom those decisions directly apply. This duty embeds self-determination principles arising from UNDRIP, alongside overarching participation principles of the CRC and the CRPD. The participation duty as it relates to First

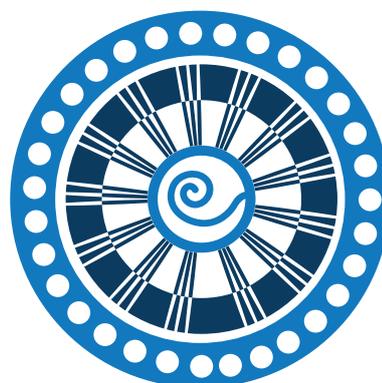
Nations self-determination also reflects specific Commonwealth jurisdictional responsibilities, and its commitments and agreements,<sup>13</sup> regarding the rights of First Nations peoples. The equal access to justice duty in turn embeds access to justice principles that are important to the realisation of rights within the Human Rights Act. These procedural duties are discussed in chapter 7.

The Commission also proposes that thematic instruments are reflected through the inclusion of a clause that references the seven core treaties that Australia has ratified and requires the rights in the Human Rights Act to be interpreted in light of those treaties. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act. For example, it may be useful to refer to the CRC when interpreting the right of a young person to privacy. This approach is intended to enable a fuller consideration of the breadth of Australia's human rights obligations, beyond the core rights contained in the Human Rights Act (which will largely implement the ICCPR and ICESCR). This is discussed in chapter 9.

All public authorities would have a positive duty to comply with human rights. Public authorities include government departments, agencies, offices and bodies, as well as contractors exercising functions on behalf of public authorities. Under a Human Rights Act, public authorities must consider human rights when making decisions, and must act in compliance with human rights. This is discussed in chapter 6. Public authorities would also be required to engage in participation processes where the participation duty is relevant.

In the parliamentary context legislation will be reviewed against all the treaties and Statements of Compatibility prepared in light of those obligations. Although causes of action will be limited to the rights in the Human Rights Act, the consideration of rights as part of the legislative process needs to be broader and reach the entire set of obligations.

In the next section, the Commission makes recommendations about the specific rights that should be included within the Human Rights Act, with a standalone cause of action, based on contents of the ICCPR and ICESCR. Most of these rights are framed similarly to the state and territory instruments with some modification to wording, usually to better reflect terminology used in the international instruments. The Commission also proposes some rights not included in state and territory instruments, that implement additional ICESCR rights (noting that states and territories have already included several key ICESCR rights). During *Free & Equal* consultations, the Commission was able to gather views about which rights to include and why, based in part on the experience of Victorian, Queensland and ACT jurisdictions, which has strongly influenced the Commission's recommendations.



## 5.2 List of rights for inclusion

The Commission proposes the following rights for inclusion in the Human Rights Act, with suggested wording. Please see the **Appendix** for further commentary on the sources and wording of the rights.

### **Recognition and equality before the law; and Freedom from discrimination**

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.
- (6) Discrimination in the context of the Human Rights Act has the same meaning as discrimination in federal discrimination laws (including any future discrimination legislation):

*Age Discrimination Act 2004*

*Disability Discrimination Act 1992*

*Racial Discrimination Act 1975*

*Sex Discrimination Act 1984*

*Fair Work Act 2009*

### **Right to life**

Every person has the right to life and has the right not to be arbitrarily deprived of life.

### **Protection from torture and cruel, inhuman or degrading treatment**

- (1) A person must not be—
  - (a) subjected to torture; or
  - (b) treated or punished in a cruel, inhuman or degrading way; or
  - (c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

### **Protection of children**

- (1) Every child has the right, without discrimination, to the protection that is needed by the child by reason of being a child.
- (2) Public authorities shall take into account the best interests of every child as a primary consideration in all actions concerning them.
- (3) Every child shall be registered immediately after birth and shall have a name.
- (4) Every child has the right to acquire a nationality.

*Note: A child also has the other human rights set out in this Act.*

*Note: This right should be interpreted in light of Article 10(3) of ICESCR.*

### **Protection of families**

- (1) The family is the fundamental group unit of society and is entitled to protection by society and the State.
- (2) Every person of marriageable age has the right to marry or refuse to marry another person of their own free choice, and to found a family.

*Note: This article should be interpreted in light of Article 10 of ICESCR.*

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### **Privacy and reputation**

(1) A person has the right—

- (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have the person's reputation unlawfully attacked.

*Note: The right to privacy applies to the collection, processing or retention of personal data through all forms of technology, and includes state surveillance measures.*

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### **Freedom of movement**

(1) Every person lawfully within Australia has the right to move freely within Australia and to leave it, and has the freedom to choose where to live.

(2) No person shall be arbitrarily deprived of the right to enter their own country.

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### **Freedom of thought, conscience, religion and belief**

(1) Every person has the right to freedom of thought, conscience, religion and belief. This right includes—

- (a) the freedom to have or to adopt a religion or belief of their choice; and
- (b) the freedom to manifest their religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would impair their freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

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### **Peaceful assembly and freedom of association**

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

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### **Freedom of expression**

(1) Every person has the right to hold opinions without interference.

(2) Every person has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another form or medium of their choice.

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### **Taking part in public life**

(1) Every person in Australia has the right and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

(2) Every eligible person has the right, and is to have the opportunity, without discrimination—

- (a) to vote and be elected at periodic elections that guarantee the free expression of the will of the electors; and
  - (b) to have access, on general terms of equality, to the Australian public service and public office.
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## **Right to liberty and security of person**

- (1) Every person has the right to liberty and security of person.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
- (5) A person who is arrested or detained on a criminal charge—
  - (a) must be promptly brought before a court; and
  - (b) has the right to be brought to trial without unreasonable delay; and
  - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) Anyone who is awaiting trial must not be detained in custody as a general rule, but their release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.
- (7) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide the lawfulness of the detention and the court must make a decision without delay; and order the person's release if the detention is unlawful.
- (8) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
- (9) A person must not be imprisoned only because of the inability to carry out a contractual obligation.

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## **Humane treatment when deprived of liberty**

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from convicted persons except in exceptional circumstances.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

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## **Children in the criminal process**

- (1) A child charged with or convicted of a criminal offence must be segregated from adults charged with or convicted of a criminal offence.
- (2) A child charged with a criminal offence must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- (3) A child charged with a criminal must be brought to trial as quickly as possible.
- (4) A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- (5) A child who has been convicted of an offence must be treated in a way that is appropriate for a person of the child's age.
- (6) Children should only be imprisoned as a last resort and for the shortest necessary period of time.

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## **Fair hearing**

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to a fair and public hearing by a competent, independent and impartial court or tribunal.
- (2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.
- (3) Each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

## **Rights in criminal proceedings**

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees, equally with everyone else—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;

(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;

(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person

(e) to be informed, if the person does not have legal assistance, about the right to legal assistance chosen by the person;

(f) to have legal assistance provided to the person, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if the person cannot afford to pay for the assistance;

(g) to examine, or have examined, witnesses against the person;

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

(i) to have the free assistance of an interpreter if the person cannot understand or speak English;

(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;

(k) not to be compelled to testify against themselves or to confess guilt.

(3) A person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

## **Compensation for wrongful conviction**

(1) This section applies if—

(a) anyone is convicted by a final decision of a criminal offence; and

(b) the person suffers punishment because of the conviction; and

(c) the conviction is reversed, or the person is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

(2) If this section applies, the person has the right to be compensated according to law.

(3) However, subsection (2) does not apply if it is proved that the non-disclosure of the unknown fact in time is completely or partly the person's own doing.

## **Right not to be tried or punished more than once**

(1) A person must not be tried or punished more than once for an offence in respect of which the person has already been finally convicted or acquitted in accordance with law.

## Retrospective criminal laws

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
- (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

## Freedom from forced work

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of subsection (2) *forced or compulsory labour* does not include—
  - (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
  - (b) work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or
  - (c) work or service that forms part of normal civil obligations.

Slavery includes 'modern slavery' defined within the *Modern Slavery Act 2018* (Cth) s 4.

## Cultural rights

### Cultural rights—generally

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

### Cultural rights — First Nations peoples

- (1) First Nations peoples hold distinct cultural rights.
- (2) First Nations peoples must not be denied the right, with other members of their community—
  - (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
  - (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
  - (c) to enjoy, maintain, control, protect and develop their kinship ties; and
  - (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
  - (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
- (3) First Nations peoples have the right not to be subjected to forced assimilation or destruction of their culture.

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### **Right to education**

(1) Every child has the right to have access to free primary and secondary education without discrimination.

*Note: This right should be interpreted in light of Article 24 of the CRPD*

(2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

(3) A child's parents or guardian may choose schooling for the child to ensure the religious and moral education of the child in conformity with their convictions, provided that the schooling conforms to the minimum educational standards required under law.

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### **Right to health**

(1) Every person has the right to access physical and mental health services without discrimination.

(2) Every person has the right to emergency medical treatment that is immediately necessary.

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### **Right to adequate standard of living**

(1) Every person has the right to access adequate housing.

(2) No one may be unlawfully or arbitrarily evicted from their home.

(3) Everyone has the right to have access to adequate food, water and clothing.

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### **Right to a healthy environment**

(1) Every person has the right to an environment that does not produce adverse health consequences in the following respects:

(a) Every person has the right not to be subject to unlawful pollution of air, water and soil.

(b) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.

(c) No unjustified retrogressive measures should be taken with regard to this right.

No one should be subject to discrimination regarding the realisation of this right.

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### **Right to work and other work-related rights (trade union, just and favourable conditions)**

(1) Every person has the right to work, including the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

(2) Every person has the right to the enjoyment of just and favourable conditions of work.

(3) Every person has the right to strike in conformity with the law.

*NOTE: These rights are to be read in context with the Fair Work Act (2009) (Cth); the Work Health and Safety Act 2011 (Cth) and federal discrimination laws, as well as Articles 6, 7 and 8 of ICESCR.*

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### **Right to social security**

Every person has the right to have access to social security.

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## 5.3 Approach to ICESCR Rights

### (a) Nature of ICESCR rights

As with ICCPR rights, States have an obligation to respect, protect and fulfill ICESCR rights. This means States cannot themselves interfere with ICESCR rights; must take measures to prevent others from interfering with ICESCR rights; and must take positive measures to fully realise these rights.<sup>14</sup> ICESCR rights have several elements and characteristics.

Non-discrimination is an immediate and cross-cutting obligation in ICESCR.<sup>15</sup> States must not discriminate with respect to all laws, policies and programs (including those affecting economic, social and cultural rights). There should be no discrimination in the provision of, for example, welfare, healthcare, employment and education, on grounds such as race, age, disability, religion, sex, gender or sexuality.

ICESCR requires the elimination of formal discrimination, which means ensuring that laws and policy documents do not discriminate on prohibited grounds. It also requires substantive discrimination to be addressed. The CESCR Committee explains:

Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.<sup>16</sup>

Proactive steps should therefore be taken to address existing inequality, even if it is pervasive, entrenched and complex — as is the case, for example, with First Nations disadvantage in Australia. In this manner, ICESCR rights are essential to protecting marginalised groups that may suffer or have historically suffered systemic discrimination, particularly in the context of government service provision; and/or are liable to fall through the cracks in government systems.

Under ICESCR, States must meet ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’.<sup>17</sup> These obligations have immediate effect. Even if a State has limited resources, it must still prioritise core obligations and introduce low-cost and targeted efforts to assist those most in need.<sup>18</sup> The CESCR Committee explains:

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.<sup>19</sup>

The OHCHR provides the following list of examples of minimum core obligations, derived from CESCR General Comments:

Ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, enabling them to live a life of dignity;

Ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

Ensure access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water;

Provide essential drugs as defined under the WHO Action Programme on Essential Drugs;

Ensure free and compulsory primary education to all;

Ensure access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health

care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.<sup>20</sup>

There must be procedural safeguards in place to ensure that an individual's rights are not arbitrarily denied, and that remedies are available when rights are breached.<sup>21</sup> Procedural fairness is an essential aspect of realising socio-economic rights in practice. For example, the realisation of the right to housing requires safeguards in case of eviction.

The OHCHR articulates safeguards required to realise the right to adequate housing as follows.

If eviction may be justifiable, because the tenant persistently fails to pay rent or damages the property without reasonable cause, the State must ensure that it is carried out in a lawful, reasonable and proportional manner, and in accordance with international law. Effective legal recourses and remedies should be available to those who are evicted, including adequate compensation for any real or personal property affected by the eviction. Evictions should not result in individuals becoming homeless or vulnerable to further human rights violations.

In general, international human rights law requires Governments to explore all feasible alternatives before carrying out any eviction, so as to avoid, or at least minimise, the need to use force. When evictions are carried out as a last resort,

those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

- An opportunity for genuine consultation;
- Adequate and reasonable notice;
- Availability of information on the proposed eviction in reasonable time;
- Presence of Government officials or their representatives during an eviction;
- Proper identification of persons carrying out the eviction;
- Prohibition on carrying out evictions in bad weather or at night;
- Availability of legal remedies;
- Availability of legal aid to those in need to be able to seek judicial redress.<sup>22</sup>

The CESCR Committee has also fleshed out features of key rights, articulating that social programs to realise rights include requirements of ‘availability, accessibility, acceptability

and adaptability’. An example of how this is understood in application to the right to education is outlined in the next text box, and the right to health in the subsequent text box.

The essential features of the right to education are set out in the CESCR Committee’s general comment No. 13 (1999):

Education in all its forms and at all levels shall exhibit the following interrelated and essential features:

(a) Availability: functioning educational institutions and programmes have to be available in sufficient quantity;

(b) Accessibility: educational institutions and programmes have to be accessible to everyone.

Accessibility has the following overlapping dimensions:

- Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination;
- Physical accessibility: education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g., a neighbourhood school) or via modern technology (e.g., access to a ‘distance learning’ programme);

- Economic accessibility: education has to be affordable to all: whereas primary education shall be available ‘free to all’, States parties are required to progressively introduce free secondary and higher education;

(c) Acceptability: the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents;

(d) Adaptability: education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

When considering the appropriate application of these ‘interrelated and essential features the best interests of the student shall be a primary consideration.’<sup>23</sup>

Many elements of ICESCR obligations, and some full ICESCR rights, can be immediately implemented, in the same way as civil and political rights – for example, the right to join trade unions, and to strike.<sup>24</sup> With respect to elements of rights that require more time and resourcing, ICESCR recognises that full implementation of ICESCR rights may not

be immediately possible. A further type of obligation on States is therefore to take steps, to the maximum of their available resources, to progressively realise the rights. ‘Progressive realisation’ fulfils the aspects of ICESCR rights that are not covered by the elements listed above. Article 2.1 states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The principle of progressive realisation is 'a necessary flexibility device, reflecting the realities of the real world'.<sup>25</sup> It recognises that some obligations need time to be implemented, and enables government discretion in relation to resourcing priorities and policy choices, within a rights-framework.<sup>26</sup>

States are also required to ensure that existing protections of economic, social and cultural rights do not deteriorate unless there are strong justifications for retrogressive measures. For example, a lowering of the minimum wage or social security payments must be rigorously justified.<sup>27</sup>

Indeed, like ICCPR rights, ICESCR rights can be justifiably limited. Article 4 states that:

the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The following example of the right to health is included to illustrate the full nature of the right in all its constituent parts.

## Right to health

The right to health includes the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health. It is not to be understood as a right to be healthy (which is something that cannot be guaranteed solely by governments).

The right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health related education and information, including on sexual and reproductive health.

The right to health contains the following interrelated and essential elements:

(a) Availability. Functioning public health and health-care facilities, goods and

services, as well as programs, have to be available in sufficient quantity within the country.

(b) Accessibility. Health facilities, goods and services have to be accessible to everyone without discrimination.

Accessibility includes:

- Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination.
- Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalised groups, such as Indigenous populations. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable

water and adequate sanitation facilities, are within safe physical reach, including in rural areas.

- Economic accessibility: health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.
- Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) Acceptability. All health facilities, goods and services must be respectful of medical ethics as well as respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.

Governments have immediate obligations in relation to the right to health. These include the guarantee that the right will be exercised without discrimination of any kind; and the obligation to take deliberate, concrete and targeted steps towards the full realisation of the right to health (progressive realisation).

Governments are under the obligation to respect, protect and fulfil the right to health. This requires:

(a) Respect. Governments refrain from denying or limiting equal access for all persons to preventive, curative and palliative health services; abstain from enforcing discriminatory practices as a State policy; and abstain from imposing discriminatory practices relating to women's health status and needs.

(b) Protect. Governments adopt legislation or take other measures to ensure equal access to health care and health-related services provided by third parties; ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.

(c) Fulfil. Governments give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realising the right to health. They ensure provision of health care and equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions.

Governments also take positive measures that enable and assist individuals and communities to enjoy the right to health, and undertake actions that create, maintain and restore the health of the population. Such obligations include:

- fostering recognition of factors favouring positive health results, e.g. research and provision of information;
- ensuring that health services are culturally appropriate and that health care staff are trained to recognise and respond to the specific needs of vulnerable or marginalised groups;
- ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; and
- supporting people in making informed choices about their health.

Governments have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of rights, including essential primary health care. This includes ensuring:

- access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- access to the minimum essential food which is nutritionally adequate and safe;
- access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; and
- equitable distribution of all health facilities, goods and services.

Governments are also required to:

- ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- provide immunisation against the major infectious diseases occurring in the community;
- take measures to prevent, treat and control epidemic and endemic diseases;

- provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and
- provide appropriate training for health personnel, including education on health and human rights.

In determining whether an action or an omission amounts to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a government to comply with its obligations. A government which is unwilling to use the maximum of its available resources for the realisation of the right to health is in violation of its obligations. If resource constraints render it impossible for a government to comply fully with its obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations. A government cannot justify its non-compliance with the core obligations set out above.

ICESCR clearly imposes a duty on each government to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

The formulation and implementation of national health strategies and plans of action should respect the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, program or strategy developed to discharge governmental obligations. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health.

Governments should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. National health strategies should identify

appropriate right to health indicators and benchmarks. These should include provisions on:

- the targets to be achieved and the time-frame for their achievement;
- the means by which right to health benchmarks could be achieved;
- the intended collaboration with civil society, including health experts, the private sector and international organisations;
- institutional responsibility for the implementation of the national strategy and plan of action; and
- possible recourse procedures.

Source: AHRC Social Justice Report 2005 and General Comment No 14.<sup>28</sup>

The case studies below illustrate the application of ICESCR rights by courts in comparable jurisdictions.

### **UK: Right to education**

#### ***R (Tigere) v Secretary of State for Business, Innovations and Skills***<sup>29</sup>

In 2011 the fees charged by universities were increased in the UK. The cost of fees and maintenance are generally financed by loans from the Government.

UK regulations required that a student must have been lawfully ordinarily resident in the UK for three years before the day the academic year begins ('the lawful residence criterion'); and be settled in the UK on that day ('the settlement criterion') to obtain a loan. Therefore all students who did not have full residence were ineligible for student loans.

The applicant was a Zambian national, aged 20, who came to the UK in 2001 at the age of six. Her mother overstayed and the applicant was unlawfully present in the country until 2012 when she regularised her immigration status. She had discretionary leave to remain in the UK, and would be able to apply for full residence in three years' time.

The applicant received her entire education in the UK, obtained good grades and wished to go to university. She was unable to take up the university places offered her as she was not eligible for a student loan because of her immigration status.

The UK Supreme Court considered whether the regulations breached the applicant's right to education, or unjustifiably discriminated against her in the enjoyment of that right.

Lady Hale, writing the leading judgement, found that the right to education does not oblige a state to provide any particular system of education. However, if the state sets up higher educational institutions it will be under an obligation to provide a right of access to them.<sup>30</sup> The question is whether the discrimination in this case is justified.<sup>31</sup>

The Respondent Secretary of State did not address his mind to the educational rights of students with discretionary or limited leave to remain (the applicant's visa category) when making the regulations.<sup>32</sup>

The settlement criteria pursue a legitimate aim, namely targeting resources on those students who are likely to stay in the UK to complete their education and afterwards contribute to the UK economy through their enhanced skills and the taxes they pay.<sup>33</sup> The means chosen to pursue that aim, however, were not rationally connected to it. Although the applicant did not yet have full residence, her established private life in the UK means that she cannot be removed unless she commits a serious criminal

offence.<sup>34</sup> Even if a 'bright line' rule is justified in the particular context, the particular rule chosen has to be rationally connected to the aim and a proportionate way of achieving it. Exclusionary rules, which allow for no discretion to consider unusual cases falling the wrong side of the line but equally deserving, are harder to justify.<sup>35</sup> In this case, a bright line rule which more closely fitted the legitimate aims of the measure could have been chosen.

Given the comparatively small numbers involved, it has not been shown that it would be administratively unworkable to provide student loans to at least some of those with discretionary or limited leave to remain.<sup>36</sup> The denial of student loans has a very severe impact upon those it affects.<sup>37</sup> Therefore, the settlement criteria in the regulations unjustifiably infringed on the applicant's rights.<sup>38</sup>

However the lawful residence criterion was compatible with the applicant's rights. There are strong public policy reasons for insisting on a period of lawful ordinary residence before a person becomes entitled to public services. If the requirement were to be relaxed it would involve an intolerable administrative burden. The overall balance of harm involved in a delay of up to three years is of a different order from that resulting from the settlement criterion.<sup>39</sup>



## South Africa: Right to health

### *Minister of Health v Treatment Action Campaign*<sup>40</sup>

The South African HIV/AIDS activist organisation, Treatment Action Campaign (TAC), along with a concerned doctor and the Children's Rights Centre, sued the South African Ministry of Health for not making drugs to prevent mother-to-child transmission of HIV widely available to the population. In that year alone, around one quarter of a million people died in South Africa of AIDS-related causes. The then-President had publicly expressed the view that HIV did not cause AIDS, and was supported by the Minister of Health.

In examining TAC's claims, the Court looked to the South African Constitution, which grants the right of all citizens to public health care and the right of children 'to be afforded special protection'.

Sections 27 and 28 of the Constitution provide that: 27(1) Everyone has the right to have access to (a) health care services, including reproductive health care ... (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights ... 28(1) Every child has the right ... (c) to basic nutrition, shelter, basic health care services and social services.

In light of these provisions, the Court found that the government had not taken reasonable steps to reduce the risk of mother to child transmission of HIV at birth, both because:

- (1) the government did not make the anti-retroviral drug Nevirapine available to HIV-positive mothers and at-risk newborns even when ordered or prescribed by doctors, and
- (2) the government had not set out a timeframe for creating a national program to prevent mother-to-child transmission of HIV.

The Court ordered the government to:

- Remove restrictions that prevented most public hospitals from making Nevirapine available to reduce the risk of mother-to-child transmission of HIV;
- 'Permit and facilitate the use of Nevirapine', and make Nevirapine available where medically indicated;
- take 'reasonable measures' to expand testing and counselling facilities at public hospitals and clinics 'to facilitate and expedite the use of Nevirapine'.

Extracted from: CRIN Legal Library.<sup>41</sup>

### **(b) The case for implementing ICESCR rights in Australia**

ICESCR is one of three core international instruments, alongside the ICCPR and the Universal Declaration of Human Rights (UDHR), that make up the 'International Bill of Rights'.<sup>42</sup> The UDHR, the first of the three instruments,

includes both civil and political rights; and economic, social and cultural rights. The split between economic, social and cultural rights and civil and political rights within the subsequent treaties, was a product of Cold War politics, with the East and West each preferring to emphasise a different set of rights based on their economies and histories.<sup>43</sup> It remains the

case that most Western democracies prioritise civil and political rights in domestic instruments, as these rights are strongly rooted in common law tradition and theories of ‘natural rights’ predominant in enlightenment thought.<sup>44</sup> However, there is no fundamental difference between the nature of ICESCR rights and ICCPR rights. Both sets of rights are of equal importance in international law, and to ensuring a dignified life for individuals.

Australia signed ICESCR in 1973 and ratified it without reservations in 1975. Australia’s obligations under ICESCR are of the same status as its obligations under the ICCPR. The Committee on Economic and Social Rights (CESCR Committee) has repeatedly recommended that Australia implement ICESCR into law.<sup>45</sup> Currently, there are some protections for ICESCR rights in Australia (for example, the *Fair Work Act 2009* (Cth), which embeds work-related rights, and the ILO 111 jurisdiction in the AHRC Act), but they are only protected in an inchoate and fragmented manner. Queensland and ACT’s human rights instruments have implemented key ICESCR rights, including the right to education and health, setting an example for the federal context.

It is commonly stated that ICESCR involves ‘positive’ obligations, which require investment of resources, while the ICCPR involves ‘negative’ obligations.<sup>46</sup> It is argued that the latter form of obligations is more familiar to the common law tradition. However, many commentators have noted that this distinction breaks down upon closer analysis. For example, the 2010 *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (ACT ESCR Report) on the implementation of ICESCR rights in the ACT, explains:

Take, for example, the right to a fair trial, considered a classic [civil and political right]. This right depends for its enjoyment on the allocation by the State of extensive financial resources to run a court system, with independent judges, the availability of

legal aid, interpreters and other forms of support. There is little difference between this and the expenditure involved in the maintenance of a health system that gives effect to the right to the highest attainable standard of health care.

... Conversely, obligations in relation to [economic, social and cultural rights] may often involve negative obligations, for example, not unlawfully evicting a tenant from state housing or discriminating against an employee for union membership or related activities.<sup>47</sup>

Similar points about positive elements of the ICCPR can be made regarding the right to vote, which requires a functioning electoral system; and the prohibition on inhumane treatment in detention, which requires prisons to respect minimum living conditions and conduct training for officials.<sup>48</sup> Moreover, as noted above, ICESCR rights are intrinsically linked with the fulfilment of ICCPR rights. ICESCR and ICCPR rights are not fundamentally distinct from one another. They are often simply two sides of the same conceptual coin.

In the Commission’s experience, many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights. These include access to adequate health care, education and housing.<sup>49</sup> And the restriction of these rights is often linked to civil and political rights – like the right to non-discrimination.

A clear majority of *Free & Equal* submitters<sup>50</sup> and consultees supported the inclusion of ICESCR rights in the Human Rights Act. Stakeholders emphasised the importance of ICESCR rights to marginalised and disadvantaged people who often fall through the cracks in Australian society. For example, ICESCR rights are important to:

- prevent homelessness, including by ensuring adequate housing is available; and prohibiting unfair evictions

- address economic exploitation by requiring a basic minimum wage that can adequately support workers
- address the impact of climate change on vulnerable groups, for example by ensuring protection from harmful health impacts of natural disasters and environmental exploitation
- protect against family violence by requiring emergency housing and access to social security
- address the gender pay gap by requiring equal remuneration for work of equal value, and the provision of parental leave
- address discrimination resulting in poverty by prohibiting the denial of social security based on a person's status (for example, asylum seekers)
- ensure equal access to education for children with disability by requiring the provision of accommodations and supports in schools.

ICESCR rights are also closely linked with realisation of self-determination for Indigenous peoples, and are essential to meeting 'close the gap' targets, which address socio-economic indicators of disadvantage.<sup>51</sup> Until social and economic rights are fully realised in relation to First Nations communities, Australia will continue to have deeply unequal outcomes for sections of the population, based on race.

Despite the centrality of socio-economic rights to a fair society, they are often overlooked in favour of ICCPR rights in domestic contexts. As the CESCR Committee observed in a statement to the World Conference on Human Rights in Vienna in 1993:

Denial of the right to vote or of the right to freedom of speech, solely on the grounds of race or sex, is loudly and rightly condemned by the international community. Yet deep-rooted forms of discrimination in the enjoyment of

economic, social and cultural rights against women, the elderly, the disabled and other vulnerable and disadvantaged groups are all too often tolerated as unfortunate realities. Thus, for example, many human rights advocates have little to say in response to the fact that women in many countries 'are generally rewarded [for the disproportionate work burden they bear] with less food, less health care, less education, less training, less leisure, less income, less rights and less protection'.<sup>52</sup>

The Australian public strongly values economic and social rights, indicating that the lack of implementation of ICESCR does not reflect the democratic will of the people. The 2009 NHRCC consultations involved 35,014 written responses and 66 community roundtables with 6,000 people, which were held in 52 locations around Australia.<sup>53</sup> The NHRCC compiled and assessed community views about the rights that were most important to Australians. The report found that

Protection and promotion of economic, social and cultural rights is important to the community, and the way they are protected and promoted has a major impact on the lives of many Australians. The right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.<sup>54</sup>

Additionally, research conducted for the NHRCC, set out in the Colmar Brunton Social Research report, highlighted

the tendency for Australians to give priority to 'survival' rights – such as the right to food, water and clothing and the right to health and medical care. For example, 96 per cent of surveyed respondents considered the right to sufficient food, water and clothing an important or very important right; similarly,

95 per cent thought the right to essential health care was an important or very important right. These rights accord closely with economic, social and cultural rights such as the right to an adequate standard of living (including adequate food, clothing and housing) and the right to enjoy the highest attainable standard of physical and mental health.<sup>55</sup>

This reflects similar findings of research conducted in Tasmania, Western Australia and the ACT.<sup>56</sup> As noted in the ACT ESCR Report, ‘protection of [ICESCR rights] is an important aspect of the often-identified Australian values of equality and a “fair go”’.<sup>57</sup> In light of this data, and the outcome of *Free & Equal* consultations, the Commission considers that a failure to include ICESCR rights in a Human Rights Act would represent a failure to uphold key values held by the Australian community. The Human Rights Act would not be a fully representative or cohesive document without them.

The Commission notes the earlier debate about how to frame ICESCR rights compatibly with the exercise of judicial power under Chapter III of the Constitution. Chapter III requires the exercise of judicial power to involve ‘the application of criteria or standards that are sufficiently definite’.<sup>58</sup>

The Human Rights Law Centre requested advice on this question from Peter Hanks KC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill (HRLC advice).<sup>59</sup>

The HRLC advice concluded that ‘the legal issue is not so much which rights can be contained in a federal Human Rights Act, but how those rights are framed and what powers are given to the courts in relation to those rights’.<sup>60</sup> The HRLC advice suggested that it is possible to frame ICESCR rights in a manner that is appropriate for the courts to adjudicate. In reaching this conclusion, the HRLC advice made the following key points:

It is true that many social and economic rights are broadly expressed; however they are no more broadly expressed than many civil and political rights that can be interpreted and applied in the exercise of federal judicial power.<sup>61</sup>

...

It is also true that decisions about social and economic rights may often have implications for the allocation of budgetary resources. However the same is true of many, if not all, human rights.<sup>62</sup>

The HRLC advice provides examples of ‘broadly expressed’ ICCPR rights, including that ‘every person is equal before the law’ and ‘all persons deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person’. It notes that these rights have been given specific content by the courts, observing that ‘the courts can apply judicial techniques to very general provisions, by giving content to these provisions on a case-by-case basis and by requiring the criteria to be satisfied by evidence’.<sup>63</sup>

The OHCHR has made similar points to the HRLC advice in this regard, noting that,

While adjudicating [ICESCR] rights may raise questions of what constitutes, for example, hunger, adequate housing, or a fair wage, judges have already dealt ably with questions of what constitutes torture, a fair trial or arbitrary or unlawful interference with privacy. Filling in the gaps in legislation is a clear function of the judiciary, not only in human rights law but in any area of law.<sup>64</sup>

The courts’ work can be aided by reference to CESCR General Comments, which flesh out the elements of key rights in some detail.<sup>65</sup>

The HRLC advice further observed that ICCPR rights contain positive obligations, not only negative obligations (as discussed above) and are nonetheless considered justiciable. Regarding the question of whether ICESCR requires courts to make inappropriate resourcing decisions, the HRLC advice refers to the example of the *Dietrich* case, in which the High Court indirectly required the provision of legal aid lawyers for serious criminal trials (discussed in chapter 7 section 7.9). The advice observed that ‘decisions by the courts clearly have implications for the allocation of public money even if the courts do not rule directly on how resources should be allocated’.<sup>66</sup>

In response to similar questions about how courts can assess ICESCR fulfilment without straying into policymaking territory, the OHCHR has stated that the primary role of the court with respect to ICESCR is *reviewing* government policy, which is not the same as making policy.<sup>67</sup>

The HRLC advice concluded that ICESCR rights could be included in a federal Human Rights Act if they are framed correctly. In the Australian context, this may involve providing more specific content to the general language of aspects of ICESCR rights.<sup>68</sup>

The Commission’s approach, outlined below, therefore aims to *frame* ICESCR rights in a manner that is constitutionally sound.

Regardless of the final approach taken, it would be constructive to seek updated advice from the Solicitor-General on this question, noting the differing views among legal minds, and the differing potential pathways for implementing ICESCR rights domestically.

### **(c) Proposed approach to framing ICESCR rights in the Human Rights Act**

The Commission has designed its proposals for ICESCR implementation with the aim of ensuring compliance with Australia’s Constitution. The Commission therefore proposes articulations of ICESCR rights that are somewhat narrower than

the full expression of those rights contained in ICESCR. Specifically, the Commission has chosen not to require progressive realisation principles to be considered by the courts.

The Commission notes that it does not consider progressive realisation principles to be inherently non-justiciable. However, it acknowledges the importance of providing certainty that the implementation of ICESCR is constitutional, suitably adapted for the Australian context, and directly enforceable by the courts. It also recognises the importance of providing sufficient clarity about the contents of rights – both for the benefit of judges and public authorities interpreting and applying the rights; and for the benefit of individuals that seek to rely upon them through complaints and judicial review processes.<sup>69</sup>

The Commission has focused on including the essential, core and/or immediately realisable aspects of ICESCR rights. This renders the rights more specific, but also somewhat narrower. All ICESCR rights are implemented through the Commission’s proposals, to varying degrees.

Per the Commission’s approach, the range of rights set out in ICESCR would still form part of the educational and advocacy functions of the Commission. It would also inform the upstream consideration of decisions about the framing of laws, through requiring a statement of compatibility to address the compliance with ICESCR as a whole.

Importantly, the Commission’s articulation of ICESCR rights is designed to accord with the Commission’s proposal for including a direct cause of action for unlawfulness under the Human Rights Act. This reflects its intention to ensure that the courts can review rights compliance, and that a right to remedy is available for individuals where breaches have occurred.

Similar approaches have been taken in comparable international jurisdictions. For example, the right to education is included in the UK Human Rights Act. The UK Joint Committee on Human Rights has stated that the right to education was ‘without difficulty guaranteed and applied by the UK courts, if in relatively circumscribed and qualified form, alongside the civil and political guarantees’.<sup>70</sup>

ACT and Queensland jurisdictions have also taken a similar qualified approach to ICESCR rights guaranteed within those Human Rights Acts. The Commission has closely drawn upon the articulation of ICESCR rights in domestic jurisdictions when developing its own proposals.

At the state and territory level, the right to education the right to health services and the right to work have been included in at least one jurisdiction. All three state and territory jurisdictions include cultural rights. The fact that these rights are already protected in Australian jurisdictions should engender confidence that they can be similarly included at the federal level. In addition to the rights already protected by state and territory instruments, the Commission recommends including the right to an adequate standard of living, the right to access social security, and the right to a healthy environment, in a similar ‘specific’ manner. This would incorporate all the key ICESCR rights.

The inclusion of all these rights are important. ICESCR rights work together to enable the realisation of a dignified life for individuals. Where ICESCR rights are protected at the state and territory level, the Commission has based its own proposals on those rights, with some adjustments to language for clarity or to better reflect international law. The Commission’s proposed approach to these rights are summarised below, as well as outlined in the list at section 5.2 and the Appendix.

The right to education implements article 13 of ICESCR. It has been included in both the ACT and Queensland Human Rights Acts. The Commissions proposed articulation provides that every child has the right to free primary education and secondary education without discrimination. A note is included to indicate that this right should be interpreted in light of article 24 of the CRPD. Article 24 elaborates on the requirements for disability inclusive education, which is required to meet the standard for non-discrimination. The proposed right to education also includes the right of a parent to choose schooling for their child in conformity with their religious or moral convictions, as long as this conforms to the minimum education standards in law. An example of how this right may be utilised is to address circumstances where a child is excluded from a school for unfair or discriminatory reasons.

The right to health implements article 12 of ICESCR. The Commission’s proposal is based on the Queensland right to health services. It would enable access to health services, including mental health services, without discrimination. It would also prevent the refusal of emergency medical treatment that is immediately necessary. For example, this right could be utilised to ensure equal access to health services in rural and remote communities. Determinants that affect enjoyment of the right to health are also addressed through other rights protected in the Human Rights Act – for example, per the right to an adequate standard of living, everyone has the right to adequate food and housing.

The right to an adequate standard of living implements article 11(1) of ICESCR. It is not included in the state and territory human rights acts. This right would provide a right of access to adequate housing, food, water and clothing. It would also prevent unlawful or arbitrary evictions. This right requires the adequate provision of necessities to maintain a basic standard of living and human dignity, and to ensure survival through the prevention

destitution, homelessness and starvation. For example this right could be utilised to ensure that emergency housing and public housing is safe, has basic amenities, provides adequate shelter from the elements and is disability accessible.

The right to work implements articles 6, 7 and 8 of ICESCR. This right has been implemented by the ACT Human Rights Act. The Commission considers that this is important to include in a federal Human Rights Act as the regulation of work and work conditions is primarily a federal responsibility. The proposed right provides that everyone has the right to choose their occupation, to enjoy just work conditions, and to strike in conformity with the law. The Commission's proposal has adapted the ACT wording to reflect existing work-related rights in federal laws, by referencing key legislation that expound upon the core of the right, including the *Fair Work Act 2009* (Cth), the *Work Health and Safety Act 2011* (Cth) and federal discrimination laws. These federal instruments include provisions for industrial action, working conditions and minimum wage, amongst other things. This will serve to link the Human Rights Act with existing federal protections and ensure that those instruments are read in light of the Human Rights Act and the broader ICESCR obligations in articles 6, 7 and 8.

The right to access social security implements article 9 of ICESCR. This right has not been included in state and territory instruments. The provision of social security is a federal responsibility and should be included in a federal Human Rights Act. The right to social security encompasses the right to access and maintain benefits without discrimination in order to secure protection from lack of work-related income (due to sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member); unaffordable access to health care; and insufficient family support, particularly for children and adult dependents.<sup>71</sup> This right could be utilised to challenge social security being denied or limited

in a discriminatory manner – for example, where access to social security has been denied on the basis of a person's immigration status; or where the provision of social security is made with different, harsher conditions in application to certain communities, as compared to the broader population's access.

Cultural rights implement article 27 of ICESCR. Cultural rights are protected in all three state and territory jurisdictions. The Commission has proposed adopting the Queensland wording as this is the most comprehensive articulation of the right out of the three jurisdictions, and it separates general cultural rights from First Nations' distinct cultural rights.

General cultural rights protect a person with a particular religious, racial or linguistic background to enjoy their culture, practice their religion and speak their language.

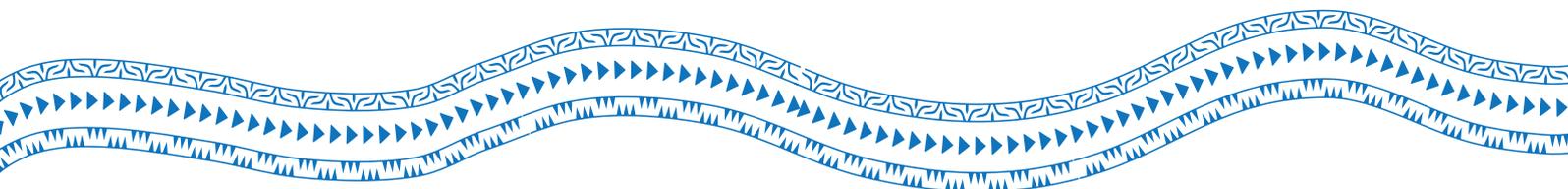
First Nations cultural rights are reflected in UNDRIP and should be interpreted in light of UNDRIP. The Commission's proposal provides that First Nations peoples, with other members of their community, should not be denied the right to enjoy, maintain, control, protect and develop their identity and cultural heritage (including traditional knowledge and distinctive spiritual practices), language and kinship ties. It would also protect rights to maintain and strengthen First Nations peoples' relationship with the land, territories, waters and seas with which they have a connection and to conserve and protect the environment and the productive capacity of these resources. This right also protects First Nations peoples from forced assimilation and the destruction of their culture. For example, this right could be utilised to ensure that a child removed from their family or held in detention is able to maintain connection with kin and culture. This right could also be used to challenge the proposed destruction of cultural heritage sites by public authorities.

The Commission's additional proposal for a right to a healthy environment provides that every person has the right to an environment that does not produce adverse health consequences. This means that a person has the right not to be subject to unlawful pollution of air water and soil; and to access safe and uncontaminated water and nutritionally safe food. The right also prohibits discrimination in the enjoyment of this right, and reflects the overarching ICESCR obligation to prevent unjustified retrogressive measures (meaning that there should be no unjustified backward movement with respect to the enjoyment of this right).

The Commission's proposal for a right to a healthy environment draws directly upon the existing ICESCR obligations contained within the right to health, the right to an adequate standard of living (Articles 12, 11) as well as the right to life in the ICCPR (Article 6). The right to health includes obligations on states to refrain from 'unlawfully polluting air, water and soil, for example, through industrial waste from State-owned facilities'.<sup>72</sup> The right to life 'depends...on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors'.<sup>73</sup> The right to health requires states to 'ensure access to the minimum essential food which is nutritionally adequate and safe' and to 'an adequate supply of safe and potable water'.<sup>74</sup> The right to an adequate standard of living also includes the obligation to protect against the 'contamination of water supplies'.<sup>75</sup> The proposal for the right to a healthy environment is therefore a thematic articulation of elements of existing rights (that would also be implemented via the Commission's proposals).

The Commission's decision to include an environmental element reflects growing international consensus and practice around the role and importance of environmental protections. In July 2022, the UN General Assembly adopted a resolution to declare access to a clean, healthy and sustainable environment, to be a universal human right. There were 161 votes in favour, including Australia, and eight abstentions.<sup>76</sup> The resolution was based on similar text adopted in 2021 by the Human Rights Council.<sup>77</sup> Currently, approximately 80% of UN member States recognise the right to a healthy environment in constitutional or legislative texts.<sup>78</sup> There was support for the inclusion of environmental considerations by a number of *Free & Equal* stakeholders.<sup>79</sup>

Finally, it is crucial to recognise that ICESCR implementation, particularly with regard to progressive realisation, occurs primarily outside of the courts. Progressive realisation is most relevant to 'upstream' decision making about policy and resourcing. In relation to this process, the culture of the public sector, external oversight measures and parliamentary scrutiny mechanisms are key elements towards ensuring compliance. These forums would provide opportunities to address the progressive realisation aspects of key rights, and are well suited to addressing overarching, systemic policy concerns. For example, the Commission could have a role in reporting on the progressive realisation of ICESCR rights. This would help to ensure that progressive realisation remains part of picture, even if it is not relevant to the work of courts or with respect to the individual claims made under the Human Rights Act.



The Commission's approach to the *Free & Equal* project contains a number of complementary elements. This Position Paper outlining a model for a Human Rights Act, and the discrimination law Position Paper outlining comprehensive reforms to discrimination laws, together set out a model for protecting important human rights through legal instruments. The Commission envisions that these legal foundations would be complemented by overarching national targets and measurable indicators assessing human rights implementation and ensuring accountability. A national framework of this kind would be broadly analogous to the Closing the Gap framework. The Commission considers that 'progressive realisation' would best be addressed through such a human rights framework, as it would assess the fulfilment of human rights in Australia over time, focusing primarily on policy measures and outcomes.

## 5.4 Approach to First Nations rights

The Commission proposes that the Human Rights Act include protections for the rights of First Nations peoples that implement key UNDRIP principles. In particular, the inclusion of an overarching 'participation duty' on public authorities would provide a process requirement to ensure the full participation of First Nations peoples in decisions that affect them, as required under multiple provisions of UNDRIP. This is discussed in chapter 7.

In addition to the participation duty, the Commission proposes UNDRIP be reflected through a number of mechanisms within the Human Rights Act, alongside steps taken separately from a Human Rights Act.

### (a) UNDRIP implementation through multiple avenues complementing a Human Rights Act

UNDRIP fulfilment should be pursued through multiple avenues, and led by First Nations peoples. The Commission considers that, in combination with a Human Rights Act, it is essential that the following steps should also be undertaken:

- The Commission's existing recommendation that a National Plan be developed to implement UNDRIP. The Commission has supported the proposal to implement UNDRIP through a legislative instrument, as has occurred in Canada.<sup>80</sup>
- The Commission's existing recommendation to include UNDRIP in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
- Implementation of the Uluru Statement from the Heart, including:
  - » A constitutional Voice to Parliament
  - » Treaty processes
  - » Truth-telling processes (through a Makarrata Commission)
- Constitutional reform of the race power and Constitutional recognition
- Improving the legislative anti-discrimination framework to strengthen protections for First Nations peoples (see *Free & Equal: A Reform Agenda for Federal Discrimination Laws*)
- The practical realisation of rights through long-term, adequate resourcing of Aboriginal-controlled organisations and the fulfilment of targets – specifically through the Closing the Gap framework.

The Commission emphasises that any steps undertaken to fulfil First Nations rights, including within a Human Rights Act, should themselves be developed with the genuine participation of First Nations peoples.

## **(b) UNDRIP implementation through a Human Rights Act**

First Nations rights are addressed throughout this report, in relation to specific aspects of the Human Rights Act. The following is an overview of the ways in which First Nations rights are proposed to be articulated through a Human Rights Act. Each point is discussed in greater detail elsewhere.

- A 'participation duty' applicable to the executive, to reflect principles of self-determination through practical measures by public authorities, to complement a Voice to Parliament mechanism.
- The inclusion of cultural rights, non-discrimination rights and ICESCR rights (alongside the participation duty) to incorporate key UNDRIP rights within a Human Rights Act. These should be included with a standalone cause of action, and representative standing to enable organisations to bring claims on behalf of communities – recognising the collective aspect of these rights.
- First Nations participation reflected in parliamentary scrutiny processes through the requirement to list steps taken in Statements of Compatibility to ensure that participation of First Nations peoples has occurred, where relevant, which would also be subject to assessment by the PJCHR.
- UNDRIP included in the clause that references the seven core treaties that Australia has ratified and requires the rights in the Human Rights Act to be interpreted in light of those instruments. This will enable human rights in the Human Rights Act to be interpreted in light of UNDRIP, in cases where the rights of First Nations peoples have been affected.
- The right to self-determination articulated in a preamble. Self-determination and its relationship to participation and other rights is discussed in chapter 7, section 7.6. Presently, the ACT Human Rights Act, Queensland Human Rights Act, and Victorian Charter preambles recognise human rights have special importance for First Nations peoples. It is proposed that a full articulation of self-determination be included within a preamble as an overarching principle of the instrument.



## Chapter 5: Endnotes

- 1 See ICCPR, art 2; ICESCR, art 2; CERD, art 2; CEDAW, arts 2, 3; CAT, art 2; CRC, art 4; CRPD, art 4.
- 2 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 123-4.
- 3 *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples), GA Resolution 61/295, UN Doc A/61/L.67 (2007); Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon J Macklin MP, Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Speech delivered at Parliament House, Canberra, 3 April 2009) <[http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm)>.
- 4 See eg, James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (2015) 40 *Australian Bar Review* 212.
- 5 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 11 [1.6].
- 6 See eg, Thomas Finegan, 'Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood' (2012) 37 *Australian Journal of Legal Philosophy*, 182.
- 7 UN General Assembly, Vienna Declaration and Programme of Action, UN Doc no A/CONF.157/23 (July 1993) [5].
- 8 See, eg, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* E/CN.4/1985/4 (28 September 1984).
- 9 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009). See, eg, Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* (Report No. 30, 55th Parliament, June 2016) <<https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2016/5516T1030.pdf>>. Department of the Attorney-General, *Report of the Consultation Committee for a proposed WA Human Rights Act* (November 2007) <<https://apo.org.au/sites/default/files/resourcefiles/200711/apo-nid3818.pdf>>.
- 10 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 7.
- 11 *Human Rights Act 2019* (Qld) s 59. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39. See discussion in chapter 3 and chapter 11, section 11.2.
- 12 ICCPR art 2(3)(a).
- 13 See eg, Australian Government and Coalition of Peaks, *National Agreement on Closing the Gap* (July 2020) <<https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>>.
- 14 General Assembly, Report of the United Nations High Commissioner for Human Rights, *Social and Human Rights Questions* UN Doc E/2015/59 (July 2015) [17]-[19].
- 15 CESCR Committee, *General comment No 20: Non-discrimination in economic, social and cultural rights*, UN Doc E/C.12/GC/20 (July 2009) [7].
- 16 CESCR Committee, *General comment No 20: Non-discrimination in economic, social and cultural rights*, UN Doc E/C.12/GC/20 (July 2009) [8].
- 17 CESCR Committee, *General Comment No 3: The Nature of States Parties Obligations*, 5th sess, UN Doc E/1991/23 (December 1990) [10].
- 18 OHCHR, *Frequently asked questions on economic, social and cultural rights* (Fact sheet no 33, 2008) 16 <<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf>>.
- 19 CESCR Committee, *General Comment No 3: The Nature of States Parties Obligations*, 5th sess, UN Doc E/1991/23 (December 1990) [11].
- 20 OHCHR, *Frequently asked questions on economic, social and cultural rights* (Fact sheet no 33, 2008) 17 <<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf>>.
- 21 CESCR Committee, *General Comment No. 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (December 1998); CESCR Committee, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [77].
- 22 OHCHR, *The right to adequate housing* (Fact Sheet No 21, 2014) 5-6 <[https://www.ohchr.org/sites/default/files/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf)>.
- 23 CESCR Committee, *General Comment No 13: The Right to Education (Art 13)*, UN Doc E/C.12/1999/10 (December 2019) [6]-[7].
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- 25 CESCR Committee, *General Comment No 3: The Nature of States Parties Obligations*, 5th sess, UN Doc E/1991/23 (December 1990) [9].
- 26 Hilary Charlesworth, Andrew Byrnes, Renuka Thilagaratnam and Katherine Young, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (September 2010) 52.
- 27 OHCHR, *Frequently asked questions on economic, social and cultural rights* (Fact sheet no 33, 2008) 15 <<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf>>.

- 28 Extracted from Australian Human Rights Commission, *Social Justice Report 2005* (2005) 55-56 <[https://humanrights.gov.au/sites/default/files/content/social\\_justice/sj\\_report/sjreport05/pdf/SocialJustice2005.pdf](https://humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport05/pdf/SocialJustice2005.pdf)> and CESCR Committee, *General Comment No 14 - The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4 (August 2000).
- 29 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57.
- 30 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [23].
- 31 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [25-26].
- 32 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [32].
- 33 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [34].
- 34 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [35].
- 35 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [37].
- 36 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [38].
- 37 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [40].
- 38 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [42].
- 39 *R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57 [45].
- 40 *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).
- 41 'Minister of Health and others v. Treatment Action Campaign and others' *CRIN legal library* <<https://legallibrary.crin.org/minister-of-health-and-others-v-treatment-action-campaign-and-others/>>.
- 42 'International Bill of Human Rights: A brief history, and the two International Covenants' *OHCHR* (Web Page) <<https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>>.
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- 45 See eg, CESCR Committee *Concluding observations on fifth periodic report on Australia*, 61<sup>st</sup> sess, UN Doc E/C.12/Aus/CO/5 (11 July 2017) [6].
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- 48 Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of advice, 2009) 11-12; 'Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?' *OHCHR* (Web Page) <<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights/escr-vs-civil-political-rights>>.
- 49 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) [58].
- 50 See, eg, Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*; Uniting Church of Australia, Submission 91, *Free & Equal Inquiry*; Confidential, Submission 16, *Free & Equal Inquiry*; Confidential, Submission 10, *Free & Equal Inquiry*; McCabe Centre for Law and Cancer, Submission 33, *Free & Equal Inquiry*; Eugene White, Submission 75, *Free & Equal Inquiry*; Mental Health Cares, Submission 139, *Free & Equal Inquiry*; ACTU, Submission 159, *Free & Equal Inquiry*; Law Council of Australia, Submission 166, *Free & Equal Inquiry*.
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- 53 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009) xiii.
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# Chapter 6: Positive duty

## 6.1 Introduction

[I]t is in the area of administrative compliance that the real success story of human rights lies.<sup>1</sup>

A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to consider human rights when making decisions. This is also known as a ‘positive duty’ applying to public authorities. Compliance with this duty would be judicially reviewable.

The positive duty is at the centre of the Human Rights Act.

It builds on the developing understanding of human rights over more than 10 years of engagement in the Parliamentary scrutiny process involving statements of compatibility and review by the PJCHR. The integration of human rights considerations into the processes of public authorities should make officials more aware of the impacts of their decisions, and therefore help to prevent human rights breaches.<sup>2</sup> If the Human Rights Act is working well, it has an upstream impact within the day-to-day processes of government, and the court has a less prominent role addressing downstream breaches, through the possibility of litigation.

The positive duty would support decision makers to consider human rights in a way that is more appropriate to individual circumstances, rather than taking a blanket approach when making a decision that affects a person’s rights and freedoms. For example, when making decisions about residential or disability care placements, a public authority may need to consider circumstances specific to the individual – such as whether they would be able to practise their religion in the care facility.<sup>3</sup> Or

when making decisions about housing, whether accommodations may be needed to realise the individual’s right to privacy in accordance with their particular circumstances.<sup>4</sup> The proper consideration of an individual’s human rights in decision making would help make public services more accessible and fairer for all.

When the Victorian Charter was being debated, the Attorney-General explained the positive duty provision as follows:

This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.<sup>5</sup>

*Free & Equal* stakeholders confirmed that the key success of state and territory human rights instruments in their experience has been the diversion or alteration of government policy as a result of the procedures in place. This is also reflected in reviews of the existing Human Rights Acts at the state and territory reviews. For example, the five year review of the ACT Human Rights Act found that its

impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government. While it has not attracted extensive public attention, and its workings have not always been apparent to the broader community, the [ACT Human Rights Act] has operated in subtle ways to enhance the standing of human rights in the ACT.<sup>6</sup>

Similar effects have been noted in relation to the Victorian Charter. The Victorian Equal Opportunity and Human Rights Commission reported the following examples of upstream impacts:

Shaped major legislative reforms to provide stronger and fairer laws. For example the Mental Health Act 2014. Consultation over six years in developing this Act enabled the Victorian Government, service providers and community to consider the significant human rights issues raised by mental health treatment, using the Charter as a framework. The new Act took a significant step forward in protecting the rights of people with psycho-social disabilities.

Improved decision-making in Victorian public bodies. It has done this by ensuring that public decision makers must consider and act compatibly with human rights. This has transformed day-to-day decision making. For example, the Department of Health and Human Services' public housing policy and procedure manuals include information about Charter obligations and guide decision makers to consider rights in the delivery of housing services.

Laid the foundations for the development of a culture of human rights within public authorities. Human rights have become part of the everyday business of government, incorporated into key policies, guidelines and initiatives. For example, in 2018 the Port Phillip City Council used the Charter framework to tackle rough sleeping in the city.<sup>7</sup>

While the implementation of the Queensland Human Rights Act is still in its early stages, *Free & Equal* consultees noted that it is already having preventative impacts, including in relation to preventing unfair exclusions in the education context; and ensuring human rights-compliant treatment in relation to compulsory mental health interventions.

Early consideration of rights impacts also results in less downstream litigation and associated costs. As submitted by Queensland Advocacy Incorporated, 'the costs [of implementing a Human Rights Act] would not be disproportionately high and would be offset by significant economic benefits that would increase over time'.<sup>8</sup>

The positive duty should ultimately result in a transformative cultural shift within government. It should make rights protection a core part of government business, not just an afterthought, and beyond preparing statements of compatibility for Bills or legislative instruments. The British Institute of Human Rights recently explained the role of the UK positive duty in instituting a human rights culture across the public service:

A human rights culture is one that fosters basic respect for human rights and creates a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities.

... The building of a human rights culture ... [depends] not just on courts awarding remedies for violations of individual rights, but on decision makers internalising the requirements of human rights law, integrating standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields is fully informed by human rights considerations.<sup>9</sup>

There are very many examples of dialogue model Human Rights Acts having a preventative impact, and enabling non-human rights compliant behaviour to be addressed without the need for court action. The following are two illustrative case studies.

### **UK Human Rights Act: Care home obligations during COVID-19**

On 21 July 2020, Robert had a serious fall at home and his wife Muriel called an ambulance. The ambulance arrived and Muriel was told she could not accompany Robert, 'due to COVID rules'. Robert, who is 79 and has dementia, was in intensive care for 12 weeks. Muriel was not allowed to visit; nurses gave her daily telephone updates. On 25 October, Robert was discharged to residential care. The care home he was moved to was locked down the following morning due to a positive COVID-19 test.

The couple have had no contact in the next 4 months as Robert is too distressed to talk on the phone, he is deteriorating mentally and physically. The thought that she might not get to say goodbye keeps Muriel awake at night. Muriel

reaches out to an advocacy organisation who advises her that based on the severe impact this is having on Muriel and Robert's mental and physical wellbeing, the couple's right not to be treated in an inhuman and degrading way (Article 3, Human Rights Act) might be at risk. Restricting or risking this right is not lawful because it is an absolute human right.

Muriel uses a template letter to raise the care home's legal duty under the Human Rights Act. The care home has since arranged for Muriel to be provided with full PPE so that she can visit Robert regularly and will ensure that Muriel is vaccinated together with staff so that she can spend time with Robert as he nears the end of his life.

Extracted from British Institute of Human Rights, 2021.<sup>10</sup>



## **Victorian Charter: preventative audits and protocols**

The Charter has played a significant role in ‘prompting identification of potential issues in advance’ and through this, influencing policy development and decision-making processes. As an example, following the implementation of the Charter, the Victoria Police Human Rights Unit Project identified various policies and practices, which have the potential to result in human rights violations. They conducted policy and practice audits into a range of units within the agency including: the Aboriginal Advisory Unit; the Gay and Lesbian Liaison Unit; the Multi-Cultural Advisory Unit; the Prisoner Management Unit; the Witness Security Unit; and the Strategic Research Unit.

The outcome of these audits in some units resulted in the development of protocols, which aim to ensure that the risk of Charter violations is minimised.

In addition, Victoria Police:

- audited police cells and holding rooms and reviewed its persons in custody policy to ensure compliance with human rights standards
- referenced the Charter in Operational Safety and Tactics training guides, and
- ensured that complaints handling procedures are in line with human rights standards.

Extracted from Human Rights Law Centre, 2012.<sup>11</sup>

## **6.2 Nature of the duty**

### **(a) Limbs of the duty**

Under the state and territory approaches there are two limbs of the positive duty. They are a duty to:

- give proper consideration to human rights when making decisions; and
- act compatibly with human rights

The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. Decision makers must seriously turn their mind to the possible impact of a decision on a person’s human rights, and must identify and balance competing interests or rights when making a decision, to comply with this limb of the duty.<sup>12</sup>

The requirement to ‘act’ compatibly with human rights is a substantive obligation on public authorities.<sup>13</sup> An ‘act’ includes a failure, refusal and proposal to act – and may also include ‘decisions’ in terms of a substantive decision that is made (as opposed to human rights consideration in the course of decision making).<sup>14</sup> Where a public authority has limited or interfered with a right through its action or inaction, and any limitation on the right was not reasonable or justified, this would constitute breach of the substantive limb.<sup>15</sup>

Most human rights are not absolute, and circumstances may require that different rights be balanced against important public interests, and countervailing rights. The positive duty requires consideration of, and action in accordance with, the criteria in the ‘limitations clause’. The limitations clause sets out a formula for permissible limitations on human rights, and is discussed in detail in chapter 9, section 9.5.

## Limitations clause

The Commission's proposal for criteria in a limitations clause is as follows.

When deciding whether a limit is reasonable and justifiable, the following factors are relevant:

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose

- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, the limitations clause would prescribe that absolute rights such as freedom from torture and freedom from forced work must not be subject to any limitations.

The Commission proposes adopting the two limbs of the positive duty for the federal positive duty. The Commission also proposes incorporating a procedural obligation to engage in participation processes within the 'proper consideration' limb where the 'participation duty' arises in relation to a particular right. The participation duty is discussed in chapter 7. This limb would therefore also encompass a requirement to facilitate participation with respect to decisions that directly or disproportionately affect the rights of First Nations peoples, children and persons with disability; or otherwise justify a decision not to facilitate participation by reference to the limitations clause.

These obligations should not apply to federal public authorities if 'the public authority could not reasonably have acted differently or made a different decision' in light of its empowering legislation (as at the state level).<sup>16</sup>

## (b) Cumulative approach

In Victoria, the two (procedural and substantive) limbs have been interpreted as 'cumulative' in nature. This means that public authorities must give proper consideration to rights engaged, and to reach a decision that is substantively compatible with human rights. For example, in *Certain Children (No 2)*, it was held that even if the decision maker's interference with rights was demonstrably justified, the failure to give proper consideration to Charter rights in the decision-making process meant that the decision maker acted unlawfully.<sup>17</sup> This approach is logically coherent in light of the distinct importance of procedural obligations to ensuring human rights compliance overall. The Commission therefore proposes making it clear in the text of the Human Rights Act that both procedural and substantive limbs are required for human rights compliance.

### (c) What constitutes 'proper consideration'

The ACT and Victorian legislation do not specify how the limitations clause interacts with the obligation on public authorities, although this question has been clarified through Victorian caselaw. The limitations clause applies to the substantive limb, meaning that an act will only breach the positive duty when it cannot be justified by reference to the full criteria in the limitations clause. A slightly different approach applies to the 'proper consideration' limb.

It has been established through *Castles v Secretary, Department of Justice*,<sup>18</sup> that the 'proper consideration' limb requires decision makers to:

- (1) Understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; [Note that rights will be 'relevant' if the proposed decision will apparently limit such rights (that is, the right is 'engaged'), and rights should be construed broadly in relation to this step]<sup>19</sup>
- (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person;
- (3) identify the countervailing interests or obligations; and
- (4) balance competing private and public interests as part of the exercise of justification.<sup>20</sup>

Dr Bruce Chen comments that 'these elements appear to draw on some, but not all, of the factors in the Victorian Charter's general limitations clause, and only in a broad sense'.<sup>21</sup> In *Castles v Secretary to the Department of Justice*, Emerton J elaborated that:

proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence ... There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.<sup>22</sup>

Although not necessarily requiring full formal consideration of the limitation criteria to meet the 'proper consideration' obligation, the Victorian Charter still sets 'a high bar'.<sup>23</sup>

Courts have stated that 'completing a checklist' or 'merely invok[ing] the Charter like a mantra' will not meet the required standard.<sup>24</sup> The word 'proper' implies that the procedural limb of s 38(1) is more stringent than the traditional judicial review requirement of those involved in public administration to take into account relevant considerations.<sup>25</sup> The standard of consideration required will 'differ depending on the circumstances, including the identity of the decision maker, the rights affected, and the vulnerability of the rights-holders'.<sup>26</sup>

In the ACT, a similar approach has been adopted by courts with respect to the application of the procedural limb of the positive duty.<sup>27</sup>

In Queensland, s 58(5) of the Human Rights Act states that the criteria for 'proper consideration' in decision making includes consideration of whether the decision would be 'compatible' with human rights, which is defined as involving the application of the full limitations clause.<sup>28</sup> The Queensland Human Rights Act therefore appears to diverge from the approach taken in Victorian and ACT caselaw by explicitly linking the full limitations test to the 'proper consideration' limb, although this has not been tested in case law to date.

In consultations, Queensland stakeholders observed that while it is useful to have a single test for both limbs of the duty, in some circumstances it will not be appropriate to require a detailed process of consideration before acting. Particularly in frontline and/or emergency decision making it may be difficult to implement the full set of criteria within the limitations test – for example, while making triaging decisions in a hospital. It was observed that something in the nature of a proportionality test is required, but it may not be practical to prescribe the application of the full limitations clause in all decision-making scenarios.<sup>29</sup>

To achieve the most workable approach, it was suggested in consultations that the Victorian (and ACT) approach is preferred. The Commission agrees with this analysis and prefers the approach that the limitations test apply in full to the ‘acting compatibly’ limb, while a less formal test be applied to the procedural requirement, recognising the realities of operational decision making and situational exigencies faced by public authorities. The Commission would be well-placed to develop general and specific guidance for public authorities about how all limbs of the positive duty are to be applied in practice.

The Commission also notes that, outside of Human Rights Act caselaw, there are a number of Federal Court cases that have articulated the standard of ‘consideration’ that decision makers must have regarding relevant matters when making administrative decisions. These cases have largely arisen in the migration context, and provide insight that may also inform the ‘proper consideration’ limb of a federal Human Rights Act.

Relevantly, Federal Courts have found that there is a need for an ‘active intellectual process’ and the giving of ‘proper, genuine and realistic consideration’ to relevant matters.<sup>30</sup> Many of the cases in the Federal Court express frustration about the use of formulaic expressions by Ministers.<sup>31</sup> In *Hands v Minister for Immigration and Border Protection*,<sup>32</sup> for example, the Full Federal Court held that:

where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people.<sup>33</sup>

A number of these cases were referenced in the 2022 High Court decision of *Plaintiff M1-2021 v Minister for Home Affairs*.<sup>34</sup> However it is worth noting that Kiefel CJ, Keane, Gordon and Steward JJ clarified that the requirements for ‘proper, genuine and realistic’ consideration ‘must be understood in its proper context’ – specifically the court must not ‘substitute its decision for that of an administrative decision maker’.<sup>35</sup> This indicates that courts should respect the distinction between merits review and judicial review, and avoid using this kind of analysis to substitute their own preferred decision.

#### **(d) Participation test**

Public authorities would also be required to consider whether consultation or other forms of participation are necessary in light of the participation duty. This would form part of the ‘proper consideration’ limb of the positive duty. The participation duty is discussed in chapter 7. The participation duty would require public authorities to facilitate the participation of First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights. It would operate as a cross-cutting duty, meaning it would be relevant to the fulfilment of all the rights in the Human Rights Act.

When a case is brought alleging a breach of a specific right protected by the Human Rights Act, a failure to enable participation as part of the decision-making process may demonstrate that there has been a failure to give proper consideration to that right, which would be a breach of the positive duty to uphold the right in question. The ability to raise the participation duty will therefore be linked to a specific decision engaging specific protected rights, as well as meeting standing requirements in accordance with the Human Rights Act. There will be no distinct cause of action available based on failure to enable participation.

When determining how to apply the participation duty in particular circumstances, public authorities, and courts assessing the compliance of public authorities with the duty, can draw on the rights in relevant treaties, as well as procedural ‘participation guidelines’ listed in chapter 7 section 7.5(b). The limitations criteria would also be relevant to this assessment, taking into account, for example, urgency.

The participation duty would be considered as one factor relevant to the ‘proper consideration’ limb of the positive duty on public authorities – and would only arise where the participation duty is engaged with respect to a particular right.

### **6.3 Failure to comply with the duty**

If a public authority does not comply with the positive duty, a person can make a complaint or bring a claim against them for breach of human rights, and may seek remedies for the breach. This is discussed in chapter 11.

### **6.4 Scope of duty on public authorities**

#### **(a) Defining public authorities**

The contracting by government authorities with the private sector to provide public services has become a prevalent fixture of the operation of government in Australia. It is essential that the same standards apply to private bodies delivering public services that apply to government institutions. Access to human rights protections should not depend on the method of service delivery. Stakeholders such as the Australian Lawyers Alliance emphasised that the positive duty should comprehensively apply to entities performing public functions, to avoid government ‘contracting out’ of human rights obligations.<sup>36</sup> This is particularly important in relation to contracting entities that provide essential services to vulnerable people. Recent inquiries, such as the Disability Royal Commission and the Royal Commission into Aged Care Quality and Safety, have shown the serious consequences of private services not being held accountable to human rights standards.<sup>37</sup>

The definition of ‘public authorities’ must therefore encompass private businesses, non-government organisations and contractors performing public functions.<sup>38</sup> The definition should be flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with a Human Rights Act.<sup>39</sup> Certainty is necessary for organisations as they will need to take steps to ensure they are compliant, and for individuals affected by the actions of public

authorities – if they cannot easily determine whether an entity is covered by the Human Rights Act, they are unlikely to make a complaint about human rights breaches.<sup>40</sup>

The definition of public authorities in state instruments, and in the UK Human Rights Act, can be divided into ‘core’ public authorities and ‘functional’ public authorities. Regarding the Victorian Charter, Michael Brett Young explained the distinction as follows:

Core public authorities are always public authorities, while functional public authorities may or may not be public authorities depending on the function they are performing.

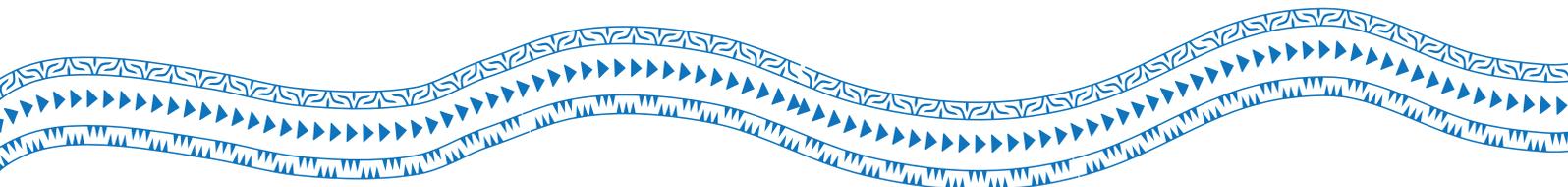
A body that has functions of a public nature and is exercising those functions on behalf of the State or a public authority is a functional public authority and attracts the same obligations under section 38 as does any other public authority.<sup>41</sup>

In *PJB v Melbourne Health (Patrick’s Case)* (2011), the Victorian Supreme Court explained that the emphasis of the definition of public authorities is ‘on matters of substance, not form or technicalities’ and that the ‘intent is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature’.<sup>42</sup>

Examples of core public authorities include Government departments, agencies, offices and police.

Examples of functional public authorities at the federal level would include a private company operating a federal prison; a private government contractor providing housing to those at risk of homelessness; and a private service provider delivering services through the NDIS.<sup>43</sup> These private entities only have to comply with the Human Rights Act when they carry out their public functions.

*Free & Equal* stakeholders preferred the definitions of public authorities in the ACT and Queensland, as they include additional factors specifying functions of a public nature, and therefore provide more clarity about functional public authorities.<sup>44</sup>



## Example: Queensland provision

### 9 Meaning of public entity

(1) Each of the following entities is a “public entity”—

- (a) a government entity within the meaning of the *Public Service Act 2008*, section 24;
- (b) a public service employee;
- (c) the Queensland Police Service;
- (d) a local government, a councillor of a local government or a local government employee;
- (e) a Minister;
- (f) an entity established under an Act when the entity is performing functions of a public nature;
- (g) a member of a portfolio committee when the committee is acting in an administrative capacity;
- (h) an entity whose functions are, or include, functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise);

*Example of an entity not performing functions of a public nature for the State—*

A non-State school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State.

- (i) a person, not otherwise mentioned in paragraphs (a) to (h), who is a staff member or executive officer (however called) of a public entity;
- (j) an entity prescribed by regulation to be a public entity.

(2) A “public entity” includes—

- (a) a registered provider when the provider is performing functions of a public nature in the State; and
- (b) a non-State police officer, under the *Police Service Administration Act 1990*, section 5 while the officer—
  - (i) is appointed as a special constable under section 5.16(1) of that Act; or
  - (ii) is authorised under section 5.17(2) of that Act to exercise the powers of a police officer; or
  - (iii) is exercising a power under another law of the State.

(3) Also, a “public entity” includes an entity for which a declaration is in force under section 60.

(4) However, a “public entity” does not include—

- (a) the Legislative Assembly or a person performing functions in connection with proceedings in the Assembly, except when acting in an administrative capacity; or
- (b) a court or tribunal, except when acting in an administrative capacity; or
- (c) an entity prescribed by regulation not to be a public entity.

(5) In this section—

“entity” means an entity in and for Queensland.

“registered provider” means a registered provider of supports or a registered NDIS provider under the *National Disability Insurance Scheme Act 2013 (Cwlth)*.

## 10 When function is of a public nature

(1) In deciding whether a function of an entity is of a public nature for this Act, any of the following matters may be considered—

- (a) whether the function is conferred on the entity under a statutory provision;
- (b) whether the function is connected to or generally identified with functions of government;
- (c) whether the function is of a regulatory nature;
- (d) whether the entity is publicly funded to perform the function;
- (e) whether the entity is a government owned corporation.

(2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.

(3) Without limiting subsection (1) or (2), the following functions are of a public nature—

- (a) the operation of a corrective services facility under the *Corrective Services Act 2006* or another place of detention;
- (b) the provision of any of the following—
  - (i) emergency services;
  - (ii) public health services;
  - (iii) public disability services;
  - (iv) public education, including public tertiary education and public vocational education;
  - (v) public transport;
  - (vi) a housing service by a funded provider or the State under the *Housing Act 2003*.

The Queensland definition could be adapted to suit the federal context. This would involve specifying core public authorities, and adopting the factors that identify functional public authorities, with a non-exhaustive list of examples. The Commission proposes that the definition of public authorities in a federal Human Rights Act incorporate the following:

### Meaning of a public authority

- A public body with powers or functions under Commonwealth law, including:
  - » Government agencies, departments, offices
  - » Regulatory and administrative bodies, Commissions and Ombudsmen, statutory corporations
  - » Federal police and national security agencies
  - » Commonwealth Ministers
  - » Tribunals
  - » Courts when acting in an administrative capacity, and where the Act applies to the court's own procedures. [discussed below]
  - » State public authorities when exercising Commonwealth functions.
- a private entity whose functions are, or include, functions of a public nature when it is performing functions of a public nature (whether under contract or otherwise)
- an individual employed or appointed by or to any these bodies when exercising powers or functions under a Commonwealth law or performing functions of a public nature
- an entity declared by the regulations to be a public authority.

## Exclusions

A public authority does *not* include:

- the Parliament of Australia, except when acting in an administrative capacity
- the courts, except when acting in an administrative capacity, and where the Act applies to the court's own procedures
- an entity declared by the regulations not to be a public authority.

## Functions of a public nature

In deciding whether a function of an entity is of a public nature for this Act, any of the following [non-exhaustive] matters may be considered—

- whether the function is conferred on the entity under a statutory provision
- whether the function is connected to or generally identified with functions of government
- whether the function is of a regulatory nature
- whether the entity is publicly funded to perform the function
- whether the entity is a government owned corporation.

Without limiting these criteria, the following functions are of a public nature

- The operation of prisons and other places of detention or correctional facilities under control of the Australian Government. [In accordance with OPCAT definitions]
- The provision of federal:
  - » public health services [for example, Medicare funded services]
  - » public disability services [for example, NDIS services]
  - » public education, including public tertiary education and public vocational education [for example Government schools and public universities]

- » emergency services [for example, Home Affairs emergency management programs]<sup>45</sup>
- » public housing services [for example, remote First Nations housing programs]<sup>46</sup>
- » aged care services [for example Aged Care Quality and Safety Commission accredited services]

Regulatory and oversight bodies would have a role to play in ensuring compliance with the positive duty. For example, the NDIS Quality and Safety Commission could include Human Rights Act compliance requirements for NDIS providers; and the Australian Public Service Commission could consider human rights issues relevant to public service employment standards and the public service code of conduct.

## (b) Opt-in and incentives for business

The Commission proposes including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act. An entity could make a request to the Attorney-General to declare that the entity is subject to the human rights obligations of a public authority under the Human Rights Act. Both the ACT and Queensland Human Rights Acts have opt-in clauses, and the 2015 Victorian Charter Review recommended an opt-in clause be added to the Victorian Charter.<sup>47</sup>

The opt-in provision in the *Human Rights Act 2004* (ACT) has resulted in only 7 entities opting-in to the regime. All of them are not-for-profit organisations with longstanding commitments to human rights. This indicates that take-up from business entities will likely take time. However, field research on those 7 organisations has indicated exceptional, operationalised human rights practice.<sup>48</sup>

*Free & Equal* consultees suggested ways to encourage ‘opting-in’ and voluntary acceptance of human rights obligations within the businesses sector. For example, the Federal Government could give preference to entities that voluntarily comply with the Human Rights Act in Government tenders and contracting processes. Where entities receive federal funding, there could be contractual requirements to comply with the Human Rights Act attached to that funding; or preference given to entities that already accept Human Rights Act obligations. In this regard, the Victorian Charter review recommended having a whole-of-government policy to include Charter obligations in relevant State contracts and adding a provision to the Charter to encourage this inclusion.<sup>49</sup> It was noted that this would help provide certainty as to which entities are public authorities and would encourage commitment and consistent application of the Human Rights Act. The Commission proposes adopting this approach for a federal Human Rights Act.

The Australian Lawyers Alliance submitted that regulatory bodies should include requirements for human rights compliance as a precondition for licensing or industry accreditation, including requirements for annual reporting of human rights compliance by organisations in order to maintain their licensing or accreditation status.<sup>50</sup> This could encompass bodies including the Aged Care Quality and Safety Commission, the National Disability Insurance Agency and the Australian Prudential Regulation Authority. The Commission endorses this approach.

### **(c) Use of regulations**

The Victorian Charter Review recommended that the Victorian Government more actively use its existing regulation-making power to clarify whether entities are or are not public authorities, including relevant bodies under national schemes.<sup>51</sup> It was noted that this could

resolve uncertainty about whether entities at the margins are functional public authorities. In this way, the Government can make a clear statement that an entity is bound by public authority obligations, when there is a need to resolve doubt.<sup>52</sup>

The Commission favours a similar approach in the federal context.

## **6.5 Courts**

The role of the courts in a dialogue model primarily consists of an interpretive and enforcement role. In the UK, courts are considered to be public authorities in their own right, and are therefore required to *themselves* comply with the Human Rights Act including when making judgments. This has allowed the UK Human Rights Act to have ‘horizontal application’<sup>53</sup> as the courts may apply human rights principles to cases that involve private parties, in the fulfilment of their own duty to consider human rights when making decisions.<sup>54</sup>

The Commission has heard mixed views on whether this approach would be acceptable in Australia. Some consultees indicated that it may be problematic at the federal level, because of Chapter III of the Constitution which prescribes a strong separation of powers between judicial and parliamentary bodies, and therefore limits the extent to which Parliament can control a court’s judicial functions. In light of this, the Commission does not recommend the UK approach of including courts as public authorities in the same manner as executive bodies.

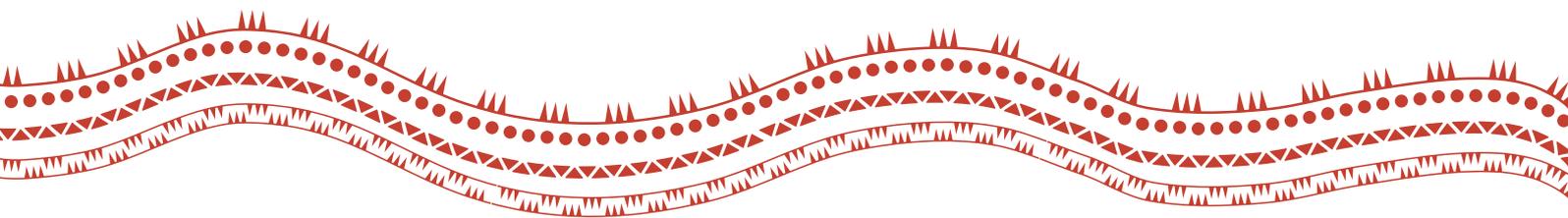
However, the Human Rights Act could apply to courts when they are operating in an administrative capacity – in circumstances where courts act similarly to other public authorities captured within the Human Rights Act. Administrative functions for courts include, for example, committal proceedings, the issuing of warrants, listing cases, hiring staff and adopting practices and procedures.<sup>55</sup> It has been established in Victoria that an administrative decision by a decision maker who is required to act judicially, remains administrative in character.<sup>56</sup> Federal tribunals are wholly administrative in nature, and cannot exercise judicial functions – there is therefore no constitutional concern with including them as public authorities within a Human Rights Act.<sup>57</sup>

Additionally, there is scope for Human Rights Act rights to apply to the procedural functions of courts. Specifically, the right to a fair trial and equality before the law as implemented through the Human Rights Act could inform court procedures. The Commission considers that this approach is unlikely to be of constitutional concern. As noted by Williams and Hume, ‘there is a distinction between Parliament commandeering a court (which may be prohibited) and Parliament merely regulating a court’s processes (which is permitted)’.<sup>58</sup> The *Nicholas* case established that ‘Parliament has the power to regulate judicial proceedings, at least so long as it does not direct that facts exist or be found, or direct a verdict’.<sup>59</sup> In *Nicholas*, Gaudron J elaborated essential features of a court, stating that a court could not be:

required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained, and in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.<sup>60</sup>

The application of a Human Rights Act to the procedural functions of the courts would not raise any of the concerns listed by Gaudron J and would serve to enhance principles of procedural fairness.

In Victoria, while the Charter explicitly applies to the courts operating in their administrative capacity, the Charter has been interpreted *also* to apply to courts where it arises in relation to *court proceedings*. The Victorian approach is outlined in the box below. The Commission proposes that this be adopted in a federal Human Rights Act, and made explicit in the text of the Human Rights Act – to avoid some of the complexities associated with the Victorian case law, resulting from the somewhat vague directions under the Victorian Charter.



## Victorian Charter approach

### Section 4(1)(j)

Section 4(1)(j) explicitly excludes from the definition of public authorities ‘a court or tribunal *except when it is acting in an administrative capacity*’. Courts and tribunals when acting in administrative capacity, fall under the remit of the Charter.

### *Direct application of Charter rights to Courts in their judicial capacity?*

Section 6(2)(b) imposes obligations on courts and tribunals to the ‘extent that they have *functions* under Part 2 and Division 3 of Part 3’. Part 2 lists the Charter rights, and Division 3 of Part 3 covers the Court’s role in interpreting and applying the Charter.

The Judicial College of Victoria has observed that ‘the direct application of Charter rights to courts and tribunals [in this section] appears to contrast with ss 4 and 38, which state that courts and tribunals are bound to act compatibly with Charter rights only when acting in an administrative capacity’.<sup>61</sup>

Section 6(2)(b) has been subject to extensive interpretation, with the caselaw generally adopting what is known as the ‘intermediate construction’,<sup>62</sup> which is that the ‘function’ referred to in the Charter is to enforce directly on the courts ‘only those rights enacted in Part 2 that relate to court proceedings’.<sup>63</sup> This involves looking at the particular functions the court is using in the proceeding and determining if it is ‘exercising functions involving the application of human rights that relate to court or tribunal proceedings’.<sup>64</sup> As a result, ‘courts and tribunals are directly bound to act compatibly with Charter rights that relate to a court and tribunal proceeding even when acting in a judicial capacity’.<sup>65</sup> In *Secretary, Department of Human Services v Sanding* this was stated as follows:

The functions of courts and tribunals under Pt 2 referred to in s 6(2)(b) are the functions of applying and giving effect to

those human rights which relate to court and tribunal proceedings. By excluding courts and tribunals from the definition of a public authority (except when acting administratively), while at the same time making the Charter apply directly to them in respect of the specified functions, the legislation has preserved the substantive legal foundation of the jurisdiction of courts and tribunals, while making it obligatory for them to act compatibly with the Charter in respect of those matters which are within their own direct control, including the conduct of proceedings in accordance with the right to a fair hearing under s 24(1) of the Charter.<sup>66</sup>

### *Nature of Cases where the Charter was applied to Judicial Functions in accordance with s 6(2)(b)*

There are multiple cases where Charter rights are applied to Courts due to lack of fair proceedings in bail applications, criminal trials or sentencing hearings,<sup>67</sup> as well as child protection and mental health proceedings.<sup>68</sup>

### Example: *Matsoukatidou v Yarra Ranges*<sup>69</sup>

The Supreme Court of Victoria found that a court or tribunal must assist a self-represented party with a disability to effectively participate in a hearing. The applicant had sought judicial review in the County Court of a decision of the local council about her home. The applicant suffered from a learning disability. She misunderstood the nature of the proceedings, the applicable legal test, and was not given an adequate opportunity to make her submissions. As a result, her application was dismissed. On appeal, the Supreme Court found that the right to equality under the Charter applied to the practice and procedure of courts, positively obliging judges to make reasonable adjustments and accommodations to ensure equal access to justice. The case was sent back to the County Court to be reheard.

## 6.6 Implementing the duty

A positive duty must be accompanied by intensive measures to ensure cultural change and the adoption of a preventative approach to human rights within public authorities. *Free & Equal* consultees were strongly of the view that the success of a federal Human Rights Act is dependent on a proper roll-out of the Human Rights Act within the public service, and consistent resources to ensure effective application of the Human Rights Act post-roll-out. In particular it was noted that, after an initial push, resources and education measures in relation to state instruments have not always been proactively maintained within the public service, to the detriment of the instrument's overall effectiveness. In light of consultation input, including from those with direct experience of the roll-out of state human rights instruments, the Commission considers that the following measures are required.

- A transition period pre-introduction (1 year) to develop proficiency within the public service.
- An initial whole-of-government education program, followed by permanent routine educational requirements for public servants, parliamentarians, courts and tribunals at regular intervals to maintain fluency with the Human Rights Act, and human rights education required as part of all government induction processes. There should also be support for training in private organisations acting as 'public authorities'.
- Permanent, dedicated internal departmental teams with human rights expertise and responsibility for consultation and education on Human Rights Act matters, and liaising across government, including in coordination with parallel teams in other departments/agencies. This requires a consistent resourcing stream for these teams.

- The development and implementation of human rights action plans by federal departments and agencies specifying how they intend to fulfil their obligations under the Human Rights Act; and annual reporting responsibilities on Human Rights Act implementation against the criteria in the action plan, including publicly available data on human rights relevant concerns, such as complaints data.
- The development of tailored guidelines, checklists and resources to enable staff within public authorities to make human rights compliant decisions within their area of competence.
- Integrating respect for human rights into public sector values and codes of conduct. This could occur via amendments to the *Public Service Act 1999* (Cth).
- External reporting on human rights compliance by the Commission (see chapter 14).

The Commission considers that it would have a central role in providing tailored and general education about the Human Rights Act for public authorities with dedicated ongoing resourcing to do so.

Many of these initiatives would complement the existing practices and goals of the public service. As the Commission submitted to the NHRCC, a Human Rights Act would help to ensure that government properly considers the needs of all members of Australia's increasingly diverse population. In human rights terms, this means that no person should apply blanket policies without proper regard to the particular circumstances of an individual user of public services. Greater regard for individuals by the public sector means better public service, leading to better policy outcomes.<sup>70</sup>

## Victorian Charter Roll-Out<sup>71</sup>

In 2007–08 the newly-established Human Rights Unit of the Victorian Department of Justice developed and delivered a whole-of-government human rights education strategy, including:

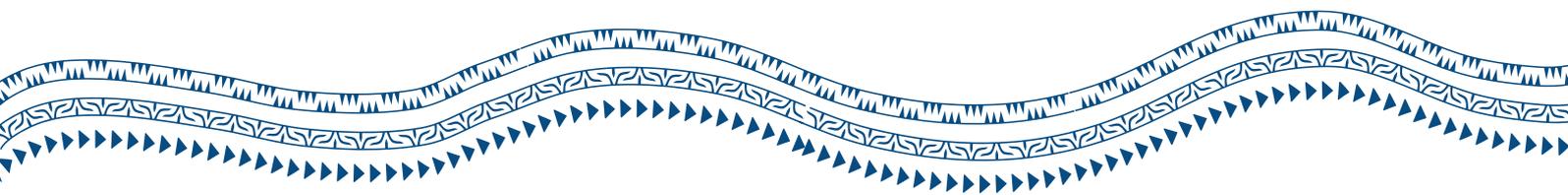
- Legal and Legislative Policy Officer Training delivered to over 500 participants
- the Human Rights Implementation Program, a train-the-trainer course delivered to over 300 service delivery staff across government.

These whole-of-government initiatives were complemented by initiatives at the departmental level, including:

- training courses for staff
- changes to the induction and performance management programs
- online learning modules and other internal communication strategies such as newsletters, displays and a Human Rights Week.

These complementary initiatives continued into 2008.

While these mechanisms were strongly supported by *Free & Equal* stakeholders, it was noted that, in the subsequent years, the Human Rights Unit was disbanded, and there has been an inconsistent focus on education, training and systematised Charter implementation since, resulting in a diminished human rights culture within Victorian public authorities.



## Chapter 6: Endnotes

- 1 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).
- 2 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009); Law Council of Australia, Submission 166, *Free & Equal Inquiry*.
- 3 See eg, Human Rights Law Centre, *Charters of Human Rights make our lives Better: 101 Cases showing how* (2022) 49 (case study 74).
- 4 See eg, *R (Bernard) v Enfield LB* [2002] EWHC 2282 Admin.
- 5 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).
- 6 ACT Human Rights ACT Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety* (May 2009) 6.
- 7 Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*.
- 8 Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*; See also Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Human Rights Alliance for NSW, Submission 107, *Free & Equal Inquiry*.
- 9 British Institute of Human Rights submission to the Joint Committee on Human Rights, *Independent Review of the Human Rights Act*, March 2021 <<https://www.bih.org.uk/Handlers/Download.ashx?IDMF=6efd6aef-3bc3-4c75-867c-d744ede5d0c9>>.
- 10 British Institute of Human Rights submission to the Joint Committee on Human Rights, *Independent Review of the Human Rights Act*, March 2021 <<https://www.bih.org.uk/Handlers/Download.ashx?IDMF=6efd6aef-3bc3-4c75-867c-d744ede5d0c9>>.
- 11 Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action* (March 2012) 19 <[https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ab45dd31ae6cf2ed3804195/1521769952176/VictorianCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ab45dd31ae6cf2ed3804195/1521769952176/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf)>.
- 12 See discussion in section 6.2(c).
- 13 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009) 332.
- 14 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 71.
- 15 See, eg, *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [306], [309]–[312]; *Antunovic v Dawson* (2010) 30 VR 355 [70], [135]; *Certain Children (No 2)* [2017] VSC 251 [199].
- 16 See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).
- 17 Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (2016) [3.5] citing *Certain Children (No 2)* [2017] VSC 251 [177]; see also *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [312]; *Antunovic v Dawson* (2010) 30 VR 355 [70]; *Minogue v Dougherty* [2017] VSC 724 [74].
- 18 *Bare v IBAC* (2015) 48 VR 129, 223 [288]–[289] (Tate JA) citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141 [185–186].
- 19 *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 [220]; *De Bruyn v Victorian Institute of Forensic Mental Health* [102],[126]; *Castles v Secretary, Department of Justice* (2010) 28 VR 141 [55].
- 20 *Bare v IBAC* (2015) 48 VR 129, 223 [288]–[289] (Tate JA) citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141.
- 21 Bruch Chen, 'The Human Rights Act 2019 (Qld): Some perspectives from Victoria' (January 2020) *Alternative Law Journal* <<https://journals.sagepub.com/doi/10.1177/1037969X19899661>> citing *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 682–3 [101] and Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect* (2005) 47.
- 22 *Castles v Secretary to the Department of Justice* (2010) 28 VR 141,184 [185]–[186].
- 23 Tamara Walsh, and Bridget Burton, 'Queensland's new right to education: What does it mean for children with disabilities?' (October 2019) *Alternative Law Journal* <<https://journals.sagepub.com/doi/10.1177/1037969X19883967>>.
- 24 *Certain Children v Minister for Families and Children* [2017] VSC 251 [221], [514]; *Castles v Secretary of Department of Justice* [2010] 28 VR 141, 185; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 700–701 [141].
- 25 Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (2016) 3.2, [12]; *Bare v IBAC* (2015) 48 VR 129; [2015] VSCA 197 [235], [275]–[276] (Tate JA); *Certain Children (No 1)* [2016] VSC 796 [183]–[184].
- 26 Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (2016) 3.2 [17].
- 27 *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83.
- 28 *Human Rights Act 2019* (Qld) s 8.
- 29 Free & Equal Consultation, Brisbane (Online) 21/07/2021.
- 30 See, eg, *Tickner* (1995) 57 FCR 451 [462]; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 [45]–[46]; *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41 [53]; *Singh v Minister for Home Affairs* (2019) 267 FCR 200 [30]; *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 [38]; *Minister for Home Affairs v Omar* (2019) 272 FCR 589 [37]; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 [37],

- [171]; *SZJSS* (2010) 243 CLR 164 [29]-[30]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 [43].
- 31 For example, when a Minister states that they have taken into account the risks of refoulement on a person but find that it is outweighed by the potential for risk to the Australian community if a person was granted a visa. See, eg, *Minister for Home Affairs v Omar* [2019] FCAFC 188 (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ) [36]-[41]).
- 32 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225.
- 33 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 [3] (Allsop CJ, with whom Markovic and Steward JJ agreed).
- 34 *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17.
- 35 *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17 [26] (Kiefel CJ, Keane, Gordon and Steward JJ).
- 36 Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; See also Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*.
- 37 Royal Commission into Aged Care Quality and Safety, *Summary of the Final Report* (March 2021) <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>>; *Royal Commission into violence, abuse, neglect and exploitation of people with disability* (Web Page) <<https://disability.royalcommission.gov.au/>>.
- 38 Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*.
- 39 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) 62.
- 40 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 55.
- 41 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 57.
- 42 *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [111]).
- 43 See *Metro West v Sudi* [2009] VCAT 2025. See also UK Human Rights Act Hansard: 'A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients.': UK, *Parliamentary Debates*, House of Lords, 24 November 1997, col 811.
- 44 Free & Equal Consultation, Sydney, 11/05/21; Free & Equal Consultation, Melbourne (Online), 26/05/21.
- 45 'Emergency management' *Home Affairs* (Web Page) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/emergency-management/about-emergency-management>>.
- 46 'Land and Housing' *National Indigenous Australians Agency* (Web Page) <<https://www.niaa.gov.au/indigenous-affairs/land-and-housing>>.
- 47 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 47.
- 48 Louis Schetzer 'The ACT Human Rights Act – How it has been applied by non-government organisations', Chapter 11 in Louis Schetzer (2018), *Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services*, 288, discussed in Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*.
- 49 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 64.
- 50 Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*.
- 51 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 63.
- 52 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 63.
- 53 See, eg, Alison Young, 'Mapping horizontal effect' in David Hoffman (ed) *The impact of the UK Human Rights Act in Private Law* (Cambridge University Press, 2011) 16–47.
- 54 Specifically, this has led to the development of the 'breach of confidence' tort to include elements of the human right to privacy under article 8 of the UK Human Rights Act. See *Douglas v Hello! Ltd* [2005] EWCA Civ 595; *Venables v News Group Newspapers Ltd* [2001] Fam 430; *Re S (A Child) (Identification: Restriction of Publication)* [2004] UKHL 47.
- 55 See Judicial College of Victoria *Charter of Human Rights Bench Book* (2016) [2.4] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57269.htm>>.
- 56 *PJB v Melbourne Health*; [2011] VSC 327, [117]-[119]; *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [279].
- 57 'Tribunals in Australia: Their Roles and Responsibilities' AAT (Web Page) <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/tribunals-in-australia-their-roles-and-responsibil>>.
- 58 George Williams and David Hume, *Human Rights under the Australian Constitution* (2nd ed, OUP, 2013) 371.

- 59 George Williams and David Hume, *Human Rights under the Australian Constitution* (2nd ed, OUP, 2013) 371, summarising *Nicholas v The Queen* (1998) 193 CLR 173.
- 60 *Nicholas v The Queen* (1998) 193 CLR 173, 208-9 [74] (Gaudron J).
- 61 Judicial College of Victoria, *Charter of Human Rights Bench Book* (2016) [2.5] <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57270.htm>.
- 62 See *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [246]; *Kracke v Mental Health Review Board* [2009] VCAT 646 [250]; *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61; The other 'constructions' are the 'broad construction' where the courts enforce directly all the rights in the Charter, and the 'narrow construction' is that courts should enforce directly only those rights that are explicitly and exclusively addressed to the courts.
- 63 Judicial College of Victoria, *Charter of Human Rights Bench Book* (2016) [2.5] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57270.htm>>.
- 64 *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [37], [39].
- 65 Judicial College of Victoria, *Charter of Human Rights Bench Book* (2016) [2.5] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57270.htm>>.
- 66 *Secretary, Department of Human Services v Sanding* [2011] VSC 42 [166].
- 67 *Application for Bail by HL (No 2)* [2017] VSC 1 [134]; *DPP v S E* [2017] VSC 13 [12], [21]; *DPP v S L* [2016] VSC 714 [5]-[6].
- 68 *Kracke v Mental Health Review Board* (2009) 29 VAR 1; *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 [165]-[167].
- 69 *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.
- 70 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009).
- 71 Victorian Equal Opportunity and Human Rights Commission, *The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forward* (2008) 12.





# Chapter 7: Procedural duties

## 7.1 Participation duty

In addition to the positive duty on public authorities to consider and act in accordance with human rights, the Commission proposes that an overarching ‘participation duty’ be introduced into a Human Rights Act.

International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would be a means of realising key procedural elements of the existing rights in the Human Rights Act, in relation to these three groups.

The participation duty would primarily operate as a duty on public authorities (the Executive). It would also apply to proponents of legislation in a different respect.

- This duty would be *binding* on public authorities with obligations under the Human Rights Act. It would require public authorities to ensure the participation of First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights. It would operate as a cross-cutting duty, meaning it would be relevant to the fulfilment of all the rights in the Human Rights Act. If a public authority has failed to comply with this duty in relation to a decision affecting a particular right, this would point to a breach of the positive duty to ‘properly consider’ human rights in decision-making.

- This duty would also include a *non-binding* requirement for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in statements of compatibility. This would also be subject to scrutiny by the Parliamentary Joint Committee on Human Rights. Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question.

The Committee on the Rights of Persons with Disabilities commented that full and effective participation ‘should be understood as a process, not as a one-time event’ and embedded systematically into government decision making.<sup>1</sup> A ‘core element of participation is that it has *influence on subsequent decisions*’.<sup>2</sup>

This chapter will first provide background on the case for a participation duty in the Human Rights Act, followed by an articulation of how the duty would be formulated, and its application to each of the groups. The specific elements of the duty are discussed in section 7.5.

While the inclusion of this duty within a domestic Human Rights Act would be a novel addition, similar laws and practices are in place in common law and democratic jurisdictions in different contexts. The model proposed by the Commission is directly informed by existing participation models, traditional common law rights, and the treaties ratified by Australia.

## 7.2 Why Australia needs a participation duty

The principle of participation is at the core of democratic systems, with the right to vote a fundamental means of exercising it as a right. The Stanford Dictionary of Philosophy defines democracy as ‘a method of collective decision making characterized by a kind of equality among the participants at an essential stage of the decision-making process’.<sup>3</sup> Liberal democracies recognise and reflect the notion that equal participation in public affairs extends beyond the right to vote, to encompass a range of mechanisms for public engagement in decision making by government, on an ongoing basis.

Australia is a robust democracy, with avenues for public participation in public policy, law-making and administrative processes. This includes consultation processes in relation to proposed laws, and opportunities for public input through mechanisms such as Parliamentary Committees, engagement with interest groups and referenda, from time to time. Consultation with certain sectors within society is regular and expected. For example, the Federal Government routinely consults business on taxation policy,<sup>4</sup> and the legal profession on law reform.<sup>5</sup>

However, despite general avenues for participation, and ad hoc mechanisms, there are certain groups in society that may not always have their views adequately reflected in law, policy and administrative decision-making processes, because they may not be at the forefront of political considerations. This is by virtue of those groups representing a minority of the populace and lacking sufficient political power to have their voice heard, or due to barriers to participation related to vulnerabilities experienced by those groups (for example, children, who are unable to vote).

Specific and regular participation processes are necessary to ensure that vulnerable and marginalised groups are considered by policymakers and administrators on matters that

affect their rights. It is particularly important in a democracy for groups that do not represent a majority of voters; do not have a powerful voice in the political system; and are not at the forefront of the minds of administrators; to be heard. In addition to protecting and realising the rights of those groups and individuals, this also leads to better, more effective administrative decisions.

Proponents of laws and policy that affect human rights often fail to consult certain groups in the development process, which causes problems down the line in the application of the policy, results in economic costs, and can infringe Australia’s obligations to protect the rights of vulnerable members of the community.

Through its work, the Commission has identified that a common factor with laws and policies that breach human rights is that they were developed without the participation of groups most impacted by those policies.<sup>6</sup>

The following examples illustrate this dynamic in federal law and policy making.

*The Community Development Program (CDP):* In 2015 legislation was passed to establish the CDP as a remote employment and community development service.<sup>7</sup> The CDP moved away from a community-controlled employment scheme to a program administered centrally by the Department of Prime Minister & Cabinet and CDP providers.<sup>8</sup> The CDP was criticised for a range of reasons, including its punitive approach and discriminatory application in relation to First Nations communities.<sup>9</sup> It was announced that the CDP would be discontinued in the 2021 budget and replaced with a First Nations co-designed model.<sup>10</sup> The report of the Senate Standing Committee on Finance and Public Administration on the ‘Appropriateness and effectiveness of the implementation and evaluation of the CDP’ found that:

There are a number of differences that set the CDP apart from its predecessor programs, including its negative impact on individuals, communities and providers.

One of the key differences is the complete lack of consultation and engagement by the government with the stakeholders – individuals communities and providers – in the design and implementation of the CDP. This lack of consultation is not acceptable.<sup>11</sup>

*The Northern Territory intervention:* In 2007, the *Racial Discrimination Act 1975* (Cth) was suspended, and a top-down intervention in First Nations communities was implemented. This was contrary to human rights principles and attracted criticism both domestically and internationally, including by the Human Rights Committee, and then-Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, for occurring with inadequate consultation with the affected communities, and for involving discriminatory treatment of First Nations peoples.<sup>12</sup>

*COVID-19:* The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) criticised the Federal Government for a ‘serious failure’ of not adequately consulting people

with disability or creating a specific plan to protect them at the start of the COVID-19 pandemic. This ‘produced serious adverse consequences for many people with disability’. The Royal Commission found that ‘the impact of the pandemic on many people with disability, especially those with high support needs, would have been significantly ameliorated if the Australian government had complied fully with the letter and spirit of its obligations under the [CRPD] from the very outset of the pandemic’.<sup>13</sup>

Some of the more serious failures to facilitate participation have been in relation to the rights of First Nations peoples. As detailed in section 7.6, First Nations peoples have a specific right to self-determination, which encompasses participation and consultation principles. However, this has not been well-reflected in Australian law – in the absence of full domestic implementation of human rights treaties – or in jurisprudence, as evidenced by the *Maloney Case*.

### ***Maloney v The Queen* (2013) 252 CLR 168**

In this case the High Court held that ‘special measures’ under the *Racial Discrimination Act 1975* (Cth) (RDA) do not require either consultation with, or the informed consent of, an affected community.

The case dealt with alcohol restrictions put in place on Palm Island, which has a 97% First Nations population. The Court found that the restrictions were discriminatory: they restricted the right of an overwhelmingly First Nations population to own property in a way that differed from people living in other parts of Queensland. However, the Court found that the restrictions constituted a ‘special measure’ because they were designed to protect the residents of Palm Island from the effects of alcohol abuse and associated violence.

Section 8 of the RDA makes provision for special measures by referring to the terms of Article 1(4) of the CERD. While the terms of Article 1(4) do not explicitly refer to consultation, the interpretation of this provision in international law has evolved over the years since the passage of the RDA and the acceptance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Authoritative commentary from the Committee on the Elimination of Racial Discrimination (CERD Committee) and the UN Expert Mechanism on the Rights of Indigenous Peoples indicated that special measures should be designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

However, the Court held that since the plain text of Article 1(4) did not include reference to consultation, the Court could not import such a requirement into domestic legislation. Chief Justice French found that while international practice occurring after the making of a treaty could be relevant to the interpretation of the treaty, it could not be used to interpret a domestic law that implemented a treaty provision.<sup>14</sup>

Since the time of this judgment, the High Court has confirmed that it will give weight to General Comments and other extrinsic international legal materials when interpreting obligations derived from treaties. For example, in the 2018 case of *CRI026 v Republic of Nauru*,<sup>15</sup> the High Court stated:

The content of a treaty obligation depends upon the construction which the international community would attribute to the treaty and on the operation which the international community would accord to it in particular circumstances. The interpretative principles to be applied include the rules of customary international law codified in Arts 31 and 32 of the Vienna Convention on the Law of Treaties (1969). Considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty.<sup>16</sup>

Introducing a participation duty on public authorities would send an unambiguous message that it is not acceptable for policies to be developed without the engagement of those most directly affected.

It would also create a clear expectation that in statements of compatibility, for example, there is a description of the engagement practices that were conducted when developing a Bill, how potential breaches of rights were identified and the consideration given to alternative, less restrictive options with the full participation of those directly affected.

The Commission also notes that there are situations where it has long been identified that a failure to ensure participation leads to problematic outcomes, and yet recommendations to address this have not been implemented. In relation to persons with disabilities, the Australian Law Reform Commission's report, *Equality, capacity and disability in Commonwealth Laws* (Report 124) proposed a national decision-making framework for supported decision making for persons with

disability. Despite enjoying widespread support, these principles have not been implemented since 2014 when the report was tabled in Federal Parliament. The Commission considers that a participation duty would provide a more appropriate and immediate protection for the human rights of persons with disability, First Nations peoples and children.

Individuals also have the right to have a say in decision making that affects them personally, which is a fundamental principle of natural justice expressed through the common law (and pivotal to the rule of law), as well as a human right. This is reflected strongly, for example, in the ALRC's national decision-making principles.

However, public authorities do not always apply these principles consistently when making decisions that affect the rights of vulnerable individuals. In particular, assumptions may be made about children and persons with disability regarding their capacity to make decisions, which can result in their perspective being minimised in decision-making processes that directly affect their lives.

While these types of decisions may be overturned by courts through judicial review, ideally recognition of the right of individuals to participate in decision making that affects them should be systematically embedded into the everyday practices of administrative bodies, rather than being addressed after the fact. Illustrative examples of systemic problems of this kind include the following.

- The Disability Royal Commission has exposed decision-making practices that fail to take into account the will and preferences of persons with disability. For example, submitters to the Royal Commission highlighted that people with disability are assumed to lack capacity to be in a relationship or to be a parent, which leads to a denial of access to sexual education and healthcare, as well as the over-representation of parents with disability in child protection proceedings.<sup>17</sup>
- According to the Australian Child Rights Taskforce, the views of children are rarely taken into account in migration matters; and there is no requirement for children seeking asylum to be interviewed independently, ‘even where facts indicate they may have the strongest asylum claim’.<sup>18</sup> The ‘best interests’ of the child are often not reflected in practice. This is evidenced by, for example, routine processing decisions that result in long-term family separation.<sup>19</sup>

## 7.3 Participation: International human rights law and common law

### (a) Participation as a right

International human rights law recognises a general right to participate in public affairs as set out in article 12 of the ICCPR. This extends beyond the right to vote in elections. General Comment 25 elaborates that:

the conduct of public affairs ... is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.<sup>20</sup>

The OHCHR has also commented that the realisation of this right means that:

Laws, policies and institutional arrangements should ensure the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them.<sup>21</sup>

Importantly, the right to participation is classified as a process right that requires ongoing implementation:

The right to participate in public affairs should be recognized as a continuum that requires open and honest interaction between public authorities and all members of society, including those most at risk of being marginalized or discriminated against, and should be facilitated continuously.<sup>22</sup>

Additionally, human rights law recognises *specific* rights of participation in relation to certain groups, within key treaty instruments.

The collective right of Indigenous self-determination is protected in the ICCPR and ICESCR and articulated through UNDRIP. It includes the right of First Nations peoples to participate in decision making that affects their rights; and a requirement that States consult and cooperate in good faith with First Nations peoples.<sup>23</sup> In addition to the right to self-determination, principles of participation for Indigenous peoples have been elaborated in a range of related contexts, for example:

- The CERD Committee has indicated that the right to equality in Article 5 of ICERD requires States to ensure that ‘no decisions directly relating to their rights and interests are taken without [the] informed consent [of Indigenous peoples]’.<sup>24</sup> The Committee has repeatedly emphasised the importance of consultations and informed consent in its concluding observations.<sup>25</sup> In 2017, the CERD Committee recommended that Australia implement the Uluru Statement, including establishing a ‘meaningful mechanism’ for participation of Indigenous peoples.<sup>26</sup>
- Articles 2, 26 and 27 of the ICCPR protect freedom from discrimination, equality before the law and the rights of minorities, respectively. These are all pertinent to Indigenous peoples. Article 27 has, through practice, become one of the most important international provisions on the protection of Indigenous peoples against interference and on their right to safeguard and develop their culture.<sup>27</sup> The Human Rights Committee has recognised that ‘the enjoyment of [cultural] rights may require ... measures to ensure the *effective participation* of members of minority groups in decisions which affect them’.<sup>28</sup> In a series of cases on Sami cultural rights, the Human Rights Committee looked to whether the State enabled effective participation through consultation, to determine whether a breach of article 27 had occurred.<sup>29</sup>
- Article 30 of the CRC is worded similarly to Article 27 of the ICCPR and recognises cultural rights of Indigenous children. The CRC Committee interprets this article as requiring States to ensure participation of Indigenous communities regarding laws and policies that affect Indigenous children, as well as meaningful participation of Indigenous children (to the extent possible).<sup>30</sup>

The CRC enshrines the child’s right to be heard on matters that affect them, including in policy and lawmaking processes;<sup>31</sup> and for their best interests to be a primary consideration in all actions concerning them.<sup>32</sup> Both articles require meaningful participation of children, individually, and as a group. This requirement is subject to the evolving capacity of children, meaning that the expectation that children’s views will be considered increases as they mature.

The CRPD includes a general obligation to consult with persons with disability on decision-making processes concerning them through their representative organisations;<sup>33</sup> equal participation rights in all areas of public life;<sup>34</sup> and equal recognition before the law – which requires States to support persons with disability to make decisions that have a legal effect.<sup>35</sup> The importance of supported decision making for persons with disability is discussed further below and is an essential aspect of this duty.

The contents of these specific obligations and how they can be reflected through a participation duty are subject to detailed discussion in sections 7.7, 7.8 and 7.9.

## **(b) Participation as a principle**

In addition to being a right in itself, participation can also be viewed as an overarching principle of human rights law, one that applies to the interpretation of human rights generally.<sup>36</sup> The OHCHR has stated that the ‘principle of participatory decision-making’ is one of the ‘salient features of the human rights normative framework’.<sup>37</sup> The OHCHR has explained that:

Participation enables the advancement of all human rights. It plays a crucial role in the promotion of democracy, the rule of law, social inclusion and economic development. It is essential for reducing inequalities and social conflict. It is also important for empowering individuals and groups, and is one of the core elements

of human rights-based approaches aimed at eliminating marginalisation and discrimination.<sup>38</sup>

In a 1985 report, the then-Secretary General of the United Nations articulated the link between human rights and participation as follows:

the relationship between popular participation and human rights is more often than not reciprocal: respect for certain rights is indispensable if genuine participation is to develop; and reciprocally, the more participation is organised, the more awareness of fundamental rights is accentuated, and the stronger demand for institutional safeguards designed to protect them.<sup>39</sup>

The principle of participation shares theoretical grounds that underlie human rights (and democratic) frameworks as a whole. Dr Nicholas McMurry identifies the principle of autonomy, elaborating that ‘the concept of individual autonomy that underpins human rights should be expressed collectively where policies to fulfil individual human rights are directed at groups of individuals’.<sup>40</sup> The principle of equality is also a theoretical basis of participation and human rights as a whole. Professor Iris Marion Young wrote that, due to power differentials within society, dominant groups are reflected in the public sphere, while groups that face discrimination and marginalisation from society do not have the same influence. There is therefore a need to proactively include those groups in public deliberations to avoid inequities.<sup>41</sup>

### **(c) Participation as a means of realising other rights**

Crucially, participation processes are a necessary means of realising a range of substantive rights,<sup>42</sup> especially for minority, disadvantaged and vulnerable groups. Participation principles are also closely linked to rights of access to information, freedom of expression and freedom of association; and rule of law principles of transparency and accountability.<sup>43</sup> In particular, participation is important for the prevention of discrimination. A *lack* of participation can also lead to the violation of rights. For example, the ICESCR Committee observed that:

one of the root causes of violations of economic, social and cultural rights ... is the lack of public participation in the governance of the country and the limited involvement of non-governmental organisations in public policymaking.<sup>44</sup>

This sentiment was reflected in *Free & Equal* consultations, with participants observing that a major reason for human rights violations in Australia was the lack of adequate participation of certain groups in decision making.

McMurry has collated UN Committee commentary where obligations to enable participation of affected groups have been discussed. He found that participation is consistently recommended in a range of contexts in relation to realising a range of rights, including both ICESCR and ICCPR rights, and particularly where State measures reduce the enjoyment of rights or directly remove access to rights.<sup>45</sup> He concludes that the wealth of material ‘implies a strong principle of participation deriving from individual human rights in that a failure to engage in participation may *constitute a breach of the right in question*’.<sup>46</sup>

#### **(d) OHCHR guidance on realising participation in decision making**

In 2018, the OHCHR released ‘Guidelines for States on the effective implementation of the right to participate in public affairs’.<sup>47</sup> These guidelines include practical steps to implement participation in decision-making processes of public authorities. Amongst other recommendations, the OHCHR notes that formal, permanent structures may be required to enable participation in decision making – including by coordinating government and relevant civil society organisations to conduct participation processes. In particular, specific permanent mechanisms may be necessary

for the participation of groups that have been historically excluded, or whose views and needs have been inadequately addressed in decision-making processes, such as indigenous peoples, minorities, and persons with disabilities.<sup>48</sup>

How this may apply in Australia is discussed further below. The OHCHR also set out detailed steps for how governments should engage in participation before, during and after decision making, when they are making decisions that will affect particular people or groups. These are outlined in the next text box, and inform the Commission’s general approach to a more specific domestic participation duty.

#### **OHCHR recommendations**

##### *Participation before decision making*

Rights holders should be given the opportunity to participate in shaping the agenda of decision-making processes in order to ensure that their priorities and needs are included in the identification of the subject matter and content for discussion. This can be done, for example, through online consultations, public hearings or forums, or working groups or committees composed of representatives of public authorities and members of the society. Where working groups or committees are established, the relevant public authorities should adopt transparent and inclusive criteria and processes for the representation of members of disadvantaged groups.

Rights holders who are directly or likely to be affected by, or who may have an interest in, a proposed project, plan, programme, law or policy should be identified and notified. Notification should be provided to all such rights holders in a timely, adequate and effective manner. In addition, the participation of any other rights holders wishing to participate should be facilitated. When decisions have countrywide or very widespread impact, for example during constitution-making and reform processes, everyone should be identified as potentially affected.

Information regarding the decision-making process should contain clear, realistic and practical goals in order to manage the expectations of those participating. Information about the process should include, as a minimum, the following elements:

- (a) The type or nature of the decision under consideration. This includes clarity of the subject matter, information on the rationale behind the decisions to be made and the kind of decision(s) that should be taken at each stage of the process;

(b) The range of options to be discussed and decided at each stage, including problems, alternatives and/or solutions, and the possible impact of their outcomes;

(c) The timelines for participation at each stage of the process, which should be adjusted depending on the specific circumstances (e.g., according to the complexity of the issue at stake or the number of rights holders affected by the decision) and should provide sufficient opportunity for rights holders to properly prepare and submit constructive contributions;

(d) The identification of public officials and institutions involved and their capacity to deliver (i.e., their respective roles and various tasks at each stage of the process);

(e) The identification of the public authority responsible for making the decision;

(f) The procedures envisioned for the participation of rights holders, including information regarding:

(i) The date on which the procedure will begin and end;

(ii) The time and venue, including information on accessible infrastructure, of any envisaged participatory processes;

(iii) The modalities and rules of the conduct of the participatory process;

(iv) The public authority or official body to which comments or questions can be addressed or from which additional information on the decision under consideration can be requested, and the procedure and time frame for the transmittal of their response.

(v) Adequate, accessible and necessary information as soon as it is known, to allow them to prepare to participate

effectively, in accordance with the principle of maximum disclosure.

Relevant information should be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against. This should include:

(a) Providing information free of charge or at reasonable cost and without undue restrictions on its reproduction and use both offline and online;

(b) Providing both technical information for experts and non-technical summaries for the general public;

(c) Disseminating information in clear, usable, accessible, age-appropriate and culturally appropriate formats, and in local languages, including indigenous and minority languages. This may entail publications in Braille, easy-to-read and plain language formats;

(d) Disseminating the relevant information as widely as possible, including through the website of the relevant public authority or authorities if that method is effective. Other dissemination channels may include local print media, posters, billboards, mass media (television or radio) and other online sources;

(e) Considering adopting the method of individual notification where appropriate and with due regard to personal data protection.

#### *Participation during decision making*

Rights holders should be able to participate in the decision-making process from an early stage, when all options are still open. This entails, for example, that public authorities refrain from taking any formal, irreversible decisions prior to the commencement of the process. It also requires that no steps be taken

that would undermine public participation in practice, for example large investments in the direction of one option, or commitments to a certain outcome, including those agreed with another organ of the State, a non-State actor or another State.

Any revised, new or updated draft versions of documents relating to the decision(s) should be made public as soon as they are available.

Sufficient time for rights holders to prepare and make their contributions during decision-making processes should be provided. This entails, for example, ensuring that opportunities to participate do not exclusively, or in large part, fall during periods of public life traditionally considered as holidays, such as religious festivals, national holidays or major vacation periods in the State concerned.

Rights holders should be entitled to submit any information, analyses and opinions directly to the relevant public authority, either electronically or in paper form. Opportunities to provide comments should be easily accessible, free of charge and without excessive formalities.

The possibility to submit written comments through online tools should be combined with opportunities for in-person participation. To this purpose, States should consider establishing, for example, multi-stakeholder committees and/or advisory bodies and organizing expert seminars and/or panels and open plenary sessions to allow meaningful participation in all stages of public decision-making processes. Where such structures are established, transparent and inclusive criteria and processes for the representation of members of disadvantaged groups should be adopted.

Participatory events should be free of charge and held in venues that are neutral and easily accessible, including for persons with disabilities and older persons. States should also provide reasonable accommodation, as needed.

Depending on local circumstances and the decision concerned, in-person participation

may be supplemented with online tools, where relevant.

The weight given to contributions received through online platforms should be equal to that given to comments received offline.

The technical capacities and expertise of public officials responsible for the conduct of participatory processes should be strengthened, including in the areas of information collection, meeting facilitation, strategy formulation, action planning and reporting on outcomes of the decision-making process.

Appropriate data collection and management systems for collecting, analysing, deleting and archiving inputs received both online and offline should be developed, and transparency in how those systems are designed and used, and how data is processed and retained, should be ensured.

#### *Participation after decision making*

The outcome of the participation process should be disseminated in a timely, comprehensive and transparent manner, through appropriate offline and online means. In addition, the following should be provided:

- (a) Information regarding the grounds and reasons underlying the decisions;
- (b) Feedback on how the contributions of rights holders have been taken into account or used, what was incorporated, what was left out and the reasons why. For example, a report can be published, together with the decision(s) made, which may include the nature and number of inputs received and provide evidence of how participation was taken into account. This requires that adequate time be allocated between the end of the participatory process and the taking of the final decision.
- (c) Information on available procedures to allow rights holders to take appropriate

administrative and judicial actions with regard to access to review mechanisms.

Opportunities should be available for those who participated to assess the participatory process in order to document lessons learned for future improvement. To this end, relevant public authorities should consider conducting surveys or focus group discussions, including through the creation of dedicated websites, by phone or in person, in order to collect information on various aspects of participation at all stages of the decision-making process. States should ensure that the information collected in this context is representative of the diversity of all rights holders who participated.

In order to allow meaningful participation in assessing the decision-making process, States should provide information on the process, including the following:

- (a) The number, and format, of communications used to notify rights holders;
- (b) The resources allocated to the process;
- (c) The number of people who participated at the various stages of the decision-making process;
- (d) Disaggregated data on those participating, with due regard to personal data protection;
- (e) Participation modalities;
- (f) Accessibility and reasonable accommodation measures.

Participation in the implementation of decisions made should be ensured. Accessible and user-friendly information should proactively be disclosed at all implementation stages. This may be achieved, for example, through the creation of dedicated websites and/or email alerts and the organization of events, conferences, forums or seminars.

When appropriate, States should consider establishing strategic partnerships with

civil society actors, while respecting their independence, to strengthen participation in the implementation of decisions made.

Participation and transparency in monitoring the implementation of decisions made should be ensured. Appropriate frameworks should be developed to evaluate States' performance in relation to the implementation of relevant laws, policies, projects or programmes. The frameworks should include objective, measurable and time-bound performance indicators, including on rights holders' participation in tracking implementation activities. Progress reports on implementation should be made public and disseminated widely, including through the use of ICTs and the organization of conferences, forums and seminars.

Rights holders should have access to key information to allow effective participation in monitoring and evaluating progress in the implementation of decisions. Information on the implementation process should include the following:

- (a) The identification of the authority in charge of the implementation process and its contacts;
- (b) The resources, financial and non-financial, to be used for implementation;
- (c) Whether the implementation involves a public-private partnership, and if such is the case, all information on the role and contacts of the private actor(s) involved;
- (d) Opportunities for participation in the implementation process.

Participation in monitoring and evaluation should be considered as a continuum and include the use of social accountability tools, such as social audits, public expenditure tracking surveys, community score cards, social audits, transparency portals, community media and public hearings.

Extracted from OHCHR participation guidelines.<sup>49</sup>

### **(e) Defining and expressing participation for the purpose of a Human Rights Act**

For the purposes of the Commission's proposal, the principle of participation should be understood as the right to participate in decisions that have an impact on a person or group's human rights. Participation must be active, free, meaningful and accessible. Full and effective participation 'should be understood as a process, not as a one-time event' and embedded systematically into government decision making.<sup>50</sup> A 'core element of participation is that it has *influence on subsequent decisions*'.<sup>51</sup>

Participation is a general concept, and it can take many forms. Genuine consultation with affected group(s) is 'one of its expressions'.<sup>52</sup> In this regard, the OHCHR has identified, in relation to persons with disability that:

full and effective participation and inclusion in society of persons with disabilities is a *general principle* of the Convention, which *also* specifically establishes the *duty on States to closely consult and actively involve persons with disabilities* in the development and implementation of policies that affect them.<sup>53</sup>

Participation encompasses consultation with representative organisations, or spokespeople, where a decision will have an impact on the rights of multiple individuals within a specific group. For example, representative disability organisations should be consulted in policy, lawmaking and regulatory processes that will have an impact upon the rights of persons with disability in Australia, such as NDIS policy.

First Nations peoples have a strong, standalone, collective right to participation on matters that affect the rights of Indigenous peoples, as elaborated within UNDRIP – therefore representative Aboriginal-controlled bodies should have a voice on all policies and laws that affect the rights of First Nations communities, such as health and justice policies.

In addition to consultation with affected groups, participation principles are also realised by ensuring individuals participate in decisions that directly affect their own lives. For example, a decision involving child protection measures should enable the affected child to be heard throughout the process based on their evolving capacity. This individual aspect of participation is also a procedural fairness requirement, as discussed in the next section.

The Commission's proposed 'participation duty' focuses on three groups identified in international treaties to which Australia is a party as having specific participation rights: First Nations peoples; people with disabilities; and children. It is designed to reflect overarching participation and procedural principles, drawing content from both international treaties and the common law. It would be a means of incorporating elements from thematic treaties that would not otherwise be directly realised through the list of rights in the Human Rights Act.

The participation duty would require the embedding of processes to realise individual participation, representative participation and collective rights of participation, with the first arising in relation to specific administrative decisions impacting an individual, and the latter two requiring consultation on legislative, regulatory and policy development that affect the rights of people who fall within a particular group.

In practice, this will mean that when a proposed law or policy generally affects a group of people, engagement should occur through representative organisations. Where a law or policy specifically affects a particular subgroup (e.g. a particular First Nations community in a locality; people with a particular disability; children of a certain age or attending a particular type of school) engagement with the specific cohort may be required due to the proximity of the potential impact of the law or policy. The participation duty would not mean that every individual has a right to participate – rather government must identify who it has engaged in consultations, why that was appropriate in the circumstances, and how the consultation is connected to and impacts the reform in question.

#### **(f) Procedural fairness under the common law**

The common law duty of procedural fairness, or natural justice,<sup>54</sup> underlies both the proposed participation duty and the equal access to justice duty (discussed in section 7.9).

The common law requires decision makers to accord a person procedural fairness before an administrative decision is made that affects their rights or interests.<sup>55</sup> Procedural fairness is concerned with the fairness of the procedure by which a decision is made, rather than the substance of the decision.<sup>56</sup> There are two requirements of the duty to afford procedural fairness: a fair hearing, and the avoidance of bias. The fair hearing rule provides that a decision maker must give the person affected by the decision an opportunity to make submissions and be heard before the decision is made, and the bias rule requires decisions to be made by an independent and impartial body.

There are also statutory protections for procedural fairness. It is the first ground of judicial review specified under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), in s5(1)(a).

Procedural fairness is reflected within human rights instruments, in relation to equality before the law and the right to a fair trial.<sup>57</sup> In a number of democratic countries, procedural fairness has been guaranteed through the Constitution or in legislative human rights instruments – including in the United States, Canada, New Zealand and the UK (via Article 6 of the European Convention on Human Rights).<sup>58</sup> Procedural fairness – specifically the fair hearing rule – is premised on the same basic understanding as broader participatory rights that arise under international law: it is not fair to make decisions that affect a person (or persons) without providing them with an opportunity to participate in the process.

The notion of procedural fairness has origins in ancient times, recurring as a ‘natural law’ in various civilisations throughout history.<sup>59</sup> Former High Court Chief Justice, the Hon Robert French AC, has observed that, ‘as a normative marker for decision-making it predates by millennia the common law of England and its voyage to the Australian colonies’.<sup>60</sup> That broader normative influence continues today. As Chief Justice French has said:

There is little doubt that the norms of procedural fairness reach well beyond the confines of the courtroom in judicial proceedings or judicial review of administrative decisions. They are important societal values applicable to any form of official decision-making which can affect individual interests.<sup>61</sup>

In the common law tradition, procedural fairness initially applied to decisions made by courts and related to specific rights and interests associated with ‘personal liberty, status, preservation of livelihood and property’.<sup>62</sup> Over the late 19<sup>th</sup> and 20<sup>th</sup> century, it was extended beyond the court system to a variety of government decisions affecting a range of interests, reflecting the expansion of the operations of government instrumentalities over that time period.<sup>63</sup>

The range of rights and interests currently protected by the principle of procedural fairness is broad. However, in order for a decision maker to have a duty to provide a fair hearing to a person, the power being exercised must be apt to affect the person as an 'individual' and in a manner that is substantially different from the public at large.<sup>64</sup> A single decision may affect the rights or interests of more than one person. In those cases, the content of procedural fairness will vary. A person is more likely to be entitled to a hearing if the decision is one that requires actual consideration of their individual circumstances.

The principle of procedural fairness is 'presumed by the courts to apply in the exercise of virtually all statutory powers'.<sup>65</sup> However, it may also be excluded by a 'a clear, contrary legislative intention'.<sup>66</sup> Where there are no clear legislative statements in a statute that procedural fairness is intended to be excluded, it is generally presumed that the legislature did not intend to exclude the duty, and courts are 'reluctant' to find that it has been excluded by the legislature by implication.<sup>67</sup>

Nonetheless, there are some circumstances where procedural fairness may be excluded, such as where 'urgent decisions need to be made to prevent a pressing or serious harm'.<sup>68</sup> Specific statutory powers may also be inconsistent by their nature with an obligation to afford procedural fairness, and therefore an obligation will not be read in by the courts. The ALRC provides the example of 'a power to forcibly enter premises in case of fire or natural disasters'.<sup>69</sup>

There is no fixed content of the procedural fairness duty. In the pivotal case of *Kioa v West*, Mason J stated that the content of the duty 'depends on the construction of the statute and the circumstances of the case including, among other things, the nature of the inquiry, the subject-matter and the rules under which the decision maker is acting'.<sup>70</sup> Justice Brennan observed that procedural

fairness principles have a 'flexible quality which, chameleonlike, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power'.<sup>71</sup> Expert commentators on administrative law have said that

Each issue might bear quite differently on the procedural content of the hearing rule. If it was accepted that the circumstances required a decision to be made urgently, that would greatly reduce the content of the hearing rule. If it was accepted that a decision would have especially serious consequences upon a person affected, the hearing rule might require detailed procedures.<sup>72</sup>

What is generally required is that a person exercising statutory power 'adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power'.<sup>73</sup> There will be a breach of procedural fairness if the procedure adopted results in a 'practical injustice' by preventing the person from effectively making their case for a favourable exercise of the power.<sup>74</sup>

Key elements of procedural fairness have been outlined in case law, including in *Kioa v West*. The ALRC summarised them as follows. Procedural fairness requires the giving of prior notice that a decision that may affect a person's interests will be made. This has been called a 'fundamental' aspect of the duty.<sup>75</sup> Additionally, there should be disclosure of critical issues to be addressed by the decision maker, alongside information that is 'credible, relevant and significant to the issues'.<sup>76</sup> A substantive hearing in oral or written form generally should be provided, with a reasonable opportunity to present a case.<sup>77</sup>

In *SZSSJ*, the High Court said:

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry

requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person.<sup>78</sup>

Procedural fairness principles enable people to participate in administrative decisions that concern them. 'Participation' is not foreign to the common law – indeed, 'individual' participation in decision making is a central precept.

In the UK, the common law regarding procedural fairness has developed to include a consultation duty that arises where a decision will have a specific effect on a definable group. A set of principles have developed around the consultation duty, called the 'Gunning' principles – these are discussed in the next section.

In Australia, courts conceptualise procedural fairness as applying *only* to decisions that directly affect an individual's rights and interests. As noted above, these may be decisions that affect the rights and interests of a number of people at the same time.<sup>79</sup> Courts have stopped short of imposing procedural fairness requirements for decisions that affect the public (or a section of the public) generally.<sup>80</sup> Professor Andrew Edgar refers to this as the 'public exception' to the right of procedural fairness as set out in *Kioa v West*, where the court stated that procedural fairness does not apply to decisions that affect an individual as a 'member of the public or a class of the public'.<sup>81</sup> He observes that the consequence of the public exception is that:

Australian courts do not impose on decision makers procedures that are suited to public interest decision-making. More specifically, they have not developed the content of the procedural fairness hearing rule to include public consultation requirements.<sup>82</sup>

Aronson, Groves and Weeks argue that it is unlikely that consultation requirements would be developed through the common law in Australia, noting the cautious approach taken by the Australian judiciary regarding executive activity and policy decisions.<sup>83</sup> Australian courts only review public consultation processes when they are required by a statute,<sup>84</sup> and 'appear reluctant to supplement those duties with additional common law requirements'.<sup>85</sup>

This was illustrated by the case of *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*.<sup>86</sup> In this case, the applicants sought judicial review of decisions made by the Federal Minister for the Environment and Water Resources under the *Environment Protection and Conservation Act 1999* (Cth) (EPBC Act). The EPBC Act set out certain public consultation requirements, as part of an environmental assessment and approval process, that the Minister had to fulfil when proposing to take a 'controlled action'. The court held that the public consultation process was aimed at permitting the public at large to comment on proposed projects in order to promote informed decision making, but was not specifically directed to people whose rights or interests might be directly affected. Further, there were indications in the Act that any procedural fairness obligations were limited to particular statutory obligations to the proponent of the project. As a result, the public had no right to procedural fairness beyond the consultation process set out in the EPBC Act.

The Commission considers that there are good grounds for imposing a broader duty on public authorities to engage with First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their interests. This would involve these groups in decision making processes in a way that is deeper than is currently available through the principles of procedural fairness. The Commission considers that a such a participation duty could be embedded as a *statutory* duty in the Human

Rights Act and assessed by courts on the basis of objective procedural principles. This would help to ensure that consultation processes are properly embedded into the operations of public authorities.

## 7.4 Examples from other jurisdictions

Multiple jurisdictions have incorporated participation mechanisms and principles in various forms. The following examples are included to illustrate practical means of systematically incorporating participation processes into government practices.

### (a) Duty to consult on decisions by public authorities

- *Gunning principles (UK)*

The ‘Gunning principles’ were developed by the UK courts as a means of determining when a ‘duty to consult’ arises, and assessing the adequacy of consultation processes. Arising from the lower courts over a number of years, it was ultimately endorsed by the UK Supreme Court in the *Moseley Case* in 2014.<sup>87</sup> Since then, the Gunning principles have formed a strong legal foundation from which the legitimacy of public consultations is assessed, and are frequently referred to as a legal basis for judicial review decisions.<sup>88</sup>

Case law provides that, ‘when decisions will have a specific impact on a definable group, fairness and natural justice may entail a duty to consult with those affected by the decisions, depending on the context of the decision’.<sup>89</sup> There is no general duty to consult, however a consultation duty may arise where there is a statutory duty to consult; where there has been a promise to consult; where there has been an established practice of consultation; and where, in exceptional cases, a failure to consult would lead to a conspicuous unfairness.<sup>90</sup>

Examples of where there is a statutory duty to consult include:<sup>91</sup>

- The *Local Government Act 1999*, which prescribes that public authorities have a duty to ensure ‘continuous improvement in the way in which its functions are exercised’ and includes a duty to consult representatives of persons who use the services of the authorities.<sup>92</sup>
- Health and social care legislation.<sup>93</sup>
- The development of Environmental Impact Assessments.<sup>94</sup>
- Anti-discrimination law. There is a requirement to conduct an ‘equality analysis’ in order to comply with the ‘Public Sector Equality Duty (PSED)’ under the *Equality Act 2010*. The PSED requires public authorities to have ‘due regard’ to a range of equality objectives. Consultation through the equality analysis is a way to show that the PSED has been satisfied.<sup>95</sup>

The Gunning principles set out objective standards to determine the quality of consultations. Where there is a duty to consult, they require consultations to be carried out ‘fairly’; and what is ‘fair’ depends on the factual circumstances. The decision maker will generally have broad discretion about how a consultation should be carried out and what should be consulted upon – however the discretion of the decision maker is bounded by the principles adopted in *R v Brent London Borough Council, ex parte Gunning*.<sup>96</sup> They are as follows.

- Consultation must take place when the proposal is still at a formative stage. Public authorities must not have already made the decision before consultations, but may consult on a preferred option without canvassing all possible options, as long as engagement occurs with an open mind.<sup>97</sup>
- Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response. Consultees must have enough information to provide informed input.<sup>98</sup>

- Adequate time must be given for consideration and response. Unless statutory time requirements are prescribed, there is no necessary time frame within which the consultation must take place. Courts will take into account the level of urgency of the decision when considering fair timeframes.<sup>99</sup>
- The product of consultation must be conscientiously taken into account. This may be shown by the decision maker indicating that they have understood the points being made by the responses and have considered them.<sup>100</sup>

The contents of each of these principles have been fleshed out in case law. Case law has also explored processes for identifying who should be consulted. The courts have rejected the notion that ‘a decision maker can routinely pick and choose whom he will consult’, since ‘a fair consultation requires fairness in deciding whom to consult’.<sup>101</sup> When there are large numbers of individuals who are affected, it is appropriate to consult with representatives.<sup>102</sup> For example, in a case involving the closure of a residential home, residents did not have to be consulted individually before the decision could be made.<sup>103</sup>

Where a court finds that a decision is unlawful as a result of a breach of a duty to consult, the court has discretion as to the remedy. Decisions may be quashed if there has been inadequate consultation, including if there is a real possibility that a different outcome may have been reached – and the courts have been reluctant to find definitively that the same outcome would have occurred regardless of consultation, in circumstances where the process has been found to be unfair.<sup>104</sup>

There are clear guidance materials on these principles, including materials developed by the UK Cabinet and the Welsh Government.<sup>105</sup> Similar documents are promulgated by public agencies.

While the Gunning principles have incomplete coverage, they provide a model for a workable mechanism for public consultation in advance of significant public sector decisions.<sup>106</sup> These rules are usually raised in cases involving local councils and health authorities, but this form of participation could also apply to decisions which affect rights.

The following are examples of cases where public authorities have had their decisions successfully challenged via judicial review for failing to abide by the Gunning principles.

### ***R (KE) v Bristol City Council [2018] EWHC 2103 (Admin)***

In this case, the court quashed Bristol Council’s decision not to consult on a budgeting decision that impacted funding for special educational needs. The special needs cuts were incorporated into ‘general’ budget consultation, rather than specifically consulting on the education cuts. It was held that not only did Bristol Council have a statutory duty to consult but it also had a

common law duty. The latter was on the basis that not consulting particular stakeholders who would be significantly affected by such a significant and focused decision was unfair. The nature, extent and impact of the specific decision being taken determines whether a duty to consult arises.

Summary extracted from Mondaq.<sup>107</sup>

***R (Buckingham) v NHS Corby Clinical Commissioning Group [2018] EWHC 2080 (Admin)***

This case concerned a decision by the Clinical Commissioning Group (CCG) to change the provision of health services. The CCG had engaged in a lengthy period of public engagement, but had made it publicly known that it intended to consult on the chosen proposal following that engagement. It later decided not to follow through on that intention on the basis that its plan had directly and substantially been influenced by and during the public engagement and there was to be no significant change to the existing service provision. The court held that since assurances had been made that consultation would follow the public engagement, there was a legitimate expectation that this would happen and there was no good reason for not fulfilling this expectation. The court noted that while there had been some public engagement on the development of the proposal there had not been any engagement on the proposal itself. The CCG's decision was quashed because of the failure to consult.

Summary extracted from Mondaq.<sup>108</sup>

***R (Article 39) v Secretary of State for Education***

This case concerned consultation obligations in the context of the Covid-19 pandemic. The charity, Article 39, which promotes the rights of children, challenged regulations made by the Department for Education (DFE) the regulations were prompted by the pandemic and concerns about the staffing challenges faced by local authorities. They relaxed a number of requirements, such as statutory timescales contained in the regulations governing the children's social care system. Before making the amendments, DFE consulted informally with local authorities, adoption agencies and service

providers. It did not consult the Children's Commissioner for England (CC) or any other organisation representing the rights of children. The Court of Appeal ruled this failure to consult to be unlawful.

The Court found that some of the regulations made under the *Care Standards Act 2000* (UK) were subject to a statutory duty in that Act to consult the CC. It found that a duty to consult on the rest of the regulations had arisen by way of a legitimate expectation based on the established practice of DFE consulting the CC when considering regulatory changes of this sort. The exceptional circumstances of COVID were recognised as relevant to the way the consultation was conducted. The court accepted that it was appropriate for DFE to consult stakeholders on short timescales by informal means of emails and phone calls.

However, the court was critical of the DFE decision not to consult the CC or any other organisation representing the rights of children. It emphasised the fundamental principle that if a public body chooses to consult, whether or not it is under a duty to do so, it must consult properly and fairly. The court held that DFE had conducted the consultation on an entirely one-sided basis and excluded those most directly affected by the changes.

The court left open the question of whether exceptionally urgent circumstances might in some cases override a duty to consult. However, it was not prepared to accept that possibility in this case, because it was clear from the facts that there was no good reason why DFE could not have consulted the CC at the same time and on the same basis as other stakeholders, in order to ensure a fair consultation.

Summary extracted from Pinsent Masons.<sup>109</sup>

- *Aarhus principles (International Environmental Law)*

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998.<sup>110</sup> The Aarhus Convention establishes rights of the public (individuals and their associations) with regard to the environment. The Convention regulates the decision-making process of ‘public authorities’ – inclusive of governments, international institutions and private bodies with public functions. Parties to the Convention are required to make provisions so that public authorities at national, regional and local levels realise the Aarhus rights.<sup>111</sup> The EU has implemented the Convention.<sup>112</sup>

The Convention is focused on participation, and ‘seeks to indirectly secure a substantive right to a healthy environment by establishing procedural rights’.<sup>113</sup> In this regard, ‘procedural rights are considered essential to securing substantive rights’ and some commentators argue that this focus ‘can lead to greater protection for the environment than the establishment of substantive rights at law’.<sup>114</sup> The Convention has been described as ‘the most stunning breakthrough to date’ regarding elements of public participation.<sup>115</sup>

The Convention has three main pillars:

Access to information: the right of everyone to receive environmental information that is held by public

authorities. This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. There are exemptions for access to information based on national security or commercial confidentiality.

Public participation in environmental decision-making [discussed below].

Access to justice: the right to review procedures to challenge public decisions that have been made without respecting the two above rights or environmental law in general.<sup>116</sup>

The Convention refers to both the ‘public’ and the ‘public concerned’. The latter term includes persons or organisations affected or interested in environmental decision making, and to whom particular participation duties apply. The interest of the ‘public concerned’ is not confined to a recognised legal interest.<sup>117</sup>

The ‘public concerned’ has a right to be notified early in the decision-making process.<sup>118</sup> So, for example, the UK introduced an obligation on public authorities to single out the ‘public concerned’ and if needed, contact them directly, rather than relying on general publicity.<sup>119</sup> The inclusion of organisations as ‘public concerned’ also means that NGOs do not have to show an interest in environmental matters and are deemed to have standing (in those countries that adopt a ‘sufficient interest’ test) to challenge procedures.<sup>120</sup>



The public participation provisions are set out in Articles 6–8, and include the following standards:

- Participation should occur when all options are still open,<sup>121</sup> on decisions to permit certain types of activities during the preparation of plans, programs and policies related to the environment. Parties must also promote effective public participation during the preparation of legislation and regulations that ‘may have a significant effect on the environment’.<sup>122</sup>
- For activities that ‘may have a significant impact on the environment’, the Convention requires Parties to inform the public concerned early in an environmental decision-making process, and in an adequate, timely and effective manner.<sup>123</sup> The Convention lists the kinds of information that must be provided, including: the proposed activity; the nature of possible decisions; the public authority responsible for making the decision; the envisioned procedure including opportunities for the public to participate; and how to access information relevant to decision making.<sup>124</sup> There is a general obligation of disclosure that provides that the ‘public concerned’ should have access to ‘all information relevant to the decision making ... available at the time of the public participation procedure’.<sup>125</sup> This information should be provided ‘free of charge and as soon as it becomes available’ and should include a non-technical summary.<sup>126</sup>
- Participation procedures should incorporate written submissions or public hearings,<sup>127</sup> and the timeframes must be ‘reasonable allowing for sufficient time for the public to prepare and participate effectively’.<sup>128</sup> This is assessed on a case-by-case basis, with decision makers having some flexibility.<sup>129</sup> Authorities must take the outcomes of the public participation into ‘due account’ in their final decision, provide reasons for the decision that reflect the public input, and inform the public promptly of the outcome.<sup>130</sup> The term ‘due account’ is not defined and is within the decision maker’s discretion.<sup>131</sup>

## (b) Consultation during the legislative development process

### • *Regulatory and legislative ‘impact statements’ (Victoria)*

A number of Australian jurisdictions have passed legislation to allow greater public participation in the making of delegated legislation.<sup>132</sup> While these consultation provisions are legal requirements, the legislation in most jurisdictions provides that a failure to comply with them does not result in the delegated legislation being invalid.<sup>133</sup> This is similar to the operation of statements of compatibility with human rights at the federal level.<sup>134</sup> Nevertheless, establishing

the rule has a strong normative effect on compliance.

In Victoria,<sup>135</sup> specific *human rights* considerations must be taken into account in legislative and regulatory consultation processes.

‘Regulatory Impact Statements’ and ‘Legislative Impact Assessments’ are required under the *Subordinate Legislation Act 1994* (Vic) (SLA). A Regulatory Impact Statement is developed for ‘proposals that may result in or change subordinate legislation’ and Legislative Impact Assessments for proposals that ‘may result in, or change, primary legislation’. They are

required for proposals that are 'likely to impose a significant economic or social burden on a sector of the public'. The threshold for impact is that the proposal 'is likely to be greater than \$2 million per year, as well as other unquantifiable, intangible or *human rights impacts*'. They are also required if the overall effects are unlikely to exceed \$2 million per year, but there are *concentrated effects on particular groups or sectors*. The Parliamentary Scrutiny of Acts and Regulations Committee reviews these statements and can receive complaints about the consultation process.

Early consultation is required for the development of all proposals. This includes consultations with 'any sector of the public (business groups, community groups, not-for-profits) that may face significant economic or social burden' and Ministers, departments and agencies, including for human rights impacts.<sup>136</sup> Consultation should also occur on the final analysis and preferred option.<sup>137</sup>

Sections 6, 11 and 12 (for statutory rules) and sections 12C, 12I and 12J (for legislative instruments) of the SLA set minimum requirements for public consultation before and after a Regulatory Impact Statement / Legislative Impact Assessment is completed. For an Regulatory Impact Statement these include draft regulations settled by the Office of the Chief Parliamentary Counsel, the notice of a Regulatory Impact Statement release, consideration of submissions, and a notice of the final decision.<sup>138</sup> Legislative Impact Assessments are not subject to the same requirements, as the information in them is used to inform Cabinet deliberations and is confidential unless there is Ministerial approval for release, however consultation on legislative proposals should still 'be undertaken wherever possible'.<sup>139</sup>

The consultation section of a Regulatory Impact Statement or Legislative Impact Assessment (where applicable) needs to include who has

been consulted, and how their views have been reflected in the impact assessment, and the planned public consultation process following the public release of a Regulatory Impact Statement or Legislative Impact Assessment.<sup>140</sup> There is a minimum public consultation period of 28 days, however the Victorian Government policy is that consultation should be at least 60 days, wherever feasible.<sup>141</sup> Agencies must advertise the release of a Regulatory Impact Statement and this notice must provide context on the proposal and the contents of the RIS, and seek public comment on the Regulatory Impact Statement. Regulatory Impact Statements must also be available in electronic form on a website.<sup>142</sup>

Agencies must consider all public submissions and comments received on the Regulatory Impact Statement, and must provide reasons for the direction taken in the final regulations, broadly addressing any general issues raised in the submissions.<sup>143</sup> In addition, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament expects agencies to send responses 'to those who have taken the time and effort to send in a submission'.<sup>144</sup> Victorian guidance states that the response

should clearly demonstrate that matters raised in public submissions have been appropriately considered. If there are a large number of submissions, a general letter with an attachment covering the various issues raised, and documenting how each issue has been addressed, can be used.<sup>145</sup>

Notice of the Minister's decision to make or not make the proposal must be published, and a statement of reasons made available on the website.<sup>146</sup>

## 7.5 Including a participation duty in the Human Rights Act

This section outlines the Commission's proposal for how a participation duty would operate through a Human Rights Act. Subsequent sections focus on how the duty would specifically manifest in relation to the three groups to which it would apply: First Nations peoples, children, and persons with disability. The current limited participation for these groups is a critical, systemic failure in policy making. The Commission argues that a positive duty would create a process-based solution to respect the right to self-determination of First Nations peoples, as well as foundational principles of the CRC and CRPD.

### (a) Nature of the participation duty

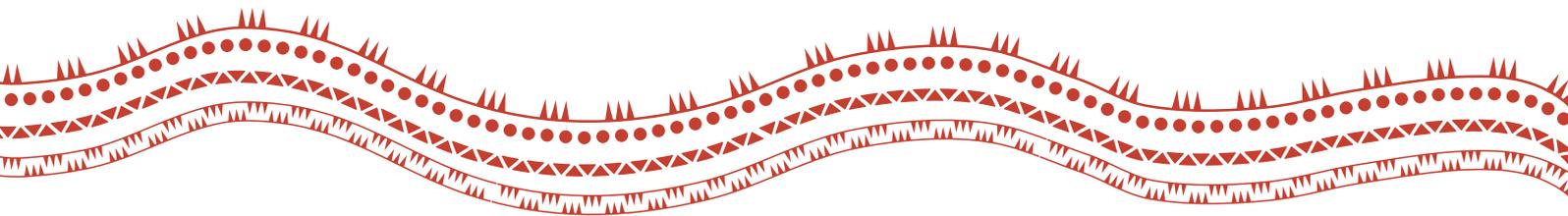
The Commission's proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures around consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in decision-making processes, by reference to key treaties. This could initially be set out through Commission guidelines that expand upon Human Rights Act provisions, and fleshed out through court processes.

The participation duty would primarily operate as a duty on public authorities (the Executive). It would also apply to proponents of legislation in a different respect.

- This duty would be *binding* on public authorities with obligations under the Human Rights Act. It would require public authorities to ensure the participation of First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights. This would form part of the positive duty on public authorities to properly consider human rights in decision-making.
- This duty would include a *non-binding* requirement for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in statements of compatibility. This would also be subject to scrutiny by the Parliamentary Joint Committee on Human Rights. Failure to engage this process would not affect the validity of the instrument in question.

### (b) Participation duty on public authorities

The Commission envisions that the participation duty will apply to decisions made by public authorities that affect the rights of First Nations peoples, children and people with disabilities. The duty will apply differently to each of these groups, as defined by the relevant international instruments. However, they all incorporate the same underlying requirement: that when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions. The cross-cutting duty will incorporate positive requirements to enable participation for:



- First Nations peoples based on articles 18 and 19 of UNDRIP (collective consultation rights)
- children, based on articles 3 and 12 of the CRC (best interests and ‘right to be heard’)
- people with disabilities, based on articles 4(3) and 12 of the CRPD (participation and equal recognition before the law).

The participation duty will arise when public authorities are developing policies, or making decisions, that affect the rights of these three groups. The duty would arise when decisions are being made that directly concern these groups or where the decision is likely to have a disproportionate impact on the group in question. For example, changes to planning policies may have a disproportionate impact on people with disabilities if they affect accessibility.

Where decisions are made that affect groups of people, the decision maker need only show that there was sufficiently fair and representative consultation, not that participation occurred comprehensively with all relevant bodies or individuals.

There will be no distinct cause of action available based on failure to enable participation. Rather, when a case is brought alleging a breach of a specific right protected by the Human Rights Act, a failure to enable participation as part of the decision-making process may demonstrate that there has been a failure to give proper consideration to that right, which would be a breach of the positive duty to uphold the right in question. The ability to raise the participation duty will therefore be linked to a specific decision engaging specific protected rights, as well as meeting standing requirements in accordance with the Human Rights Act. This will prevent vague or broad standalone claims in relation to participation being made.

### Positive duty

The positive duty is discussed in chapter 6. In summary, the positive duty applies to all public authorities, including government entities and contractors. At the state and territory level, the positive duty comprises two ‘limbs’:

- a duty to give proper consideration to human rights when making decisions; and
- a duty to act compatibly with human rights.

The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. The requirement to ‘act’ compatibly with human rights is a substantive obligation on public authorities.<sup>147</sup> An ‘act’ includes a failure, refusal and proposal to act – and may also include ‘decisions’ in terms of a substantive decision that is made (as opposed to human rights consideration in the course of decision making).<sup>148</sup>

The two positive duty limbs described in the text box above would comprise the positive duty at the federal level. The participation duty would link with the first limb of the positive duty – the procedural requirement to properly consider human rights.

The Commission anticipates that it will have a role in developing guidance for public authorities on how to implement the participation duty. Some public authorities will be called upon to apply it regularly (for example, child protection authorities in relation to children), while others may only need to apply it intermittently, depending on the nature of a proposal or decision. Therefore, more specific guidance and training may be required in some areas of the public service to embed the principles into everyday practice.

- *Participation guidelines*

In the Commission's view, the following set of overarching guidance (inspired by the UK, Aarhus and Victorian regulatory approaches, as well as OHCHR guidelines) encompasses key considerations for determining the quality of a general participation process. These principles could inform decision making and policy development in all federal public authorities and could constructively inform upstream law-making processes.

- Participation (via genuine consultation) should occur when an administrative decision or policy will affect the human rights of an individual or a particular group. Noting Australia's international obligations and the right to participation in the CRC, CRPD and UNDRIP, a specific *duty* to consult should be in place in relation to First Nations people, children and persons with disability – with specific considerations related to each relevant instrument.

- Determining who to consult will depend on proximity. Where there is likely to be a direct, distinct impact on a particular sub-group, that cohort should be directly consulted: for example, a proposal affecting a particular region should involve consultation of relevant people in *that* region. Other proposals that involve an impact on a more general group, for example, persons with disability as a whole, should incorporate consultations with representative disability organisations.
- Consultation should occur at a formative stage.
- Sufficient information, including reasons for the instrument/policy under consideration, should be provided to participants to inform consultation.
- A reasonable timeframe should be provided for consultation/input, taking into account the level of urgency.
- The input should be conscientiously taken into account when developing the final approach. Some form of explanation/reasons for the final decision should be provided in light of the consultation outcomes.
- Consultation processes should be fair and conducted in good faith. Fairness of consultation encompasses decisions about who to consult and the representative nature of the consultations.
- Consultations, and information about consultations, should be accessible in nature. This may mean providing information in languages other than English, ensuring consultations are accessible for people with disabilities and culturally safe for First Nations participants.

Where decisions by public authorities that have a positive duty under the Human Rights Act will affect the rights of First Nations peoples and communities as a collective, the Commission anticipates that participation processes would be facilitated through the proposed Voice mechanism, in line with UNDRIP principles and standards, and embedding Articles 18 and 19 of UNDRIP (see section 7.6).

When individual children are affected by a decision, the 'best interests' principle should be applied, and the child should be heard, with their views given due weight in accordance with their age and maturity. When children as a group are affected by proposed policies or laws, the best interests of children should be proactively considered, and children should be consulted as part of the development process, which may involve the creation of specific, permanent consultation mechanisms for children (see section 7.7).

Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. This should be achieved through the implementation of the ALRC's National Decision-Making Principles. When decisions have an impact upon persons with disability as a group, those persons through their representative organisations should be consulted as part of the process, which may involve the creation of a specific, permanent consultation mechanism (see section 7.8).

- *Limitations on the duty*

A limitations assessment will apply to the participation duty in the same manner as limitations to rights generally. Participation processes may be less comprehensive or done away with entirely if this can be justified through the application of proportionality criteria. Limitations must be necessary to achieve a legitimate aim or a pressing social need and must be proportionate to that aim. For example,

if a decision needs to be made urgently, the timeframes for consultation could be reduced, or consultation may be forgone, depending on the nature of the circumstances. If a decision maker can show that they have turned their mind to the question of whether participation is required, and engaged in a process that resulted in a justifiable finding that it was not required in the particular circumstances, then they will have complied with their obligations under the Human Rights Act.

Assessing the extent to which participation may be limited should also take into account the extent of the impact of the decision on a particular group – if it is likely to have a direct, strong and negative impact on the enjoyment of rights, participation will be more difficult to justifiably forgo. Additionally, limitations may apply to the consultation process (for example, providing less information to participants about the decisions where national security considerations are in play) in preference to forgoing participation altogether. Importantly, choosing not to engage in participation merely because of administrative convenience, when there is no other legitimate reason for not conducting a participation process, will not be a sufficient justification.

As with all human rights in a Human Rights Act, the intention of Parliament may be that the duty should not apply in relation to certain laws. This may be made clear expressly in the legislation in question, or read in by courts as a necessary implication. In some cases, and in relation to certain kinds of decisions, it will be clear from the statutory framework that participation was not intended or required in a particular context. For example, some operational decision making by police, such as a decision to arrest someone, and some emergency health decisions.

- *Applying the duty*

Participation principles are not foreign to the public service or Australian law, and are implemented in a piecemeal fashion in different areas. Public authorities that work closely with First Nations peoples, children and persons with disability will already have familiarity with international standards. A participation duty would enable a nationally consistent process for participation, by embedding processes and standards comprehensively across the public service, along with objective criteria to assess compliance. As noted, the development of guidance and codes of conduct, which are in place in other jurisdictions with similar requirements, would be of assistance. Regular training on how to implement the principles would also need to be facilitated, alongside training on implementing the positive human rights duty (discussed in chapter 6, section 6.6).

- *Reviewing the duty and assessing compliance*

As in the UK in relation to the Gunning principles, objective criteria can be applied by the courts in an ordinary fashion when determining whether there was a breach of the participation duty due to failure to consult in relation to particular rights. As with other judicial review processes, the decisions of public authorities can be assessed according to set procedural standards, and informed by international treaties. The principles are flexible and will vary in accordance with the specific facts and circumstances of the case, as well as developing through jurisprudence over time. The failure to meet the procedural standards and rights considerations relevant to the participation duty may result in a breach of the positive duty on public authorities (and the decision would therefore be unlawful under the Human Rights Act).

The Commission could also have a reporting and assessment role regarding the quality of consultation processes in relation to particular public authorities, either arising out of individual complaints in relation to rights in the Human Rights Act, or on its own initiative.

### **(c) Non-binding participation duty on proponents of legislation**

The participation duty would also have a non-binding application on proponents of legislation to facilitate and report on participation during the legislative development process. If proponents of legislation do not meet this standard, this would not affect the validity of the legislative instrument. This element of the duty is intended to be a normative standard that would result in better compliance with participation rights in law making.

There would be a role for parliamentary scrutiny of participation undertaken by proponents of legislation. A consultation section could be added to Statements of Compatibility, developed through the legislative drafting process, and assessed by the PJCHR in the same manner as human rights impacts are currently considered by this Committee. To enable this, amendments should be made to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) – specifically sections 8 and 9 which deal with the contents of Statements of Compatibility.

Additionally, there should be a process for complaints to be made to the PJCHR when a consultation process has not been undertaken effectively – and the PJCHR should have power to review and report the adequacy of consultation processes.

This could be modelled on the approach taken to Regulatory Impact Statements by the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian Parliament. The Victorian Guide to Regulation explains the role of the SARC as follows:

After statutory rules or legislative instruments are made, the SARC must be supplied with copies of the Regulatory Impact Statement (RIS), the Commissioner [for Better Regulation]’s final assessment letter for the RIS, the regulations or legislative instruments, all public comments received during the consultation period, and the relevant department/agency’s response to the main issues raised in the public comments. The SARC will review the regulations in accordance with the criteria relating to the adequacy of the statutory head of power authorising the regulations; their consistency with principles of justice and fairness; and conformity with the processes for regulation-making specified in the Act.

The Act provides that, if it is of the belief that any of these criteria has not been met, the SARC may make any recommendations to Parliament that it considers appropriate, including the disallowance of the regulation, wholly or in part, and the suspension of the regulation. In practice, however, the SARC has indicated that, where it is considered that a statutory rule can be rectified by amendment, the Committee will approach the Minister privately to seek amendment rather than report to Parliament.<sup>149</sup>

## 7.6 First Nations participation

This section outlines international principles associated with the right to self-determination; examples of international practice; and the Commission’s proposal for how a participation duty would operate in relation to First Nations peoples.

### (a) UNDRIP standards

In 2009, the Australian Government accepted UNDRIP and has referred to it as a standard by which it is measured.<sup>150</sup> UNDRIP was developed to articulate how the existing human rights standards should be applied to the specific circumstances and histories experienced by indigenous peoples globally. UNDRIP does not create new or separate rights, but rather articulates what rights protection is required so that First Nations peoples may fully benefit from human rights standards. Key elements of UNDRIP include rights and principles associated with:

- self-determination, autonomy and participation, consultation and consent
- equality and non-discrimination
- cultural integrity
- lands, territories and resources, development with identity, redress and compensation.<sup>151</sup>

While UNDRIP does not itself create legally binding obligations, it echoes many of the rights already contained in other human rights treaties, but with a focus on Indigenous peoples.<sup>152</sup> Specifically, UNDRIP articulates the right to self-determination contained in common article 1 of the ICCPR and ICESCR. Article 1(1) states that ‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. The right to self-determination has developed to require participation rights of Indigenous peoples and certain minorities within an existing State. Indigenous participation principles are also reflected within General Comments of the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child in relation to cultural and non-discrimination rights.<sup>153</sup>

UNDRIP has been described as ‘ground-breaking’<sup>154</sup> for reflecting Indigenous participation as a collective right.<sup>155</sup> Additionally, rather than leaving ‘the process or modalities of participation entirely to the discretion of the parties’, UNDRIP places an obligation on States to guarantee the right to collective participation.<sup>156</sup> Mere electoral participation is not sufficient to guarantee Indigenous participation rights, and ‘structural changes to political systems’ may be required.<sup>157</sup>

A key means of realising self-determination for Indigenous peoples is therefore through participation rights and political representation through established processes within a democracy. Professor David Held relates politics ‘to the decision-making process and those who press their claims upon it’.<sup>158</sup> It is through participation that Indigenous peoples are able to influence laws and engage in decision making that affects their rights.

The centrality of participation to Indigenous self-determination is uncontroversial. Former Special Rapporteur James Anaya observed that even if all aspects of self-determination have not reached the requisite level of acceptance to be customary international law, it is nonetheless apparent that customary law has crystallised around the component of self-determination requiring participation and consultation.<sup>159</sup>

UNDRIP also indicates that Indigenous participation in decision making is not limited to formal political institutions and can encompass all areas of public life where there is engagement between the state and Indigenous peoples.<sup>160</sup> This may encompass decisions made in the context of varied administrative and executive practices, noting that bureaucratic decisions can have a profound impact on the enjoyment of Indigenous rights, including land and cultural rights. Therefore ‘Indigenous representatives may also need an effective voice in local, regional and national institutions’.<sup>161</sup>

Key participation components of self-determination are articulated in Articles 18 and 19 of UNDRIP.

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

While UNDRIP does not prescribe specific processes of participation, it takes an expansive approach, stipulating a substantive duty to consult, and including the more onerous requirement to obtain ‘free, prior and informed consent’ (FPIC) in certain circumstances where mere consultation is insufficient.<sup>162</sup>

The duty to consult is well established in international law and is expressed in Articles 19 and 32 of UNDRIP.<sup>163</sup> This duty requires good faith negotiations utilising culturally appropriate procedures with the objective of achieving agreement, where measures that may affect Indigenous peoples are considered.<sup>164</sup> It arises in circumstances where Indigenous peoples will be specifically or disproportionately affected by a decision.<sup>165</sup> This duty also presupposes the establishment of Indigenous representative institutions that may be consulted on behalf of communities.<sup>166</sup> The State should not interfere with these representative institutions, but should offer support so that they can operate freely.<sup>167</sup>

The requirement of free, prior and informed consent arises in relation to fundamental rights involving land and resources<sup>168</sup> and entitles Indigenous peoples to ‘withhold consent and establish terms and conditions for their consent’.<sup>169</sup> In addition to UNDRIP, the Human Rights Committee has recommended the recognition of a right to FPIC in several Concluding Observations.<sup>170</sup>

Processes of participation are a tool by which to realise the principle of self-determination and associated Indigenous rights. This is because these processes realise other objectives, including economic, social and cultural outcomes.<sup>171</sup> In this regard, the UN Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) recognises that participation is of ‘fundamental importance to Indigenous peoples’ enjoyment of other rights’, noting that these standards are designed to ‘fill the gap between [Indigenous] rights on the one hand, and their implementation on the other hand’.<sup>172</sup>

## **(b) Lack of self-determination in Australia**

Australia has not signed a treaty or agreement with Indigenous peoples,<sup>173</sup> having been designated a ‘settled’ rather than a ‘conquered’ colony under the British and international law prevailing in the late 18<sup>th</sup> century.<sup>174</sup> Therefore State institutions and laws have developed without the basis of such foundation.<sup>175</sup> First Nations peoples maintain that sovereignty was never ceded, and they resisted colonisation, dispossession and forced assimilation. In this regard, Michael Dodson has stated that the acquisition of sovereignty ‘remains a mystery’.<sup>176</sup> While the High Court of Australia rejected the idea that Australia was to be regarded as *terra nullius* in relation to claims to land in the landmark *Mabo* case, the Court did not consider the wider implications in relation to questions of sovereignty, considering this question to be non-justiciable.<sup>177</sup>

In the absence of this process, it has been argued that the relationship between Australia and First Nations peoples can be characterised as one of ‘domination’.<sup>178</sup> In contemporary Australia, First Nations peoples have belatedly been recognised by the state as citizens, granted voting rights and formal equality before the law.<sup>179</sup> However, due to their small numbers, they are, in effect ‘governed and dominated by Australia’s non-Indigenous majority’.<sup>180</sup>

Laws and policies regarding First Nations peoples, and their administration, have developed in a piecemeal fashion, subject to reversals, repeal and inconsistent practice.<sup>181</sup> There are numerous examples that illustrate this dynamic. One is the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005. ATSIC was a legislated representative body with executive powers, elected by First Nations peoples. A subsequent representative body, the National Congress of Australia’s First Peoples, was established in 2010, but subsequently ceased operation in 2019 when it went into voluntary administration following funding cuts.<sup>182</sup> There is currently no organisation capable of representing First Nations peoples at the federal level. Further examples include the winding back by the Commonwealth Government of native title rights under the *Native Title Act 1993* (Cth) in 1998,<sup>183</sup> and of land rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2006<sup>184</sup>.

Dr Jane Robbins states that this dynamic has led to the relationship between First Nations peoples and the state to be ‘played out as an essentially political process with Aboriginal and Torres Strait Islander activists cast in the role of interest group lobbyists or protestors’,<sup>185</sup> rather than autonomous rights-holders with particular entitlements to self-determination and enhanced participation.

While Australia has implemented policies it has labelled 'self-determination' in the past, these measures have not generally referred to or integrated international law.<sup>186</sup> Anaya states that legislative and constitutional reforms are 'often necessary conduits for the implementation of international norms'.<sup>187</sup> Similarly, the Expert Mechanism has recommended that 'States should enact and implement constitutional and other legal provisions that ensure indigenous people's participation in decision-making consistent with the UNDRIP'.<sup>188</sup>

### **(c) Uluru Statement from the Heart and Voice negotiations**

First Nations peoples have long struggled to achieve constitutional recognition and parliamentary representation in Australia as a means of reflecting the principle of self-determination. Over the past decade, a series of reports on proposals of this kind were commissioned and debated by various governments: in 2012, 2014, 2015, 2017 and 2018.<sup>189</sup>

In 2015, the Referendum Council was created to consult with First Nations peoples about their views on recognition.<sup>190</sup> The Council subsequently designed and led the Uluru process, a series of 12 dialogues across the country, engaging 1,200 First Nations delegates, in gatherings designed and led by First Nations peoples, representative of gender, demographics, traditional-landowners and local organisations. The Regional Dialogues culminated in the National Constitutional Convention at Uluru in May 2017. It was the 'most proportionally significant consultation process process of First Nations peoples Australia has ever seen'.<sup>191</sup>

The resulting Uluru Statement from the Heart, addressed to the people of Australia, called for a First Nations Voice to Parliament, enshrined in the Constitution, along with a Makarrata Commission (a truth/reconciliation body) to supervise a process of agreement-making between governments and First Nations and facilitate truth-telling.<sup>192</sup> The Commission welcomed the Uluru Statement, alongside many other civil society groups, Aboriginal-controlled organisations and businesses.<sup>193</sup> A mechanism of this kind is arguably required under UNDRIP, which indicates that 'one man one vote' is not sufficient to guarantee collective participation rights. In Australia's third-cycle Universal Periodic Review, numerous recommendations focused on the need to implement a Voice to Parliament, recognise First Nations peoples in the Constitution and implement UNDRIP.<sup>194</sup>

The Commission's proposal for a participation duty is designed to complement a Voice mechanism and the broader implementation of the Uluru Statement. A genuine Voice mechanism will be a necessary means of ensuring compliance with the proposed participation duty.

### **(d) Participation duty in application to First Nations peoples**

- *Participation duty on public authorities*

The Commission emphasises that any steps undertaken to fulfil First Nations rights, including within a Human Rights Act, should themselves be developed through genuine participation with First Nations peoples. This is necessary for the resulting mechanisms to be legitimate tools of self-determination. Self-determination must be viewed as a continuing process and participation should underpin all laws and policies that seek to affect, enhance or diminish First Nations' rights.

The Commission does not propose or recommend a specific articulation of a First Nations participation duty within a Human Rights Act, as this should be determined by First Nations peoples and organisations, in conjunction with Voice and constitutional reform processes. While the Commission has obtained input on this proposed model from First Nations people, it has not conducted an extensive consultation process. Rather it provides a proposal that should helpfully inform future consultations between Government and First Nations on participation and UNDRIP rights within a Human Rights Act.

Self-determination is focused on free pursuit and free choice. Since it does not prescribe a 'type' of outcome,<sup>195</sup> it can be construed as a 'right of due process'.<sup>196</sup> Self-determination as a 'process right' is the articulation by which it could be practically implemented into a Human Rights Act. Participation standards and processes can be embedded within different public and administrative bodies as a requirement under the Human Rights Act. The fairness, representativeness and adequacy of participation processes are capable of being brought before a court and assessed through objective criteria, through the lens of UNDRIP.

The Uluru Statement was developed through a comprehensive, genuine consultation of First Nations peoples and communities, and provided a clear message to Government and the Australian public that participation in public affairs should be a reform priority. An important complement to embedding consultation and participation principles through a Voice to Parliament would be to reflect these principles in a specific duty on public authorities, to guide executive processes.

The Commission proposes that the articulation of the First Nations limb of the participation duty be based upon articles 18 and 19 of UNDRIP. The Commission does not prescribe wording, noting again that the views of First Nations peoples are critical.

The Commission considers that the Human Rights Act must align closely with the Voice mechanism, as this is the preferred option for most First Nations peoples for a participatory body. A participation duty can reference and closely align with the functions of a Voice, with the existence of the Voice enabling the proper fulfilment of the duty by public authorities. Essentially, including a participation duty will require the establishment of effective procedures for consultation and appropriate, self-determined representative bodies – that is, it will require a functioning Voice mechanism.

Where consultation is required with public authorities on specific issues, or where policy will have an impact upon specific communities (for example, communities affected by welfare trials such as the Cashless Debit Card) the Voice could facilitate consultations at the regional and local level and coordinate with Government to ensure that an appropriate participation process occurs, inclusive of those in the affected communities and conducted in a culturally safe manner. The Voice itself would also be subject to the Human Rights Act as a public authority. The membership and representational structure of this mechanism should be a matter for First Nations peoples to determine. First Nation consultation processes, including through the Voice, must be adequately resourced to be effective.

Where consultations have not occurred, or have been inadequate, and may have an impact or already have affected the rights of First Nations peoples and/or communities, the fulfilment of the participation duty can be assessed by the courts. For example, if a policy affects the cultural rights of a particular community, the adequacy of the consultation could be considered as part of the rights claim. The claim could be brought by an individual or a representative organisation to reflect the collective nature of the right, in line with standing requirements under the Human Rights Act. There should not be requirements for First Nations organisations to have some form of

corporate entity or legal entity to have standing under the Human Rights Act.<sup>197</sup>

The Commission's role would be to assist, in conjunction with First Nations organisations, in creating UNDRIP-aligned guidelines for different public authorities on their obligations and the steps that should be taken to ensure consultation occurs effectively. The Commission could also have a reporting role to publicly assess overall compliance with the duty. By including the principle of self-determination in the preamble and a clause enabling the human rights in the Human Rights Act to be interpreted in light of UNDRIP, it will be made clear to public authorities, the courts and the general public that the participation duty is to be understood as a practical way to respect the self-determination principle.

In 2010, Professor Larissa Behrendt and Alison Vivian prepared an Occasional Paper on options for including self-determination in the Victorian Charter:

- Option one: include the right to self-determination in the list of rights protected in the Charter.
- Option two: protect a cluster of rights that would assist in the exercise of the right to self-determination. This would involve including additional rights, such as: the right to education, the right to adequate housing, a duty to consult, the right to free and informed consent when the rights of Aboriginal people are being adversely affected.
- Option three: to have a Preamble to the Charter that places self-determination as a key principle against which the rights within the Charter need to be interpreted.<sup>198</sup>

The Commission's proposal draws on options two and three. It involves incorporating a cluster of rights related to self-determination (including cultural rights, non-discrimination rights, ICESCR rights, all with a cause of action and representative standing); an overarching participation duty; and a preamble articulating self-determination principles. It also adds the inclusion of UNDRIP as interpretive material for the courts to apply when considering Human Rights Act rights in relation to First Nations peoples.

The Commission considers that including a participation duty and related rights helps to operationalise self-determination in a manner that can best lead to practical outcomes. It offers this proposal as an alternative to including a standalone 'right to self-determination' in the Human Rights Act, because of the vagueness and complexity of the term, and the associated potential difficulties with litigating collective self-determination claims in court. The Commission also notes that the Optional protocol of the ICCPR only confers the HRC with jurisdiction over individual complaints ('communications'). Therefore, while it can ask for reports from States on the protection of the right to self-determination, it cannot adjudicate the right since it is primarily in the nature of a collective right.<sup>199</sup>

Previous attempts to incorporate the right to self-determination into state and territory human rights legislation has not been achieved, including due to 'a lack of clarity' in relation to potential application<sup>200</sup> and 'a lack of consensus both within Australia and internationally on what the right to self-determination comprises'.<sup>201</sup> The 2015 review of the Victorian Charter recommended that the preamble to the Charter be amended to include self-determination and participation as principles and that any more detailed articulation of the right should be subject to engagement between Aboriginal communities and the Victorian Government.<sup>202</sup> However this recommendation has not yet been implemented.

For these reasons, the Commission considers that an approach that adopts key constituent parts of self-determination, and operationalises them, may be preferable to including a distinct ‘right to self-determination’ in the Human Rights Act. The participation duty and relevant Human Rights Act rights are capable of assessment by the courts and of practical application by public authorities. The Commission does suggest that the right to self-determination be articulated in the preamble of the Human Rights Act. This will provide context for how the Human Rights Act is to be framed and understood in relation to First Nations, particularly those aspects of the Human Rights Act, such as the participation duty, that embed UNDRIP rights and principles.

However, the Commission reiterates that, ultimately, the question of how best to reflect principles of self-determination should be a matter for First Nations peoples, and recommends that this proposal be considered subject to deeper consultations.

Similar forms of participation duties exist in jurisdictions that have much in common with Australia. The following examples indicate that a participation duty, and UNDRIP principles, can be implemented by Government to improve processes and enhance self-determination, as has occurred in New Zealand and Canada.



In New Zealand and Canada, government is obliged to consult with Indigenous people before making decisions or passing laws that affect their interests. This ‘duty to consult’ forms part of a broader legal doctrine known as ‘the Honour of the Crown’, developed by courts in those countries to accompany the constitutional guarantees provided by section 35 of the Canadian Constitution and by New Zealand’s Treaty of Waitangi.<sup>203</sup> The Honour of the Crown is a legal principle that commits government to act with integrity.<sup>204</sup>

## Canada

### *Consultation duty*

The Canadian Supreme Court has stated that the general purpose of the duty to consult is to foster reconciliation.<sup>205</sup> Since federal and provincial governments did not historically consult on decisions, ‘the duty can be viewed as a response to imbalances of power between governments and First Nations peoples in Canada’.<sup>206</sup>

The duty to consult requires Canadian provincial and federal governments to consult with Indigenous groups before taking actions or decisions that may adversely affect asserted or established Aboriginal or treaty rights.<sup>207</sup> It ‘arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it’.<sup>208</sup> The ‘goal is to listen to the views and concerns of affected Indigenous groups and, where necessary and possible, modify the action or decision to avoid unlawful infringement of those rights’.<sup>209</sup>

A trilogy of cases in 2004 and 2005 clarified procedural protections for Aboriginal rights and outlined a framework for the duty to consult.<sup>210</sup>

'While an Indigenous group can designate an individual to represent it in consultations, individuals are generally not entitled to be consulted separately'.<sup>211</sup> The duty can vary widely and depend on the circumstances, such as the nature and scope of the right and the potential impact of the proposed conduct. Case law has found that 'in some cases, it may be necessary to provide funding to enable Indigenous rights-holders to participate in the process'.<sup>212</sup> When the Crown has a duty to consult, 'all parties are expected to participate in the consultation process in good faith (with sincere or honest intentions, regardless of the outcome or action)'.<sup>213</sup>

Consultation generally involves:

- providing timely and accessible information to the Aboriginal community on the proposed project, activity or decision
- obtaining information on any potentially affected rights
- listening to any concerns raised by the Aboriginal community
- determining how to address these concerns, including attempting to avoid, minimize and/or mitigate adverse impacts on Aboriginal or treaty rights
- two-way flow of information. There is an onus on Aboriginal communities to make their concerns known; respond to ministries' attempts to meet those concerns; and attempt to reach some mutually satisfactory solution.<sup>214</sup>

The duty to consult does not dictate an outcome. The process of consultation does not have to be impeccable, however: 'in some cases, the absence of certain procedural requirements, such as the lack of oral hearings and participant funding, may "significantly [impair] the quality of consultation" and result in a breach of the Crown's duty'.<sup>215</sup>

The Supreme Court has found that the duty to consult and accommodate does not give Indigenous groups a veto over final Crown decisions. However, the consent of Indigenous groups may be required for some government actions or decisions. For example, 'consent may be required when the Crown seeks to use the land where Aboriginal title has been established. In such cases, if consent is not given, the only recourse for the Crown is to prove that the infringement of the right is justified'.<sup>216</sup>

There is a range of remedies available. Courts can quash government decisions made without adequate consultation, issue injunctions, damages or an order to carry out the consultation, sometimes with specific requirements to be met within the process.<sup>217</sup>

Consultation arrangements are organised in different communities in accordance with their own preferences. For example, some are represented by a Tribal Council or have a process where an umbrella organisation is the point of entry.<sup>218</sup>

#### *Implementation of UNDRIP*

On 21 June 2021, after years of ultimately unsuccessful struggle to pass Bill C-262, its successor Bill C-15 received Royal assent, affirming the Declaration as a universal international human rights instrument with application in Canadian law.

The law itself is a short document with 6 sections that annexes the Declaration. It provides that the 'Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration' (section 5).

Additionally, 'the Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration' (section 6).

There is also an annual reporting provision for the Minister to undertake in consultation with Indigenous people (section 7).

The Act requires that the action plan be developed by 21 June 2023, and the 2021 budget provided \$31.5 million over 2 years, starting in 2021 to 2022, to support the co-development of this plan.<sup>219</sup>

## New Zealand

Māori share ‘public sovereignty’ by electing members to Parliament from designated Māori constituencies.<sup>220</sup> The Treaty of Waitangi incorporates a principle of partnership which requires the Crown and Māori to act reasonably towards each other and with utmost good faith.<sup>221</sup> This includes an obligation of the Crown to make informed decisions on matters affecting the interests of Māori, which requires consultation with Māori on significant issues.<sup>222</sup> These principles have become ingrained within New Zealand, and while legally unenforceable, they have ‘moral and political force’.<sup>223</sup> Morris has observed that such agreed ‘high level principles’ ensure a fairer relationship between Indigenous peoples and the state.<sup>224</sup>

Where a consultation duty arises in relation to the Treaty, consultation must be ‘meaningful’, which has been described in *Wellington International Airport Ltd v Air New Zealand*:

Consultation must be real; not a charade. It does not mean to tell or present, nor can it be equated to negotiation. It is an intermediate situation involving meaningful discussion. The party consulting can have a work plan in mind, but must keep an open mind, and be ready to change and even start afresh. Any manner of oral or written interchange that allows adequate expression and consideration of views will suffice. It is essential that the consultation is fair and enables informed decisions to be made. There is no universal requirement regarding duration, but sufficient time must be allowed and a genuine effort to consult made. Those being consulted must know what is being proposed, and have a reasonable and sufficient opportunity to respond to the proposal. The overall focus is on fairness, underpinned by good faith.<sup>225</sup>

### *UNDRIP Implementation*

In 2019, the New Zealand Government stated its intention to develop a national plan to implement the Declaration and the development of a technical working group report *He Puapua* which outlines what a pathway forward might look like.<sup>226</sup> Consultations with iwi (tribes), Māori organisations, and the wider public are underway with a view to plan for how Aotearoa New Zealand will meet commitments under the Declaration being produced by the end of 2022.

- *Participation duty on proponents of legislation*

The Voice to Parliament will be designed to enhance participation of First Nations peoples in the law-making process. This would be complemented by the non-binding duty on legislative proponents to facilitate and report on participation in Statements of Compatibility and through the Parliamentary Joint Committee on Human Rights scrutiny process.

## 7.7 Children’s participation

### (a) CRC principles

The Convention on the Rights of the Child (CRC) is the most widely ratified international convention.<sup>227</sup> It represents international consensus on children’s rights, binding State parties and providing a framework for assessing State initiatives. Despite this, the implementation into Australian law has been limited.<sup>228</sup>

The rights in the proposed Human Rights Act would apply to children, via the interpretive lens of the CRC. Some rights in the Human Rights Act are drawn directly from the CRC and focus on children (for example, children's rights in the criminal process). In order to adequately reflect key elements of the CRC and ensure cohesive protection of children's rights, it is also necessary to directly reflect two overarching CRC principles in the Human Rights Act through the participation duty.

The CRC Committee has identified the 'best interests' of the child and the 'right of the child to be heard' as core principles of the CRC.<sup>229</sup> These principles derive from Article 3 and Article 12 of the CRC respectively, and are relevant to the fulfilment of all rights in the CRC. The 'best interests' principle provides that

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>230</sup>

The right to be heard requires Government to ensure that 'the child who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.<sup>231</sup> Additionally, for this purpose, 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.<sup>232</sup>

- *Best interests of the child*

The right of a child to have their best interests taken into account as a primary consideration is 'a substantive right, an interpretive legal principle and a rule of procedure'<sup>233</sup> and applies to every right in the CRC.<sup>234</sup> The principle requires that a child's best interests are

considered in 'all actions concerning them',<sup>235</sup> and is designed to

address the historical disregard for children's interests by decision makers at all levels of society ... It therefore plays an important agenda-setting role which elevates children's interests to a primary and legitimate consideration in all decision-making which is about or has an impact on children.<sup>236</sup>

The Commission has included the best interests principle as part of a distinct children's right in its proposed list of rights. In addition, these principles would form part of the application of the participation duty in conjunction with the right to be heard, recognising the interconnection between these two rights.

The best interests principle applies to actions concerning individual children, groups of children, and children as a class, with State parties called upon to apply the principle 'in all legislative, administrative and judicial proceedings as well as policies, programmes and projects relevant to and with an impact on children'.<sup>237</sup> In *Ah Hin Teoh* Mason CJ and Deane J stated that 'a broad reading of the provisions in Article 3, one which gives to the word 'concerning [children]' a wide-ranging application, is more likely to achieve the objects of the convention'.<sup>238</sup>

Not every action requires a 'full and formal process' of consideration of the principle, rather 'where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate'.<sup>239</sup>

Government decision making relating to custody, residence, parental contact, care and protection must make children's best interests the paramount consideration. In other decision making, the best interests of the child, or of children generally, must be a primary consideration.<sup>240</sup> Tobin and Eekelaar elaborate on the distinction between decisions that are

primarily ‘about children’ and those that ‘affect’ them:

As regards those decisions which merely affect but are not directly about children, the distinction operates to direct the attention of those whose activities might affect children, whether they are judicial officers, urban planners, or treasury officials, to the presence and relevance of children’s interests. It seeks to arrest the historical ignorance of the relevance of children’s interests in this context and essentially operates to reconceptualize the agenda for decision makers so as to ensure that children’s interests are given primary consideration. With respect to decisions directly about children, in areas such as child protection, family law, special medical procedures, and the like, the principle needs to sustain and justify potentially coercive state action regarding specific children, and therefore demands that children’s interests are placed at the centre of the decision process.<sup>241</sup>

The CRC Committee has provided guidance on measures required to implement the principle. This guidance does not prescribe specific outcomes, rather they are focused on the inclusion of a ‘*process*’ to ensure that actions and decisions affecting children actively take their interests into account, and that decisions can be assessed by reference to their impact upon children.<sup>242</sup>

Central to the application of the best interests principle is the consideration of the views of the child. The CRC Committee has stated that

any decision that does not take into account the child’s views or does not give the child due weight according to their age and maturity does not respect the possibility for the child or children to influence the determination of their best interests.<sup>243</sup>

States therefore are responsible for developing procedural measures to ensure that children’s views are taken into account when determining their best interests, in accordance with their age and maturity. Overall, the process for decision makers assessing a child’s best interests should involve consideration of:

- the views of a child, subject to their evolving capacity
- the relevance of any other rights under the Convention or other international treaties
- the views of parents or other persons involved in the child’s care
- the individual circumstances of the child, including their developmental needs and any relevant social, religious or cultural practices
- any available empirical evidence of relevance.<sup>244</sup>

Children’s best interests are not necessarily the determinative consideration in every circumstance, and the principle may be subject to limitations through a proportionality assessment.<sup>245</sup> Where, for example, decisions are urgent, ‘decision makers will be obliged merely to take all reasonable measures, in light of available resources, to ascertain a child’s views when making an assessment as to their best interests’.<sup>246</sup> While the principle may not apply in every circumstance, the onus is still on the decision maker to justify the choice to exclude aspects of the principle through an established process.

- *Right to be heard*

The right to be heard extends to individual children who have the right to influence decisions that affect them personally, and also to groups of children who have the right to influence decisions that affect them collectively.<sup>247</sup>

Article 12(2) focuses on the individual aspect of participation, requiring the child to be heard in judicial and administrative decisions. It extends to all children who are 'capable of forming their own views'. The CRC creates a presumption that children are capable of forming their own views, and the child does not need to have comprehensive knowledge of the matter in question, merely sufficient understanding for forming views. 'Due weight' is given to the child's views in accordance with their age and maturity. General Comment 12 elaborates that Article 12(2)

applies for all relevant judicial proceedings affecting the child without limitation, including for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical and psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum seeking and refugee children and victims of armed conflict and other emergencies.<sup>248</sup>

The CRC outlines five steps required by Article 12(2), with regard to the individual right to participation:

- preparation of a child to ensure he or she is informed about their right to express his or views and the means and methods by which a child can exercise this right
- the hearing which relates to the creation of an enabling environment in which a child can express their views
- the assessment and capacity of the child in light of the requirement to give the child's views due weight
- the information (feedback) given to the child about how their views were considered
- the provision of an opportunity for complaint, remedies and redress for a child when their right to be heard has been violated.<sup>249</sup>

The CRC Committee has also outlined how Article 12 applies to the participation of children as a collective. The principle applies to matters affecting particular groups of children and the wider population of which they are part,<sup>250</sup> including 'a class of school children, the children in a neighbourhood, the children in a country, children with disabilities or girls'.<sup>251</sup> The right is not restricted to matters that 'directly' affect children. Decisions made by government which do not specifically or exclusively concern children also fall in this category (for example, cuts to social services for parents).<sup>252</sup> The children who have a right to participate 'are limited to those who are affected by the measure in question — there is no intention that children should have a say in all political matters'.<sup>253</sup>

In particular, it is important that vulnerable groups of children are provided opportunities to participate when policies affect them.<sup>254</sup> The CRPD promotes participation of children with disabilities, and the CRPD Committee has found that children with disability have a right to be consulted in matters affecting them.<sup>255</sup>

The CRC has explained that Article 12 is 'not only a right in itself but should 'be considered in the interpretation and implementation of all other rights'.<sup>256</sup> Lundy, Tobin and Parkes explain that it 'must be understood as both normative (an end in itself) and instrumental (a means to an end)'.<sup>257</sup> Article 12 is essential to the realisation of other rights, and is therefore an important overarching principle to be applied across the framework. Information gleaned from participation also helps ensure that policies and practices regarding children are robust and effective:

children's views can lead to better, more relevant, and informed decisions regarding matters that affect children ... policies and programs are likely to be more efficient and effective if those for whom they are designed are themselves involved in the design and delivery leading to improved outcomes for children.<sup>258</sup>

The right to be heard is a necessary complement to the best interests principle. The CRC moved beyond historical ‘welfare’ focused approaches, which treated children as ‘passive objects in need of assistance rather than as active subjects with rights’.<sup>259</sup> The right to be heard ensures that decisions made affecting children, including those designed to protect them from harm, are not merely based on adult assumptions about what is in the interests of children, and instead genuinely take into account children’s views about decisions that affect their lives.<sup>260</sup>

Practically, the implementation of the right to be heard involves a range of different measures, beginning with legal protections. The Council of Europe’s Child Participation Assessment Tool sets out measures States need to undertake to comply with Article 12, accompanied by comprehensive guidance. There are three overarching clusters:

*Measures to protect the right to participate*

1. Legal protection for children’s right to participate reflected in national Constitution and legislation.
2. Child participation explicitly included in cross-sectoral national strategy to implement children’s rights.
3. Independent children’s rights institution in place and protected by law.
4. Mechanisms enable children to exercise right to participate safely in judicial & administrative proceedings.
5. Child friendly complaints procedures in place.

*Measures to promote awareness of the right to participate*

6. Children’s right to participate in decision-making embedded in training programmes for professionals.
7. Children provided with information about right to participate in decision-making.

*Measures to create spaces for participation*

8. Children represented in forums, including own organisations, at school, local, regional & national governance level.
9. Child-targeted feedback mechanisms on public services in place.
10. Children supported to participate in monitoring of UNCRC & shadow reporting, & relevant Council of Europe instruments & conventions.<sup>261</sup>

Australia currently has some of these mechanisms in place, but not in a comprehensive manner. In particular it is lacking the third cluster: ‘measures to create spaces for participation’. If implemented, this could involve the creation of forums for children to represent their views to Federal Government, including through processes embedded in public administration processes. These types of

forums have been created in other jurisdictions. In particular, Scotland has led the way by implementing the CRC into domestic law, and creating permanent forums to enable children’s participation.

## Scotland and the CRC

Scotland has passed legislation implementing the CRC and incorporating it into Scots law. It is accompanied by an action plan to realise the rights of children and young people and a process of 'Child Rights and Wellbeing Impact Assessment' for new laws and policy.<sup>262</sup>

The legislation incorporates the CRC directly (along with the first and second optional protocols), taking a 'maximalist' approach. It passed the Scottish Parliament on 16 March 2021. The new legislation:

- Directly incorporates the CRC as far as possible within the powers of the Scottish Parliament.
- Makes it unlawful public authorities to act incompatibly with the CRC.
- Requires Ministers to produce a Children's Rights Scheme setting out how they comply with children's rights and to report annually.
- Requires listed public authorities to report every three years on how they comply with children's rights.
- Requires the Scottish Government to include statements of CRC compatibility alongside all Bills.
- Envisions increased protection powers for the Scottish Children and Young People's Commissioner. The Children's Commissioner will be able to bring claims in the public interest.<sup>263</sup>

Relevantly, the Scottish Government framed the case for the legislation in the context of COVID-19:

The Scottish Government is committed to a revolution in children's rights. The dual impacts of the Covid-19 pandemic and the

United Kingdom's withdrawal from the European Union underline the importance of human rights being built into the fabric of society. Nowhere is this more important than in relation to children and young people, whose futures depend on the action taken by all public authorities to implement their rights in practice <sup>264</sup>

...

The pandemic has highlighted and exacerbated existing inequalities in our society with the effects of Covid-19 being felt across every aspect of children's lives, including having significant impacts on relationships with family and friends, housing, access to healthy and nutritious food, education, health and social care, and safety and security. The Scottish Government is committed to ensuring that a rights respecting approach is at the heart of Scotland's recovery from the pandemic. This will ensure that the services and support which are put in place build on previous successes but are renewed and improved to support better and more equal outcomes for the people of Scotland. Incorporation of the UNCRC will provide a strong platform from which to build stronger rights-based approaches and decision-making structures that will support children and young people recovering from the effects of the pandemic and which will better support children's health, wellbeing and participation into the future.<sup>265</sup>

Prior to the passage of this legislation, Scotland was already advanced in incorporating key principles of the CRC into its domestic legislation, with a particular focus on best interests and the right to be heard.<sup>266</sup> In place are two key forums to enable children's collective participation on issues that affect their lives.

### *Scottish Youth Parliament*

The Scottish Youth Parliament was established in 1999. Initially it ensured that the youth voice ‘remained a critical part of the conversation about how democracy would work in light of newly devolved Government structures’ and remains in place today.<sup>267</sup> For example:

Members of the Scottish Youth Parliament (MSYPs) played a key role in the UN Committee’s 2016 examination of the UK. Very many of the Committee’s Concluding Observations reflect issues that were highlighted by MSYPs in a visit to Scotland by the Committee’s Vice Chair, Amal Aldoseri, and in subsequent meetings with the Committee in Geneva. Key messages raised through the UNCRC reporting process included the impact of welfare reforms, the minimum age of criminal responsibility and child poverty.<sup>268</sup>

In March 2016, the Scottish Youth Parliament Launched its Lead the Way Manifesto based on 72,744 responses from young people all over Scotland about the focus of the organisation. One of the questions included whether the CRC should be fully incorporated into Scots law. An overwhelming 72% of respondents agreed that full incorporation should be a priority

for the SYP. In response to this widespread consultation, the SYP harnessed its energies into a focused incorporation campaign and in 2017 it amplified its call for the Scottish Government to incorporate the CRC through its ‘Right Here, Right Now’ campaign.<sup>269</sup>

### *Children’s Parliament*

Scotland’s Children’s Parliament was created in 1971. It explores with children ‘what it means to be happy, healthy and safe as a way to embed a rights-based approach in practice’.<sup>270</sup> One of the projects undertaken by the Children’s Parliament, for example, involved,

Building on the CRC Committee’s recommendation to intensify efforts to tackle bullying and violence, children from the Children’s Parliament formed an investigation team to explore key ideas based on four important themes: human dignity, kindness, empathy and trust. The investigators created a dice game through which both adults and children can be encouraged to think about the issues children face in bullying behaviours. The game includes a series of ‘I can’ and ‘I will’ commitments for adults to focus on awareness, creating spaces and environments to listen to children, and using the children’s participatory model in their own fields.<sup>271</sup>

## **(b) Current reflection of these principles in Australian law**

Presently, CRC ‘best interests’ and participation principles are unevenly reflected in Australian law.

There is no overarching legal duty to consider the best interests of children in decision making. The *Family Law Act 1975* (Cth) provides that the best interests of the child is to be the paramount consideration in a range of family law proceedings in which children are involved.<sup>272</sup> Care and protection legislation in states and

territories also requires consideration of the child’s best interests.<sup>273</sup> However, this is not the case in other areas directly affecting children’s rights. For example, one paper assessing the application of the ‘best interests’ principle in juvenile justice legislation found ‘an alarming degree of disparity between the various jurisdictions and their application of Article 3’, including ‘a failure in all but one jurisdiction (ACT) to make best interests a primary consideration in all decisions and actions relating to the young offender’.<sup>274</sup>

Additionally, while all jurisdictions recognise the importance of the best interests principle and have policies to guide its implementation, its application varies significantly.<sup>275</sup> In 2019, the CRC Committee recommended that Australia

Ensure that procedures and criteria guiding all relevant persons in authority for determining the best interests of the child and for giving it due weight as a primary consideration are coherent and consistently applied throughout the State party.<sup>276</sup>

The ‘right to be heard’ similarly lacks holistic application in Australian law and policy. Child protection legislation in Australian jurisdictions supports involving children in decision making to the extent that their age and maturity allows.<sup>277</sup> Procedural rights are granted to children in the criminal law processes, however this does not necessarily extend to opportunities to be heard within, for example, juvenile justice facilities.<sup>278</sup> The *Family Law Act 1975* (Cth) does not extend to considering the views of children in non-contested matters.<sup>279</sup>

The common law recognises the increasing competence of children in the context of medical advice and treatment, with decisions in *Gillick v West Norfolk and Wisbech Area Health Authority* and *Secretary of the Department of Health and Community Services v JWB and SMB* (‘*Marion’s Case*’) confirming that a child under 16 is able to consent to medical treatment when they achieve sufficient understanding of the nature and consequences of proposed treatment (‘*Gillick competence*’).<sup>280</sup> However, as the Commission’s 2021 report, *Ensuring health and bodily integrity: towards a human rights approach for people born with variations in sex characteristics*, elaborates, these principles may not always be adequately reflected in medical practice.<sup>281</sup> At the policy development level, government may choose to engage with children through schools, youth advisory boards, and forums, however this kind of engagement can be sporadic.

To practically realise the right to be heard, it is necessary to adequately resource specialist children’s legal assistance, advocates and courts, to ensure that children’s voices are properly reflected in judicial and administrative procedures. The Law Council has stated that

Access to specialised, free legal assistance for children and young people is critical given their limited independence and life experience, limited knowledge of the law, difficulties identifying legal problems and the systemic barriers created by an adult legal system — as recognised by the Committee [on the Rights of the Child] and United Nations Office of the High Commissioner for Human Rights.<sup>282</sup>

However, ‘there are significant gaps in specialist legal assistance for children ... and lawyers with specialist skills to deal with children and young people,’ and ‘specialist courts for children and young people are often under-resourced, overburdened and unevenly available in Australia’.<sup>283</sup>

The CRC Committee has made a number of recommendations to Australia, designed to improve the embedding of this principle.<sup>284</sup>

### **(c) Participation duty in application to children**

- *Duty on public authorities*

The participation duty in the Human Rights Act as applied to children would include two limbs; best interests of the child; and the right of the child to be heard. It would require that public authorities consider these principles when making decisions concerning children and their rights, and to enable participation by both an individual child subject to a decision, and groups of children where policy and laws are being made that affect their rights. This duty would bind public authorities.

The implementation of this principle will require the embedding of policies and practices across the public service. This could take the form of a child-rights impact assessment tool utilised at the law, regulatory and policy-making stage, to assess impacts on children and provide for a consultation process where necessary. The National Children's Commissioner Anne Hollonds has advocated strongly for the adoption of such a tool,<sup>285</sup> and it is already used by some states and territories.<sup>286</sup> It could also take the form of guidance and codes for officials engaging directly with children and their families, about the steps that need to be undertaken to ensure that the duty is fulfilled, including potentially involving children's advocates and lawyers.

For some public authorities that deal directly with children and children's rights, the requirement to fulfil the duty may be more onerous and comprehensive, applicable to virtually all decisions made in that space – for example, education, juvenile justice, and care and protection. In other circumstances the duty would be applicable where a particular policy is likely to have an impact on children – for example, decisions that affect access to housing for families.

### **ParentsNext**

The children's participation duty would apply to policies and programs such as *ParentsNext*.

*ParentsNext* is a mandatory 'pre-employment' program applied to targeted recipients of the Parenting Payment. The Parenting Payment is the main form of income support available to a parent or primary carer of a young child. The *ParentsNext* program requires participants to engage activities set out in a participation plan. Non-compliance can result in the suspension, reduction or permanent cancellation of a person's Parenting Payment.<sup>287</sup>

Human rights engaged by this program include the right to social security, the right to equality and non-discrimination and children's rights. The Commission has argued that the compulsory method is flawed and there are less restrictive alternative approaches available to achieve the goal of reducing welfare dependency, such as incentive based models.<sup>288</sup> The program

is therefore a disproportionate restriction on rights. This conclusion was echoed by the Parliamentary Joint Committee on Human Rights, which recommended that participation in the *ParentsNext* program be voluntary, rather than compulsory.<sup>289</sup>

While the *ParentsNext* program is directed towards parents receiving welfare, it *also* affects children. A single parent with no other source of income may, as a result of compliance action, be unable to afford basic necessities and services for themselves or their children. As a result, a child may be left without adequate food, water, shelter or medical care.<sup>290</sup>

This consideration was not adequately addressed by Government or Parliament prior to the introduction of the *ParentsNext* program.<sup>291</sup> This highlights the importance of a *requirement* to consider and include children and children's rights in decision-making processes, including in circumstances where children are indirectly (but no less acutely) affected by proposals.

Where the duty is not adequately realised, it would be a matter for the courts to assess. Australian courts are well versed in the CRC, already required to apply best interests principles in the context of immigration, family law and juvenile justice.<sup>292</sup> As discussed, it will not always be appropriate to realise these principles in full, and it would be subject to reasonable limitations through a proportionality test, that can be applied by public authorities and reviewed by courts.

To ensure genuine participation of children within what can be complex bureaucratic systems, it will be necessary to ensure access to specialist children's lawyers and services,

that can advocate on behalf of children and represent their needs to public authorities in circumstances where a child may be (adversely) affected by decisions.

To fully realise the participation principle as it applies to policies that affect children in the collective, a forum or 'youth Parliament' modelled on the Scottish example above could be created as a permanent consultative body of children and young people. Alternatively, regular consultation with groups of affected children could be coordinated through the National Children's Commissioner, children's NGOs and schools.

### **Victorian Charter and the rights of children to a fair hearing: *A & B v Children's Court of Victoria & Ors* [2012] VSC 589 (5 December 2012)**

#### *Facts*

The plaintiffs were two sisters aged nine and 11 who were the subject of protection applications under the under the *Children, Youth and Families Act 2005* (Vic). An Interim Accommodation Order permitted them to live with their maternal aunt until the applications could be heard. Over a period of five months, the plaintiffs were represented by lawyers who considered them as having the capacity to give instructions. There was no evidence that either of the plaintiffs had developmental issues, and a report provided to the Court by an officer of the Department of Human Services described the plaintiffs as being 'mature for their years in terms of the language they use and their insight into their childhoods'. Separately and on several occasions, the plaintiffs expressed that they wanted to continue living with their aunt, that they did not want any contact with their mother and that they wanted to be able to see their

maternal uncle, against whom their mother had made sexual abuse allegations.

At the interim hearing, the magistrate ruled that the plaintiffs were not of an age where they could give instructions and were not mature enough to give instructions, particularly in relation to the serious allegations about their maternal uncle. The magistrate also did not grant leave under the Act for the plaintiffs to be represented by the same lawyer.

#### *Decision*

The issue concerned the proper construction of the phrase 'mature enough to give instructions' in section 524(4) of the Act:

If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

The plaintiffs argued that the expression ‘mature enough to give instructions’ required an individual assessment of each child’s capacity to give instructions and that chronological age was not the sole factor. The plaintiffs also argued that there is a presumption of statutory interpretation that the provision should be determined consistently with international law.

The Victorian Equal Opportunity and Human Rights Commission intervened in the proceedings arguing that section 32 of the Victorian Charter required section 524(4) to be interpreted compatibly with human rights and consistently with the purpose of the provision. The applicable Charter provisions were the right to equality before the law (section 8(3)), the right of a child to protection as in his or her best interests (section 17(2)) and the right to a fair hearing (section 24(1)). Justice Garde of the Supreme Court of Victoria also considered the Commission’s submissions concerning international law in construing statutory provisions, and particularly article 12 of the CRC, which provides, inter alia, that a child has a right to have an opinion and to have that opinion heard.

Approaching the construction of ‘mature enough to give instructions’ in accordance with its ordinary meaning, Justice Garde held that the phrase requires a court to have regard to factors other than the child’s age and that it is sufficient that the child be mature enough to give instructions on one or more issues that may arise. Such a construction would be consistent with international law and with the Charter.

On this basis, the magistrate made an error of law in interpreting ‘mature enough to give instructions’ solely by reference to chronological age. In so misconstruing the phrase, the finding about maturity was made in the absence of relevant evidence. The plaintiffs also succeeded in their arguments of denial of procedural fairness. Justice Garde held that the plaintiffs were denied procedural fairness, given that they had been directly represented at court on several occasions and it was never suggested at these previous hearings that their legal representation was an issue. When the issue arose at the hearing, the plaintiffs were not given an opportunity to give evidence about their maturity. In addition, the order refusing leave to allow the plaintiffs to be represented by the same lawyer received almost no consideration at the hearing.

Extracted from Human Rights Law Centre case summary.<sup>293</sup>

- *Duty on proponents of legislation*

The above duty on public authorities to facilitate children’s participation would be complemented by the non-binding duty on legislative proponents to facilitate and report on children’s participation regarding laws that would have a direct or disproportionate impact on them, in Statements of Compatibility and through the Parliamentary Joint Committee on Human Rights scrutiny process.

## 7.8 Participation of persons with disability

### (a) CRPD principles

Australia was an active participant and leader in the development of the CRPD, which it ratified in July 2008.

Historically, ‘persons with disabilities have been considered objects but not subjects of law with the full volume of human rights who are equal to others in society’.<sup>294</sup> The CRPD reflects

a 'paradigm shift ... to recognise people with disabilities as persons before the law' with 'the right to make choices for themselves'<sup>295</sup> and to be 'active members of society'.<sup>296</sup> The CRPD reflects a 'social' model of disability, which describes disability in terms of the interaction between a person's disability and the external world. The preamble states:

Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>297</sup>

The preamble also outlines the foundational principle that 'persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them'.<sup>298</sup>

The CRPD 'recognises participation as both a general obligation and a cross-cutting issue'.<sup>299</sup> It includes an obligation to closely consult and actively involve persons with disabilities (article 4(3)) and the participation of persons with disabilities in the Convention monitoring process (article 33(3)) as part of a wider concept of participation in public life.<sup>300</sup> The CRPD Committee has explained that,

Often, persons with disabilities are not consulted in the decision-making about matters relating to or affecting their lives, with decisions continuing to be made on their behalf. Consultation with persons with disabilities has been acknowledged as important in the last few decades, thanks to the emergence of movements of persons with disabilities demanding recognition of their human rights and their role in determining those rights. The motto 'nothing about us without us' resonates with the philosophy and history of the disability rights movement, which relies on the principle of meaningful participation.<sup>301</sup>

Article 12 recognises the right of persons with disabilities to enjoy legal capacity 'on an equal basis with others in all aspects of life'. It confirms that persons with disability should not be excluded from making decisions that affect their own lives, because the inherent dignity and individual autonomy of persons with disability includes the freedom to make one's own choices.<sup>302</sup> The ICCPR guarantees the right to equality before the law for everyone, and article 12 of the CRPD describes this right in relation to its application to people with disabilities, focusing on areas where they 'have traditionally been denied that right'.<sup>303</sup> Article 12 underpins the ability of persons with disability to achieve many of the other rights under the CRPD.<sup>304</sup>

A disability participation duty in a Human Rights Act would specifically embed the right to equal recognition before the law (Article 12) and the overarching principle of 'full and effective participation and inclusion in society'<sup>305</sup> for people with disability.

- *Participation in public policy and law*

Article 4(3) of the CRPD provides:

In the development and implementation of legislation and policies to implement the present Convention and other decision-making processes concerning issues relating to persons with disabilities, State Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The CRPD Committee defines the scope of the obligation in the following terms:

States parties should include the obligation to closely consult and actively involve persons with disabilities, through their own organizations, in legal and regulatory frameworks and procedures across all levels and branches of Government. States parties should also consider consultations with and the involvement of persons with disabilities

as a mandatory step prior to the approval of laws, regulations and policies, whether mainstream or disability specific.

Therefore, consultations should begin in the early stages and provide an input to the final product in all decision-making processes. Consultations should include organizations representing the wide diversity of persons with disabilities, at the local, national, regional and international levels.<sup>306</sup>

While persons with disability should be able to participate directly on issues that affect them personally, consultations about policy can occur either with people who have disability, and representative organisations led, directed and governed by persons with disabilities,<sup>307</sup> as opposed to ‘third-party representatives, such as organisations “for” people with disabilities’.<sup>308</sup> Participation may also be required for sub-groups of persons with disability, such as people with hearing impairments, where policy will have a specific impact on them.<sup>309</sup>

Participation processes must also take into account intersectional considerations. The human rights model of disability recognises ‘that disability is one of several layers of identity’,<sup>310</sup> and intersectional forms of discrimination are acknowledged in the CRPD.<sup>311</sup> Articles 6 and 7 recognise that women with disability and children with disability are subject to multiple forms of discrimination, and these articles are ‘illustrative of intersectionality and not exhaustive’.<sup>312</sup> In relation to participation rights, the CRPD Committee has, for example, noted the need to consult Indigenous persons with disability,<sup>313</sup> and has ‘most frequently referenced the obligation to consult in connection with the rights of women and children with disabilities’.<sup>314</sup> Other international human rights instruments can provide guidance in the application of human rights in addressing intersectionality – for example, UNDRIP should be considered alongside the CRPD when considering how to apply participation rights to First Nations people with disability.<sup>315</sup>

A broad approach to issues ‘concerning’ persons with disability is adopted by the Committee, incorporating policies that may directly or indirectly affect persons with disability by having a disproportionate impact upon persons with disability.<sup>316</sup> The Committee gives the following examples of the kinds of issues that may arise for consultation:

deinstitutionalization, social insurance and disability pensions, personal assistance, accessibility requirements and reasonable accommodation policies. Measures indirectly affecting persons with disabilities might concern constitutional law, electoral rights, access to justice, the appointment of the administrative authorities governing disability-specific policies or public policies in the field of education, health, work and employment.<sup>317</sup>

Consultation processes should be disability accessible: for example, through the provision of ‘sign language interpreters, Braille and Easy Read’, along with ‘support, funding and reasonable accommodations as appropriate and requested’.<sup>318</sup> Access to relevant information should also be provided in accessible formats.<sup>319</sup> Public authorities should give ‘due consideration and priority’ to the views of disability consultees when addressing issues directly related to persons with disabilities, and have a duty to inform them of outcomes of consultation processes in an accessible manner.<sup>320</sup>

The CRPD Committee outlines the need to adopt specific legal and regulatory frameworks and procedures to ensure the participation of people with disabilities, through their representative organisations and to ‘establish clear procedures for consultations’.<sup>321</sup> The CRPD Committee has repeatedly recommended that permanent consultation mechanisms and frameworks be established, to facilitate ongoing participation of persons with disability and their representative organisations on disability issues. For example, in its 2019 review of Australia, the CRPD Committee recommended

the establishment of 'formal and permanent mechanisms' to ensure the full participation of persons with disability.<sup>322</sup> This could include 'roundtables, participatory dialogues, public hearings, surveys and online consultations', and could also take the form of a 'national advisory board such as a representative national disability council representing organizations of persons with disabilities'.<sup>323</sup> In this regard, Virtanen argues that the establishment of permanent, rather than ad hoc, mechanisms forms part of the duty to protect human rights by creating adequate institutions to realise rights.<sup>324</sup>

The Committee also contemplates the need for compliance mechanisms and access to remedies where these participation responsibilities are not met by the State.<sup>325</sup> Additionally, to facilitate consultations, States should grant 'financial or other assistance to organisations of persons with disabilities'.<sup>326</sup>

- *Decisions affecting individuals*

Persons with disability are often excluded from making decisions that affect their own lives, because of a denial of legal capacity. Article 12 affirms that persons with disability have legal capacity on an equal basis with others. The CRPD Committee has stated that legal capacity is 'key to accessing meaningful participation in society'.<sup>327</sup>

Legal capacity includes the capacity to be both a holder of rights and duties, and to exercise those rights and duties under the law.<sup>328</sup> Holding rights – legal standing – may include 'having a birth certificate, seeking medical assistance, registering to be on the electoral roll or applying for a passport'.<sup>329</sup> Exercising rights – legal agency – involves the power to act on those rights and have those actions recognised by law, and includes the ability 'to engage in transactions and create, modify or end legal relationships'. The CRPD Committee notes that the ability of persons with disability to exercise legal rights in particular, is 'frequently denied or diminished for persons with disability'.<sup>330</sup>

Historically,

persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment.<sup>331</sup>

The denial of the right to legal capacity has often led to the deprivation of fundamental rights, including 'the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty'.<sup>332</sup>

Article 12 emphasises that 'perceived or actual deficits in mental capacity' are not legitimate reasons for denying legal capacity.<sup>333</sup> As noted by the ALRC, 'legal capacity should not simply be equated with mental capacity' and 'people with cognitive impairment should not be assumed to have limited legal capacity, in the sense of being able to exercise legal agency'.<sup>334</sup>

Rather, States have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity (where required by the individual) to enable them to make decisions that have legal effect (known as supported decision-making).<sup>335</sup> This support must 'respect the rights, will and preferences' of the individual and should not amount to 'substituted decision-making'.<sup>336</sup> Emeritus Professor Terry Carney elaborates that

Supported decision-making encompasses a range of processes to support individuals to exercise their legal capacity, and these consist of: effective communication, including in the provision of information and advice to a person and through ensuring that a person is able to communicate their decisions to others; spending time to determine a person's preferences and wishes; informal relationships of support between a person

and members of their social networks; agreements or appointments to indicate that a relationship of support exists; and statutory relationships of support — whether through private or court/tribunal appointment.<sup>337</sup>

In circumstances where it is not practicable to determine the will of the individual, decisions must be based on the ‘best interpretation of will and preferences’ of the individual with safeguards in place to prevent abuse in accordance with human rights law.<sup>338</sup>

Article 12(5) also outlines that subject to Article 12, States should

take all appropriate and effective measures to ensure the equal rights of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit and ... ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 12 is closely linked to obligations of States to ensure accessibility of services and facilities, to enable persons with disability to live autonomously and participate fully in all aspects of life, on an equal basis with others.<sup>339</sup>

In 2014, the ALRC released its report, *Equality, Capacity and Disability in Commonwealth Laws*. The report considered the requirements of Article 12 in significant detail, and developed decision-making principles designed to embed the CRPD into Australian laws and practice, along with a range of specific law reform recommendations. The decision-making principles are as follows:

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support persons

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.<sup>340</sup>

These principles were intended to guide legislative and policy reform and be applied to legislative schemes that contain a decision-making mechanism or some provision for supporters and representatives – including the NDIS, social security and aged care administration.<sup>341</sup> Additionally, the ALRC recommended that justice system processes should reflect similar considerations to enhance access to justice for persons with disability.<sup>342</sup> The ALRC also recommended that the objects and principles provisions in Commonwealth legislation concerning decision making by persons who require decision-making support should reflect the National Decision-Making Principles.<sup>343</sup>

The ALRC outlined support guidelines that address each principle in turn, in order to aid implementation, along with a range of specific recommendations designed to enhance existing federal laws to reflect supported decision making. For example, with respect to assessing support needs, the guidelines state that the following should be considered:

- All adults must be presumed to have ability to make decisions that affect their lives.

- A person must not be assumed to lack decision-making ability on the basis of having a disability.
- A person's decision-making ability must be considered in the context of available supports.
- A person's decision-making ability is to be assessed, not the outcome of the decision they want to make. A person's decision-making ability will depend on the kind of decisions to be made.
- A person's decision-making ability may evolve or fluctuate over time.<sup>344</sup>

The National Decision-Making Principles were strongly supported by disability stakeholders.<sup>345</sup>

### **(b) Current implementation of these principles in Australia**

In Australia, while persons with disability may be consulted in an ad hoc manner on disability-related policy, there is no consistent or defined procedure for disability consultation in legislative, regulatory and administrative processes.

The Commission has previously recommended to the CRPD Committee that the Australian Government

establish permanent consultation mechanisms and develop best practice guidelines for the active engagement of people with disability and their representative organisations in policy development, implementation and monitoring activities relating to the CRPD.<sup>346</sup>

The Commission also observed that mechanisms for the engagement of persons with disability and their representative organisations can occur through the National Disability Strategy (2010–2020) and the National Disability Agreement (including future iterations). A review of the National Disability Strategy by the Social Policy Research Centre at the University of New South

Wales in 2018 concluded that further facilitating participation of persons with disability at all levels of policy design and implementation would help to achieve the goals of the National Disability Strategy.<sup>347</sup>

During the Commission's own national disability consultations in 2016–17, many consultees raised concerns about the adequacy of funding for advocacy supports.<sup>348</sup> The Disability Civil Society Shadow Report to the CRPD stated that the 'important role of [Disabled Persons Organisations], in line with General Comment 7, is not well understood by governments', also noting reductions in government resourcing for these organisations.<sup>349</sup>

In its 2019 Concluding Observations, the CRPD recommended that Australia,

in the implementation and monitoring of the Convention, establish formal and permanent mechanisms to ensure the full and effective participation of persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation and policies to implement the Convention, ensuring adequate resources and the provision of the necessary support.<sup>350</sup>

Despite the ALRC's comprehensive and practical recommendations, there has been no progress towards implementing a nationally consistent supported decision-making framework.<sup>351</sup> The CRPD Committee recommended in 2019 that this be implemented.<sup>352</sup>

Moreover, as the Disability Civil Society Shadow Report to the CRPD stated:

A number of Australian laws, policies and practices, including guardianship, estate management and mental health laws deny recognition of people with disability as equal persons before the law, and the right to the assumption of legal capacity.<sup>353</sup>

The Commission has also raised specific concerns that children with disability are often not provided with disability and age-appropriate assistance to participate and express their views. For example, in the context of the Family Law system, courts are not required to provide children with disability with assistance and procedural accommodations for this purpose.<sup>354</sup>

The Disability Royal Commission currently in progress has exposed serious and harmful outcomes that can occur when people with disability are not granted autonomy over their own lives.<sup>355</sup> Systemic failings are being uncovered after the fact through the Royal Commission, when there are clear opportunities

for prevention through the systematic application of a human-rights based approach.

However, there are positive examples in certain contexts. For example, the implementation of human rights legislation in Victoria has led to important jurisprudence about the proper implementation of supported decision making. The following case study highlights how a human rights lens applied to public decision-making processes can result in important outcomes for individuals that respect their autonomy and dignity; and can set standards for systemic reform of practices across particular sectors.

### **PBU & NJE v Mental Health Tribunal [2018] VSC 564 (1 November 2018)**

In this case, the Victorian Supreme Court confirmed that the capacity test under the *Mental Health Act 2014* (Vic) (MHA) must be interpreted and applied in a way that is compatible with the human rights of persons receiving compulsory mental health treatment under the Victorian Charter.

Under the MHA, the Mental Health Tribunal (MHT) can order that a compulsory patient undergo a course of involuntary electroconvulsive treatment (ECT) when:

- the patient does not have the capacity to give informed consent to ECT; and
- there is no less restrictive way for the patient to be treated.

A person has capacity to give informed consent under s 68 of the MHA if the person:

- understands the information he or she is given that is relevant to the decision;
- is able to remember the information that is relevant to the decision;
- is able to use or weigh information that is relevant to the decision; and
- is able to communicate the decision he or she makes by speech, gesture or any other means.

A person is presumed to have capacity to give informed consent to treatment under s 70(2) of the MHA.

The Supreme Court appeal was brought on behalf of two clients, PBU and NJE, in relation to whom orders of involuntary ECT had been made by the MHT and upheld by the Victorian Civil and Administrative Tribunal (VCAT).

## PBU

PBU did not agree with his diagnosis of schizophrenia, however he accepted that he had experienced depression, anxiety and post-traumatic stress disorder. He was willing to receive psychiatric and psychological treatment for those conditions but not ECT or anti-psychotic medication. In April 2017, the MHT ordered that PBU undergo a course of 12 ECT treatments. On appeal from the MHT, VCAT confirmed the order for ECT. In applying the capacity test, VCAT accepted that PBU could understand the information relevant to a decision about ECT. However, VCAT did not apply the other limbs of the capacity test and instead found that PBU did not have capacity to make a decision about ECT because he did not accept his diagnosis of schizophrenia.

## NJE

NJE was diagnosed with treatment resistant schizophrenia and was willing to remain in hospital and continue to receive the prescribed antipsychotic medication rather than undergo ECT treatment. In April 2017, the MHT ordered that NJE undergo a course of 12 ECT treatments. On appeal from the MHT, VCAT confirmed the order for ECT. In applying the capacity test, VCAT accepted that NJE could understand and remember the relevant information and could communicate a decision about ECT. However, VCAT found that NJE could not use or weigh the information relevant to a decision about ECT on the basis that NJE was unable to 'carefully consider the advantages and disadvantages of ECT'.

In relation to PBU and NJE, VCAT found that the second criterion was met as there were no less restrictive treatment options available.

Victoria Legal Aid (VLA), on behalf of PBU and NJE, appealed the VCAT decisions on a number of grounds:

- that VCAT failed to give proper consideration to the rights conferred

by the Charter, in its application of the capacity test to PBU's case.

- that VCAT erred in its interpretation and application of the capacity test in relation to PBU and NJE by requiring the patient to accept or believe the diagnosis of their illness and need for treatment before they could be regarded as having the capacity to give informed consent.
- that VCAT erred in law by directing itself that s 68(1)(c) MHA required a person to carefully consider the advantages and disadvantages of a situation or proposal prior to making a decision.
- that VCAT erred in its interpretation and application of the criterion that there is '*no less restrictive way for the patient to be treated*' in relation to PBU and NJE.

## Decision

Justice Bell determined that VCAT misinterpreted and misapplied the capacity test in s 68 of the MHA in ways that undermined PBU and NJE's human rights to self-determination, to be free of non-consensual medical treatment and to personal inviolability which are protected by the Charter.

In relation to PBU, his Honour found that a lack of insight into a diagnosis of mental illness, is not alone determinative of a lack of decision-making capacity and that VCAT erred by equating lack of insight with lack of capacity to give informed consent to treatment.

His Honour held that 'lack of acceptance, belief or insight may be relevant when determining whether a person has the capacity to give informed consent, but it is only one consideration'. Justice Bell opined that it would be discriminatory for lack of insight to be determinative of lack of capacity in relation to people having mental illness when it is not considered determinative in relation to people not having mental illness.

In relation to NJE, Justice Bell found that in considering whether NJE could ‘use or weigh’ information relevant to ECT, VCAT erred by:

- focusing on whether NJE had actually considered the advantages and disadvantages of the decision, not whether she had the ability to use or weigh the relevant information; and
- applying a threshold of capacity that required the person ‘to carefully consider the advantages and disadvantages of the situation or proposal’, which was too high.

His Honour determined that the capacity test must be applied in a non-discriminatory manner to ensure that people with mental illness are not deprived of their equal right to exercise legal capacity. He found that the capacity threshold is a low threshold which requires that a patient ‘understands and is able to remember and use or weigh the relevant information, and communicate a decision, in terms of the general nature, purpose and effect of the treatment, and should not be an inquiry into whether the person can make a sensible, rational or well-considered decision’.

With respect to the interaction between human rights and the assessment of capacity, Justice Bell held that the fundamental human rights principles of self-determination, freedom from non-consensual medical treatment, personal inviolability, and the right to health, are most respected by capacity assessments that are ‘criteria-focused, evidence-based, person-centred and non-judgmental’ and do not depend upon the assessment of an objectively reasonable outcome.

Ultimately, his Honour held that VCAT erred in law by interpreting and applying the capacity test in the MHA incompatibly with the human rights of PBU and NJE under the Charter.

His Honour ordered that VCAT’s decisions be set aside. As PBU and NJE are now being treated in the community and compulsory ECT is no longer being sought, Justice Bell was not required to remit the decisions for further consideration.

Extracted from Human Rights Law Centre case summary.<sup>356</sup>

## **(c) Participation duty in application to people with disabilities**

### *• Consultation of persons with disability*

The participation on duty applied to persons with disability as a collective would require the consultation of persons with disability, including through their representative organisations, on decisions that directly or disproportionately affect their rights. This would be binding on public authorities, and complimented by the non-binding requirement for proponents of legislation to engage in consultations and report on this through Statements of Compatibility and Parliamentary scrutiny mechanisms.

Consultations of this kind could occur through permanent representative consultative bodies, and/or established procedures in decision-making processes to embed genuine, representative and accessible consultation of persons with disability. For example, Professor Rosemary Kayess has recommended the following to the Disability Royal Commission:

The establishment of a high-level independent office of disability inclusion to act as the focal point for driving implementation, monitoring and reporting of CRPD obligations across all portfolio areas and across all levels of government, and that has responsibility for reporting on CRPD progress annually to the Parliament.

As a key component of the office of disability inclusion, the establishment of a standing advisory mechanism made up of people with disability through their representative organisations to ensure the active participation and close consultation of people with disability across all levels of government, and in line with General comment no. 7.<sup>357</sup>

Rosemary Kayess and Therese Sands observe that participation of persons with disability through their representative organisations ‘provides a catalyst to shift the power relations between the so-called “experts” and people with disability who are the genuine experts in the lived experience of disability’.<sup>358</sup> They further emphasise that a human rights model of disability means that ‘human rights cannot be limited or taken away because of the existence, degree or type of impairment, diagnosis or disability’.<sup>359</sup> It is therefore important that participation mechanisms for people with disability are not arbitrarily defined by the ‘medical model’<sup>360</sup> of disability – for example, open only to those with certain diagnosed conditions or those described as having a ‘severe’ impairment.<sup>361</sup>

Participation mechanisms should also take into account the needs of intersectional groups, such as children with disability and First Nations peoples with disability. To enable this, it is necessary to ensure that groups that experience intersectional forms of discrimination are represented in consultations (including in any permanent consultation mechanism) and to support and resource organisations and consultation processes to consider and engage with intersectional groups.

Participation of this kind has the potential to result in significant positive outcomes, including the empowerment of persons with disability. As the CRPD Committee observes:

Full and effective participation can also be a transformative tool for social change, and promote agency and empowerment of individuals. The involvement of organizations of persons with disabilities in all forms of decision-making strengthens the ability of such persons to advocate and negotiate, and empowers them to more solidly express their views, realize their aspirations and reinforce their united and diverse voices.<sup>362</sup>

- *Decisions affecting individual persons with disability*

The ALRC has developed principles to operationalise Article 12 into the decision-making processes of public authorities. However, these principles have yet to be systemically reflected across relevant laws and policies. The Commission considers that an appropriate ‘home’ for the principles is within a Human Rights Act, where it can set the standard for public authorities dealing with decision making affecting people with disabilities, across the board. The ALRC has developed guidelines for the implementation of these principles, which could assist their integration into the practice of relevant authorities, and could also be included in relevant legislation of the public authorities per the recommendations of the ALRC.

The CRPD represented a paradigm shift, particularly in the recognition of persons with disability as equal before the law. This paradigm shift has not been adequately reflected in Australia, despite the ratification of the CRPD. A Human Rights Act can help to engender a comprehensive, nationally consistent approach to Article 12, shifting practice upstream to enable persons with disability to be full participants in decision-making processes.

The Commission suggests that the principles can be implemented in a Human Rights Act as follows. In all decisions concerning persons with disability:

- Every adult has the right to make decisions that affect their life and to have those decisions respected.
- Persons who may require support in decision making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.
- The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

- Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.<sup>363</sup>

## 7.9 Equal access to justice duty

### (a) Introduction

In addition to an overarching participation duty, the Commission proposes a complementary ‘equal access to justice duty’ for public authorities. This would complement and strengthen existing common law rights, and better realise them in practice, including equality before the law and the right to a fair hearing. It would also flesh out requirements relating to rights that would be implemented through the Human Rights Act, including rights in criminal proceedings.

This duty would mean that public authorities have a positive duty to realise access to justice principles – and would require active steps by public authorities to ensure the provision of key elements of a functioning justice system. Specifically, it would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system and engage in justice related proceedings.

This duty would create an obligation to meet minimum requirements associated with the right to a fair hearing, overlaid by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law. This is a principle that ensures *equal* access to justice for those who face particular barriers to such access. The purpose of this duty is not only to codify, but to strengthen and support key principles established by common law courts, such as the *Dietrich* principle (discussed below), by linking them to positive human rights obligations as defined by international law. The duty would embed non-discrimination principles into planning and policy by public

authorities associated with the justice system. The duty may arise as part of a consideration of whether related Human Rights Act rights were breached by public authorities due to a failure to implement minimum justice guarantees.

For courts, these principles may inform the application of procedural rights that already apply in the court room – but they would not impose a ‘duty’ per se on courts. This is because the duty is primarily a positive obligation to ensure that the justice system is properly resourced to carry out its function, so that individuals are able to access justice on an equal basis with others, which is a function of government, rather than the judiciary.

The following section discusses each aspect of the equal access to justice duty and how it may apply in practice.

### (b) What is access to justice?

‘Access to justice’ is an umbrella concept associated with a number of human rights, and common law principles.<sup>364</sup> Specific human rights encompassed within ‘access to justice’ include the right to a fair trial, the right to an effective remedy, equality before the law and non-discrimination.

Access to justice is considered central to the rule of law. It is reflected in clause 40 of the landmark constitutional document, the Magna Carta of 1215, which states that ‘to no one will we sell, to no one deny or delay right or justice’.<sup>365</sup> As the Law Council has stated, under the law, everyone has the right to seek justice, but ‘this does not count for much if it cannot be exercised’,<sup>366</sup> which is why access to justice is important. The UN has observed that

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision makers accountable.<sup>367</sup>

However, despite being a central legal principle in Australia, the nature and scope of 'access to justice' is contested.<sup>368</sup> The following definitions shed light on how access to justice may be understood.

The Law Council of Australia describes access to justice as

concerning the link between a person's *formal right* to seek justice and the person's *effective access* to the legal system or legal remedies ... Realising or guaranteeing access to justice means fair and equitable access to legal assistance, as well as access to both formal and informal justice mechanisms without economic, geographic, social, cultural, linguistic or other barriers.<sup>369</sup>

Professor Simon Rice similarly states that

the idea is broadly understood as access to law – justice being, in effect, 'justice according to the law'. The idea of 'access to justice' is, therefore, the capacity to understand the law, to get legal advice, to get legal assistance and representation, and to use public legal institutions such as the courts. It requires an ability to, for example, understand, communicate, travel and pay, and also requires the means to overcome the inability to do any of those things.<sup>370</sup>

The then Attorney-General, the Hon Robert McClelland MP, recognised that

An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.<sup>371</sup>

The Law Council has provided the following examples of what falls under the rubric of access to justice:

- getting the right information about the law and how it applies to you;
- understanding when you have a legal problem and knowing what to do about it;
- getting the right help with a legal problem, including from a lawyer;
- being able to deal with your legal problem and being able to understand the outcome; and
- making sure your voice is heard when laws are made.<sup>372</sup>

Access to justice has an important preventative purpose. The Law Council has listed the following 'personal, community, social and economic costs' when people cannot access justice:

- a greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted;
- family violence victims being evicted for reasons which are not their fault, such as damage to the rental home by the perpetrator;
- an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness, as well as deteriorating mental and physical health, and in some jurisdictions, imprisonment;
- an inability to access a person's entitlements, such as unpaid wages, income support or a pension, resulting in destitution;
- an inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;

- people remaining at risk of harm, violence and exploitation – such as family violence victims, elder abuse victims, people with disability who are abused by carers, and people who are trafficked or subject to forced marriages;
  - families being split when children are unnecessarily removed from their parents;
  - a greater likelihood of people being returned to their countries of origin to face persecution, torture or death; and
  - unresolved problems escalating from civil, to family, to criminal matters.<sup>373</sup>
- » Provision of supports including accessible court facilities and procedural accommodations to ensure equal participation of persons with disability in legal proceedings (CRPD)
  - » Provision of specialist children’s advocates/lawyers (CRC)
  - » Support for culturally safe legal services.
- *Access to legal representation in criminal matters*

Access to legal representation is a key element of access to justice, and is often necessary for the achievement of other rights. The Special Rapporteur on the Independence of Judges and Lawyers has explained that Legal Aid is ‘an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and effective remedy’.<sup>374</sup>

The common law recognises that a lack of legal representation in criminal matters may result in an unfair trial. In the landmark case of *Dietrich v The Queen*, the High Court held that where the lack of legal representation to an indigent accused defending a serious criminal charge might result in an unfair trial, a court may stay the proceedings.<sup>375</sup> This decision was premised on the common law right to a fair trial, and the understanding that legal representation is a component of a fair trial for a serious criminal offence. In such cases, the court will consider the seriousness of the matter and the complexity of the issue when determining whether a lack of legal representation will result in an unfair trial.<sup>376</sup> However, the court did not recognise a positive ‘right’ to Legal Aid. Mason CJ and McHugh J said:

### (c) Contents of equal access to justice duty

In order to ensure access to justice, it is necessary for the justice system to embed mechanisms that proactively prevent inequality, discrimination and avoidable miscarriages of justice. Specific elements of access to justice are required through the right to a fair trial and the requirements of procedural fairness and equality before the law under the common law. The Commission has drawn upon international law to define what the duty should encompass, and how it should supplement existing common law rights. This duty requires *equal* access to justice through the provision of minimum guarantees.

The Commission proposes that the duty should encompass, at a minimum:

- Access to legal representation in criminal matters. This practically involves:
  - » Provision of publicly funded lawyers in criminal trials for people who cannot afford one (provided for in the ICCPR)
- Non-discrimination regarding access to legal services and courts in both civil and criminal matters. This practically includes:
  - » Provision of interpreters where required (including First Nations languages, and ASL) (ICCPR, common law)

Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.<sup>377</sup>

Meanwhile, article 14 of the ICCPR includes the right of a defendant in a criminal trial:

to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and

to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The ALRC observed that while the first aspect of this right is guaranteed in Australia, the second limb, which requires the positive provision of legal assistance, is 'less secure'. It noted that it is 'questionable whether it is part of the judicial function to order government to provide a service [of a lawyer]'.<sup>378</sup>

The Australian government already recognises the importance of Legal Aid in criminal matters, as well as some civil and family matters.<sup>379</sup> However, despite this, limited funding undermines the effectiveness of the Legal Aid system. As the Law Council's 2018 Justice Project highlighted, legal assistance services are critically lacking in funds across the board. This includes Legal Aid for criminal matters, not least because 'most people charged with crimes do not qualify for legal aid, due to stringent means tests and guidelines for eligibility for legal aid'.<sup>380</sup> This means that 'it is possible to convict and imprison a person who is not deemed eligible for legal aid' but was unable to afford legal representation.<sup>381</sup> The Law Council gives

the example of people facing criminal trials in Magistrates Courts:

While previously, people facing criminal charges in Magistrates Courts could obtain a grant of legal aid which would provide a lawyer to represent them, subject to the means test, from about 2008 cuts in government funding have meant that in every jurisdiction, only people who are likely to go to jail can receive legal aid. This has meant that thousands of vulnerable people face criminal charges prosecuted by a professional prosecutor without legal representation. The evidentiary and forensic complexity of criminal charges are well beyond the vast majority of defendants in criminal cases.<sup>382</sup>

The Australian government has codified *Dietrich* principles in some federal statutory instruments. For example, Division 105A of the *Criminal Code Act 1995* includes *Dietrich*-style rights in relation to proceedings in which continuing detention orders or extended supervision orders are sought in relation to terrorist offenders. Under section 105A.15A the court can make orders where an offender is unable to engage legal representation, including orders:

staying the proceeding for such period and subject to such conditions as the Court thinks fit

requiring the Commonwealth to bear, in accordance with the regulations (if any), all or part of the reasonable costs and expenses of the offender's legal representation in the proceeding.<sup>383</sup>

The Explanatory Memorandum for the Bill that first introduced this provision states that:

Providing for legal representation for a terrorist offender who is the subject of continuing detention order proceedings is important to ensure that the terrorist offender may respond effectively to the matters raised by the Commonwealth. Providing for the staying of a proceeding,

or requiring the Commonwealth to bear all or part of the costs of the offender's legal representation where the terrorist offender, through no fault of their own, has been unable to obtain legal representation, enhances the terrorist offender's right to a fair hearing.<sup>384</sup>

Noting the centrality of legal representation to the right to a fair trial, the lack of sufficient access to legal assistance in Australia, and the narrow statutory codification of *Dietrich*, the Commission's proposed equal access to justice duty would require public authorities to ensure that individuals in criminal trials have access to a lawyer when they cannot afford one. This ensures that the second limb of the ICCPR obligation is realised.

Legal Aid in civil and family matters is not a right guaranteed by the ICCPR or other treaties to which Australia is party, but it is often essential for the realisation of a person's human rights. Professor Simon Rice has noted that the distinction between civil and criminal is somewhat arbitrary:

It is simply not possible to say, as a general rule, that a person who loses their liberty loses 'more' or 'less' than a person who loses their home, their livelihood, their children, their reputation, their earning capacity, their freedom of expression, their right to vote and so on.<sup>385</sup>

The limited availability of Legal Aid funding in Australia has resulted in a lack of ability for disadvantaged Australians to exercise their legal rights. A number of reports have highlighted the shortfall of legal assistance funding for these kinds of matters in Australia, with the Productivity Commission recommending an immediate injection of \$200 million for civil legal assistance services in 2014.<sup>386</sup> The lack of civil legal assistance funding is short-sighted, noting the role of legal assistance in preventing the escalation of legal problems, with can spiral into social, health, criminal and financial problems, with associated government

spending.<sup>387</sup> Vulnerable individuals may also lack the ability to make judicial review claims – including asylum seekers, some of whom are entirely excluded from accessing government funded legal assistance, despite the direct effect that immigration decisions have on their human rights.<sup>388</sup>

It is worth noting that the European Court of Human Rights (ECtHR) has extended the application of Article 6 of the European Convention of Human Rights (ECHR), which guarantees the right to a fair trial, to include legal aid in the determination of civil rights and obligations. In the 1979 case, *Airey v Ireland*, the ECtHR recognised that there was no duty to provide free legal aid in all civil matters. However, Article 6 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court', including by reason of the complexity of the procedure or of the case, the capacity and means of the litigant, and the importance of the case.<sup>389</sup> This ruling was grounded in the procedural right to access courts,<sup>390</sup> rather than the procedural rights guaranteed by a criminal trial.

As the right to free legal assistance in civil cases is not a requirement of the ICCPR, to which Australia is bound, the Commission is not including this as a requirement of the proposed equal access to justice duty. However, there should still be a requirement to ensure that where civil and family legal assistance is available, it is equally accessible in accordance with non-discrimination principles.

- *Access to interpreters*

Access to qualified interpreters is necessary to ensure proceedings are conducted fairly. Those involved in legal proceedings 'must be able to understand what is being said and be understood'.<sup>391</sup> Article 14 of the ICCPR states that in criminal trials, defendants have the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used

in court'. Similarly, at common law, the accused must be able to understand and participate in the proceeding in order to receive a fair trial,<sup>392</sup> and interpreters must also be provided to meet procedural fairness standards in civil and administrative contexts. For example, in *SZRMQ v Minister for Immigration*, the Full Court of the Federal Court held that, in the context of administrative law, the relevant procedural fairness standard was

whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to him or her, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done.<sup>393</sup>

Procedural fairness rights for those from linguistically diverse backgrounds cannot be

### **Gibson v State of WA [2017] WASCA 141 (28 July 2017)**

Gene Gibson, an Aboriginal man from Western Australia, was convicted in 2014 for a manslaughter committed in 2010. After nearly five years in jail, the WA Court of Appeals unanimously found that he had been wrongfully convicted and acquitted him.

Mr Gibson was found not to have the cognitive ability or language skills to understand what was happening during the legal process. Mr Gibson could not read English and his oral communication in English was limited.

A 2015 investigation by the Corruption and Crime Commission found 'systemic failures' by the Western Australian police in its initial investigation into the death, which helped prompt the appeal against his conviction.<sup>397</sup>

fully realised if there is insufficient access to free interpreters in practice. The Law Council's Justice Project highlighted problems with the availability of free interpreters in the Australian justice system. It recommended that Governments implement a National Justice Interpreter Scheme to ensure, among other things, that 'professional, appropriate and skilled interpreters are readily available and free' to those who cannot afford them, to people from culturally and linguistically diverse backgrounds, including First Nations peoples.<sup>394</sup> This reflects previous recommendations for a national interpreter scheme, including by the Productivity Commission.<sup>395</sup> Other law reform reports reveal that ASL interpreters are similarly required for those who are deaf or hard of hearing.<sup>396</sup>

The failure to ensure the provision of interpreters in the justice system has led to substantial miscarriages of justice. This is evidenced in the following case study.

During interviews conducted for the investigation, Mr Gibson was not offered an interpreter. These interviews were found to be inadmissible by the WA Supreme Court because they were 'not voluntary, were obtained in breach of the *Criminal Investigation Act 2006* (WA) and to accept them would, in any event, be unfair to the accused'. Nonetheless, Mr Gibson pleaded guilty and was convicted.

The Court of Appeal found that the absence of a qualified interpreter during the appellant's interaction with his solicitors contributed to the finding that a miscarriage of justice had occurred. Mr Gibson was advised to plead guilty by his Legal Aid lawyer. An interpreter was present for some, but not all, of Mr Gibson's meetings with his lawyer. The interpreter who gave evidence was also found not to be entirely qualified and to have poor recollection. The conviction was overturned on the grounds that he suffered a miscarriage of justice because of:

- the likelihood that he had not understood adequately the legal process, the State's case against him, the legal advice given to him about his plea, the options available to him and the consequences of a plea of not guilty; and
- the real, as distinct from fanciful, risk that the plea was not attributable to a genuine consciousness of guilt.

Former Chief Justice, the Hon Wayne Martin AC KC has subsequently commented that language was causing a 'significant disadvantage' for Indigenous people in the justice system. He told a Senate Committee inquiry that 'if we do not have properly resourced and effective interpreter services for Aboriginal people, then they will continue to fare badly in the criminal justice system'.<sup>398</sup>

The Western Australian Government subsequently awarded Mr Gibson \$1.5 million in compensation.<sup>399</sup>

The Equal Access to Justice Duty would help to ensure that public authorities guaranteed access to qualified interpreters where required.

- *Access to justice for children*

As detailed in chapter 7, section 7.7, the CRC requires independent legal representation and other appropriate assistance for children in the justice system, and mechanisms to ensure that children have an opportunity to be heard in proceedings, either directly or through their representative. This is necessary for the fulfilment of Article 12, the right of the child to be heard, and Article 3, the best interests of the child principle. The equal access to justice principle will complement the children's participation duty by requiring the provision of specialist children's legal assistance, advocates and adjustments to court procedures to facilitate their participation in judicial proceedings.

- *Access to justice for persons with disability*

Articles 12 and 13 of the CRPD outline standards for access to justice for persons with disability. As discussed, Article 12 enshrines equal recognition before the law. The CRPD Committee has commented in regard to Article 12 that State parties must

Ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied, including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference – on their own behalf or with legal representation – and to defend their rights in court.<sup>400</sup>

Article 13 of the CRPD embeds a specific right to access to justice. It states that

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The CRPD Committee has elaborated that this article implies that persons with disability have the right to participate on an equal basis with others in the justice system ‘as a whole’. This means that persons with disabilities should be supported to assume a range of roles within the justice system, including as claimants, jurors and lawyers.<sup>401</sup> In order to ensure equal access to justice for persons with disabilities, public authorities and courts should make the necessary modifications or adjustments, including (and are not limited to) the following:

- the provision of disability advocates, support persons or communication intermediaries throughout engagement with the justice system (including during any police engagement, in legal services, and in the courts).
- the provision of ASL interpreters, and the translation of material to braille or plain language where required.
- accessible court and tribunal facilities; and accessible legal services.
- adoption of flexible procedures where required (for example, taking breaks or allowing video testimony where appropriate).

Persons with disability, particularly First Nations peoples with disability, are overrepresented in the criminal justice system in Australia.<sup>402</sup> This includes children with disability, who are similarly overrepresented in the juvenile justice system, particularly children with intellectual disabilities or psychosocial disabilities.<sup>403</sup> The Commission’s research has found that necessary procedural accommodation for persons with disability is frequently not provided in the justice system.<sup>404</sup> The Commission recommended, in its 2014 *Equal Before the Law* report, that each jurisdiction in Australia should develop an overarching response to ensuring equal recognition before the law and access to justice, through a Disability Justice Plan. This recommendation has not been widely implemented. An equal access to justice duty

would provide impetus for such an initiative, as it would place a duty on public authorities to ensure that persons with disability were appropriately accommodated in the justice system.

- *Culturally safe legal assistance*

While not directly reflected within international instruments, the Commission also considers that culturally safe legal assistance is an important aspect of access to justice. Particularly in light of the ‘legacy of dispossession, marginalisation and exclusion [which] have created conditions in which Aboriginal and Torres Strait Islander peoples experience serious and multiple forms of disadvantage’;<sup>405</sup> the continued overrepresentation of First Nations peoples in the justice system;<sup>406</sup> consistent low funding of Aboriginal legal services;<sup>407</sup> and particular cultural and self-determination rights. Access to Aboriginal-controlled legal services for First Nations peoples should be considered for inclusion within the equal access to justice duty. This is also an important means of realising Close the Gap targets to reduce incarceration rates of First Nations peoples.<sup>408</sup>

## 7.10 Technology and decision making

Increasingly, public authorities are utilising technology, such as artificial intelligence (AI), when making decisions, including decisions that directly affect people’s rights. It is important that the same procedural fairness principles and rights consideration apply to *all* decisions made by public authorities, *regardless of how the decision is made*. This should be explicitly clarified in the Human Rights Act.

In 2019, the Special Rapporteur on extreme poverty and human rights highlighted human rights concerns associated with the ‘Digital Welfare State’.<sup>409</sup> This term refers to the use of digital data and technologies in public administration, to make predictions, and automate decisions affecting individuals in a

range of contexts, including social security, housing, child protection and education.<sup>410</sup> An example, in the Australian context, is 'Robo-debt', discussed in chapter 2. These technologies are also increasingly used by law enforcement and security agencies, including to target individuals for investigation, or to make decisions about who needs protection.<sup>411</sup> When AI technology is used to make public decisions, a range of concerns arise that are associated with the provision of procedural fairness and key rights. These include, but are not limited to:

- *A lack of transparency.* It is often unclear when and how AI decision-making programs are being used, despite the implications for people's rights.<sup>412</sup> The use of these technologies also often lack a legislative basis, lessening accountability over the decision-making process.<sup>413</sup> Individuals may not know how or why a decision was made, including whether it was made by machine, which limits their ability to challenge decisions.<sup>414</sup>
- *A lack of explainability.* AI decision-making processes are often highly complex. The manner in which decisions are made may be opaque not only to those affected by decisions, but also to the officials responsible for administering decisions, and even the designers of the technology themselves.<sup>415</sup> If an explanation cannot be provided as to how a decision is made, the fairness of the decision cannot be adequately assessed.
- *Biased decision making.* A key element of procedural fairness is that decisions should not be made in a biased fashion. This is also essential for realising non-discrimination rights. Machines are made by people, and can exhibit bias inherent in their programming and in the data being processed. In particular, AI decision making relies on input data, which, if flawed or unrepresentative, may

affect algorithmic 'learning' processes. AI learning relies heavily on correlation and can manifest discriminatory outcomes that are not necessarily obvious to human users.<sup>416</sup> For example, certain policing algorithms have been found to associate risk of crime with postcode areas – namely, areas that have high minority populations. As a result, the AI then 'learns' to associate certain racial characteristics with risk of crime.<sup>417</sup> When AI systems are used and relied upon across particular government departments or agencies, this kind of bias in decision making may occur on a systemic level.<sup>418</sup>

Recognising these risks, the Commission's *Human Rights and Technology Report* made a number of recommendations designed to address the human rights implications of such technologies used in administrative systems. These include: that legislation be introduced to ensure that affected individuals are notified when AI is used in decision making;<sup>419</sup> that the Government should not make administrative decisions using automation or AI if the decision maker cannot generate reasons or a technical explanation for an affected person;<sup>420</sup> and that Government should make clear that, where a person has a legal entitlement to reasons for a decision, this entitlement exists regardless of how the decision is made (including by making amendments to this effect to the *Acts Interpretation Act 1901* (Cth)).<sup>421</sup>

In light of these recommendations, and the impact of AI decision making on the realisation of procedural fairness principles, the Commission considers that it is important to include technological decision making explicitly within the remit of the Human Rights Act.

## Chapter 7: Endnotes

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# Chapter 8: Jurisdiction and scope

## 8.1 Jurisdiction

A Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination. This reflects the fundamental principle that human rights are universal and apply equally to all human beings,<sup>1</sup> as articulated in Article 1 of the Universal Declaration of Human Rights: 'all human beings are born free and equal in dignity and rights'.<sup>2</sup>

The Human Rights Act should therefore apply to citizens and non-citizens, but with the stipulation that some civic rights, such as the right to vote, apply only to citizens.

It is established in international jurisprudence that the human rights obligations of a State extend to persons who are outside of the State's territory, but within the State's jurisdiction, due to being 'under the effective control' of the State.<sup>3</sup> Determining whether 'effective control' exists involves the application of a factual test, to prove either 'control over persons' or 'control over territory'.<sup>4</sup> For example, Australia's offshore immigration detention centres have been recognised as falling under Australia's 'effective control' by international Treaty bodies.<sup>5</sup>

A Human Rights Act should include individuals under Australia's 'effective control' overseas in order to fully implement Australia's international obligations.

Similar forms of extraterritorial jurisdiction are already found in Australian federal law and exercised by federal entities. For example, the *Ombudsman Act 1976* (Cth) enables the Commonwealth Ombudsman to perform functions in relation to immigration and detention, including oversight of offshore processing sites;<sup>6</sup> and the *Crimes Act 1914* (Cth)<sup>7</sup> and *Criminal Code Act 1995* (Cth)<sup>8</sup> set out extra-territorial jurisdiction for conduct that has a sufficient nexus with Australia.

## 8.2 Interaction with state and territory instruments

Federalism poses complications for uniform rights protections across Australia.<sup>9</sup> In light of Australia's Constitutional structure and the existing Human Rights Act instruments in states and territories, the Commission proposes that a federal Human Rights Act should be restricted to federal laws and federal public authorities. The Human Rights Act instruments in place in Victoria, Queensland and the ACT should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act. In this regard the NHRCC suggested that the Federal Government could use fiscal means to encourage the states to adopt equivalent legislation – for example by issuing grants that are tied to Human Rights Act compliance.<sup>10</sup>

The Human Rights Act would need to make clear that a federal Human Rights Act is not intended to override state and territory laws. Section 109 of the Constitution provides that where state laws are incompatible with federal laws, the law is invalid to the extent of the inconsistency.<sup>11</sup> The former Solicitor General advised the NHRCC that this could easily be dealt with by a concurrency provision.<sup>12</sup> A concurrency provision could operate similarly to existing concurrency provisions in federal discrimination laws.<sup>13</sup>

The practical effect of a federal Human Rights Act on uniform schemes and federal-state co-operative schemes could be dealt with on a case-by-case basis. For example, there could be agreements to adopt the Human Rights Act in application to those specific laws, or exemptions made.<sup>14</sup>

State authorities that exercise public functions on behalf of the Federal Government may fall under the jurisdiction of both federal and state human rights instruments. This, too, could be dealt with on a case-by-case basis, including through memorandums of understanding or the clarification of obligations through regulations. On the whole, any practical difficulties or inconsistencies between federal and state/territory laws and functions could be resolved during a transitional implementation period of 1 year. This is discussed in chapter 6, section 6.5.



## Chapter 8: Endnotes

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- 9 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) 41.
- 10 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General’s Department, September 2009) 306.
- 11 Bruce Stone and Nicholas Barry, ‘Constitutional Design and Australian Exceptionalism in the Adoption of a National Bill of Rights’ (2014) 47(4) *Canadian Journal of Political Science* 677, 778.
- 12 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General’s Department, 2009) 306.
- 13 See, eg, *Racial Discrimination Act 1975* (Cth) s 6A.
- 14 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General’s Department, 2009) 307.



# Chapter 9: Interpretation and limitation of rights

## 9.1 Interpretation of the Human Rights Act

The federal Human Rights Act, like its state and territory counterparts, should include a direction about interpreting the human rights within the Human Rights Act. As Human Rights Act rights are derived from international law, it is necessary for courts, tribunals and public authorities to be directed to consider the source instruments and related authoritative international materials, in order to gain context for how the rights are to be understood.

State and territory instruments all include a direction that ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.<sup>1</sup> In *Free & Equal* consultations, there was a general consensus that it would be worthwhile to strengthen this clause by including specific reference to the seven core treaties ratified by Australia, and UNDRIP, noting its particular relevance to First Nations rights.<sup>2</sup> The Commission’s proposed wording is as follows:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

Relevant international instruments include: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the

Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; United Nations Declaration on the Rights of Indigenous Peoples.

The Commission anticipates that this wording will encourage the fuller consideration of international law, and specifically the contents of thematic instruments which elaborate on the rights within the Human Rights Act, as they apply to certain groups. It is important that these instruments are drawn upon in the interpretation of specific rights that have additional contextual considerations deriving from treaties such as the CRPD, CRC, CERD and CEDAW.

So, for example, if a person with disability is challenging a decision they say infringes upon their right to health, courts would consider the specific health right within the CRPD (article 25) when interpreting the general health right in the Human Rights Act.

This approach will also encourage consideration of explanatory General Comments and other relevant international materials, ensuring that the Human Rights Act remains a ‘living document’ that takes into account developments in international law, including beyond the time the Human Rights Act is itself adopted. International sources are highly relevant to the interpretation of rights. This has been recognised by the High Court in *CR1026 v Republic of Nauru* (2018):

The content of a treaty obligation depends upon the construction which the international community would attribute to the treaty and on the operation which the international community would accord to it in particular circumstances. The interpretative principles to be applied include the rules of customary international law codified in Arts 31 and 32 of the Vienna Convention on the Law of Treaties (1969). Considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty.<sup>3</sup>

For the last principle, the High Court cited *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* where the International Court of Justice said:

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>4</sup>

## 9.2 Interpretation of federal laws

The interpretive clause, and the related limitations clause, collectively provide guidance to courts about how they should interpret statutes in light of the human rights contained within the Human Rights Act. Courts are to consider whether laws are compatible with human rights by assessing whether laws can be interpreted in this manner, by reference to the intention of Parliament as expressed through the statute under analysis, and the criteria within the interpretive and limitation clauses.

Interpretive and limitations clauses are also relevant to public authorities who interpret legislation when applying laws and developing policies. Courts assess the actions and decisions of public authorities through the lens of these clauses, to determine whether they acted compatibly or incompatibly with human rights in a particular circumstance.

Laws, decisions and actions may be compatible with human rights where they infringe human rights, as long as the infringement is justified by reference to the limitations clause. The Commission considers that this should be made explicit in the Human Rights Act, through the adoption of the overarching definition of compatibility that is included in the Queensland Human Rights Act:

### Meaning of *compatible with human rights*

An act, decision or statutory provision is *compatible with human rights* if the act, decision or provision—

- (a) does not limit a human right; or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with [the limitations clause].<sup>5</sup>

The interpretive direction itself must be designed to require interpretation in line with human rights, while respecting the parliamentary intention underlying the statute – noting that, in a dialogue model, parliamentary intention will prevail, due to the ultimate supremacy of Parliament.

State and territory instruments take a similar approach to interpretive directions, with all adopting virtually identical wording:

Vic s 32(1)	So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
ACT s 30	So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.
Qld s 48(1)	All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

State and territory instruments diverge from the initial inspiration for the clause, s 3 of the UK Human Rights Act. The UK interpretive clause states that, ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’.<sup>6</sup> The state and territory instruments add in the phrase ‘*so far as it is possible to do so consistently with its purpose*’. The UK formulation is stronger than the state and territory formulations due to the inclusion of the phrase ‘so far as it is possible to do so’ without a further qualifier. The UK Human Rights Act has been interpreted to direct courts that they may diverge substantially from the text

of the statute in order to interpret it compatibly with human rights. As a general rule, UK courts allow for interpretations that may depart from the plain words of the text, as long as they ‘go with the grain’ of the purpose of the legislation.<sup>7</sup>

For example, in the case of *Ghaidan v Godin-Mendoza*,<sup>8</sup> the UK Court of Appeal interpreted provisions of the *Rent Act 1977* (UK), relating to the succession of statutory tenancies to a spouse, in light of section 3 of the UK Human Rights Act. A landlord had sought to deny succession of a tenancy to the deceased tenant’s same-sex partner. The Court interpreted the provisions to be inclusive of same-sex couples, reasoning that the social policy underlying the *Rent Act* was to protect cohabiting couples, despite a literal reading limiting it to heterosexual couples.

The Australian Constitutional context differs from that in the UK, which has no written Constitution and less rigorous separation between the judiciary and Parliament. In *Momcilovic v The Queen*, the High Court considered section 32(1) of the Victorian Charter. The majority confirmed that ‘remedial’ approaches akin to the UK approach would be outside the bounds of the role of the judiciary within Australia’s constitutional structure; and that s 32(1) did not require courts to interpret legislation in this manner.<sup>9</sup> An interpretive clause that enabled legislation to be altered beyond its intended meaning (as indicated by Parliament) would therefore be unconstitutional.<sup>10</sup> French CJ quoted Lord Reid in *Jones v Director of Public Prosecutions* in this regard:

It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.<sup>11</sup>

Beyond clarifying this point, the *Momcilovic* decision is 'widely regarded as having added great uncertainty to the meaning of section 32(1)' of the Victorian Charter.<sup>12</sup> Justice Weinberg of the Victorian Supreme Court told the Parliamentary Committee inquiring into the possibility of a Human Rights Act for Queensland that,

even though the High Court has spoken on the point, we do not know what the High Court's decision in *Momcilovic* actually says.<sup>13</sup>

There remains some confusion about the relative strength of the state and territory clauses, including the extent to which they differentiate from the principle of legality, and the extent to which courts may depart from the 'literal or grammatical' reading of the text.<sup>14</sup> It is necessary to address this grey area when considering the scope and strength of a potential clause at the federal level.

On one view, widely adopted by Victorian courts since *Momcilovic*, interpretive approaches under the state and territory instruments simply codify the existing principle of legality, 'with a wider field of application'.<sup>15</sup> Under this principle, it is presumed that Parliament does not intend to interfere with rights and freedoms 'except by clear and unequivocal language'.<sup>16</sup> Hence, when a statute is ambiguous, the courts should presume that it is intended to be read subject to fundamental rights.<sup>17</sup> Interpretive clauses can therefore be seen to widen the scope of the principle of legality to include the set of rights outlined in the human rights instrument.<sup>18</sup> The Victorian Court of Appeal explained this approach in *Nigro v Secretary to the Department of Justice*:

the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction ... The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the

principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.<sup>19</sup>

Associate Professor Janina Boughey and Professor George Williams observe that due to the conflation of section 32 with the principle of legality, section 32 'has had little effect on interpretation in Victoria'.<sup>20</sup>

Other Victorian opinions suggest that an interpretive clause is different in kind from the legality principle.<sup>21</sup> In the 2015 Victorian Charter Review, Michael Brett Young concluded that,

characterising section 32(1) as a codification of the common law principle of legality is an oversimplification. The section goes further than that, being a direction by the Victorian Parliament that its laws should be interpreted compatibly with the Charter's rights.<sup>22</sup>

The Commission considers that an interpretive clause under a Human Rights Act should be viewed as conceptually distinct from the principle of legality. First, as observed by Michael Brett Young, and some Victorian case law,<sup>23</sup> Parliament, by passing a Human Rights Act, incorporates human rights into Australian law – it is a more stringent directive from Parliament that specific rights are to be applied. Secondly, the interpretive clause is read in context with the Human Rights Act, including the limitations clause, while legality 'does not require one to look at whether the intended end justifies the proposed means'.<sup>24</sup> Pamela Tate SC observes that 'the focus [of the principle of legality] is upon discerning an unequivocal intention to interfere with a right and not upon assessing the rationality of the degree of interference consistent with the statutory objective'.<sup>25</sup> There are further distinctions between interpretive clauses and the principle

of legality – including regarding the scope of the principles and the source and nature of the rights included.<sup>26</sup>

There is room to manoeuvre between the two poles of unacceptable ‘remedial’ approaches that enable the rewriting of statutes on the one hand, and an interpretive approach that simply codifies the principle of legality, on the other. In *Free & Equal* consultations, stakeholders argued that a federal interpretive clause should be stronger than approaches broadly equivalent to the principle of legality.<sup>27</sup> Such a clause could require interpretations that are consistent with human rights where this is ‘reasonably possible’ in light of existing principles of statutory interpretation.

In general, statutory interpretation requires consideration of context and purpose, not merely a literal approach to the interpretation of the words of a statute. This applies when determining the purpose of Acts, and the imputed intention of Parliament. Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that,

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

Courts have emphasised that when they engage in the ‘ascertainment of legislative intention’, this is in fact ‘a statement of compliance with the rules of construction, [both] common law and statutory’.<sup>28</sup> A Human Rights Act would add a new rule of construction: a presumption of compatibility with human rights. This would fit into the existing rubric of statutory interpretation principles. Courts would be required to interpret two expressions of parliamentary intent together – the first being the text of the statute in question and its purpose; the second being the directive to interpret the statute compatibly with human rights *where reasonably possible*. This is within

the remit of courts, as they are regularly called upon to have regard to a range of factors when interpreting laws. This approach still ensures that interpretations that contravene the clear purpose of the statute and the intent of Parliament would not be viewed as acceptable – or reasonable – by the courts, even where there is a breach of human rights.

In some circumstances, depending on the instruments being interpreted, departure from the literal meaning of the text may be justified by a consideration of interpretive principles, including the context and purpose of the Act, the principle of legality, or the interpretive clause in the Human Rights Act. At other times, it will not. This reflects the fact that some words are open-ended and capable of a range of interpretations (for example ‘public interest’), while others have more precise and concrete meanings less open to interpretive choices.<sup>29</sup>

In light of these considerations, the proposed approach that received the most support in consultations is a formulation developed by the Law Council in its Human Rights Charter policy:

All primary and subordinate Commonwealth legislation is to be interpreted, **so far as is reasonably possible**, in a manner that is consistent with human rights.<sup>30</sup>

This formulation would indicate to courts that the federal interpretive clause is intended to be stronger than the state and territory clauses, but not to the extent of adopting ‘remedial’ approaches that cannot be supported by the text. The Law Council elaborates that ‘such a provision should require courts, tribunals and others interpreting legislation to depart from accepted interpretations of legislative provisions [in a way that is consistent with human rights] where this is reasonably possible and does not fundamentally undermine or distort the purpose of the legislation’.<sup>31</sup>

In addition to this clause, the Commission also recommends including clarification that the interpretive clause does not affect the validity of Acts or provisions that are not compatible with human rights; or statutory instruments made under an empowering Act, where the Act is not compatible with human rights. This is the approach taken at the state and territory level, to ensure that parliamentary supremacy is clearly protected. It clarifies that courts cannot strike down Acts for being incompatible with human rights. However, a statutory instrument that is not compatible may be struck down where it goes beyond what is required by the empowering Act.

The Commission favours wording to this effect, developed by the Human Rights Law Centre, based on the existing state and territory provisions:

This section:

(a) applies to a law of the Commonwealth whether made before or after the commencement of this section;

(b) does not affect the validity, continuing operation or enforcement of primary Commonwealth legislation;

(c) does not affect the validity, continuing operation or enforcement of subordinate Commonwealth legislation if the subordinate legislation is expressly empowered by the primary legislation under which it is made to be incompatible with human rights.

### 9.3 Interpretive steps and link with limitations clause

In Victoria there has been some debate about how the limitations clause interacts with the interpretive clause when applying the Victorian Charter. In *Momcilovic v The Queen*, the High Court Justices expressed differing views on this subject.<sup>32</sup> Subsequently, the Queensland

Human Rights Act explicitly linked the two to make it clear that they are part of the same process of determining compatibility, by defining compatibility as including consideration of justifications for limiting rights (extracted above). The Queensland Human Rights Act also added a clarifying point in s48(2):

If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

The Explanatory Memorandum to the Human Rights Act elaborates that

This means that if a provision can be interpreted in more than one way but none of the options would be compatible with human rights, then the court should apply the analysis required under [the limitations clause] to each of the available options and select the option that is most compatible.<sup>33</sup>

This approach reflects a similar recommendation in the Victorian Charter review:

make it clear that section 7(2) applies to the assessment of the interpretation of what is most compatible, or least incompatible, with human rights.<sup>34</sup>

The approach adopted by the Queensland Human Rights Act indicates that the interpretive clause is intrinsically linked with the limitation clause: together they set out a process to determine compatibility with human rights. A determination of compatibility requires an evaluation of whether a limitation of a right is justifiable. If it is not justifiable, it is not compatible with human rights. If it is justifiable, it is compatible. The Queensland approach received support in *Free & Equal* consultations for clarifying this point.<sup>35</sup>

The Victorian Charter Review set out the following steps for interpretation of laws in light of the limitations clause, based on approaches adopted in case law, both domestically and internationally.

- Determine the possible meanings of the provision through statutory interpretation in conjunction with the human rights in the Act.
- Where a provision has more than one possible meaning, the limitations clause can be utilised to determine which meaning is most compatible with human rights.
- If the only possible meaning interferes with human rights, apply the limitation clause to determine if the limitation is justified.<sup>36</sup>

The Commission endorses this approach to interpretation, which would be supported by the proposed interpretive and limitation clauses.

## 9.4 Full proposed wording of interpretive clauses

Based on the discussion above, the entirety of the interpretive provisions would read as follows:

### Interpretation of human rights in the Act

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

Relevant international instruments include: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the

Child; Convention on the Rights of Persons with Disabilities; United Nations Declaration on the Rights of Indigenous Peoples.

### Interpretation of federal laws

All primary and subordinate Commonwealth legislation is to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.

If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

This section:

(a) applies to a law of the Commonwealth whether made before or after the commencement of this section;

(b) does not affect the validity, continuing operation or enforcement of primary Commonwealth legislation;

(c) does not affect the validity, continuing operation or enforcement of subordinate Commonwealth legislation if the subordinate legislation is expressly empowered by the primary legislation under which it is made to be incompatible with human rights.

### Meaning of *compatible with human rights*

An act, decision or statutory provision is compatible with human rights if the act, decision or provision—

(a) does not limit a human right; or

(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with [the limitations clause].

## 9.5 Limitations clause

Most human rights are not absolute, and circumstances may require that different rights be balanced against important public interests, and against countervailing rights. For example, it may be necessary to balance the right to freedom of expression with the right to privacy; and the right to access information with national security interests. It is important that the Human Rights Act provides clear guidance about what rights can be limited, when and how, through a limitations clause.

Applying a limitations clause would not be a novel role for Australian courts, which already assess the limitations placed on rights in specific contexts under Commonwealth legislation,<sup>37</sup> and in relation to state and territory human rights instruments. Further, Australian courts apply a similar proportionality analysis in relation to the constitutionally implied ‘freedom of political communication’ and the guarantee that interstate trade and commerce shall be absolutely free.<sup>38</sup>

The Commission considers that a limitations clause should be based on the following criteria, tested during *Free & Equal* consultations.

- Absolute rights under international law should be carved out. This handful of rights cannot be justifiably limited under international law, which should be reflected in the Human Rights Act.
- For the avoidance of confusion, there should be one overarching limitations clause. This means that limitations within rights should not be included in the text of the right itself, as the limitations process is covered through the overarching clause. Otherwise, there will be a ‘double up’ in the limitations process when the right is applied alongside the clause.<sup>39</sup>

- The limitations clause should be based on the proportionality test that is strongly established in international law and applicable to human rights instruments. The Siracusa principles, which provide guidance on limitations of rights within the ICCPR set a clear standard in this regard.<sup>40</sup>
- The wording of the limitations clause should improve on state and territory approaches. It should serve a dual purpose of being a straightforward and complete legal test for the courts to apply, and a clear directive to public servants on how to conduct the limitations analysis in their day-to-day work.

The ACT, Queensland and Victoria all adopt similar limitations tests, but with some variance in wording and criteria. During *Free & Equal* consultations, the Commission heard that the Queensland clause was considered the most coherent legal test, but that it is somewhat difficult for public servants to apply in practice. The Queensland limitations clause is as follows:

### 13 Human rights may be limited

- (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
  - (a) the nature of the human right;
  - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;

(e) the importance of the purpose of the limitation;

(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

(g) the balance between the matters mentioned in paragraphs (e) and (f).

The Commission suggests adapting the Queensland provision to carve out absolute rights; and to provide more precise and clear wording for the proportionality test criterion to ensure that public authorities are able to apply it without difficulty. The Commission notes that Guidance Note 1 of the Parliamentary Joint Committee on Human Rights (PJCHR) which sets out the approach to proportionality, is a good resource in this regard.<sup>41</sup> A set of criteria based on the PJCHR guidance and the Queensland Act, that also carves out absolute rights, would be a practical proposal.

A provision of this kind should incorporate the overarching statement: 'the rights and freedoms contained in this Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. When deciding whether a limit is reasonable and justifiable, the following relevant factors could be included in the provision:

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the

legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose

- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, the provision should prescribe that the following absolute rights must not be subject to any limitations:

- Freedom from torture and other cruel, inhuman or degrading treatment or punishment
- Freedom from forced work
- Freedom from imprisonment for inability to fulfil a contractual obligation
- Prohibition against the retrospective operation of criminal laws
- Right to recognition before the law.

As well as carving out absolute rights, the Commission proposes including examples in the limitations clause that highlight the minimum core of certain ICESCR rights. This will signify that ICESCR rights should not be limited to such an extent as to encroach upon the minimum protection required by the right.<sup>42</sup>

Minimum core obligations have been described by commentators as:

the non-negotiable foundation of a right to which all individuals, in all contexts, and under all circumstances are entitled. The minimum core content implies a 'floor' below which no government can go regardless of the economic situation in a country.<sup>43</sup>

The CESCR Committee has provided examples:

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>44</sup>

The core content of ICESCR rights have also been elaborated through international case law. For example, the South African constitutional case of *South Africa v Grootboom*<sup>45</sup> focused on the right to housing for people had been forcibly evicted and were awaiting access to low-cost housing, while living in untenable conditions. The Constitutional Court addressed the question

of whether the South African Government's actions were 'reasonable' in the circumstances. The court found that the failure of government to provide for any form of temporary relief to those in desperate need, with 'no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations' was unreasonable, and that the Government had fallen short of its obligations in relation to the right to housing.<sup>46</sup>

Drawing on relevant CESCR commentary on the right to housing, along with this case, the limitations clause could state that rights in the Human Rights Act should not be limited to such an extent as to deprive a person from access to basic shelter or housing with adequate sanitation and access to safe drinking water.<sup>47</sup> Other examples could also be included in the text to illustrate the nature of minimum core obligations.

## Chapter 9: Endnotes

- 1 *Human Rights Act 2019* (Qld) s 48(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2); *Human Rights Act 2004* (ACT) s 31(1).
- 2 The Commission considers that that UNDRIP is capable of being implemented through the external affairs power of the Australian Constitution (section 51(xxix)), noting that it is an articulation of the right to self-determination, which is included in common article 1 of the ICCPR and ICESCR, as well as other key rights included in core treaty instruments that Australia has ratified.
- 3 *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 [22] (Kiefel CJ, Gageler and Nettle JJ).
- 4 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, 664 [66].
- 5 *Human Rights Act 2019* (Qld) s 8.
- 6 *Human Rights Act 1998* (UK) s 3(1).
- 7 Attributed to Lord Rodger Earlsferry by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [33]; Conor Gearty, *On Fantasy Island* (OUP, 2016) Ch 6, 88.
- 8 *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2004] UKHL 30.
- 9 *Momcilovic v The Queen* (2011) 245 CLR 1 [51] (French CJ); [146(vi)] (Gummow J, Hayne J agreeing at [280]); [545], [566] (Crennan and Kiefel JJ); [683]-[684] (Bell J).
- 10 *Momcilovic v The Queen* (2011) 245 CLR 1, [37]-[40] (French CJ).
- 11 *Momcilovic v The Queen* (2011) 245 CLR 1 [39] (French CJ) citing *Jones v Director of Public Prosecutions* [1962] AC 635 [662].
- 12 Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* (Report No. 30, 55th Parliament, June 2016) [4.2.6] <<https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2016/5516T1030.pdf>>.
- 13 Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* (Report No. 30, 55th Parliament, June 2016) [4.2.6] <<https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2016/5516T1030.pdf>>.
- 14 See, eg, *Slaveski v Smith* (2012) 34 VR 206 and *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [190], quoting Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1 [170], both discussed in Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 143.
- 15 See *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103-4 [46] (Ashley, Redlich and Priest JJA).
- 16 *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ). See also Dan Meagher, 'The Common Law Principle of Legality in an Age of Rights' (2011) 35 *Melbourne University Law Review* 449-478; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130.
- 17 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130.
- 18 Pamela Tate, 'Statutory interpretive techniques under the Charter' (Speech given at Human rights under the Charter: The development of human rights law in Victoria Conference, Melbourne, 8 August 2014) 36 <<https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/1f/959639eb2/statutory%2Binterpretive%2Btechniques%2Bunder%2Bthe%2Bcharter%2Baugust%2B2014.pdf>>.
- 19 *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [85].
- 20 Janina Boughey and George Williams, Submission to Legal Affairs and Community Safety Committee, *Inquiry into Human Rights Bill 2018*, 14 November 2019, 3 <<https://documents.parliament.qld.gov.au/committees/LACSC/2018/HumanRights2018/submissions/008.pdf>>.
- 21 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [190], quoting Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1 [170].
- 22 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 144. See also Benedict Coxon, 'Learning from Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation' (2020) 39(2) *University of Queensland Law Journal* 254.
- 23 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [190], quoting Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1 [170].
- 24 *WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322 (Warren CJ).
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- 26 See Bruce Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?' *Australian Public Law* (Blog, October 2016) <<https://www.auspublaw.org/2016/10/same-same-or-different/>>.
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- 28 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43]. See discussion in Pamela Tate, 'Statutory interpretive techniques under the Charter' (Speech given at Human rights under the Charter: The development of human rights law in Victoria Conference, Melbourne, 8 August 2014) 30 <<https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/1f/959639eb2/statutory%2Binterpretive%2Btechniques%2Bunder%2Bthe%2Bcharter%2Baugust%2B2014.pdf>>.
- 29 See *Hogan v Hinch* (2011) 243 CLR 506, 512 [69]-[70] discussed in Pamela Tate, 'Statutory interpretive techniques under the Charter' (Speech given at Human rights under the Charter: The development of human rights law in Victoria Conference, Melbourne, 8 August 2014) 25, 30 <<https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/1f/959639eb2/statutory%2Binterpretive%2Btechniques%2Bunder%2Bthe%2Bcharter%2Baugust%2B2014.pdf>>.
- 30 Law Council of Australia, *Human Rights Charter Policy* (November 2020) <https://www.lawcouncil.asn.au/publicassets/c517fdbd-9a28-eb11-9436-005056be13b5/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>.
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- 32 *Momcilovic v The Queen* (2011) 245 CLR 1 [51] (French CJ); [512], [565], [579] (Crennan and Kiefel JJ); [684] (Bell J); see also [166]-[170] (Gummow J), [280] (Hayne J).
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- 41 Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting statements of compatibility* (December 2014) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>.
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- 44 CESCR Committee, *General Comment No 3: The Nature of States Parties Obligations*, 5th sess, UN Doc E/1991/23 (December 1990) [11].
- 45 *South Africa v Grootboom* (2001) 1 SALR 46 (CC).
- 46 *South Africa v Grootboom* (2001) 1 SALR 46 (CC) [52] [99].
- 47 *Grootboom*, and CESCR Committee, *General Comment No 3: The Nature of States Parties Obligations*, 5th sess, UN Doc E/1991/23 (December 1990) [11]; See CESCR Committee, *General Comment No 4: The Right to Adequate Housing*, UN Doc E/1992/23 (December 1991); CESCR Committee, *General Comment No 14 - The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4 (August 2000).





# Chapter 10: Notification to Parliament regarding incompatible laws

State and territory Human Rights Acts provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights via the interpretive clause, the court has the power to issue a ‘declaration of incompatibility’ (DOI)<sup>1</sup> (called a ‘declaration of inconsistent interpretation’ in Victoria).<sup>2</sup> DOIs are designed to notify Parliament that a law is considered incompatible with human rights, and triggers a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.

The UK Human Rights Act was the first to include a power to make a DOI. In the UK, DOIs are issued regularly, resulting in a range of important amendments to UK law – the UK Parliament has acted swiftly to address most DOIs that have been issued. As of July 2020, 43 Declarations of Incompatibility had been made under the UK Human Rights Act. In respect of those, 29 legislative changes had taken place, 9 had been overturned on appeal and the remaining 5 were either under consideration, the government had proposed a response or there was scope for further appeal.<sup>3</sup> In New Zealand, the courts have found that a similar DOI power is available through the *New Zealand Bill of Rights Act 1990* (NZ), although it has only been utilised in two cases.<sup>4</sup>

In Australia, and particularly at the federal level, the issue of DOIs and their constitutionality is somewhat vexed.

The High Court has held that the vesting of Commonwealth judicial power in federal courts by s 71 of the Constitution entrenches separation of judicial power from legislative

power. The *Boilermakers* doctrine provides that a court exercising Commonwealth judicial power cannot exercise non-judicial power, or a power that is not incidental to a judicial power. If a power is not judicial or incidental to judicial power, then Parliament cannot confer such a power on a Chapter III Court (federal courts).<sup>5</sup> Key characteristics of ‘judicial power’ are that it involves the resolution of a justiciable controversy (a legal dispute) between parties, regarding existing rights or duties, through a binding decision.<sup>6</sup>

In the 2011 High Court case of *Momcilovic v The Queen*,<sup>7</sup> the High Court considered the constitutionality of DOIs made under s 36 of the Victorian Charter, including the constitutional implications of DOIs made by courts exercising federal jurisdiction. Each judgment differs in reasoning. Relevantly, all members of the High Court held that an exercise of power under s 36 is not judicial in nature, and five justices held that the issuing of a DOI is also not *incidental* to the exercise of judicial power.<sup>8</sup> Accordingly, federal courts may not be able to make a DOI without violating the separation of powers doctrine entrenched in the Australian Constitution.<sup>9</sup>

The High Court’s comments have led to legal uncertainty about the constitutionality of DOIs and this poses a risk that a federal Human Rights Act could not validly include a provision empowering federal courts to make them. Other jurisdictions that have successfully implemented dialogue models have not faced this kind of obstacle. Justice McHugh has observed:

what may work effectively in a jurisdiction with an unwritten constitution and a single legislature, as in the United Kingdom and New Zealand, may not work as effectively in a federal jurisdiction with a written constitution that incorporates the political doctrine of separation of powers.<sup>10</sup>

*Free & Equal* consultees were split on how to address this issue.

A number of stakeholders were in favour of including an adapted DOI that would be rendered 'judicial' in nature, thus avoiding the unconstitutionality of Chapter III courts exercising a non-judicial power.

The former Solicitor-General advised the NHRCC that a DOI would be consistent with the exercise of judicial power, provided it is made in proceedings for some other relief or remedy (that is, an application of some other law to the determination of a dispute as to the rights, duties or liabilities of the parties before it).<sup>11</sup> The Solicitor-General further suggested that the DOI should be binding on the parties to the proceeding, and the Attorney-General should be made party to the proceedings so that duties could be imposed on them (that is, in the manner of the resolution of a judicial dispute between parties).<sup>12</sup> Some *Free & Equal* stakeholders referenced these points and made other suggestions regarding how a DOI power could be rendered 'judicial' and therefore constitutional.<sup>13</sup>

Stakeholders that were in favour of a 'judicial' DOI noted that it would be an important element of the dialogue model (namely, the 'dialogue' that occurs between the judiciary and Parliament). Because the DOI would come directly from the courts, it would be imbued with institutional power, and Parliament would be inclined to respond by amending the relevant legislation, which would lead to better rights protections for all.<sup>14</sup> A DOI designed to be a 'judicial' power would address the key constitutional concerns raised in *Momcilovic*.

However other consultees argued that the DOI power may not be necessary, stating that the more important and regularly applicable element of the Human Rights Act model with respect to the judiciary is the interpretive power.<sup>15</sup> It was also observed that a DOI power may simply be ill-suited to the Australian context due to Australia's particular judicial culture, its stricter separation of powers doctrine and the chilling effect of *Momcilovic*, all evidenced by the lack of DOIs issued by state and territory courts.<sup>16</sup> Only one declaration has been issued under the Victorian Charter, and it was set aside on appeal in *Momcilovic*.<sup>17</sup>

The Commission considers that both points of view on DOIs have merit. However, on balance, in light of the Australian context, and the level of uncertainty associated with them, the Commission does not propose incorporating a DOI power for the courts to apply. Rather, the Commission proposes the following 'middle ground' option between the courts directly issuing DOIs, and not having any form of notification to Parliament about incompatible laws.

In the course of applying the interpretive clause in the Human Rights Act, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the Human Rights Act or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.

The Commission recommends that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question. For example, the Attorney-General could be required to table the notification in Federal Parliament and Government could be required to respond within a set time-period,<sup>18</sup> and proposed amendments could also be reverted to the PJCHR for review.

There need not be a formal DOI issued by the court to Parliament – the court would not play any role in this process other than to publish reasons for judgment in the usual way. This approach would simply require the Attorney-General’s Department to have processes in place to monitor cases that arise under the Human Rights Act, and a statutory mechanism for the Attorney-General to trigger the review of relevant laws when cases arise that highlight incompatibilities.

This option would still enable a form of ‘dialogue’ (albeit, at a remove), and would not run the risk of breaching constitutional principles, or discomfoting courts that may be reluctant to issue DOIs as a ‘novel’ remedy.



## Chapter 10: Endnotes

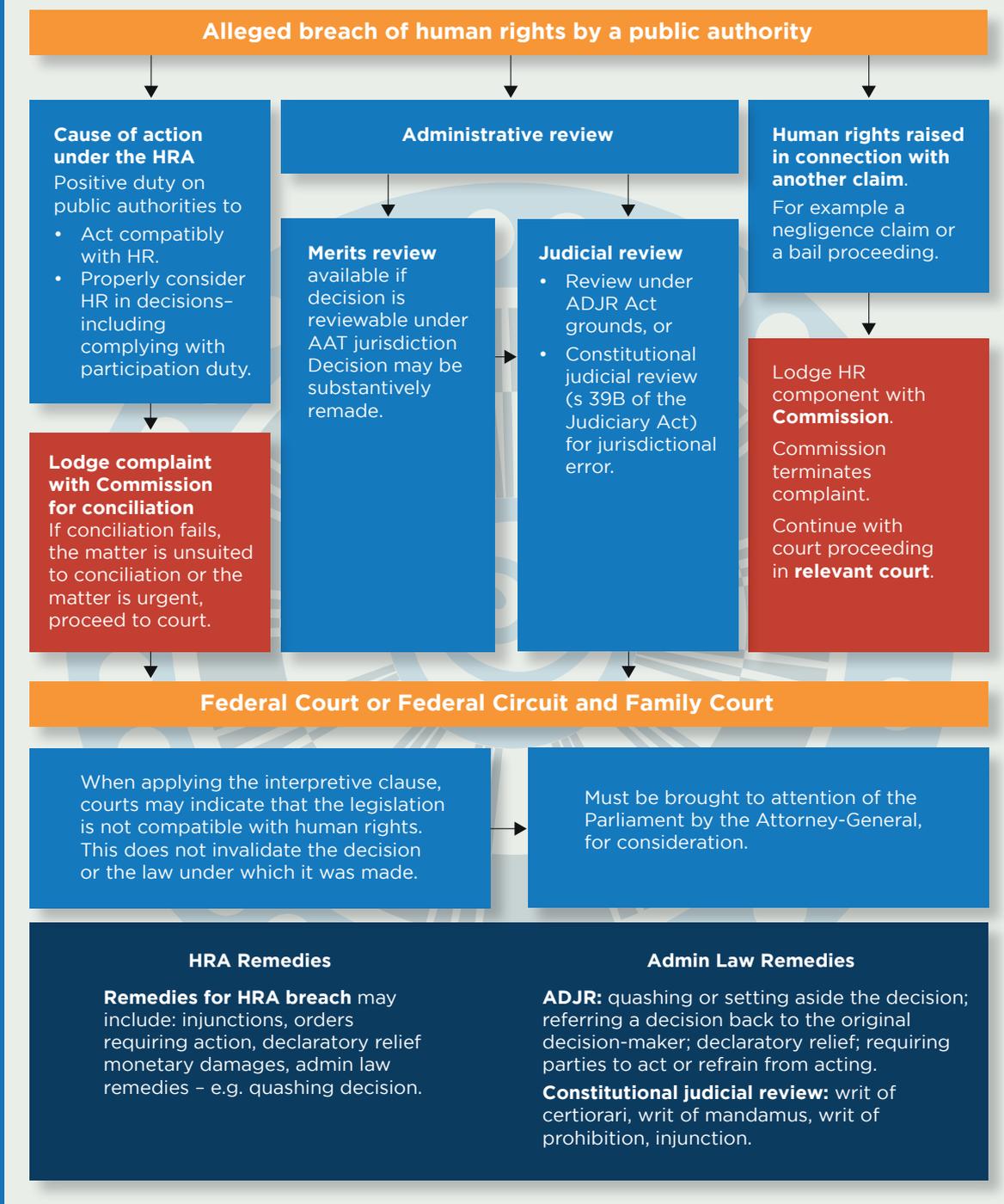
- 1 *Human Rights Act 2004* (ACT) s 32; *Human Rights Act 2019* (Qld) s 53.
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- 4 See *Taylor v Attorney-General* [2015] NZHC 1706; *Chief Executive of the Department of Corrections v Chisnall* [2020] 2 NZLR 110. See also Andrew Geddis and Marcelo Rodriguez Ferrere, 'Judicial Innovation Under the New Zealand Bill of Rights Act: Lessons for Queensland?' (2016) 36(2) *University of Queensland Law Journal* 251.
- 5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- 6 See, eg, *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 357 (Griffiths J).
- 7 *Momcilovic v The Queen* (2011) 245 CLR 1.
- 8 Chief Justice French, Crennan J, Kiefel J, Gummow J, Hayne J and Heydon J all held that the DOI did not amount to an exercise of judicial power. Only Crennan J and Kiefel J held that it was incidental to judicial power. *Momcilovic v The Queen* (2011) 245 CLR 1 [89], [90]–[91] (French CJ); [187] (Gummow J); [280] (Hayne J); [457] (Heydon J); [584] (Crennan and Kiefel JJ); [661] (Bell J).
- 9 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 15–16. Will Bateman & James Stellios 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 22.
- 10 Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (Speech to the Australian Human Rights Commission, 5 March 2009) <<http://www.humanrights.gov.au/publications/human-rights-act-courts-and-constitution-hon-michael-mchugh-ac-qc-2009>>, discussed in Bruce Stone and Nicholas Barry, 'Constitutional Design and Australian Exceptionalism in the Adoption of a National Bill of Rights' (2014) 47(4) *Canadian Journal of Political Science* 677, 780.
- 11 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009) 329.
- 12 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General's Department, September 2009) 329.
- 13 For example, by likening DOIs to declaratory relief; by enabling compensation ex gratia from the Attorney-General; by reframing it as certificate indicating a loss for the party seeking relief, rather than as a 'win' with no remedy attached (with a costs provision to deal with any adverse costs outcomes associated with this reframing approach).
- 14 Free & Equal Consultation, Sydney, 29 April 2021; Free & Equal Consultation, Sydney, 4 May 2021.
- 15 Free & Equal Consultation, Sydney (Online) 30 April 2021; Free & Equal Consultation, Brisbane (Online) 5 May 2021.
- 16 Free & Equal Consultation, Melbourne, 21 May 2021.
- 17 Bruce Chen 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' (2021) 44(3) *Melbourne University Law Review* 928.
- 18 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) 60.





# Chapter 11: Cause of action, complaints and remedies

## Pathways through complaints and courts



## 11.1 Introduction

The integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision making and policy design. However, sometimes better processes and education will not be enough, and breaches of human rights may occur. In those circumstances a Human Rights Act should provide a cause of action, a complaints pathway and enforceable remedies. The availability of a complaints pathway and remedies would also result in preventative measures being taken to build a stronger human rights culture both in the community and in government.

## 11.2 Cause of action and remedies

### (a) The need for an independent cause of action

A Human Rights Act should provide an independent cause of action for victims of a breach of human rights committed by a public authority, with access to a range of remedies. *Free & Equal* stakeholders strongly supported this approach.<sup>1</sup>

All unlawful actions under the Human Rights Act should give rise to a cause of action. The Commission's proposed rights, listed in chapter 5, are all amenable to investigation by complaints bodies and enforcement by the courts. An independent cause of action for every right in the Human Rights Act would provide clarity and consistency and enable enforcement of rights in accordance with Australia's international obligations.

Moreover, the inclusion of an independent cause of action and associated remedies may be *required* under international law and would assist (in a constitutional sense) in demonstrating that the Human Rights Act was appropriate and adapted to giving effect to Australia's international obligations.<sup>2</sup>

The right to an effective remedy is central to the ICCPR – and to international human rights in general. The right to remedy is outlined in Article 2(3) of the ICCPR, and Australia has ratified the First Optional Protocol to the ICCPR, which enables individuals to have access to the UN Human Rights Committee to make complaints about Australia breaching their rights. The Hon Pamela Tate SC argues that a Human Rights Act purporting to implement the ICCPR, but which did not include a domestic right to remedy through a direct cause of action, 'might be inconsistent with the ICCPR' and therefore may not be considered 'appropriate and adapted' to its implementation. In short, it might be beyond Commonwealth power under s 51(xxix).<sup>3</sup>

A direct cause of action has been adopted in the UK, ACT, New Zealand and Canada. For example, section 7(1) of the UK Human Rights Act provides:

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may – (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.<sup>4</sup>

The ACT Human Rights Act's cause of action is modelled on the UK provision.<sup>5</sup>

The Human Rights Act should also enable the raising of Human Rights Act rights in the context of another legal proceeding. Human rights may be relevant to a range of issues – including discrimination claims, tort claims and criminal claims. Human rights issues are often raised collaterally. This approach enables flexibility for litigants and reflects the practical reality that most cases are not ‘pure’ human rights cases. These are some examples of how human rights have been raised in various capacities within the Victorian courts:

- In a judicial review proceeding brought on administrative law grounds, a decision can be set aside because it is incompatible with human rights protected by the Charter or because the decision maker has not properly considered relevant rights.

- When the Charter is raised in a bail application, the court can grant bail on conditions that are informed by the Charter.
- A court can exclude evidence that is adduced in a criminal trial if it was obtained in a manner incompatible with the right to privacy.<sup>6</sup>

All Australian jurisdictions with Human Rights Acts enable human rights to be raised alongside other claims. However, Queensland and Victoria are international outliers by *only* allowing human rights to be raised alongside other claims. In these jurisdictions, a person can only raise human rights before a court by ‘piggybacking’ a human rights claim to separate proceedings against a public authority.

#### Overview of comparable jurisdictions:

	UK	ACT	Vic	Qld	NZ	Canada
<b>Judicial Cause of action: Direct</b>	✓	✓			✓ <sup>7</sup>	✓
<b>Judicial Cause of Action: Piggy-back only</b>			✓	✓		
<b>Availability of damages</b>	✓				✓	✓
<b>Commission HR complaints handling</b>				✓		

There is no principled reason for restricting human rights claims to ‘piggybacking’ – and it may be seen to be purely a mechanism to reduce access to the courts for human rights matters. The 2015 Victorian Charter Review recommended that Victoria adopt a direct cause of action, modelled on the ACT approach. Michael Brett Young gave the following summary in support of this recommendation that highlights the key issues with ‘piggybacking’. These problems have been raised regularly since the introduction of the Charter, including by *Free & Equal* stakeholders:<sup>8</sup>

the confusing and limited [piggybacking] remedies provision in section 39 of the Charter is undermining its effectiveness. Providing for human rights without corresponding remedies sends mixed messages to the public sector and to the community about the importance of those rights. Further, the Charter is based on a flawed regulatory model that does not include an ability to enforce the standards that it sets, as a last resort...

... I am also concerned the current model leads to contortions in litigation just to get a Charter question before a court or tribunal, even when the Charter is ‘piggy backed’ onto a claim that is not successful. It seems absurd to require people to make unsuccessful arguments on other grounds before they can raise Charter grounds. This situation also creates complex jurisdictional and procedural questions.

... I am not convinced the introduction of a separate cause of action would significantly increase civil litigation. While making remedies more accessible is likely to result in some increase in litigation, it should also reduce unnecessary litigation that occurs because the current remedies provision is obscure.

... I am also encouraged by the experience in other jurisdictions, and under other Victorian legislation that protects human rights, that has not involved a deluge of litigation.<sup>9</sup>

Regarding the final point, fears about opening ‘floodgates’ to litigation through a direct cause of action have proved unwarranted in other jurisdictions:

- A direct cause of action was introduced in the Australian Capital Territory in 2009. In that year, the number of cases that mentioned the Human Rights Act increased markedly, but the proportion of cases involving human rights issues has since reduced to pre-2009 levels.<sup>10</sup> In its first ten years of operation (up to 2014), the ACT Human Rights Act was mentioned in approximately 50 cases in ACT tribunals (6.6% of published decisions), 164 cases in the ACT Supreme Court (9.2% of 1846 published decisions) and in 29 cases in the ACT Court of Appeal (7.6% of 371 published decisions).<sup>11</sup>
- In the UK, figures show that human rights legal actions peaked at 714 in 2002, shortly after the passage of the Human Rights Act, but had fallen to only 327 cases in 2009.<sup>12</sup>

Additionally, an accessible complaints process (utilising alternative dispute resolution) would reduce the impact of a Human Rights Act on the judicial system. Litigation need not be the only port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed.

## (b) The need for flexible remedies

The following are examples of two remedies clauses:

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### ***Human Rights Act 1998 (UK)***

8. Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
- (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

### ***Human Rights Act 2004 (ACT)***

40C Legal proceedings in relation to public authorities

(1) This section applies if a person—

(a) claims that a public authority has acted in contravention of section 40B; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

(a) start a proceeding in the Supreme Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

...

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(5) This section does not affect—

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

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Both of these clauses allow the courts to grant the relief it considers appropriate. However, while the UK clause includes (limited) access to damages, the ACT provision excludes damages as a remedy where a person alleges a breach of the ACT Human Rights Act.

Monetary damages are currently available for breaches of rights protected by federal discrimination laws, including breaches by public

authorities.<sup>13</sup> Damages are also available in the UK,<sup>14</sup> New Zealand<sup>15</sup> and Canada.<sup>16</sup> The Human Rights Acts in the ACT, Victoria and Queensland do not permit the recovery of damages where a breach of human rights has been found.<sup>17</sup> Australian state and territory jurisdictions are outliers for not making damages available where breaches have occurred.

The reason for excluding access to monetary damages in the states and territories was to avoid litigation and costs for government. For example, the Victorian Charter review recounted:

the Victorian Attorney-General's May 2005 Human Rights Statement of Intent for a Human Rights Charter in Victoria preferred a focus on preventing and mediating disputes rather than litigation ... The [2005 Human Rights Consultation] Committee also recommended excluding damages and other forms of monetary compensation as possible remedies, both to reflect the community's preference for a remedy that fixes the problem, and to avoid imposing potentially significant additional costs on government.<sup>18</sup>

However, as discussed above, jurisdictions with a direct cause of action and monetary damages available have not seen 'floodgates' of litigation. Additionally, procedural remedies will not always be effective in remedying every kind of breach, and it is important to recognise this fact. When it is not appropriate to have a decision remade but a person has suffered loss or damages, courts should be able to provide a remedy – otherwise that individual will be denied justice. The remedies provision should ensure that monetary damages are an available option to the courts where it is the correct remedy in the circumstances.

The Commission also considers that the remedies available under the federal Human Rights Act should replicate the remedies available under the federal discrimination law regime which includes monetary damages, amongst other remedies. In the discrimination context, it is broadly accepted that sometimes monetary damages are the appropriate response to breaches of rights, and the same reasoning can be applied to the Human Rights Act. This would also enable consistency between the two frameworks, which would reduce complexity for applicants and courts, including with respect to claims that raise both discrimination and human rights issues.

In the UK, awards of damages are restricted: they may be awarded only if, in all the circumstances, it is necessary to afford just satisfaction to the person concerned.<sup>19</sup> Damages awarded for breach of the UK Human Rights Act have been modest and infrequent.<sup>20</sup> If concerns arose about courts awarding excessive damages a similar provision could be included in the federal Human Rights Act to address potential concerns.

Failing to provide sufficient remedies may mean that Australia is breaching its international human rights obligations – including Article 2(3) of the ICCPR. *Free & Equal* submitters and consultees were strongly against restricting available remedies through the Human Rights Act.<sup>21</sup>

The right to claim monetary damages for a breach of human rights would send an important message to public authorities, people in Australia and the international community: Australia takes breaches of human rights by, or on behalf of its government, seriously.

### **(c) Articulation of cause of action**

A cause of action would arise where a public authority has acted unlawfully under the Human Rights Act. It is unlawful for a public authority to:

- Act in a way that is incompatible with a right in the Human Rights Act.
- Fail to give proper consideration to a relevant right in the Human Rights Act when making a decision – including by failing to fulfil the participation duty.

If there has been an alleged breach of the positive duty, a person could:

- Make a complaint to the Commission (discussed in section 11.3).

- If conciliation through the Commission fails or is inappropriate, or if the matter is urgent, initiate proceedings in the Federal Court or the Federal Circuit and Family Court.
- Rely on the rights under the Human Rights Act in other legal proceedings.

This would not affect:

- a right a person has (otherwise than because of the Human Rights Act) to seek relief in relation to an act or decision of a public authority.

The above articulation is broadly based on s 40C of the ACT Human Rights Act, which also prescribes a direct cause of action.

## Positive duty tests

### *Proper consideration*

The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. The ‘proper consideration’ limb requires decision makers to:

- (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; [Note that rights will be ‘relevant’ if the proposed decision will apparently limit such rights (that is, the right is ‘engaged’), and rights should be construed broadly in relation to this step]<sup>22</sup>
- (2) seriously turn his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person;
- (3) identify the countervailing interests or obligations; and
- (4) balance competing private and public interests as part of the exercise of justification.<sup>23</sup>

The ‘proper consideration’ limb would also include a procedural obligation to engage in participation processes where the participation duty arises in relation to a particular right. The participation duty is discussed in chapter 7. This limb would therefore also encompass a requirement to facilitate participation with respect to decisions that directly or disproportionately affect the rights of First Nations peoples, children and persons with disability; or otherwise reasonably justify a decision not to facilitate participation by reference to the limitations clause.

### *Acting compatibly*

The requirement to ‘act’ compatibly with human rights is a substantive obligation on public authorities.<sup>24</sup> An ‘act’ includes a failure, refusal and proposal to act – and may also include ‘decisions’ in terms of a substantive decision that is made (as opposed to human rights consideration in the course of decision making).<sup>25</sup> Courts apply the following test to determine if this limb has been breached:

- consider whether a right has been engaged;
- determine whether a public authority has limited or interfered with the right through its action or inaction;
- with reference to the limitations clause, determine whether any limitation imposed was reasonable and justified in the circumstances.<sup>26</sup>

### **Distinction between review under the direct cause of action via the Human Rights Act, and ordinary judicial review pathways**

If a person is seeking to review a decision by a public authority, they may be able to do so either pursuant to:

- a direct cause of action under the Human Rights Act; or
- ordinary judicial review pathways, such as:
  - » proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); or
  - » ‘constitutional’ judicial review (under s 75(v) of the Constitution and its statutory equivalent in s 39B of the *Judiciary Act 1903* (Cth)).<sup>27</sup>

As is the case in the ACT (see s 40C(5) of the ACT HRA referred to above), the Commission proposes that ordinary judicial review could proceed either as an alternative to, or in addition to, a direct cause of action under the HRA. Different considerations would apply in each type of proceeding.

In Victoria and the UK, there is authority indicating that Human Rights Act requirements impose a higher standard of decision making in relation to both the ‘acting compatibly’ limb, and the ‘proper consideration’ limb, when compared to ordinary judicial review pathways. In the Victorian *Patrick’s Case* it was noted that human rights assessments involve ‘a more intensive ... standard of judicial review than traditional judicial review’.<sup>28</sup> Similarly in *Bare v IBAC* it was observed that ‘the word “proper” implies that the procedural limb [in the Victorian Charter] is more stringent than the common law requirement of those involved in public administration to take into account relevant considerations’.<sup>29</sup>

In the UK, the pivotal case of *Re Daly* explored the differing standard of review introduced by the UK Human Rights Act. Lord Steyn explained the nature of Human Rights Act judicial review in comparison to the common law *Wednesbury* reasonableness test in the following terms.

Clearly, [proportionality] criteria are more precise and more sophisticated than the traditional grounds of review.

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.

... First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations ...

... In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

... The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way.

This does not mean that there has been a shift to merits review. On the contrary ... the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood* ‘that the intensity of review in a public law case will depend on the subject matter in hand’. That is so even in cases involving Convention rights. In law context is everything.<sup>30</sup>

#### **(d) Available remedies via the direct cause of action**

The Commission proposes that the federal Human Rights Act remedies clause grant courts a broad discretion over remedies, including damages, noting the range of different kinds of human rights claims and the importance of flexibility. Namely, the clause should include a phrase such as:

In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

The Commission proposes that the Human Rights Act jurisdiction replicate the range of remedies available under the discrimination law regime. Section 46PO(4) of the AHRC Act sets out a non-exhaustive list of remedies for successful anti-discrimination claims, including injunctions and monetary damages.

It is proposed that available remedies include:

- *Injunctions*

Courts should be able to make an order for an injunction in cases where a public authority has acted, is acting or is proposing to act inconsistently with human rights.

- *Orders requiring action*

The Human Rights Act should give courts the power to make an order requiring a respondent to act to redress any loss or damage suffered by a person whose human rights have been breached.

- *Declaratory Relief*

Declaratory relief is when the court sets out the rights of parties with respect to a particular manner, in a binding way.<sup>31</sup> A declaration may provide both parties to a proceeding with clarity as to their obligations and rights.

- *Monetary damages*

Monetary damages are awarded to place the person back in the position in which they would have been had the conduct had not happened, by compensating financially for loss or harm.

- *Administrative law remedies*

A Human Rights Act could also attract a range of administrative law remedies, including setting aside the decision and referring the decision back to the decision maker for further consideration.<sup>32</sup>

### **11.3 Complaints under the Human Rights Act**

#### **(a) Commission complaints pathway**

The Human Rights Act should allow a person to make a human rights complaint to the Commission. The Commission's existing unlawful discrimination jurisdiction, under the four federal Discrimination Acts, reflects the potential of alternative dispute resolution to resolve disputes between complainants and public authorities in a quick, accessible, cost-efficient and effective manner.<sup>33</sup> The Commission also already conciliates complaints about breaches of human rights, which are currently non-justiciable. The Commission's existing processes could be easily adapted to conciliate human rights complaints with the foundation of unlawfulness.

The Commission currently has three complaint streams:

- Complaints of 'unlawful discrimination' under the four Federal Discrimination Acts. If a complaint is terminated by the Commission, the affected person can bring an unlawful discrimination case before the courts.<sup>34</sup>

- Complaints under ILO Convention 111 for ‘discrimination in employment’. The Commission conducts conciliation where appropriate, but if it is unable to effect settlement and the Commission considers the alleged act or practice amounts to discrimination in employment or occupation, the Commission reports to the Attorney-General.<sup>35</sup>
- Complaints relating to the international human rights instruments scheduled to, or declared for the purposes of, the AHRC Act. If conciliation is not successful and the Commission considers alleged act or practice to be a breach of a human right, it reports to the Attorney-General. There is no recourse to courts.<sup>36</sup>

**AHRC Report: *FZ v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 135**

This report was based on an inquiry into the use of force in immigration detention against Mr FZ. Mr FZ, a refugee from Sudan, made a complaint to the Commission alleging a breach of his human rights as a result of force used against him on two occasions, including the conduct of a strip search.

Mr FZ was isolated in a room at Villawood Immigration Detention Centre at the time of the two incidents. The officers responsible for the uses of force believed Mr FZ to be at a risk of self-harm, due to his alleged possession of a razor blade. In response to this perceived risk, Serco, a service provider to the Department of Home Affairs, deployed seven emergency response team officers in riot gear into the room. Six of the officers forced Mr FZ to the ground, face down, and handcuffed him. He was subjected to a pat, metal detector, and search strip search on the first occasion, and a pat search on the second occasion. The strip search was not authorised by the Australian Border Force Superintendent, and it appears that the officers conducted it without prior approval, contrary to policy.

As a result of these uses of force, Mr FZ suffered a fracture to his hand, requiring surgery. The Commission noted that the Department and its service providers were aware of Mr FZ’s mental health history, including that he is a survivor of trauma and torture. The Commission found that the level of force employed was not necessary, proportionate, or reasonable, despite

the risk Mr FZ posed to himself or others, and that negotiation and de-escalation strategies should have been employed instead, centring on Mr FZ’s physical and mental safety and preserving his dignity.

The Commission found that the use of force on Mr FZ was contrary to the requirements of article 10 of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity.

The report makes ten recommendations to both remedy the loss caused to Mr FZ and to engender systemic change in the immigration detention system to prevent the excessive use of force in the future. These recommendations include the payment of an appropriate amount of compensation and an apology to Mr FZ for the breach of his human rights; and improved policy guidance, training, and incident reporting in relation to the use of force and strip searches in the immigration detention environment.

The Department of Home Affairs did not agree that the use of force on Mr FZ was excessive, however it noted that certain policies and procedures governing the planned use of force in immigration detention were not followed in this case. The Department advised that staff were reminded of their obligations, and that a manager was counselled after the incident. The unauthorised removal of clothing of Mr FZ has also been utilised as a case study for Serco personnel at a management level. The Department also noted that it has updated its policies relating to the use of force in detention since the incident.<sup>37</sup>

The case study above is an example of a recent matter that was not able to be conciliated, but one in which there was some acknowledgement by an agency that relevant procedures had not been followed. An enforceable cause of action may have impacted on the conciliation process in two ways. First, it may have provided an increased incentive on the Department to reach a conciliated outcome. Secondly, if the matter was unable to be conciliated, it would have provided a pathway for the complainant to have his claims adjudicated by a court.

When the AHRC Act was passed in 1986, the then-government's proposal was that functions in relation to the ICCPR would be exercised under a Human Rights Act. The Australian Bill of Rights Bill 1985 (Cth) would have replicated the human rights functions of the existing Commission, but by reference to a Human Rights Act, with an associated human rights complaints function.<sup>38</sup> However this Bill was never passed, leaving a gap in Australia's human rights protection regime and limiting the effectiveness of the human rights complaints jurisdiction.

Currently, a person can make a complaint to the Commission by reference to the international instruments annexed to, or declared for the purposes of, the AHRC Act, including the ICCPR, the CRPD and the CRC. With the implementation of a Human Rights Act, this complaints jurisdiction should be removed and replaced with a Human Rights Act jurisdiction. Complainants could proceed to court if conciliation fails (or is inappropriate), as is the case with unlawful discrimination complaints. This approach was supported by a range of submissions.<sup>39</sup>

Existing unlawful discrimination jurisdiction procedures contained in Division 1 of Part IIB of the AHRC Act should apply to human rights complaints. This includes the following:

- After a complaint is lodged with the Commission, a complainant, a respondent, an affected person or the Commission should be able to apply for an interim

injunction to the Federal Court or the Federal Circuit and Family Court, to maintain the status quo or maintain their rights. This is currently provided for in s 46PP of the AHRC Act.

- The President should be able to terminate a complaint on the same range of grounds in s 46PH of the AHRC Act, including where there is no reasonable prospect of conciliation, or where the President satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit and Family Court, as in s 46PH(1B)(b) and s 46PH(1)(h).
- After a complaint is terminated by the President, a person should be able to make an application to the Federal Court or Federal Circuit and Family Court alleging a breach of human rights, as in s 46PO of the AHRC Act.
- Representative complaints should be available to the Commission, as in ss 46PA and 46PB of the AHRC Act, and to the Federal Court or Federal Circuit and Family Court.<sup>40</sup>

In addition, the Commission proposes a new termination ground that should apply specifically to human rights complaints – see discussion in section 11.4.

The AHRC Act jurisdiction includes rights contained in three declarations by the United Nations General Assembly,<sup>41</sup> the subject matter of which has been substantially overtaken by later treaties to which Australia is now a party and which have been declared for the purposes of s 47 of the AHRC Act.<sup>42</sup> The AHRC Act jurisdiction also includes the rights set out in the United Nations General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>43</sup> When Australia joined in the adoption by consensus of this declaration, it explained that its view was that the declaration came within the

context of the obligations imposed by article 18 of the ICCPR. The Commission is of the view that a new complaints stream under a Human Rights Act as recommended in this position paper would in substance encompass all the rights in the international instruments annexed to, or declared for the purposes of, the AHRC Act. As a result, the Commission recommends that its existing human rights complaints jurisdiction be replaced entirely with a new jurisdiction dealing with complaints made under the Human Rights Act.

The new human rights jurisdiction based on a Human Rights Act would be broader than the Commission's existing human rights jurisdiction. For example, the Commission does not currently accept complaints under ICESCR as part of its human rights complaints jurisdiction (although ICESCR is referred to when appropriate by the Commission in the exercise of its other

functions). The Commission has long advocated for ICESCR to be given the same status in the AHRC Act as the other core human rights treaties.<sup>44</sup> This is a necessary reform to ensure that the full suite of human rights protections formally falls under the Commission's remit, and it should be actioned alongside the implementation of the Human Rights Act.

The Commission has also recommended that key ILO complaints grounds (including discrimination on the basis of religion; and discrimination on the basis of an irrelevant criminal record) should be included as new protected attributes in unlawful discrimination law, and the ILO 111 jurisdiction otherwise be removed.<sup>45</sup> For a detailed discussion of the Commission's proposals for reforming its complaints jurisdiction, see *Free & Equal: A reform agenda for discrimination law*.

### **Queensland Human Rights Act Complaint Jurisdiction**

Since January 2020, the Queensland Human Rights Commission (QHRC) has conciliated complaints under the *Human Rights Act 2019* (Qld).<sup>46</sup>

The QHRC's human rights complaints process may include conducting preliminary investigations, requesting submissions from public entities, and conducting early negotiations and conciliation conferences. Should a complaint against a public entity be unamenable to conciliation, the Commissioner may also report on actions the entity should take to ensure its acts and decisions are compatible with human rights.<sup>47</sup> If the complaint is not resolved, there is no subsequent pathway to courts or tribunals.

Before a complaint can be made to the QHRC, an internal complaint must be made to the public authority about the contravention which is the subject of the complaint, which needs to accord with the relevant public entity's complaints procedure. At least 45 business days must have elapsed since the internal complaint was made before the complaint can be referred to the QHRC. Following the expiry of this 45 day period, the person may only then refer the complaint to the QHRC if they have not received a response to the complaint or received a response which the person perceives to be an inadequate response.<sup>48</sup>

In its 2019–20 annual report, covering 4 months of the new human rights complaint stream, the QHRC reported that 130 complaints received were about human rights issues. Of these complaints, 56 were combined claims, and 74 were human rights-only complaints.<sup>49</sup>

In its 2020–21 report, the QHRC reported that it accepted 340 human rights complaints, representing just over a quarter of accepted complaints.<sup>50</sup> 29.1% of these human rights complaints were resolved through conciliation or other processes, including early intervention.<sup>51</sup> There are two public reports arising from unresolved human rights complaints on the QHRC website: on prisoner isolation and hotel quarantine.<sup>52</sup>

Queensland consultees informed the Commission that the Human Rights Act complaint stream is operating as intended. It is an important, accessible avenue enabling individuals to be heard on human rights matters. This is despite a backlog due in part to COVID-19 and related complaints — resourcing to ensure the QHRC has capacity to hear complaints was viewed as essential by consultees.<sup>53</sup>

Consultees observed that public authorities often view the complaints process as a learning opportunity and are open-minded when participating. However, it was also noted that the lack of a direct cause of action is a barrier that has an impact on the bargaining position of complainants in the complaint processes.

Moreover, the requirement to make a complaint to the relevant public entity first has led to delays and difficulties, because there is a lack of clarity on how public authorities are supposed to handle human rights complaints internally.

*Example of complaint resolved through the Queensland Human Rights Commission:*

A woman who had mobility issues made a complaint about the limited number of accessible parks at a bus terminal and being issued with a number of fines for parking in other places. She said that on two occasions the bus driver refused to engage the ramp, requiring her to struggle up and down the bus stairs.

The complaint was resolved on the basis that the transport service agreed to conduct an internal review of its policies and procedures about the use of ramps, and to provide a copy to all bus drivers employed by it. Employees were also required to attend training on the Anti-Discrimination Act and the Human Rights Act, and an internal training module on human rights and improving services to people with disability was introduced.<sup>54</sup>

The Commission notes that a recent ACT Legislative Assembly Committee report entitled *Right to Remedy* recommended a new complaints process be introduced under the ACT Human Rights Act to enable the ACT Human Rights Commission to conciliate human rights complaints.<sup>55</sup> Like the Commission's own proposal, and the Queensland Human Rights Act's current approach to complaints, this process would mirror the approach taken

in the unlawful discrimination jurisdiction. The report also recommended a pathway to the ACT Civil and Administrative Tribunal (ACAT) if conciliation is unsuccessful. This would be in addition to the existing direct cause of action in the ACT enabling Human Rights Act cases to be brought to the ACT Supreme Court.<sup>56</sup> The report gave the following examples of why the current ACT Human Rights Act system is inadequate without an accessible complaints mechanism.

## Vulnerabilities prevent individuals from pursuing Supreme Court action

The following are de-identified case studies provided by Canberra Community Law to the ACT Committee, highlighting why court action is out of reach for many of their clients.

- 'Trisha' – a public housing resident with cognitive and mental health disabilities living with a disabled mother who was moved into aged care, leaving Trisha as an unapproved resident facing homelessness with limited options to have that decision reviewed.
- 'Peter' – an indigenous detainee at the Alexander Maconochie Centre (AMC) with mental health disabilities and severely

disadvantaged background, facing human rights limitations due to his behaviour, who is unlikely to be able to make a complaint to the Supreme Court.

- 'Kaylee' – a 14-year-old former detainee at Bimberi with behavioural problems who on release is unwelcome at her local high school and unable to make a complaint about her lack of human rights to suitable education.
- 'Ryan' – a detainee at the AMC on the path to reform after overcoming his alcohol addictions but has lost his ACT Housing while incarcerated, and therefore has no home to be paroled to, with no accessible complaint mechanism.<sup>57</sup>

## (b) Other complaints avenues

In addition to a complaints mechanism within the Commission, complaints processes could also be embedded in the following areas:

- Public authorities could be required to establish internal human rights complaint mechanisms. This could be a first recourse for individuals, but it should not be compulsory to make a complaint internally before proceeding to the Commission.
- Public sector oversight bodies could have the ability to consider human rights issues that arise within their jurisdiction.<sup>58</sup> For example, the Australian Public Service Commission could consider the Human Rights Act when dealing with instances of public service misconduct.

## 11.4 Pathways through the Commission and courts

It is important to ensure that there are appropriate pathways enabling flexibility to raise human rights in different forums, and simplicity for claimants navigating the system.

The Commission has proposed implementing a human rights complaint system that mirrors the discrimination law jurisdiction, where complaints could be made in relation to the causes of action under the Human Rights Act. This would mean that there would be a requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then move onto the Federal Court or Federal Circuit and Family Court for adjudication. The same processes that currently exist for unlawful discrimination would apply

in the human rights context (including all the termination grounds, and representative complaints processes, discussed in section 11.3).

However, the Commission notes that human rights claims are different in kind from complaints of unlawful discrimination. Sometimes matters will be urgent and require immediate court action, such as when a person faces imminent deportation. Some matters are simply not suited to conciliation at all. Some matters will be raised alongside other claims. For example, if a person has both a human rights claim, and a related claim (such as a negligence claim, or an administrative review claim on a related ground) they should be able to raise the human rights claim in the course of that dispute. Similarly, if a person is facing bail or a criminal trial, they should be able to raise human rights concerns to the court conducting the criminal process.

A number of *Free & Equal* stakeholders were in favour of enabling direct access to the Commission, courts or tribunals, without the requirement to progress claims through the Commission first. They considered this to be important for maximising access to justice. Stakeholders cited the diversity and urgency of many human rights claims, as well as the need for flexibility to raise collateral claims without being hampered by additional processes.

The Commission considers that these concerns could be dealt with through the model used in the existing unlawful discrimination jurisdiction, with one adjustment.

The existing unlawful discrimination termination ground of ‘no reasonable prospect of conciliation’<sup>59</sup> could be applied under the Human Rights Act in circumstances where there is an existing claim on foot, such as the bail proceeding and negligence examples above. The Commission currently utilises this termination ground in unlawful discrimination matters where there is an existing claim that relates to the same underlying subject matter as the complaint to the Commission. In practice, it is usually clear

on the face of the complaint documents that there is no reasonable prospect of the matter being settled by conciliation at the Commission and the complainant and/or respondent request immediate termination of the claim so it can be joined to the existing court proceedings.

The Commission also anticipates that it would rely more upon the existing ‘public importance’ ground to terminate complaints in the human rights context, in comparison to the unlawful discrimination jurisdictions.

The Commission proposes adding the following termination ground to apply to human rights complaints (in addition to the termination grounds imported from unlawful discrimination):

- A termination ground based on urgency: enabling a claim to be fast tracked to the court where there is an imminent risk of irreparable harm to a person.

The Commission envisions that with regard to the new and existing termination grounds, there would be an adapted and quick internal lodgment and review process, so that the Commission could return a response promptly in urgent cases. The Commission would simply confirm that a particular claim meets criteria indicating that urgent consideration is needed, or that there is another related matter on foot (or soon to be on foot) and terminate the claim without delay. Human rights claims could still be heard urgently by a court, and claims joined to other proceedings. Termination via these grounds would be a form of verification that the Commission has been notified and considers the claim to meet basic criteria for further consideration by the courts.

There are principled arguments in favour of an approach that requires complainants to progress through the Commission as a first step.

The Commission already has a successful complaints process for unlawful discrimination, which has a consistently high satisfaction rate.<sup>60</sup> There is also well-understood legal architecture surrounding the complaint, termination and

court process for discrimination grounds. The necessary adjustments suggested above could be made to the existing processes, without the need to start from scratch. The Commission considers that adopting similar processes across both jurisdictions would result in a simple, consistent and streamlined system.

In particular, the Commission considers that there is great value in providing a single starting point for human rights cases – this would provide certainty to applicants about how to proceed. It would also mean that the Commission could filter cases, by sorting out plainly unmeritorious or vexatious claims before they are filed in court. This should help to mitigate any concerns about the Human Rights Act leading to an increase in unwarranted litigation. This approach would also be helpful for tracking complaints through the system, which would be useful for data collection and evaluations; and for enabling cross-referrals to be made.

The Commission has run the AHRC Act human rights complaints process since 1981, which applies in a way that is similar to the proposed Human Rights Act complaint process (but without a court pathway). This AHRC Act experience has resulted in the Commission building up significant institutional expertise on appropriate actions to take in response to allegations of human rights breaches. Such expertise includes an awareness of circumstances where conciliation could add significant value, and when it would not be appropriate.

The Commission has established and built relationships with key government departments and offices through running the AHRC Act jurisdiction, which would be equally useful for managing complaints under the Human Rights Act. Respondents are generally more amenable to engaging with the Commission's concerns at the initial stage, while court processes by their nature are far more adversarial.

For these reasons, the Commission is in favour of an approach that mirrors the unlawful discrimination jurisdiction and requires claimants to lodge with the Commission as a first step. Noting the differing views on this matter, the Commission suggests that this be subject to review at a future date, through the broader Human Rights Act review process.

## 11.5 Administrative law pathways

Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could have an impact on those mechanisms by supplementing existing bases for reviewing government decisions to ensure they are compatible with human rights.

### (a) Merits review

The Administrative Appeals Tribunal (AAT) has the function of conducting a merits review of many kinds of government decisions. In doing so, the AAT reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. This process is often described as 'stepping into the shoes' of the original decision maker. This allows tribunals to reconsider discretionary matters and the merits of the original decision. A 'correct' decision is one made according to law. A 'preferable' decision is the best decision that could be made on the basis of the relevant facts.

Section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) states as follows:

(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- (a) affirming the decision under review;
- (b) varying the decision under review;
- or

(c) setting aside the decision under review and:

- (i) making a decision in substitution for the decision so set aside; or
- (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

The AAT may competently deal with questions of law that arise when conducting a review of an administrative decision.<sup>61</sup> If human rights (either consideration of, or substantive compliance with) were a requirement for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider those human rights issues again independently. The AAT would be able to find that a person's human rights have been affected and take this into account in an administrative decision.

### **(b) Potential intermediate adjudicative processes**

Some *Free & Equal* stakeholders were in favour of creating a new standalone human rights tribunal to hear complaints arising directly from a Human Rights Act.<sup>62</sup> The Commission has recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts, in relation to unlawful discrimination matters.<sup>63</sup> This could also extend to the resolution of disputes in relation to Human Rights Act matters.

The Commission suggests that creating a new tribunal, or granting the Commission hearing and determination powers in relation to the Human Rights Act (and unlawful discrimination), could be subject to future consideration through subsequent Human Rights Act reviews.

### **(c) Judicial review**

A person who claims that their human rights have been affected as a result of a decision by a public authority can seek to bring a direct statutory cause of action claiming a breach of the Human Rights Act.

In addition, existing judicial review pathways and remedies would be preserved through the Human Rights Act. That is, the person may also seek ordinary judicial review of a decision of a public authority, either as an alternative to or in addition to a direct cause of action under the Human Rights Act.

There are two avenues for judicial review of administrative decisions in Australia. The first is via the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This enables review by a federal court of decisions made under an enactment to which the ADJR Act applies. There are some limitations to this jurisdiction. In particular, Schedule 1 to the ADJR Act sets out a long list of decisions which are not subject to ADJR Act review.

If the decision is covered by the ADJR Act, a person could seek review on one of the grounds covered by s 5, including that there was a breach of the rules of natural justice or that it involved an improper exercise of power. Compliance with the requirements of the Human Rights Act may be relevant to a number of grounds, including whether the decision maker failed to take into account a relevant consideration that they were bound to take into account, or whether the decision involved an error of law.

Remedies under the ADJR Act include an order quashing or setting aside the decision, or a part of the decision; an order referring a decision back to the original decision-maker for further consideration subject to the directions of the court; an order declaring the rights of the parties (declaratory relief); and an order directing the parties to do or refrain from doing any act or thing.<sup>64</sup>

The second avenue of judicial review is 'constitutional' judicial review, which usually involves either review in the High Court under s 75(v) of the Constitution, or review in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth).<sup>65</sup> The key question in constitutional judicial review is whether there has been a jurisdictional error. A jurisdictional error arises when a decision maker exceeds the authority or power conferred upon them. It means the decision maker has failed to comply with an essential condition to, or limit on, the valid exercise of power.

Constitutional writs could be granted as remedy. These include: a writ of certiorari which sets aside a decision made contrary to law; a writ of mandamus, which is an order compelling or directing an administrative decision maker to perform mandatory duties correctly; and a writ of prohibition which forbids a decision maker from commencing or continuing to perform an unlawful act.

As such, administrative law should apply as usual in relation to review of decisions affecting human rights.

## 11.6 Standing

The Commission proposes that standing under the Human Rights Act be afforded to individual 'victims' affected by human rights breaches by public authorities, and organisations or entities acting in the interest of a person, group or class affected by human rights breaches.

The Commission has previously discussed this issue with regard to representative unlawful discrimination claims – see *Free & Equal: A reform agenda for discrimination laws*.<sup>66</sup>

The 'victim' criterion for standing is established in international human rights law. The UK and the ACT both use this as the applicable standing test under their respective Human Rights Acts.<sup>67</sup> Under the formulation in those Human Rights Acts, only individuals can be a 'victim'. Relatives of a victim may have standing

in certain circumstances, for example, where a complaint is made about the victim's death, or where the victim is a child.<sup>68</sup> However, in the UK, the Equality and Human Rights Commission also has standing to bring judicial review proceedings under the Human Rights Act in its own capacity.<sup>69</sup>

The victim criterion as the sole basis for standing is a relatively narrow test. From a policy and access to justice perspective, there is a strong argument for enabling representative actions (and/or class actions) on behalf of affected individuals or groups, alongside individual actions under the Human Rights Act.<sup>70</sup>

First, those affected by human rights breaches are more likely to be vulnerable and disadvantaged, without the financial means to bring a claim. They may also have experienced significant trauma associated with the breaches in question. Representative standing would enable human rights cases to be brought without burdening the vulnerable and disadvantaged individuals as the centre of human rights claims.

Secondly, human rights breaches that affect many people (for example, in cases of the misuse of artificial intelligence), could be run more effectively, and are more likely to result in systemic outcomes that prevent future abuses. For First Nations peoples, representative claims relating to issues affecting communities will be especially important, noting that UNDRIP rights are collective in nature. Enabling representative claims on behalf of communities would be an important means of realising self-determination principles. It will also often be the most logical way of handling a claim – for example, actions of public authorities affecting cultural rights will often affect communities as a whole.

Thirdly, public interest cases could be run that create certainty and improve the overall strength of human rights law in Australia, whilst penetrating the public consciousness. This also provides impetus for reform and structural change to reduce potential future cases.

In the past, some have raised concerns that there may be constitutional barriers to broad standing provisions.<sup>71</sup> In this regard, the ALRC has stated that the constitutional requirement that the jurisdiction of federal courts be confined to ‘matters’ does not affect representative standing. It has rejected the argument that it would be unconstitutional to allow a person to start a proceeding where he or she is not pursuing any right or special interest.<sup>72</sup> The ALRC observed that, while the courts will not determine issues which are ‘hypothetical or abstract’, ‘hypothetical questions and standing are separate issues ... the requirement that a matter must not be hypothetical or abstract will remain irrespective of any changes to the law of standing’.<sup>73</sup> Claimants with no personal interest in a claim would still be addressing a real, non-hypothetical disagreement about a legal question or issue, relating to legal rights, duties or liabilities, even if only declaratory relief is sought.<sup>74</sup>

Subsequent to the ALRC report, the High Court determined in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*, that an open standing provision ‘does not necessarily breach the “matter” principle and that there may be a justiciable controversy for the purposes of Chapter III despite the applicant having no personal right or special interest at stake’.<sup>75</sup> Consultees noted that in light of this case, and recent administrative law trends, it is unlikely that there would be constitutional issues with a broader standing clause in a Human Rights Act.

Nonetheless it is important that standing be circumscribed to ensure that claims address a specific breach of human rights in relation to a particular individual or a clearly defined and identified group of individuals. The organisation initiating a claim should also have some kind of subject matter connection and/or representative interest in the matter at hand. However, any requirements around this should not be overly prescriptive as this could unnecessarily limit access to justice. For example, it was noted in

consultations with First Nations people that there should not be requirements for First Nations organisations to have some form of corporate entity or legal entity to have standing under the Human Rights Act.

Similar recommendations regarding public interest cases have been made in previous reports. The ALRC has recommended permitting appropriate organisations with a legitimate interest in a particular subject matter to commence public interest proceedings particularly where the claim involves a systemic problem that affects a wide class of persons.<sup>76</sup>

The Commission has also consistently recommended that the AHRC Act be amended to enable representative bodies to bring claims of unlawful discrimination on behalf of members to court, including in the *Free & Equal* Position Paper on discrimination law reform.<sup>77</sup> Currently, representative bodies may make discrimination complaints to the Commission on behalf of individuals affected by discrimination, but those representative bodies are not able to commence proceedings in the courts once the complaint is terminated. This kind of application would be different from the representative proceedings in Part IVA of the *Federal Court of Australia Act 1976* (Cth) in that representative proceedings under Part IVA involve a group of seven or more people who each have claims against the same person. Proceedings may not be brought under Part IVA by representative bodies on behalf of individual claimants.

Some steps have been taken recently to allow representative bodies to bring sexual harassment claims to court.<sup>78</sup> A consistent approach should be adopted with regard to discrimination claims and human rights claims, to permit representative bodies to make complaints to the Commission, and to make applications to the courts.

The Commission also considers that it would be worthwhile to include an explicit right of *amicus curiae* for organisations. The form of submissions (written/oral) would be at the discretion of courts.

## 11.7 Protections against adverse cost orders

An additional means of enhancing access to justice is to include protections against adverse cost orders.<sup>79</sup> The ALRC has recommended that legislation be implemented to permit public interest costs orders to be made by federal courts and tribunals where satisfied that the proceedings will:

- determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
- affect the development of the law generally and may reduce the need for further litigation, or
- have the character of public interest or test case proceedings.<sup>80</sup>

The Commission considers that the Human Rights Act should include a provision reflecting similar public interest considerations to protect against adverse cost orders.

The Commission has also traversed the issue of costs and made recommendations in relation to unlawful discrimination claims in *Free & Equal: A reform agenda for discrimination laws*. In that Position Paper, the Commission recommended that the AHRC Act should be amended to include mandatory criteria to be considered by the courts in determining whether to award costs in the interests of justice. The Paper referred to the list included in the Human Rights and Anti-Discrimination Bill 2012 as an instructive example:

(a) the financial circumstances of each of the parties to the proceedings

(b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)

(c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)

(d) whether any party to the proceedings has been wholly unsuccessful in the proceedings

(e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer

(f) any other matters that the court considers relevant.<sup>81</sup>

A failure to include protections against adverse cost orders may have a chilling effect on individuals establishing case law in relation to matters that may have a degree of uncertainty, but are nonetheless essential for the public interest. Such cases may determine the application of rights affecting large sections of the community, and can provide clarity as to the nature of obligations on public authorities – which should in turn engender systematic changes, preventing future rights breaches and court claims.

Consideration may also be given to the model of the Civil Rights Division of the United States Justice Department, which has the role of litigating on behalf of individuals and groups on various rights matters.<sup>82</sup> This enables important cases, including test cases, to be heard without financial risk to individuals and organisations.

## Chapter 11: Endnotes

- 1 For example, National Justice Project, Submission 27, *Free & Equal Inquiry*; Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*; Human Rights Law Centre, Submission 65, *Free & Equal Inquiry*; Eugene White, Submission 75, *Free & Equal Inquiry*; Julian Gardner, Submission 79, *Free & Equal Inquiry*; Australian Privacy Foundation, Submission 119, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Victoria Legal Aid, Submission 141, *Free & Equal Inquiry*.
- 2 Ratification of an international convention (such as the ICCPR) by the Executive attracts the external affairs power of s 51(xxix) of the Constitution, providing a basis for the making of legislation by the Federal Parliament to give effect to the convention. *Commonwealth v Tasmania* (1983) 158 CLR 1. Discussed in Pamela Tate SC, 'Human Rights in Australia: What would a federal charter of rights look like' (Michael Kirby Lecture at Southern Cross University, 14 March 2008) 17 <<http://www.austlii.edu.au/au/journals/SCULawRw/2009/2.pdf>>.
- 3 Pamela Tate SC, 'Human Rights in Australia: What would a federal charter of rights look like' (Michael Kirby Lecture at Southern Cross University, 14 March 2008) 20 <<http://www.austlii.edu.au/au/journals/SCULawRw/2009/2.pdf>>.
- 4 *Human Rights Act 1998* (UK) s 7(1).
- 5 *Human Rights Act 2004* (ACT) s 40C(2).
- 6 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 126 citing *PJB v Melbourne Health* (2011) 39 VR 373; *Bare v IBAC* [2015] VSCA 197; *Director of Public Prosecutions v Kaba* [2014] VSC 52.
- 7 Courts have developed remedies for breach and expanded the cause of action, not directly found in legislation. *Simpson v Attorney General (Baigent's case)* [1994] 3 NZLR 667.
- 8 See, eg, National Justice Project, Submission 27, *Free & Equal Inquiry*; Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*; Human Rights Law Centre, Submission 65, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Eugene White, Submission 75, *Free & Equal Inquiry*; Victoria Legal Aid, Submission 141, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Julian Gardner, Submission 79, *Free & Equal Inquiry*; Australian Privacy Foundation, Submission 119, *Free & Equal Inquiry*.
- 9 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127.
- 10 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127.
- 11 ACT Human Rights Commission, *Look who's talking: A snapshot of ten years of dialogue under the HRA 2004* (2014) <<https://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.
- 12 Robert Verkaik, 'Lawsuits on human rights halve despite European act' *The Independent* (Online) 20 April 2009 <<https://www.independent.co.uk/news/world/europe/lawsuits-on-human-rights-halve-despite-european-act-1671332.html#comments-area>>.
- 13 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(d).
- 14 Damages are available for a violation of the UK Human Rights Act but only if this award is necessary to afford just satisfaction to the complainant *Human Rights Act 1998* (UK) s 8(3).
- 15 While the *New Zealand Bill of Rights Act 1990* (NZ) does not make specific provision for remedies, the NZ Court of Appeal has held that compensation is available for breach of the human rights protected under that Act: *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.
- 16 Canadian Charter of Rights and Freedoms s 24(1).
- 17 *Charter of Human Rights and Responsibilities 2006* (Vic) 39(3); *Human Rights Act 2004* (ACT) 40C(4); *Human Rights Act 2019* (Qld) 59(3).
- 18 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 118 citing Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 116.
- 19 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 125.
- 20 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 125. See *Dobson v Thames Water Utilities* [2009] EWCA 28 [41]-[46]; *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254; [2013] UKSC 23.
- 21 See, eg, Australian Lawyers Alliance, Submission 29, *Free & Equal Inquiry*; Human Rights Law Centre, Submission 65, *Free & Equal Inquiry*; Uniting Church of Australia, Submission 91, *Free & Equal Inquiry*; Amnesty International Australia, Submission 103, *Free & Equal Inquiry*; Australian Privacy Foundation, Submission 119, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Victoria Legal Aid, Submission 141, *Free & Equal Inquiry*; Sean Stimpson et al., Submission 158, *Free & Equal Inquiry*.

- 22 *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 [220]; *De Bruyn v Victorian Institute of Forensic Mental Health* [102],[126]; *Castles v Secretary, Department of Justice* (2010) 28 VR 141 [55].
- 23 *Bare v IBAC* (2015) 48 VR 129, 223 [288]–[289] (Tate JA) citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141.
- 24 Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney-General’s Department, September 2009) 332.
- 25 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 71.
- 26 See, eg, *PJB v Melbourne Health* (Patrick’s Case) (2011) 39 VR 373, [306], [309]–[312]; *Antunovic v Dawson* (2010) 30 VR 355 [70], [135]; *Certain Children (No 2)* [2017] VSC 251 [199].
- 27 Administrative Review Council, *Federal Judicial Review in Australia* (2012), 45.
- 28 Patrick’s Case (2011) 39 VR 373, 423 [229], 443–444 [315] (Bell J). See also *Certain Children by Their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (No 2)* [2017] VSC 251 [217]; *Loiello v Giles* [2020] VSC 722 [241].
- 29 *Bare v IBAC* (2015) 48 VR 129; [275]–[276] (Tate JA); *Certain Children* (No 1) [2016] VSC 796 [183]–[184].
- 30 *Regina v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26 [27]–[28] (Lord Steyn).
- 31 Regarding declaratory relief in the discrimination context, see eg, *Commonwealth v Evans* (2001) 105 FCR 437 [8].
- 32 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 15, 15A, 16; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 104, 114 (Sweeney J), 126 (Morling J), 134 (Foster J).
- 33 For information on the complaints process, see Australian Human Rights Commission, *Federal Discrimination Law Online*, ch 6: <<http://www.humanrights.gov.au/legal/FDL/index.html>>.
- 34 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.
- 35 Rosalind Croucher “‘Seeking Equal Dignity without Discrimination’ – The Australian Human Rights Commission and the Handling of Complaints’ (2019) 93(7) *Australian Law Journal* 577.
- 36 *Australian Human Rights Commission Act 1986* (Cth) s 20.
- 37 Australian Human Rights Commission, *Annual Report 2020–21* (2021) 58.
- 38 Rosalind Croucher “‘Seeking Equal Dignity without Discrimination’ – The Australian Human Rights Commission and the Handling of Complaints’ (2019) 93(7) *Australian Law Journal* 576.
- 39 Lisa Ho, Submission 11, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Human Rights Law Centre, Submission 65, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Refugee Advice and Casework Centre, Submission 140, *Free & Equal Inquiry*.
- 40 See the discussion in Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) 213 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 41 The *Australian Human Rights Commission Act 1986* (Cth) includes the *Declaration of the Rights of the Child* (1986) (sch 3) *Declaration on the Rights of Mentally Retarded Persons* (1971) (sch 4) and the *Declaration on the Rights of Disabled Persons* (1975) (sch 5).
- 42 The CRC and the CRPD.
- 43 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55), declared for the purposes of s 47 of the AHRC Act on 8 February 1993.
- 44 Scheduling ICESCR to the AHRC Act was supported by submissions to Free & Equal, eg, Public Interest Advocacy Centre, Submission 69, *Free & Equal Inquiry*; McCabe Centre for Law and Cancer, Submission 33, *Free & Equal Inquiry*.
- 45 Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) 345 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>. See also Australian Law Reform Commission, *Spent Convictions*, (Final Report No 37, 1987) [79].
- 46 Queensland Human Rights Commission, *Complaints* <<https://www.qhrc.qld.gov.au/complaints>>. The 2015 review of the Victorian Charter also recommended that the VEOHRC be given the statutory function and resources to resolve disputes under the Charter, however this was not implemented. Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 105.
- 47 Queensland Human Rights Commission, *Annual Report 2020–21* (2021) 32 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/35511/Queensland-Human-Rights-Commission-Annual-Report-2020-21.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0015/35511/Queensland-Human-Rights-Commission-Annual-Report-2020-21.pdf)>.
- 48 Samantha Kane, ‘The Human Rights Act 2019 – Legal Proceedings and Human Rights Complaints’ *Crown Law* <<https://www.crownlaw.qld.gov.au/resources/publications/the-human-rights-act-2019-legal-proceedings-and-human-rights-complaints>>.
- 49 Queensland Human Rights Commission, *Putting People First: The first annual report on the operation of Queensland’s Human Rights Act*

- (2020) 120 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf)>.
- 50 Queensland Human Rights Commission, *Putting People First: The first annual report on the operation of Queensland's Human Rights Act* (2020) 42 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf)>.
- 51 Queensland Human Rights Commission, *Putting People First: The first annual report on the operation of Queensland's Human Rights Act* (2020) 44 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf)>.
- 52 'Reports of unresolved human rights complaints' *Queensland Human Rights Commission* (Web Page) <<https://www.qhrc.qld.gov.au/resources/legal-information/reports-on-unresolved-human-rights-complaints>>.
- 53 See also Queensland Human Rights Commission, *Putting People First: The first annual report on the operation of Queensland's Human Rights Act* (2020) 31 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf)>.
- 54 Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (June 2022) 7 citing Australian Lawyers for Human Rights Inc., *Submission 15*.
- 55 Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (June 2022) 11.
- 56 Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (June 2022) 11.
- 57 Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (June 2022) 5-6.
- 58 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 110.
- 59 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(b).
- 60 See, eg, Australian Human Rights Commission, *Annual Report 2020–21—Complaint Statistics* (2021) 6 <[https://humanrights.gov.au/sites/default/files/2022-02/ahrc\\_ar\\_2020-2021\\_complaint\\_stats.pdf](https://humanrights.gov.au/sites/default/files/2022-02/ahrc_ar_2020-2021_complaint_stats.pdf)>.
- 61 See Peter Cane, 'Merits Review and Judicial Review: the AAT as a Trojan Horse' (2000) 28 *Federal Law Review* 213, 227–228.
- 62 See, eg, Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Eugene White, Submission 75, *Free & Equal Inquiry*.
- 63 Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) Recommendation 22, 236 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 64 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16.
- 65 Section 75(v) of the Australian Constitution gives jurisdiction to the High Court where a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Section 39B of the *Judiciary Act 1903* (Cth) provides that the Federal Court of Australia can exercise this jurisdiction. For a discussion of this jurisdiction, see Administrative Review Council, *Federal Judicial Review in Australia* (2012) 45.
- 66 Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) 213 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 67 *Human Rights Act 1998* (UK) s 7(1); *Human Rights Act 2004* (ACT) s 40C(1)(b).
- 68 'Achieving the Rights Outcome' *ACT Human Rights Commission* (Web Page) <<https://hrc.act.gov.au/resources/guides/achieving-rights-outcome/6/>>.
- 69 *Equality Act 2006* (UK) s 30(3).
- 70 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) 71.
- 71 Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, (Final Report 87, 1996) 'Public Interest Litigation' [4.45] <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html#ALRC78Ch2Publicinterest1>>.
- 72 Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, (Final Report 87, 1996) 'Public Interest Litigation' [4.45]–[4.47] <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html#ALRC78Ch2Publicinterest1>>.
- 73 Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, (Final Report 87, 1996) 'Public Interest Litigation' [2.10]–[2.11] <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html#ALRC78Ch2Publicinterest1>>.
- 74 Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, ALRC 87 (1996) 'Public Interest Litigation' [4.45]–[4.47] <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html#ALRC78Ch2Publicinterest1>>.
- 75 Andrew Edgar, 'Extended Standing: Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011)

- 39 *Federal Law Review* 435, 443 discussing *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 603 [20] (Gleeson CJ and McHugh J), 611 [44]–[45] (Gaudron J), 631 [104], 637 [120]–[122] (Gummow J), 659–60 [176]–[180] (Kirby J), 660 [183] (Hayne J), 670 [214] (Callinan J).
- 76 See Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public Remedies*, (Final Report 87, 1996) ‘Public Interest Litigation’: <<http://www.austlii.edu.au/other/lawreform/ALRC/1996/78.html#ALRC78Ch2Publicinterestl>>.
- 77 See Respect@Work: ‘unions and other representative groups should be able to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the Commission’. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 29 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>; Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) 337 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 78 Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) Sch 4.
- 79 Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; Law Council of Australia, *Human Rights Charter Policy* (2020) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>>.
- 80 Michael Kirby, ‘Deconstructing the law’s hostility to public interest litigation’ (2011) *Law Quarterly Review* 29 citing Australian Law Reform Commission, *Costs-shifting: Who Pays For Litigation?* (Report 75, 1995).
- 81 Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) 201 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 82 ‘Civil Rights Division’ *Department of Justice* <<https://www.justice.gov/crt>>.





# Chapter 12: Periodic reviews of the Human Rights Act

The Human Rights Act should include a provision for a periodic statutory review process within a set timeframe. The Commission proposes that an initial review be undertaken at the five-year mark, with the timeline for subsequent reviews assessed at that stage. Statutory review processes were strongly supported by *Free & Equal* stakeholders.<sup>1</sup>

Periodic reviews could assess the Human Rights Act's impact and effectiveness. They could ensure the continued relevance of a Human Rights Act for an evolving Australia. It could draw the government's attention to necessary amendments and help prevent a Human Rights Act from becoming 'frozen in time'.

Reviews could, for example, include consideration of whether further rights should be set out in the Human Rights Act or if the content of the existing rights should be expanded or clarified. Reviews might also consider whether further human rights education initiatives are required to better implement the Human Rights Act. These periodic reviews should involve significant public consultation. In particular, the consultation process should ensure that First Nations peoples, as well as marginalised and vulnerable groups, can participate effectively.



## Chapter 12: Endnote

- 1 Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*. Rape and Domestic Violence Services Australia, Submission 77, *Free & Equal Inquiry*; Uniting Church of Australia, Submission 91, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*; ACT Human Rights Commission, Submission 152, *Free & Equal Inquiry*.



# Chapter 13: Parliamentary scrutiny and human rights

## 13.1 Introduction

This chapter considers the operation and effectiveness of parliamentary scrutiny of laws for compatibility with human rights.

The reform recommendations in this chapter reflect the principles set out in chapter 3, section 3.6, by way of strengthening the mechanism of accountability for human rights protection provided by the PJCHR, ensuring early consideration of human rights in the development of legislation and embedding human rights in primary legislation against which the scrutiny is conducted.

The principal recommendation of this Position Paper is for a Human Rights Act. This would also become the centrepiece for human rights scrutiny by the PJCHR. In this chapter the Commission advocates that the PJCHR also continue a wider scrutiny role, referable to all the international treaty obligations.

In this chapter the Commission also sets out practical and procedural suggestions to strengthen the operation of the PJCHR. As submitted by Victoria Legal Aid,

The introduction of parliamentary scrutiny of new legislation and legislative instruments to ensure consistency with human rights was a welcome step forward for increasing accountability and transparency in developing rights-compliant Federal laws. However, further changes are needed to ensure human rights are properly embedded and central to decision-making at every level of government.<sup>1</sup>

## 13.2 Parliamentary scrutiny and human rights

Parliamentary scrutiny in Australia has a long history. The creation of the PJCHR added to the number of committees established since 1932 that consider whether Commonwealth laws encroach upon rights.<sup>2</sup>

The Senate Standing Committee on Regulations and Ordinances was established in 1932 to review delegated legislation.<sup>3</sup> Renamed the Senate Standing Committee for the Scrutiny of Delegated Legislation in December 2019 (Scrutiny of Delegated Legislation Committee),<sup>4</sup> it has reviewed all delegated legislation ‘using criteria based on common law rights’.<sup>5</sup> It is required to review, and if necessary, report against a range of criteria, including whether the instruments:

- are in accordance with the applicable statute
- unduly trespass on personal rights and liberties
- unduly exclude, limit or fail to provide for independent review of decisions affecting rights, liberties, obligations or interests
- contain matters more appropriate for parliamentary enactment.<sup>6</sup>

These ‘cornerstone’ scrutiny principles<sup>7</sup> have been described as a ‘traditional common law scrutiny mandate’.<sup>8</sup>

When the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) was established in 1981, it was given a similar role.<sup>9</sup> However, as the Committee was established shortly after the ratification of the ICCPR, the debates over the responsibilities of the Committee included discussion of including the ICCPR as a touchstone for parliamentary rights scrutiny. This was rejected in favour of the ‘general and short’ scrutiny standard of the Scrutiny of Delegated Legislation Committee.<sup>10</sup>

This did not mean that human rights considerations would have no place. Grenfell points out that, while the 1981 Senate debates reveal ‘a breakdown in bipartisanship’, they ‘demonstrate that members of all parties recognised that a scrutiny process applying the “cornerstone” principles would involve consideration of human rights principles and civil liberties’.<sup>11</sup>

The Scrutiny of Bills Committee is required to report on, among other things, whether proposed laws:

- trespass unduly on personal rights and liberties
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions.<sup>12</sup>

These two committees have ‘a longstanding history of conducting a technical scrutiny function, without specifically assessing the policy merits of a particular provision’.<sup>13</sup> It is characterised by an assessment of the extent to which legislation complies with particular scrutiny principles.

Other committees review legislation which may have an impact on rights, including in relation to migration, counter-terrorism and national security legislation: in particular, the

Parliamentary Joint Committee on Intelligence and Security, the Parliamentary Joint Committee on Law Enforcement and the Senate Standing Committee on Legal and Constitutional Affairs.

Then in 2009, the National Human Rights Consultation, chaired by Fr Frank Brennan SJ, showed support for greater parliamentary scrutiny in relation to human rights, and the limited capacity of the existing scrutiny committees ‘to engage in comprehensive human rights scrutiny’.<sup>14</sup>

In consequence, the PJCHR was established in 2011 to consider a set of human rights specifically tied to Australia’s international human rights obligations under the seven international instruments set out in s 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The express incorporation of human rights principles into Commonwealth law-making ‘represents a new chapter in the development of Australian human rights law’,<sup>15</sup> and ‘arguably moved Australia into a new era’.<sup>16</sup>

As observed by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC):

A system of Parliamentary scrutiny that requires members of Parliament to consider human rights assists in the creation of legislation that is considerate, proportionate and justified to its purpose. This helps make sure laws are consistent with the rights and freedoms that all humans hold.<sup>17</sup>

The establishment of the PJCHR put human rights scrutiny directly into the mandate of parliamentary scrutiny at the federal level, reflecting a recognition that ‘human rights analysis needs to be built into the process of law-making at its early stages’,<sup>18</sup> and that the mandate of the Scrutiny of Bills Committee, while covering important rights, was ‘still very narrow when set against the range of international human rights by which Australia is bound’.<sup>19</sup>

The introduction of the PJCHR was welcomed by both sides of parliament at the time. The then Attorney-General, the Hon Robert McClelland MP, expressed great optimism for the new regime, that the measures would deliver improved policies and laws ‘by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues’.<sup>20</sup> The Shadow Attorney-General, Senator the Hon George Brandis KC, proclaimed it ‘the most important piece of human rights legislation in a quarter of a century’.<sup>21</sup>

## 13.3 The Parliamentary Joint Committee on Human Rights

### (a) The model

The PJCHR was established to examine all Bills and legislative instruments – including legislative instruments exempt from disallowance – that come before either House of Parliament, for compatibility with human rights as set out in the ICCPR, ICESCR, and a number of other international instruments.<sup>22</sup> The PJCHR seeks to determine whether identified limitations on rights are justifiable through a limitation assessment, including that of necessity and proportionality.

The PJCHR was modelled on the UK Joint Committee on Human Rights, which was established at the time of the passage of the UK Human Rights Act in 1998, which is the Committee’s principal point of reference.<sup>23</sup>

The PJCHR is an important scrutiny mechanism that enables pre-legislative consideration of human rights and may prevent breaches. It is a key component of the dialogue model (see chapter 4), and aims to enhance human rights protection in Australia, by improving parliamentary deliberation with respect to human rights and by improving the quality of legislation itself – especially at the policy-making or legislative drafting stage.<sup>24</sup>

### (b) Structure and functions

The PJCHR comprises ten members, drawn equally from both Houses of Parliament.<sup>25</sup> Its membership is reconstituted each Parliament and includes five Government members and five non-Government members. The Chair is drawn from the Government and has a casting vote.<sup>26</sup> The Committee is supported by an external legal adviser<sup>27</sup> and the human rights committee secretariat, including staff with specialised expertise in international law.<sup>28</sup>

The PJCHR has three functions as set out in s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth):

- (a) to examine Bills and legislative instruments coming before the Parliament for compatibility with human rights
- (b) to examine current Acts for compatibility with human rights
- (c) to inquire into any matter relating to human rights that is referred to the Committee by the Attorney-General.

In each case, the PJCHR must report its findings to both Houses of Parliament.<sup>29</sup> Over the first ten years of the committee’s operation it had tabled:

- 124 scrutiny reports
- 8 annual reports
- 6 self-initiated inquiry reports
- 2 inquiry reports on matters referred by the Attorney-General.<sup>30</sup>

The powers and proceedings of the PJCHR are further set out in the resolution of appointment.<sup>31</sup>

#### • *Scrutiny function*

The ‘vast majority’ of the PJCHR’s work has fallen under the function in s 7(a), the scrutiny function, of examining Bills and legislative instruments.<sup>32</sup> In its first ten years of operation, from 2011–2021, the PJCHR has considered 2,254 Bills and more than 18,000 legislative instruments.<sup>33</sup>

Until July 2021, the PJCHR was the only parliamentary committee able to conduct routine scrutiny of exempt delegated legislation.<sup>34</sup>

In the exercise of its functions, the PJCHR takes a 'technical' approach, drawing on the 'longstanding conventions' of the Scrutiny of Bills Committee and the Scrutiny of Delegated Legislation Committee, without an inquiry into the broader policy merits of the legislation.<sup>35</sup> It is a similar approach to the type of technical scrutiny undertaken by the UK Joint Parliamentary Committee on Human Rights.<sup>36</sup>

The approach of the committee as a 'technical' one, without comment on the policy merits of the legislation has been a key way of managing possible political tensions.

The PJCHR's scrutiny reports reflect the progress of the dialogue model, with matters proceeding from an initial report describing the human rights engaged by the Bill, to a concluding report that analyses any information received from the legislation proponent in respect to the committee's initial report.<sup>37</sup>

As explained in the *2020 Annual Report*,

The committee's main function of scrutinising legislation is pursued through dialogue with ministers. Accordingly, where legislation raises a human rights concern which has not been adequately explained in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out the human rights concerns it has in relation to the legislation and advising that it intends to seek further information from the minister. Any response from the minister is subsequently considered and published alongside the committee's concluding report on the matter. As well as making concluding remarks on the human rights compatibility of the relevant legislation, the committee may make recommendations to strengthen

the compatibility of the legislation with Australia's human rights obligations.<sup>38</sup>

In an analysis on the 10<sup>th</sup> anniversary of the Committee, Charlotte Fletcher and Anita Coles summarise that

Overall, the committee has considered that three-quarters of bills do not raise human rights concerns requiring the committee's comment. This is because the bills may not have engaged any human rights, they may have promoted rights, they may have limited rights but it appeared these were permissible limits, and/or they raised only marginal human rights concerns.<sup>39</sup>

- *Inquiry functions*

The PJCHR can resolve to inquire into a Bill or legislative instrument that it is examining as part of its regular scrutiny work.<sup>40</sup> Such inquiries have included calls for submissions and the holding of public hearings. While such inquiries have required 'significant effort' by committee members and secretariat, the inquiries 'culminated in well-considered, thoughtful reports'.<sup>41</sup>

The inquiry function under s 7(c), requires a referral from the Attorney-General.<sup>42</sup> As of 2022, there were two inquiries by referral. In 2016, the 'Freedom of Speech Inquiry' attracted widespread attention and led to amendments to the procedures of the Australian Human Rights Commission.<sup>43</sup> It provided the opportunity for an examination of a broad range of policy issues related to human rights and 'focused on matters outside solely compliance with international obligations'.<sup>44</sup> In November 2021, the Attorney-General referred the examination of Bills associated with the Religious Discrimination Bill to the PJCHR, which added to the range of public engagement on the issues raised.<sup>45</sup>

These second and third functions have formed a comparatively small part of the PJCHR's total work.<sup>46</sup> This is a function of both the limitation of the Committee's powers and its resources. Both are considered below.

### **(c) Statements of compatibility**

A key aspect of the scrutiny process is the consideration of a statement of compatibility with human rights for all Bills and disallowable legislative instruments introduced into the Commonwealth Parliament.<sup>47</sup>

In introducing the legislation, then Attorney-General, the Hon Robert McClelland MP, said that this requirement would 'alert parliament to the relevant human rights considerations and will assist in informing parliamentary debate'.<sup>48</sup>

The 'primary function' of the statement of compatibility is 'to assist the Committee when it considers relevant human rights issues and to inform parliamentary consideration and debate'. While it is an important document for this purpose, 'it does not limit the ability of the Committee or the Parliament to consider additional issues or express a different view'.<sup>49</sup>

The idea of explanatory material for Bills was not new. As the ALRC observed, 'the history of explanatory statements and explanatory memoranda goes back to 1932 and the 1950s respectively'.<sup>50</sup> Since 1983, it has been standard practice for government Bills to be accompanied by an explanatory memorandum, and since 2003, all Commonwealth legislative instruments must be accompanied by an explanatory statement.<sup>51</sup>

Professor David Kinley and Christine Ernst, writing the year following the establishment of the PJCHR, spoke of the potential that the requirement for preparing and including statements of compatibility would have:

The statement of compatibility will entrench human rights as a key issue that must be considered whenever legislation is drafted. In addition it will create a powerful incentive for law-makers to bring proposed legislation into line with human rights standards, for experience indicates that rarely will the proponents of a Bill want to concede that it is incompatible with human rights.<sup>52</sup>

The idea was to force upstream consideration of the human rights impacts of draft laws. The Australian Government Solicitor explained in a Briefing Paper that

It is intended to be 'an expression of opinion by the relevant minister or sponsor of the Bill or by the rule-maker in the case of legislative instruments about the instrument's compatibility with human rights'. It is, in a sense, the initiating document for the dialogue between the Government and the Parliament on relevant human rights issues.<sup>53</sup>

The 'constructive dialogue' between the Committee and the initiating agency<sup>54</sup> has also had an educative impact over time.

### **(d) Educative role**

Over its ten-years of operation from 2011, the PJCHR has had an increasingly important educative role – 'enhancing the understanding of, and respect for, human rights in Australia, and facilitating the appropriate recognition of human rights issues in legislative and policy development'.<sup>55</sup>

It has produced and revised guidance material and other resources, including:<sup>56</sup>

- *Guidance Note 1*, 'Expectations for Statements of Compatibility' – on the committee's expectations for statements of compatibility. The note explains that the PJCHR expects statements 'to be able to be read as stand-alone documents' and to

identify the relevant sections, clauses or items of the legislation referred to.<sup>57</sup>

- *Guidance Note 2*, ‘Offence provisions, civil penalties and human rights’ – setting out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.<sup>58</sup>
- *Guide to Human Rights*, providing a brief overview of 25 of Australia’s human rights obligations, the key human rights considered by the committee, and the manner in which human rights may be permissibly limited, with case studies,<sup>59</sup> complementing guidance and resource material available developed by the Attorney-General’s Department and the Australian Human Rights Commission.<sup>60</sup>

Fletcher and Coles also note the role of Chairs and Deputy Chairs of the PJCHR ‘in spreading awareness of the committee’s role and work, including by presenting speeches to public officials, non-government organisations and lawyers’.<sup>61</sup>

The interactions with the PJCHR and the committee secretariat in relation to the content of statements of compatibility over the first ten years of the committee’s operation has had an educative impact in improving them.<sup>62</sup> Since 2018, the secretariat has been authorised by the committee at times to engage directly with departmental officers. This has assisted in improving understanding by providing feedback and guidance in the drafting of statements of compatibility with human rights, as well as training opportunities.<sup>63</sup>

## 13.4 Assessing effectiveness of parliamentary scrutiny

In considering changes to law and practice to improve the way the current system of parliamentary scrutiny operates to promote

and protect human rights, commentators and participants in this inquiry have identified a range of challenges and shortcomings in the work of the PJCHR. Some of these are of an historical kind, which have been largely addressed as the Committee’s working methods and impact have evolved. Others remain worth considering.

The strengths of the regime have been acknowledged, including:

- the requirement to produce [statements of compatibility] for all proposed legislation, with which there has been formal compliance by the executive;
- the industriousness of the PJCHR, as evidenced by the significant volumes of analysis it has conducted;
- the consultative approach adopted by the PJCHR, whereby proponents of legislation are afforded an opportunity to provide further justification for their proposals beyond that contained in the [statement of compatibility]; and
- the regime’s success in achieving its stated aim of limiting the scope for litigation arising under the Act.<sup>64</sup>

The potential for the PJCHR and the parliamentary scrutiny process to enhance the protection of human rights was welcomed – ‘by raising the profile of human rights and giving human rights an increased sense of legitimacy’.<sup>65</sup> However, as Professor George Williams and Lisa Burton observed in 2013, the ‘ultimate efficacy’ of the committee’s work ‘will depend on Parliament’s ability to self-regulate its own compliance with the regime’.<sup>66</sup>

What ‘ultimately matters’, said Michael Tolley, is ‘whether rights are adequately protected’:

In order for the Commonwealth model to deliver on its promise of adding ‘new dimensions and perspective’, institutions on the parliamentary side need to be

improved. One problem that reformers and scholars alike will need to address is how to make human rights scrutiny committees more effective.<sup>67</sup>

A number of commentators have contributed assessments of the effectiveness of the parliamentary scrutiny regime.<sup>68</sup>

In 2014, a framework for designing and determining effectiveness of parliamentary oversight of human rights was developed by Dr Phillipa Webb and Kirsten Roberts of King's College London, drawing from models developed for assessing institutional effectiveness. In particular, the report said that the 'challenges to parliamentary oversight of human rights need to be acknowledged':

These include political realities, lack of independence, shifting national priorities, the existence of a multiplicity of actors, the unavailability of sufficient resources and varying levels of human rights expertise. In addition, ... the palpable impact of parliamentary human rights scrutiny on legislative and policy reforms may be an 'iceberg phenomenon', an element that may pose additional challenges in determining effectiveness. This phenomenon means that the visible impacts of parliamentary human rights activity may not be in the public domain, potentially impacting the legitimacy and promotion role of the parliament.<sup>69</sup>

In a series of articles, Professor George Williams and a number of co-authors have contributed assessments of the effectiveness of Australia's human rights scrutiny regime empirically, by looking at: the deliberative impact of the regime within Parliament; the legislative impact of the regime, in the extent to which it results in improvements from a rights perspective to the legislative output of Parliament or the executive; judicial impact; media impact and international impact.<sup>70</sup> Associate Professor Laura Grenfell and

Dr Sarah Moulds have analysed effectiveness in terms of: the adequacy of time to conduct formal parliamentary scrutiny; the attributes of particular committees that lead to greater legislative influence; the power and willingness of committees to facilitate public input; a culture of respect for the value of formal parliamentary scrutiny including rights scrutiny; and, the generation of a rights discourse in parliamentary debates.<sup>71</sup>

Measuring effectiveness in terms of legislative impact may provide only a limited indicator for assessment. The ALRC for example, stated that

determining the efficacy of scrutiny Committees solely, or even primarily, by reference to the number of amendments resulting from consideration of Committee reports is not necessarily appropriate. As noted by political scientists Meghan Benton and Meg Russell, 'take-up by government of recommendations is only one form of Committee influence and arguably not even the most important'. Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the Committee, are all examples of other important functions of scrutiny Committees.<sup>72</sup>

Such aspects of influence may be considered part of the 'iceberg phenomenon' referred to by Webb and Roberts.<sup>73</sup>

Zoe Hutchinson adds another aspect to such analysis in saying that an empirical perspective must develop and apply criteria of effectiveness 'that are capable of taking the parliamentary context into account':<sup>74</sup>

framing criteria of effectiveness only against an expectation that laws passed by parliament be compatible with human rights may unduly lead to the conclusion that the PJCHR is ineffective. This is particularly in a context where the PJCHR only reports on legislation after it is introduced to parliament and its findings do not affect the ability of legislation to be passed or its legal validity. By contrast, as set out above, there is a range of processes which the PJCHR has developed which provide opportunities and capacities for engagement with the human rights implications of legislation.<sup>75</sup>

Hutchinson urges recognition that ‘there is a range of factors that may account for [legislative outcomes] beyond the effectiveness or otherwise of the PJCHR’.<sup>76</sup> Hence, the absence of such evidence ‘should not necessarily lead to a conclusion that the PJCHR is ineffective in its working methods or operation or is not making a contribution’.<sup>77</sup>

Charlotte Fletcher and Anita Coles, of the Committee Secretariat, contribute insights from within the workings of the committee and the Parliament, providing a reflective analysis of the PJCHR’s operations over its first decade.<sup>78</sup> Using a number of detailed case studies, they provide examples of the committee’s impact, some of which is acknowledged, some unacknowledged, and some being examples of the hidden influence on the development of legislation, including where the committee and, increasingly since 2018, its secretariat, have influenced the development of legislation ‘behind the scenes’.<sup>79</sup> Their analysis is particularly useful in rounding out any assessment of effectiveness that is of the more readily and publicly available kind.

As Fletcher and Coles observe, some of the case studies show that ‘it can often be challenging to identify the committee’s impact on face value, without very close monitoring of the progress of legislation over time, or an intimate knowledge of its passage through both chambers of

Parliament’:

This can often be because while aspects of the committee’s concerns may in fact be addressed by amendments or future legislation or policy, the committee’s role and influence in causing those amendments to be made is not always explicitly acknowledged. In such instances, the committee may have an important impact on the re-drafting of legislation, but without any acknowledgment given as to the role of the committee.<sup>80</sup>

Further deliberative impact may be seen outside of parliamentary debates, Hutchinson suggests, such as the use of the PJCHR reports by other parliamentary committees and to provide portfolio and other committees with information about human rights implications and to inform questioning of witnesses.<sup>81</sup>

Many of the case studies provided by Fletcher and Coles highlight the PJCHR’s impact on the development of legislative instruments, despite their being a small part of the committee’s work. The authors suggest that one reason for the ‘success stories’ of impact of the committee’s work, is that ‘officials can fairly readily amend legislative instruments without the need for a parliamentary process, meaning that changes in response to the committee’s comments are more likely. Changes to Bills, on the other hand, once introduced to Parliament is often less likely’.<sup>82</sup>

In its *Annual Report 2020*, the PJCHR stated that the full impact of the committee’s work ‘can be difficult to quantify’, because it is likely that the committee has ‘an unseen influence in relation to the development of legislation before its introduction into the Parliament and on consideration of future legislation’.<sup>83</sup> One measure of impact noted was the use of the PJCHR’s reports.

In this respect, during the reporting period, there was evidence of the committee's reports being considered and drawn on in Parliament and beyond. For example, on a number of occasions, an addendum to the explanatory memorandum was tabled in Parliament to address specific concerns raised by the committee in its reports.<sup>84</sup>

Academic commentators and submissions to the Commission have identified a range of areas for improvement in the processes that provide checks on legislative encroachment on human rights:

- timeliness of the scrutiny process
- adequacy of statements of compatibility
- coordination of the work of scrutiny committees

### **13.5 Timeliness of the scrutiny process**

The need for adequacy of time for deliberation and reporting has been a common theme among commentators and in submissions. The timely delivery and consideration of reports is a function of several elements: the volume of the matters for scrutiny and the time allowed in the parliamentary process; the width of the scrutiny task; and the working methods of the committee. As the PJCHR itself observed in its *Annual Report 2020*, the committee's ability to inform the legislative deliberations of the Parliament is 'dependent on Parliament's legislative program and the timeliness of responses to the committee's inquiries'.<sup>85</sup>

#### **(a) Volume of work and time allowed in the parliamentary process**

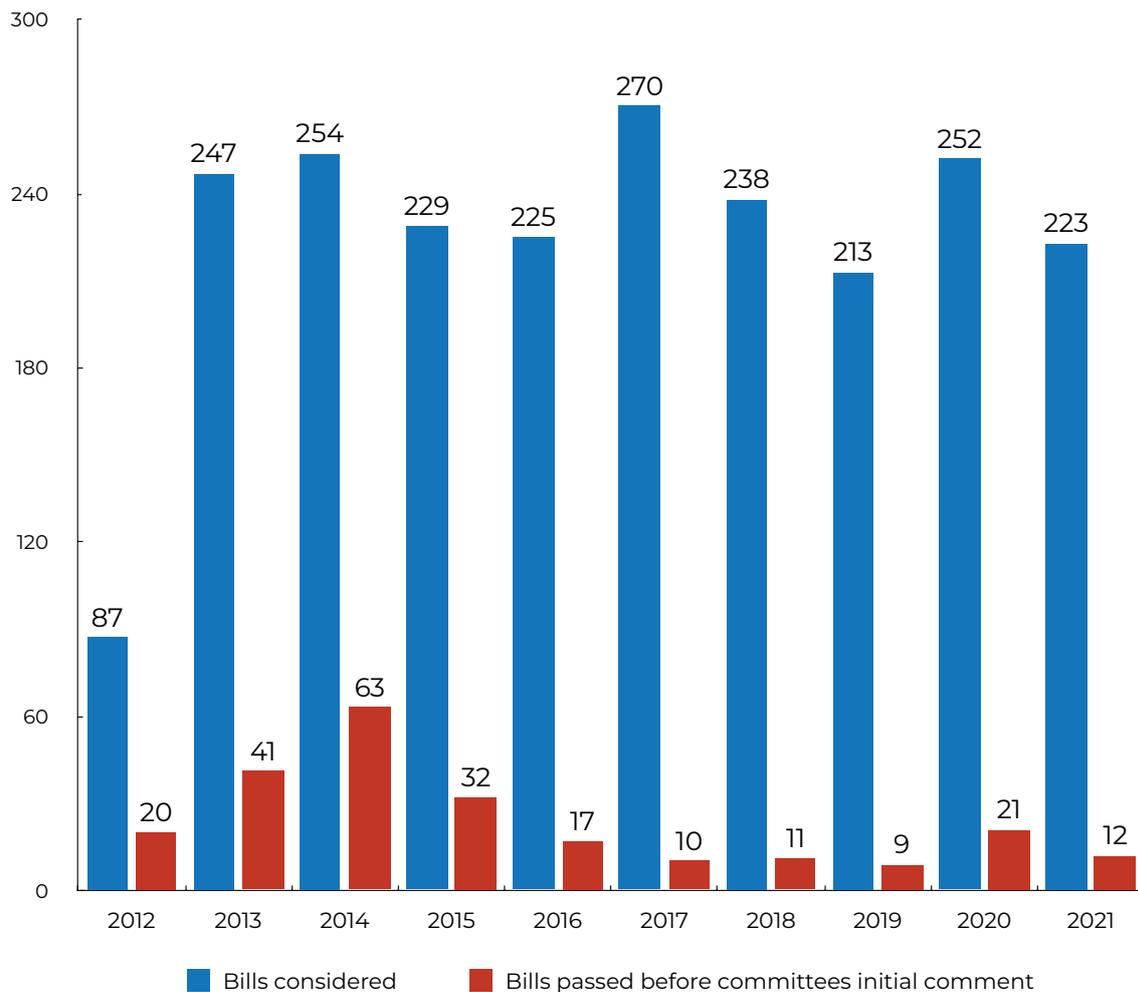
The volume of Bills and legislative instruments has an impact on the adequacy of time to conduct formal parliamentary scrutiny.<sup>86</sup> Dr Fergal Davis described the 'sheer volume' of legislation as a 'systemic problem', making 'genuine scrutiny impossible'.<sup>87</sup>

By way of illustration, in 2020, the PJCHR tabled 15 scrutiny reports and considered 252 Bills and 1,776 legislative instruments.<sup>88</sup> From inception to April 2022, the committee had considered 2,254 Bills and more than 18,000 instruments.<sup>89</sup> In its first ten years, the annual average for the committee's scrutiny was 225 Bills and 1,827 legislative instruments.<sup>90</sup>

In managing such a volume of work, concerns were expressed, for example, about legislation passing without the PJCHR considering it.<sup>91</sup> In its 2017 review of Australia's compliance with the ICCPR, this attracted comment by the UN Human Rights Committee.<sup>92</sup> The UN Committee recommended that Australia should 'strengthen its legislative scrutiny processes with a view to ensuring that no Bills are adopted before the conclusion of a meaningful and well-informed review of their compatibility with the ICCPR'.<sup>93</sup>

In their reflections on the first ten years of the PJCHR's operation, Fletcher and Coles acknowledge the historical issues of timeliness such as these, noting that the committee's own work practices contributed to some aspects of timeliness. They also noted that, at times, the volume of legislation introduced, and the speed with which it is passed, has meant that the committee is unable to complete its reports before legislation is passed.<sup>94</sup> They also point to changes in the practical operations of the committee to manage the volume of work and to respond to the challenges of criticism as to the timeliness of the scrutiny process.

For example, in the period 2012-15, there were delays in the PJCHR's reporting on Bills, including in 2014, that 24.8% of Bills had passed before the committee had published its initial comment.<sup>95</sup> Then in the next period, 2016-2021, there was significant improvement in the timeliness of reporting, so that, in 2019, only 9 Bills (4.2%) passed before the committee's initial comment was published.<sup>96</sup>



From: Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 9.

The year 2020 interrupted the trajectory of the improved timeliness of scrutiny. This was largely attributable to the fact they were COVID-19 pandemic responses, many of which passed both Houses of Parliament the day they were introduced.<sup>97</sup> There were 24 of 252 Bills (9%) that passed prior to, or on the same day, as the PJCHR's report was tabled. Some of this group related to COVID-19 measures, for which speed through Parliament was critical.<sup>98</sup>

With respect to three of the other Bills in that group of 24, the PJCHR pointed out that they had still published an initial comment in advance of its passage.

As the committee's initial reports generally contain a detailed human rights analysis, this means that a human rights analysis of

92 per cent of new bills was available to inform members of parliament prior to the passage of legislation.<sup>99</sup>

Fletcher and Coles conclude that, since 2016, the Committee has consistently reported on more than 90% per cent of all Bills while they remained before the Parliament.

One example of a change in scrutiny practice from September 2019 is not to comment on Bills introduced by private Members and Senators, given that very few are passed.<sup>100</sup> They are listed without being analysed in detail, noting that if they proceed to further stages of debate, the committee may request further information from the proponent of the legislation as to human rights compatibility. 'This assists in enabling the committee to manage its high workload and

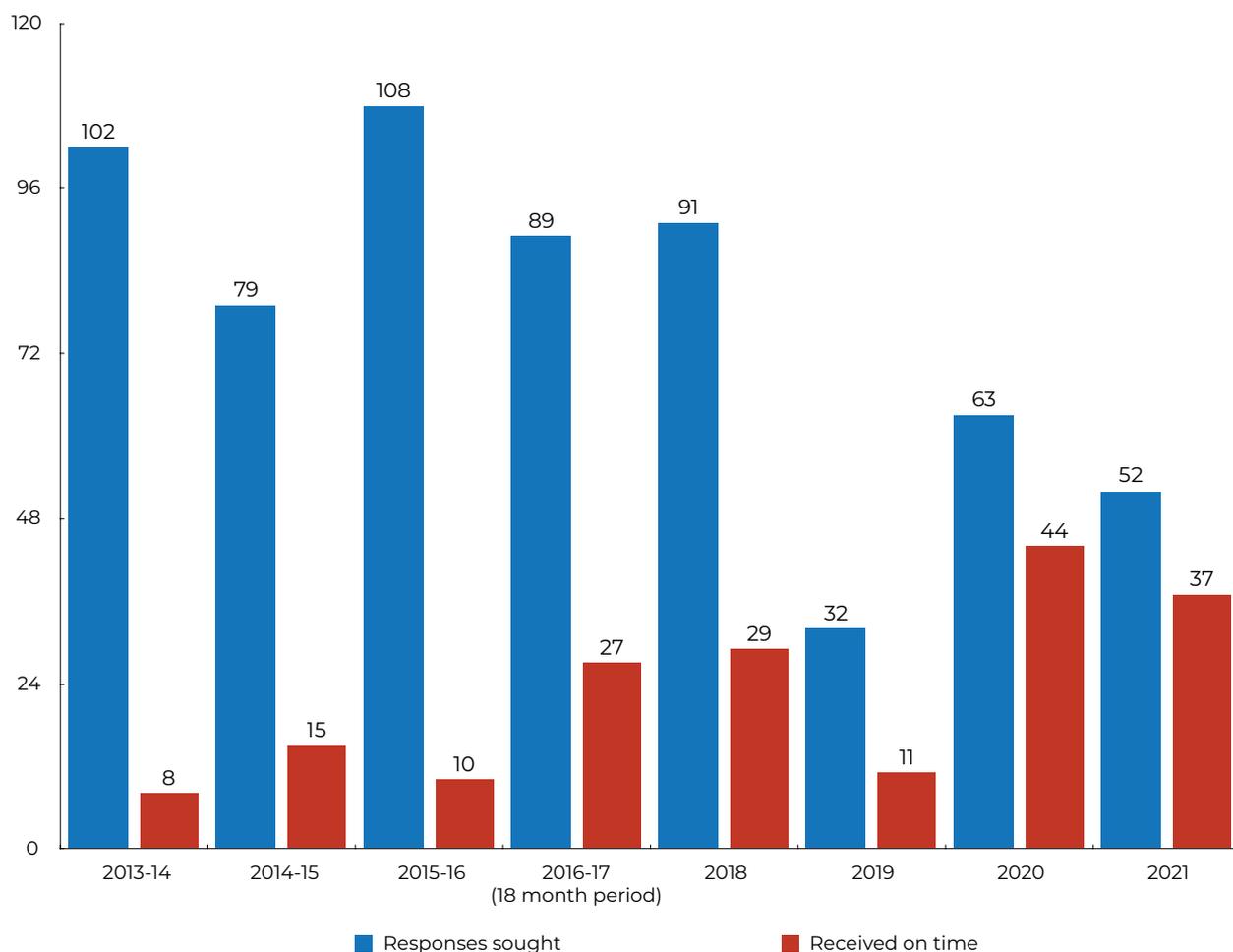
prioritise those bills which are more likely to move to further stages of debate'.<sup>101</sup>

As the committee's scrutiny process involves a dialogue with proponents of Bills and legislative instruments, delays in responding to requests by the PJCHR can cause delays.<sup>102</sup> As Fletcher and Coles explain, when the PJCHR requests further information before concluding its advice to Parliament, it stipulates a response time, typically of two weeks, to provide a response. In their analysis over the ten years from 2012-2022, they identify that 'the timeliness of responses from ministers has improved dramatically in recent years'.<sup>103</sup> They conclude that, while 'the timeliness (and fulsomeness) of responses to

the committee is the responsibility of individual proponents of legislation',

this trend of significantly increased responsiveness would appear to reflect that the legitimacy of the committee's processes – its role, questions, and advice to Parliament – appears to have gradually gained acceptance by parliamentarians, as the committee has progressively established itself. Consequently, the necessity for ministers to engage with the committee's processes by responding substantively to its questions in a timely way – while not universal – appears to have progressively become the expected norm.<sup>104</sup>

### Responses received on time



From: Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 12.

The PJCHR has also adopted some additional measures to address the timeliness of responses. Where a ministerial response is not received by the requested date, the PJCHR may decide to conclude its examination in the absence of this further information.<sup>105</sup> Where Ministers do not respond, and the PJCHR proceeds to its own finding of compatibility or incompatibility despite the absence of information in the statement of compatibility or in the Bill itself, this ‘effectively shift[s] the burden of proving that the Bill is compatible with human rights to the person who proposed it’.<sup>106</sup> A record of ministerial responses which are due (or overdue) is also provided on the Committee’s webpage.

Hence some concerns in relation to timeliness appear to have been addressed in large measure by the changes in the working methods of the committee itself and improvements of ministerial responsiveness.

In its 2015 *Freedom Report*, the ALRC noted that a number of parliamentarians<sup>107</sup> and commentators<sup>108</sup> supported the imposition of minimum timeframes for scrutiny committees to consider Bills.

A number of suggestions have been made to address concerns about the passage of Bills before proper consideration of the PJCHR’s scrutiny of them. A common suggestion for reform was to amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to provide a minimum time period for the PJCHR to consider each Bill, such that a Bill could not be enacted as law before the PJCHR had an opportunity to table its report;<sup>109</sup> or to stipulate that legislation cannot be passed until the Committee has considered the Bill,<sup>110</sup> outside of a ‘clearly defined emergency’.<sup>111</sup> In the circumstances, the Commission has previously suggested that Parliament should be required to review that legislation after a fixed period of operation (for example, two years): ‘[t]his would encourage public debate on the impacts of that legislation upon human rights’.<sup>112</sup>

Hutchinson suggests there is scope for improvement through consideration of additional procedural or other mechanisms, including those currently available in respect of other parliamentary committees:

Newly permanent Senate Standing Order 24(1)(e)–(h) enables Senators to ask the responsible minister why the Senate Scrutiny of Bills Committee has not received a response if that committee has not finally reported on a bill because a ministerial response has not been received. In reflecting on the effectiveness of this mechanism in its first year in operation, the Senate Scrutiny of Bills Committee noted that the proportion of ministerial responses that were received late had reduced from 44 percent to 22 percent. This approach could similarly further improve the timeliness of responses to the PJCHR. However, a more far-reaching solution would be to introduce an equivalent to Senate Standing Order 115(3) that would have the effect of preventing the passage of legislation prior to the PJCHR’s final report. This would also address issues of timeliness of reporting and also might allow further time for the PJCHR to consider legislation raising human rights concerns.<sup>113</sup>

An example of such a provision is found the Standing Orders of the ACT Legislative Assembly:<sup>114</sup>

182A. An amendment to be proposed by any Member to any bill must be considered and reported on by the Scrutiny Committee before it can be moved. By leave of the Assembly, this standing order may be dispensed with on the grounds that an amendment is:

- (a) urgent; or
- (b) minor or technical in nature; or
- (c) in response to comment made by the Scrutiny Committee.

Professor George Williams and Daniel Reynolds urged that such a change should also be introduced at Commonwealth level – ‘perhaps with an exception for urgent matters’.<sup>115</sup> Such a change, they argued, ‘would aid not only the PJCHR’s work, but also the parliamentary process more generally, which has suffered from the over-hasty passage of a number of measures in recent times, including the Northern Territory intervention and recent national security laws’.<sup>116</sup>

In June 2020, a motion was unsuccessfully put at the request of the Chair of the Scrutiny of Bills Committee for a temporary change to the relevant orders to adjourn debate if the Scrutiny of Bills Committee had not yet presented its initial report.<sup>117</sup>

With respect to a requirement for review of legislation passed without proper initial human rights scrutiny, the PJCHR could undertake such review under its existing functions.

**The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.**<sup>118</sup>

### **(b) Width of the scrutiny task**

The scrutiny task covers the seven core human rights treaties to which Australia is a party. Academic commentators have pointed to the wide-ranging definition of rights considered by the PJCHR as affecting the timeliness and impact of its reports. When the task is very wide, the reports of the committee are necessarily lengthy in consequence, which reduces the potential for engagement.<sup>119</sup> Further, the width of rights and freedoms covered, Davis argued, ‘undercuts the potential educative impact of the legislation’.<sup>120</sup>

Kinley and Ernst, for example, point to the ‘extraordinary breadth of rights that the Act sets out to protect’, encompassing the rights and freedoms recognised or declared in seven of the core international human rights treaties: that is, ‘every major human rights instrument that Australia has ratified’.<sup>121</sup>

Such concerns raise questions about the desirability of having a more focused list of rights to consider, and/or a process that enables a streamlining or concentration of the approach to the Committee’s work. Associate Professor Lisa Burton Crawford, for example, argues that a ‘clearer and more concise list of rights’ would likely generate ‘real procedural change’.

While acknowledging that a narrowing of the list of rights protected ‘would send some dubious signals’, she argues that ‘some degree of prioritisation is warranted’.

However provocative it may sound, it seems implausible to suggest that all of the rights and freedoms presently recognised by the Act – which range from foundational freedoms from torture and slavery, the right to ‘remuneration for public holidays’ and ‘the progressive introduction of free [higher education]’ – are valued in the same way, or to the same extent.<sup>122</sup>

In contrast, Shawn Rajanayagam suggested that ‘the fact that parliamentarians must learn about a great deal of rights is not a bad thing’.<sup>123</sup>

Crawford advocates that a statutory charter of human rights ‘must simply correspond with the views and values of the majority of the voting public’ and that any catalogue of rights deserving of Parliament’s recognition and protection must be carefully designed. Because the Parliamentary Scrutiny Act does not display ‘that requisite degree of care’, is ‘one of the primary reasons why it has not meaningfully influenced parliamentary debate or public discourse’.<sup>124</sup>

There are two issues to be distinguished: the range of rights in the Human Rights Act and the range of rights to be addressed in a statement of compatibility and the scrutiny work of the committee.

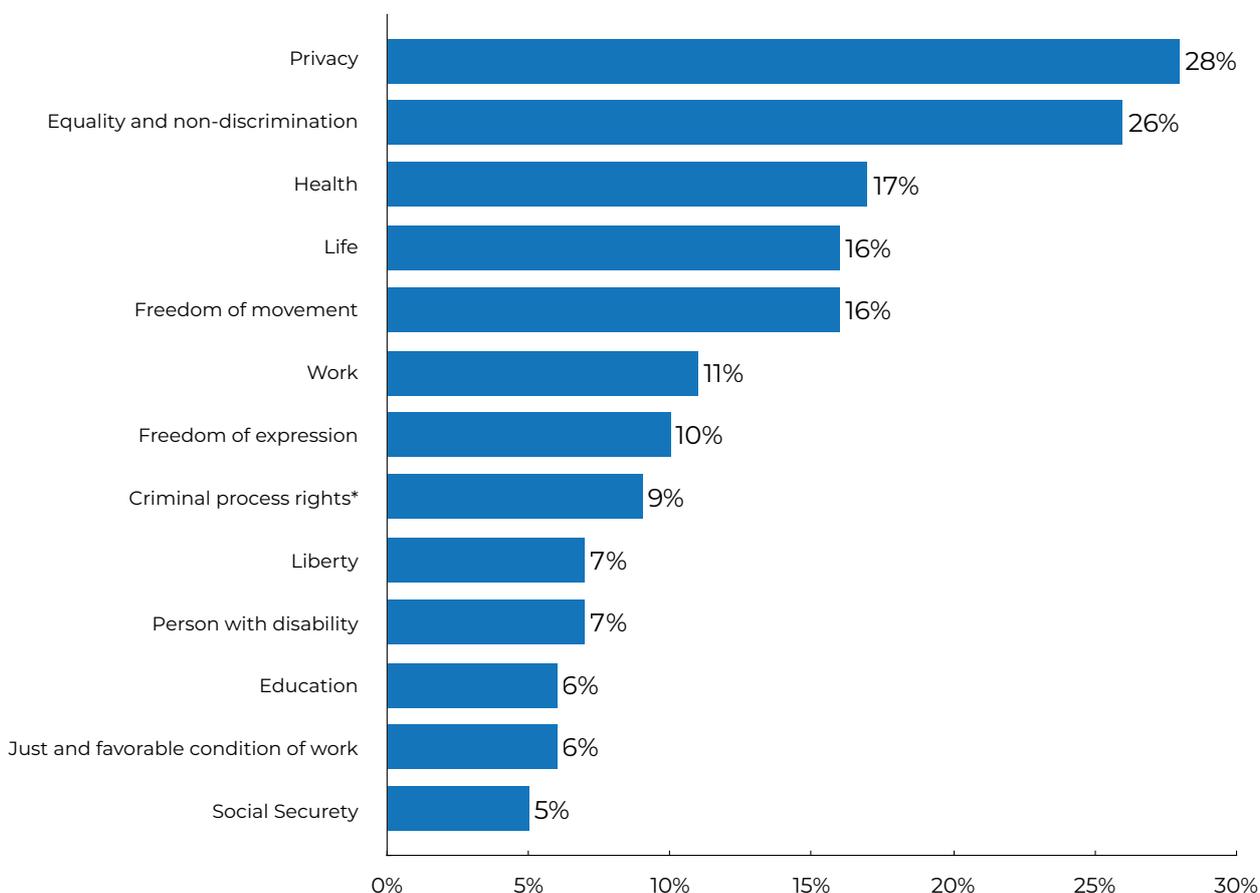
Each annual report of the PJCHR sets out most of the commonly listed rights engaged during the year. Taking the PJCHR's *Annual Report 2020* as an illustration, the range of rights engaged was wide and included both civil and political rights and economic, social and cultural rights:

These were, in order of most commonly engaged:

- right to privacy;
- right to equality and non-discrimination;
- right to health;
- right to life;
- right to freedom of movement;
- right to work;
- right to freedom of expression or opinion;
- criminal process rights;
- right to liberty;
- rights of persons with disabilities;
- right to education;
- right to just and favourable conditions at work;
- right to social security.<sup>125</sup>

This data is visualised in Figure 3.1 in the Annual Report:

**Figure 3.1: Human rights engaged by legislation in 2020**



\*Criminal process rights include the right not to incriminate oneself, the right to be presumed innocent, the right to a fair trial, the prohibition against retrospective criminal laws, and the prohibition against double punishment.

Since 2016, the rights to privacy and equality and non-discrimination are the most commonly engaged rights each year.

In consultations, the Commission was told that the PJCHR is one of the few places where there is analysis of the impact on cultural, social and economic rights of vulnerable groups – such as in relation to health, education, work and social security.

Rajanayagam suggests that the issue is not so much about the *range* of rights, but rather that it is a matter of human rights literacy. Merely truncating the list of rights will do little to solve the problems identified with statements of compatibility. While the scrutiny task covers seven treaties, many rights in ICERD, CEDAW, the CRC, CRPD and CAT, overlap with those in the ICCPR and ICESCR.

Not all rights will need to be considered in every statement of compatibility and some treaty rights are more relevant to some departments than others.

Departments will naturally develop competencies in the areas where their legislation commonly engages rights. Where the issues are foreign to them, they can consult the Attorney-General's Department for further advice. Over time, however, human rights literacy in government should steadily improve.<sup>126</sup>

Another key reason for this lack of meaningful influence in debates on rights is that the reference list of rights and freedoms are ones in international instruments. They are not in domestic law:

the greater difficulties faced by the PJCHR ... may be attributed to ... the antagonism towards human rights, shared by some in government and in Parliament.<sup>127</sup>

The Commission considers that making human rights part of the domestic legal architecture, through a Human Rights Act, and framing the scrutiny role through the

lens of domestic law may go a fair way towards addressing this antagonism.

The Commission recommends in this report the introduction of a Human Rights Act. The work of the PJCHR will then complement this legislation in its role of review. The range of matters to be addressed in a statement of compatibility will principally focus on the rights and freedoms in the Human Rights Act.

The Commission also considers that while the principal focus of scrutiny should be on the rights and freedoms in the Human Rights Act, there is value in maintaining the range of rights and freedoms under all the treaties as reflecting the commitment of the Australian Government through all of the international instruments ratified. Given that the educative value of statements of compatibility starts with the drafting of policy and laws in departments, the Commission considers that it would be detrimental to the outcome of improving human rights literacy – rights-mindedness – overall, if that list were to be limited.

Other recommendations in relation to Statements of Compatibility are included in the section 13.4(c) on 'Adequacy of Statements of Compatibility', below.

### **(c) Working methods of the PJCHR**

The working methods of the PJCHR have changed since its establishment in 2012, both in terms of its practical operation and in its prioritising of key human rights issues.

- *Committee processes*

A change in the way of meeting has facilitated improvements in the timeliness of reporting. Fletcher and Coles describe how,

In its first eight years, the committee generally met only in person during joint sitting weeks, and would meet in the second week of back-to-back sittings where these occurred. This meant that

bills that had been introduced in the first sitting week were not able to be fully reviewed before the committee's meeting (especially where they were complex and may have had complicated human rights implications), because this would require their review within one day of their introduction. Consideration of such bills was often deferred, a practice which attracted some criticism.<sup>128</sup>

Fletcher and Coles note the change in the working of the Committee particularly since the onset of the COVID-19 pandemic, when the Committee resolved to meet and table its scrutiny reports both within and outside of parliamentary sittings.

This has meant that it can report in a more timely way, and that the committee only occasionally needs to defer the consideration of bills in cases where there is no time to consider them and they raise potentially significant human rights concerns. In 2021, 203 of the 223 bills introduced (91 per cent) were still before the parliament when the committee published its final comments, meaning that its advice was available to parliamentarians to consider while a bill remained before the Parliament. Further, since 2021 the committee has reviewed all legislative instruments, and commented on relevant instruments, within the disallowance period.<sup>129</sup>

The Commission commends such practical changes as a way of managing the stream of scrutiny matters that come before the committee.

- *Prioritising of issues on which to report*

Fletcher and Coles observe that the threshold for the Committee's formally commenting on Bills has 'evolved over time, gradually shifting to a higher threshold'.<sup>130</sup> This involves a filtering process in relation to deciding the matters on which to comment in a report. As they explain:

In its earlier years it focused largely on improving awareness and understanding of the committee's expectations regarding statements of compatibility. As such, while in the first half of its existence the committee often raised more minor human rights issues on the basis that the statement of compatibility was considered inadequate, in more recent years it has focused its reports on legislation where there appear to be some significant human rights questions to be addressed.<sup>131</sup>

The aim of improving statements of compatibility, and the understanding of the proponents of legislation that draft them, has been achieved by both 'an increased awareness by departments and proponents of legislation of the committee's expectations when drafting statements of compatibility with human rights (and their knowledge and understanding of relevant human rights and how a proposed measure may engage them)'.<sup>132</sup> The reports have evolved to focus on the more important human rights issues – through this higher threshold.

This approach is in line with the approach that has developed in the Joint Committee on Human Rights of the UK Parliament (UK Human Rights Committee) as discussed by the ALRC in its 2015 *Freedom Report*.<sup>133</sup> The initial 'ambitious goal' of filtering every Bill was curtailed in 2006,<sup>134</sup> when the Committee shifted its focus to the scrutiny of the most significant human rights issues raised by the Bills.<sup>135</sup>

Since then, the committee focuses only on Bills which appear to raise 'significant questions of human rights'.<sup>136</sup> Significance is determined by reference to various criteria, including:

how important is the right affected, how serious is the interference with it, and in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.<sup>137</sup>

While there is an argument that the PJCHR should only focus on the ‘big ticket issues’, the secretariat appears to achieve some of the best results working ‘behind the scenes’, by focusing on ways in which rights are breached accidentally and unintentionally, particularly in relation to legislative instruments. These are some of the ‘success stories’ included in the paper by Fletcher and Coles.<sup>138</sup> It also speaks to the educative role the secretariat in particular can have in direct engagement with relevant departmental officers and the improved awareness of what is required.<sup>139</sup>

The PJCHR’s working method in relation to legislative instruments has also seen some change. Although the Committee has examined more than 18,000 instruments over the ten years to 2021, and is required to examine each one, it has only commented on approximately 3% overall.<sup>140</sup> As Fletcher and Coles explain, the Committee does not comment on ‘the vast majority of delegated legislation as it does not engage, or only marginally engages, human rights’.<sup>141</sup> Rather, the PJCHR takes ‘an exception-based approach’ to reporting on legislative instruments.

- *Approach to legislative instruments*

The PJCHR has also ‘experimented with different ways by which to make clear what instruments have been considered in each reporting period’.<sup>142</sup> An example of this experimentation is the way the Committee referred to the legislative instruments considered in each period. For the first two years, 2012–2013, the Committee published in each report a list of all legislative instruments that had been considered (including those that raised no human rights concerns).<sup>143</sup> In 2014 the practice changed, with reports simply referring to legislative instruments ‘received’ within a particular date range.<sup>144</sup> In 2018, after criticism of this practice,<sup>145</sup> the reporting changed to provide greater clarity. References to legislative instruments ‘received’ within a particular period were replaced by a reference to legislative instruments ‘registered

on the Federal Register of Legislation’ within a particular date range.<sup>146</sup> As Fletcher and Coles explain, ‘[t]his method allows for the full list of legislative instruments considered by the committee during that period to be generated via the FRL website’.<sup>147</sup>

- *Proposing amendments*

A further change that has been adapted from the practice of the UK Human Rights Committee is one regarding proposing amendments. The UK Committee includes recommendations for amendments to Bills in its reports, and encourages Committee members to table these amendments before both Houses of Parliament.<sup>148</sup> This is reported to have contributed to a dramatic increase in parliamentary consideration of the UK Committee’s reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.<sup>149</sup>

The Australian PJCHR has similarly adopted a practice of recommending amendments. The 2021 *Annual Report* gives the example of amendments that the Committee proposed in relation to the Data Availability and Transparency Bill 2022 (Cth), which established a legislative framework to facilitate the sharing of, and controlled access to, public sector data held by Commonwealth bodies and accredited entities. The PJCHR raised concerns that the measures in the Bill may not be a proportionate limitation on the right to privacy and suggested a number of amendments to assist with proportionality.<sup>150</sup> The Committee noted the response:

The bill, as passed by both Houses in March 2022, contained 251 government amendments that were partly in response to concerns raised by the committee. The supplementary explanatory memorandum stated that the amendments clarify and strengthen privacy protections, and include several privacy enhancing

measures, including data minimisation requirements and a starting position that data shared under the scheme must not include personal information unless an exception applies. Most relevantly to this committee, the amendments introduced a general complaints division, to allow members of the general public to make complaints to the Commissioner about the operation and administration of the scheme. This amendment reflects the committee's recommendation that a mechanism be established to enable the Commissioner to consider complaints from individuals with respect to the scheme.<sup>151</sup>

- *Thematic focus*

Another example of constructive contribution to parliamentary scrutiny, and a good illustration of 'dialogue' on human rights issues, is the undertaking of thematic inquiries. As noted above in section 13.3, the PJCHR can undertake inquiries as part of its regular scrutiny work as well as inquiries on 'any matter relating to human rights', as referred to the Committee by the Attorney-General.<sup>152</sup>

In addition to the two inquiries referred to the PJCHR by the Attorney-General, on freedom of speech and on the Religious Discrimination Bill and related Bills,<sup>153</sup> up to August 2022 the Committee had undertaken six other inquiries.<sup>154</sup>

In 2020, the PJCHR also published a special thematic scrutiny report focusing on COVID-19 related Bills and legislative instruments, with an overview regarding the laws applicable to the protection of human rights in times of emergencies, with subsequent reports continuing a thematic section on COVID-19 measures.<sup>155</sup> The committee recognised that the federal bills and instruments made in response to the COVID-19 pandemic could have significant human rights implications. It resolved to meet regularly by teleconference to continue its work of scrutinising all federal legislation for human rights compatibility, including legislation relating to the COVID-19 pandemic.<sup>156</sup>

Fletcher and Coles describe the process undertaken:

To communicate this approach, the committee issued a media release setting out the committee's proposed course of action regarding COVID-19 bills and instruments. It also wrote to civil society stakeholders advising them that the committee could accept submissions about a bill or instrument at any time, and drawing their attention to the COVID-19 sub-page on the committee's web pages.<sup>157</sup>

To facilitate public engagement in the process, the Committee also resolved to publish a number of key pieces of correspondence particularly relevant to its work in examining COVID-19 related legislation.<sup>158</sup>

The Annual Reports are also presented in a thematic way. For example, *Annual Report 2020* identified four areas that attracted substantive comment from the committee in the relevant period: the rights implications of the COVID-19 pandemic; national security measures; information sharing arrangements, particularly with foreign countries; and equality and non-discrimination, particularly in relation to First Nations peoples.<sup>159</sup>

The Commission considers that the undertaking of thematic inquiries and the presentation of the reports in a thematic way are good illustrations of the educative role of the PJCHR.

However, the ability to undertake a wider range of thematic inquiries is constrained by the limits on the Committee's powers, as the PJCHR cannot self-initiate general inquiries, unlike its UK counterpart.

The UK Human Rights Committee may undertake thematic inquiries, choosing its own subjects of inquiry and seeking evidence from a wide range of groups and individuals with relevant experience and interest, leading to the publication of a report.<sup>160</sup> Under the relevant Standing Order, the UK Human Rights Committee may consider 'matters relating

to human rights in the United Kingdom (but excluding consideration of individual cases).<sup>161</sup>

For example, in July 2022, the UK Human Rights Committee published its report, *Protecting human rights in care settings*. The motivation for the inquiry is explained at the beginning of the report:

This inquiry into protecting human rights in care settings follows a torrid few years for care users: the pandemic caused great suffering and isolated residents from their loved ones. We have sought to shed a light on the human rights most at risk in care settings, and what can be done to better protect them. We have focused on four main issues: the provision of medical and personal care; ongoing concerns about visiting arrangements; the complaints process for when things go wrong; and the coverage of the protections of the Human Rights Act 1998 (Human Rights Act) to all those in receipt of regulated care services. As health services are devolved, our inquiry focuses on care settings in England although we draw on experiences elsewhere where useful through this report.<sup>162</sup>

The UK Human Rights Committee therefore has broader powers to undertake thematic inquiries on human rights issues, not tied to a specific Act or Bill, or dependent on referral by the relevant Minister.

The Commission considers that the PJCHR should have a similarly broad power. Enabling the Committee to identify key areas of concern appropriate for a wider inquiry, would enhance its contributions to human rights deliberations in the parliamentary context.

While adding this power would expand the ability of the PJCHR to contribute to wider human rights discussions, the Commission acknowledges that the ability for the Committee to do so is dependent on its capacity – namely,

its staff resources to support such inquiries, as they require ‘significant effort’ by committee members and the secretariat,<sup>163</sup> as demonstrated in relation to the exercise of its existing inquiry powers. Given the volume of Bills and legislative instruments being introduced and made, it is not surprising that the existing inquiry power is one that has not been historically drawn upon very frequently to conduct stand-alone examinations.

**The Commission recommends that s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* be amended, along the lines of the power of the UK Human Rights Committee, to allow it to ‘make special reports on any human rights issues which it may think fit to bring to the notice of Parliament’ (but excluding consideration of individual cases).**

**The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.**

## 13.6 Adequacy of Statements of Compatibility

Statements of compatibility are a fundamental element of the dialogue process between the executive and the Parliament. They are part of what Mr Graham Perrett MP, a long-serving committee member, described as the ‘very powerful gate-keeping and scrutiny role’ of the PJCHR, helping to ensure that Australian laws reflect human rights obligations, and ‘tighten[ing] the parliament’s focus on human rights’.<sup>164</sup>

Statements of compatibility are also a feature of the dialogue models of human rights scrutiny in New Zealand, the UK, the ACT, Victoria and Queensland. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility through their relevant departments. In Victoria, Queensland and the United Kingdom, as in the Australian Commonwealth model, it is the Minister or the sponsor of the Bill who prepares the statement of compatibility.

The engagement of the PJCHR in the interrogation of statements of compatibility provides a procedural hurdle that can generate dialogue between the committee and the executive proponent of the relevant law, seeking further information from proponents of legislation, generally about ‘whether there is a sufficient basis for justifiably limiting human rights applying the PJCHR’s analytical framework’.<sup>165</sup>

The scrutiny-dialogue model also directly addresses the goal of providing for dialogue between the executive and parliament. It sits in contrast to the situation that existed prior to the creation of the PJCHR and the introduction of the requirement for legislation to be accompanied by statements of compatibility. Specifically, prior to the Parliamentary Scrutiny Act there was no requirement for legislation proponents to consider human rights at all, let alone whether limitations on human rights are justifiable.<sup>166</sup>

The issue of ‘adequacy’ is therefore the trigger point for the dialogue, and also builds the opportunity for improving adequacy through better understanding over time.

Both the PJCHR and the Scrutiny of Bills Committee have raised questions regarding statements of compatibility and explanatory memoranda, respectively, and have sought further information and justifications from the relevant Minister.<sup>167</sup>

While there have been criticisms, Davis suggested that the continued engagement in relation to poor statements of compatibility may, in time bring about a ‘shift in executive culture’ to make statements of compatibility a key scrutiny mechanism.<sup>168</sup>

The Commission supports a focus on the long-term potential in relation to rights-mindedness through the requirement of developing statements of compatibility. The implementation of an Australian Human Rights Act would assist with this in a general sense, by increasing the understanding, awareness and sense of importance of human rights processes across the public service, with a consequent improvement in statements of compatibility. The introduction of a positive duty in a Human Rights Act would also be a powerful requirement for statements of compatibility to be more compelling.

There are three aspects about the adequacy of statements of compatibility to be considered: first, an expansion in their scope; secondly, concerns in the initial preparation of the statements themselves; thirdly, the process of engagement with the PJCHR on the questions of compatibility addressed.

### **(a) Expanded scope**

- *Non-disallowable instruments*

There is one current limit in relation to requirements for statements of compatibility. They are not required for non-disallowable instruments. This became especially evident in relation to COVID-19 responses, many of which were made by way of legislative instruments under the *Biosecurity Act 2015* (Cth) and were exempt from disallowance. Although they were not required to have statements of compatibility,<sup>169</sup> the PJCHR was able to scrutinise such exempt delegated legislation. Indeed, until 16 June 2021, the PJCHR was the sole parliamentary committee that could do so.<sup>170</sup>

In its thematic consideration of COVID-19 related legislation, the PJCHR scrutinised many exempt legislative instruments, without statements of compatibility. The committee then sought further information, largely from the Minister for Health, to establish whether the measures were compatible with human rights.<sup>171</sup> Fletcher and Coles observe that '[t]he ministerial responses and the committee's assessment of these legislative instruments provided greater information about the rationale for, and impact of, each instrument than was otherwise available'.<sup>172</sup>

There is value in requiring a statement of compatibility for *all* legislative instruments, including those exempt from disallowance. This would address some of what Shawn Rajanayagam described as the 'human rights blindspot' regarding delegated legislation.<sup>173</sup> The limitation in regard to the requirement for statements of compatibility was exposed during the experience of COVID-19 use of delegated legislation, when some measures that had significant impacts on human rights – non-disallowable instruments – were not required to have statements of compatibility. A requirement to provide a statement of compatibility would at least require a demonstration of upstream consideration of the impact on rights and a justification in terms of proportionality as to why the measure was required in the form it was proposed.

**The Commission recommends that s 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* be amended to require statements of compatibility for all legislative instruments.**

- *Required consultations*

As discussed in chapter 7, section 7.5, the Commission's model for a Human Rights Act requires consultation with key groups.

The Commission recommends that a consultation section should be included in Statements of Compatibility for legislative proponents to articulate what consultations were undertaken in light of a potential direct or disproportionate impact on the human rights of a group. The adequacy of consultations engaged should be assessed by the PJCHR, in the same manner as human rights impacts are currently considered by this committee.

**The Commission recommends that the range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken in accordance with the participation duty.**

- *United Nations Declaration on the Rights of Indigenous Peoples*

Under the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*, statements of compatibility are required to be assessed against the seven human rights treaties that Australia has ratified. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (see sections 5.4 and 7.6) is not included in that list and the PJCHR may only consider the Declaration informally when carrying out its scrutiny functions.

Aspects of UNDRIP have been addressed across the range of recommendations in this Position Paper. With the introduction of a Human Rights Act, the principal focus of the PJCHR will shift to the Human Rights Act itself. The Commission above in section 13.5(a) considers that there remains value in the scrutiny taking into account the full scope of the range of rights in the treaties and for these to be addressed through the process of preparing statements of compatibility.

**The Commission recommends that Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.**

**(b) Initial preparation**

While the legislation itself is 'silent on the quality and nature' of statements of compatibility,<sup>174</sup> the PJCHR, as noted above, has produced two guidance notes, and the Attorney-General's Department has also developed resources, including general information, templates and a flowchart tool for assessing human rights compatibility.<sup>175</sup>

Over time, the PJCHR's Annual Reports have highlighted the committee's concerns about inadequacies of statements of compatibility. For example, in the 2018 Report, it commented that 'the quality of statements of compatibility continued to pose challenges in the context of the scrutiny process'.<sup>176</sup> Conversely, where the human rights issues were fully addressed in the statement of compatibility, the Committee was able to conclude its analysis without needing to seek further information from legislation proponents.<sup>177</sup>

As the committee observed, where statements of compatibility were not comprehensive, 'this creates further work for the committee and ministers and their departments, and makes it more difficult to assess whether legislation raises human rights concerns'.<sup>178</sup> The PJCHR identified a number of common issues in the drafting of statements of compatibility which made its task of analysing human rights compatibility more difficult:

- although a number of human rights appear to be engaged by the legislation, no rights or not all relevant rights are identified as engaged in the statement of compatibility;

- where a proposed piece of legislation contains several measures, only some of those measures are addressed in the statement of compatibility, whereas other measures within the legislation that engage human rights are not addressed;
- the statement of compatibility provides insufficient information about the operation of the legislation and the objectives supporting the legislation to enable the committee to determine whether measures in the legislation engage and limit or promote human rights;
- the statement of compatibility identifies that a right is engaged, but does not provide a sufficient explanation of how the right is engaged;
- the statement of compatibility does not provide any assessment on whether any limitations on the human rights identified in the statement of compatibility are permissible;
- while it appears that the measures in the legislation only marginally engage human rights or contain permissible limits on human rights (and so may be included in the 'no concerns' category of bills and instruments), the statement of compatibility does not provide a sufficient assessment of whether each of these limitations are permissible; and
- where a measure substantially engages human rights, the statement of compatibility's assessment of whether any limitations on the right are permissible is insufficient to allow the committee to conclude its analysis and requires the committee to seek further advice. This includes where the statement of compatibility addresses the limitation criteria inadequately (e.g. failing to identify a legitimate objective, or failing to provide information as to the proportionality of the measure such as the presence of safeguards).<sup>179</sup>

The PJCHR itself has taken ‘a robust stance’ on the quality of statements of compatibility, frequently demanding ‘more and better details’.<sup>180</sup>

Writing in 2016, Davis advocated that, through engagement with the executive and the development and embracing of the various instructions and tools for the preparation of statements of compatibility and explanatory memoranda, the shift in executive culture may happen steadily and, if the executive ‘is taking this process seriously, we would expect to see an improvement in the quality of [statements of compatibility] over time’.<sup>181</sup>

Hutchinson refers to improvements in ministerial responsiveness to Committee requests with changes in the committee’s procedures in 2016. Fletcher and Coles demonstrate improvements in responsiveness, reflecting to some extent the shift in ‘executive culture’ wished for by Davis, through engagement with the committee and also the engagement between the secretariat and relevant department officers, together with training from time to time.

It has been suggested that the PJCHR’s position could be fortified if it were stipulated in (primary or delegated) legislation, what must be included in statements of compatibility.<sup>182</sup> The ALRC suggested that one approach may be ‘to incorporate the Committee’s expectations into pt 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)’.<sup>183</sup>

One other suggestion to improve the quality of the statements was to establish centralised oversight of statements. In a submission to the ALRC, the Law Council of Australia suggested that a more centralised approach to preparing statements of compatibility – for example, by an independent statutory body such as the AHRC – should be considered.<sup>184</sup>

The ALRC preferred a different approach. Emphasising that, at the Commonwealth level, the Parliamentary Scrutiny Act was designed to ‘deliver improved policies and laws in the future

by encouraging early and ongoing consideration of human rights issues in the policy and law-making process’, the ALRC considered that ‘centralising the preparation of statements of compatibility, may reduce the extent to which a culture of human rights permeates among policy makers as a whole’.<sup>185</sup> The ALRC focused on the understanding that goes into the statements and through training for policy makers and parliamentarians on human rights and proportionality analyses, suggesting that bodies such as the Commission may be ‘well placed to conduct such training’.<sup>186</sup>

As the ALRC observed, ‘[p]olicy development and legislative drafting are not undertaken in a rights vacuum’.<sup>187</sup> There are places where guidance on rights is provided: the Legislation Handbook and Legislative Instruments Handbook and drafting directions prepared by the OPC, among other guidance documents.<sup>188</sup> In addition, the Attorney-General’s Department has published a number of guidance documents for policy makers about human rights issues, like fair trial and fair hearing rights, the presumption of innocence, retrospective criminal laws, and freedom of movement.<sup>189</sup>

The ALRC noted, however, that these materials ‘may not be easily discoverable for policy makers as they begin the policy-making process’:

The guidance material is prepared by a number of government departments and agencies, and sometimes, by the relevant parliamentary scrutiny committee. It is sometimes organised by subject matter, and sometimes by reference to human rights.<sup>190</sup>

The ALRC suggested a number of improvements, including updating the Legislation Handbook with specific reference to the approach to rights encroachments, the justifications for such encroachments, and the role of the various parliamentary scrutiny committees.<sup>191</sup>

The ALRC also suggested that the OPC might, for instance, draw attention to potential encroachments, direct the policymaker to relevant advisers (for example, the relevant sections of the Attorney-General's Department), and where appropriate, advise on alternative approaches. If the policymaker decides to continue with the rights encroaching approach, the OPC would follow such instructions.<sup>192</sup> With the introduction of a Human Rights Act, and in working towards a deeper embedding of human rights understanding within departments, a constructive strategy may also be to have specific advisers in the departments, to assist the internal processes of building understanding about developing proportionate policies and legislation.

Some stakeholders have suggested that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could stipulate what must be included in statements of compatibility to encourage sophisticated proportionality assessments. Amnesty International, for example, submitted that this could include a detailed, evidence-based assessment of proposed provisions that interfere with rights as emphasised by the PJCHR.<sup>193</sup>

Reflecting on such suggestions, Associate Professor Lisa Burton Crawford said that,

On the other hand, requiring more detailed [statements of compatibility] would increase the burden of complying with the Act. If the requirement remained self-policing, it remains an open question whether parliamentarians would comply. It is also unclear whether this would enhance the effectiveness of the scheme as a whole, for it is not clear whether the lack of detail found in many [statements of compatibility] is the reason why they do not feature prominently in parliamentary debate. Would parliamentarians make more use of more detailed [statements of

compatibility]? Would the additional detail discourage them from doing so? Would it simply make no difference, because the device is not perceived as valuable at all?<sup>194</sup>

In 2018, in light of concerns the PJCHR had identified with statements of compatibility, the Committee itself commenced a project to improve them, recognising that,

while the committee's scrutiny reports are a key mechanism for improving statements of compatibility, this project has sought to augment this reporting with additional approaches and mechanisms for improving statements of compatibility. These include liaising with legislation proponents and government departments about areas of concern, supplementing and developing further guidance materials and resources to assist in the preparation of statements of compatibility and providing targeted training to departmental officials regarding the committee's expectations. It has also involved preliminary discussions to explore options for collaboration with the Attorney-General's Department, in relation to guidance materials, as well as the Australian Human Rights Commission.<sup>195</sup>

The Commission encourages and supports this work of the PJCHR and commends the 'behind the scenes' work of the secretariat, authorised by the Committee, to increase the upstream engagement with proponents of legislation and departments.<sup>196</sup>

An aspect of the project to improve statements of compatibility could include the development of an accessible register, to accompany guidance material.<sup>197</sup> The development of comprehensive templates and further guidance notes were advocated by the Law Council of Australia.<sup>198</sup>

The Commission acknowledges that, while such resources add to the educative contributions that the PJCHR can make to deepening the understanding of departmental officers and legislative proponents, the primary role of the committee is a scrutiny one. The development and maintenance of resources for the public service sits properly with the Attorney-General's Department.

The Commission notes that the quality of statements of compatibility and associated legislation could also be improved by ensuring there is regular education and training support for public servants on human rights.

When the requirement for statements of compatibility was introduced, there was also a suite of education resources developed. All public servants were required to complete a mandatory training module on human rights, with supporting toolkits, fact sheets and other guidance resources.

The Australian Human Rights Commission also hosted a federal Public Service Human Rights Network to create a forum for public servants to network and share information as they met their legislative responsibilities. These initiatives were funded under the Australian Human Rights Framework but funding for this framework has since lapsed.

**The Commission recommends that with the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* could be amended or an accompanying legislative instrument drafted to provide greater clarity on expectations in statements of compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.**

**The Commission recommends that a public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.**

**The Commission recommends that consideration be given to having designated human rights advisers in Departments.**

### **(c) Process of engagement**

The process of engagement with proponents of legislation and legislative instruments, and the departments that assist, has improved over the first ten years of the operation of the PJCHR (see section 13.4). Fletcher and Coles consider that the work of the Committee and its secretariat have influenced the development of legislation 'behind the scenes'. They refer to periods where the Committee has authorised the secretariat to engage directly with departmental officers, 'immediately after the legal adviser and secretariat have identified minor, technical human rights concerns with legislative instruments, in an attempt to resolve the matter *before* involving the minister or committee by reporting on the legislation publicly'.<sup>199</sup>

This was intended to help departmental officials understand the type of information that should be included in a statement of compatibility. Further, where a statement of compatibility was considered to be inadequate (but where it nonetheless does not appear that the legislation raises human rights concerns), the committee authorised the Committee Secretary to write to departmental officials setting out the committee's expectations for future reference.<sup>200</sup>

The Commission supports such engagement as facilitating the educative role of the PJCHR over time. The earlier that role is activated in a process of dialogue, the better. In an embedded human rights framework, training would enhance understanding and engagement through the mechanism of statements of compatibility, properly considered and developed, so that statements of compatibility would not be added on at the end of the drafting process, but become embedded in the process as formative development of drafts.

Further, as Fletcher and Coles point out,

In relation to legislative instruments (and their explanatory materials), this feedback can be incorporated directly by departmental officers, because legislative instruments can often be amended and updated by departmental officers or other delegates directly.<sup>201</sup>

They also point to direct impact of such engagement:

In one case, this resulted in a large department updating its internal guidance for preparing statements of compatibility, and inviting the Committee Secretary to present on the subject at a training session attended by over 70 departmental officers. The approach has also resulted in significant improvements to the explanatory materials accompanying legislative instruments, as well as fostering the committee's positive educative relationship with departments.<sup>202</sup>

The example provided is included below.<sup>203</sup>

## **Instruments amending the Pharmaceutical Benefits Scheme**

### *Background*

Each year, numerous legislative instruments are registered to add, remove or otherwise alter the listing of medications on the Pharmaceutical Benefits Scheme (PBS), which provides for medication subsidies. For some time, the statements of compatibility with human rights accompanying these instruments were largely standard wording noting that the PBS itself promotes the right to health by providing for access to subsidised medication, but not addressing whether the amendments being made by a specific legislative instrument were taking subsidised medications or medical services away from patients (and so potentially limiting the right to health). As such, it could be difficult to determine the effect of the instrument on its face given the complexity of the PBS and the potential availability of other medications or medical procedures.

### *Liaison with department*

Following the committee's resolution that the secretariat may liaise directly with departmental officers to discuss minor technical human rights concerns, the secretariat contacted the Department of Health seeking advice about the operation of several PBS instruments. The secretariat advised that it was unclear from the statements of compatibility what the effect of deleting relevant drugs from the PBS would be and asked whether there would be any detriment to patients.

### *Result*

The Department swiftly responded, explaining the effect of the relevant instruments and advising that they would amend their statements of compatibility in future to explain how most amendments to the PBS do not affect human rights, but where any drug is to be de-listed entirely, to provide more specific information as to the effect of this on patients. This revised approach has since been observed.

Williams and Burton point to situations of emergency as challenging the context for parliamentary scrutiny:

In theory, the requirement to table [a statement of compatibility] will create a procedural hurdle which slows the process and forces Parliament to analyse the potential impact of the proposed law. In practice, the requirement to table [a statement of compatibility] may be ignored altogether, legislation may be vaguely asserted to be compatible with human rights because it is necessary to meet an urgent threat, or an obvious incompatibility with rights may be excused because of the political imperative to act.

In addition, when a government holds a majority in both houses of federal Parliament, or when the rights in question are those of an unpopular minority, the ability of Parliament to resist or force amendments to government-sponsored legislation is limited. There is no reason to believe that the Parliamentary Scrutiny Act will alter those dynamics.<sup>204</sup>

Situations of terror, or indeed since early 2020, pandemics, provide powerful examples. As Williams and Burton observe, '[a] sense of emergency, fear, and political pressure to act can lead to the hurried enactment of disproportionate new measures and the silencing of the rigorous debate crucial to good decision making about human rights'.<sup>205</sup>

What is necessary in such contexts is the opportunity for later review. For example, the 2015 Victorian Charter Review recommended that if legislation is passed that is incompatible, the responsible Minister should report to Parliament on its operation every five years.<sup>206</sup> This could be replicated in the federal context.

## 13.7 Coordination of scrutiny committees

The ALRC Freedoms Report noted the areas of potential overlap between the work of the Scrutiny of Bills Committee and the PJCHR, identifying that with the establishment of the PJCHR, 'the overwhelming majority of Bills' which have an impact on rights and freedoms, 'have been subject to at least two separate streams of parliamentary committee review'.<sup>207</sup>

In some respects, the ALRC observed, the practice of the committees appears similar. Where further information is required before a determination on compatibility can be made, both Committees 'commonly write to the Minister seeking additional information or explanation as to why a law that limits rights is justified'.<sup>208</sup> However, 'where there are stronger concerns about the impact of a proposed law on human rights, it seems that only the Human Rights Committee regularly seeks evidence to justify an encroachment, and focuses on the measure as a whole'.<sup>209</sup>

In 2012, the year the PJCHR was established, the Scrutiny of Bills Committee concluded its own inquiry into its future role and direction.<sup>210</sup> Acknowledging the potential for significant overlap in the work of the Committees, the Scrutiny of Bills Committee also noted that there were significant areas of difference.<sup>211</sup> As the ALRC summarised:

The Scrutiny of Bills Committee does not conduct its scrutiny function by reference to international law, and potentially does not cover many of the economic, social and cultural rights considered by the [PJCHR]. Similarly, the [PJCHR] does not usually address matters like administrative law principles that are covered by the Scrutiny of Bills Committee. This can result in the two Committees focusing on very different issues. Additionally, even where the two Committees consider the same

right, the scope of the right discussed may vary. For example, in looking at provisions which have retrospective effect, the [PJCHR] focuses only on retrospective criminal offences. By contrast, the Scrutiny of Bills Committee considers retrospective civil provisions, as well as other matters such as 'legislation by press release' in taxation matters.<sup>212</sup>

The ALRC observed that there was particular overlap between the Scrutiny of Bills Committee and the PJCHR.<sup>213</sup>

The ALRC recommended effective and appropriate streamlining of overlapping work across scrutiny committees. The human rights scrutiny process could be coordinated across the board,<sup>214</sup> to work together more effectively and bring rights thinking to the forefront of the parliamentary process.<sup>215</sup>

The ALRC suggested that

It may be constructive to consider reviewing the operations of the Committees and Senate procedures to ensure that the relevant parliamentary scrutiny bodies have sufficient time to conduct their reviews, and to facilitate adequate consideration of scrutiny reports during parliamentary debates. While political interests may, in some circumstances, result in a Bill being passed without adequate time for review, or consideration by the Parliament, such procedures may assist in creating a rightsminded culture, and facilitate more informed decision-making by the legislature.<sup>216</sup>

The National Human Rights Consultation Report considered, but decided against, adding scrutiny for human rights to the functions of the Scrutiny of Bills Committee and the then Regulations and Ordinances Committee (now the Scrutiny of Delegated Legislation Committee). The report expressed concern about 'overburdening existing committees'.<sup>217</sup> The report supported

the establishment of a joint committee to ensure both Houses of Parliament were involved in the scrutiny process.<sup>218</sup>

The PJCHR reflects a concentration of specific consideration of human rights in a single committee, supported by staff with demonstrated expertise. There are risks with this concentration of focus: that human rights issues may become marginalised in a specialist committee, and fail to generate a broader human rights discussion in Parliament.<sup>219</sup>

Other considerations were raised in the research by Webb and Roberts, in relation to a committee approach to human rights scrutiny. As summarised by Professor Simon Rice:

One is to treat human rights as a cross-cutting issue, so that all parliamentary committees would be required to take human rights considerations into account.<sup>220</sup>

That the National Consultation Report did not consider this cross-cutting option, Rice suggests, 'seems a missed opportunity'.<sup>221</sup> The inadequacy of human rights scrutiny of the other parliamentary committees has been identified by Professor Edward Santow.<sup>222</sup>

It seems that if other committees do not have to think about human rights, human rights scrutiny by the PJCHR does little to inform their deliberations, and they reach conclusions about the merits of Bills and instruments without regard to, and at times at odds with, the view of the PJCHR.<sup>223</sup>

The scrutiny process could be coordinated to streamline overlapping work (e.g. with the Scrutiny of Bills Committee) and bring rights thinking to the forefront of the parliamentary process.<sup>224</sup>

Notwithstanding such suggestions, the coordination of the work of the Committees has happened in certain respects incrementally and in practice. This may be seen to be part of the 'hidden' impact of the work of both the Scrutiny of Bills Committee and the PJCHR. Fletcher and Coles note that the secretariat for the PJCHR is co-situated with the secretariats to two Senate Standing Committees: the Scrutiny of Bills Committee and the Scrutiny of Delegated Legislation Committee. As they point out, '[t]his means that, in practice, a significant degree of informal collaboration between these three legislative scrutiny committee secretariats takes place'.<sup>225</sup>

An aspect of coordination is also the emphasis given in the reports, with a focus increasingly 'on legislation where there appears to be some significant human rights questions to be addressed'.<sup>226</sup>

As the secretariat put it in consultation, there is not much overlap in the report as the focus of each committee is different and, in some instances, as the secretariats coordinate their work informally. The membership of the committees may also overlap. They also observed that there may be value in both the Scrutiny of Bills and the PJCHR raising concerns where there are significant breaches of human rights.

## Chapter 13: Endnotes

- 1 Victoria Legal Aid, Submission 107, *Free & Equal Inquiry*.
- 2 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) ch 3 provides a summary and analysis of the various Commonwealth scrutiny mechanisms. The section from [3.21]–[3.49] summarises the scrutiny committees.
- 3 The establishment of this Committee is described in Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 21–24.
- 4 ‘Scrutiny of Delegated Legislation’, *Australian Government Directory* (Web Page) <<https://www.directory.gov.au/commonwealth-parliament-parliamentary-committees/parliamentary-scrutiny-committees/scrutiny-delegated-legislation>>.
- 5 Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 20.
- 6 Senate, Parliament of Australia, *Standing Order 23*. The range of matters goes from para (a) to para (m) and was expanded following inquiries in 2019 and 2021. For the earlier form of the list of matters, see consideration in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.23]–[3.27].
- 7 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (4<sup>th</sup> ed, 2012) 93. See discussion in Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19.
- 8 Andrew Byrnes, ‘The Protection of Human Rights in NSW through the Parliamentary Process: A Review of the Recent Performance of the NSW Parliament’s Legislation Review Committee’ (University of New South Wales Faculty of Law Research Series, 2009) 5.
- 9 Senate, Parliament of Australia, *Standing Order 24*.
- 10 Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 25.
- 11 Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 25.
- 12 Commonwealth of Australia, *Standing Order of the Senate O24(1)(a)*.
- 13 Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 22. Andrew Byrnes lists the common categories of undue trespass on rights and liberties identified through this scrutiny function: Andrew Byrnes, ‘The protection of human rights in NSW through the Parliamentary process: a review of the recent performance of the NSW Parliament’s Legislation Review Committee’ [2009] University of New South Wales Law Research Series 43, 5–6.
- 14 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) 168–160.
- 15 Robert Orr, Genevieve Ebbeck, Robyn Briese and Andrew Yuile, ‘Human Rights in Commonwealth Policy Development and Decision-making’ (Legal Briefing No 100, Australian Government Solicitor, 20 August 2013) [1.2].
- 16 Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 20.
- 17 Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*.
- 18 Andrew Byrnes, ‘The Protection of Human Rights in NSW through the Parliamentary Process: A Review of the Recent Performance of the NSW Parliament’s Legislation Review Committee’ (University of New South Wales Faculty of Law Research Series, 2009) 13.
- 19 Andrew Byrnes, ‘The Protection of Human Rights in NSW through the Parliamentary Process: A Review of the Recent Performance of the NSW Parliament’s Legislation Review Committee’ (University of New South Wales Faculty of Law Research Series, 2009) 5. Grenfell explains that the PJCHR was established ‘after sustained criticism that the remit of the [Scrutiny of Bills Committee] was inadequate in that it did not empower comprehensive human rights scrutiny and that the cornerstone principles provided insufficient guidance for effective rights scrutiny’: Laura Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’ (2015) 26 *Public Law Review* 19, 27.
- 20 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 272 (Robert McClelland).
- 21 Commonwealth, *Parliamentary Debates*, Senate, 25 November 2011, 9661 (George Brandis).
- 22 Namely, the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); Convention on the Rights of the Child, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). See ALRC, *Freedom Report*, [3.32]–[3.36].
- 23 Anjali Sakaria and Stephanie Aiyagari, *The Parliamentary Committee as Promoter of Human*

- Rights: The UK's Joint Committee on Human Rights* (Commonwealth Human Rights Initiative, 2007) <[https://www.humanrightsinitiative.org/publications/hradvocacy/parliamentary\\_committee\\_as\\_promoter\\_of\\_hr.pdf](https://www.humanrightsinitiative.org/publications/hradvocacy/parliamentary_committee_as_promoter_of_hr.pdf)>. The authors point out that while at around the same time, it was through a separate process.
- 24 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 471.
  - 25 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 5(1).
  - 26 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights)>. The membership as of August 2022: 'Parliamentary Joint Committee on Human Rights: Committee Membership' *Parliament of Australia* <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Committee\\_Membership](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Membership)>.
  - 27 Professor Andrew Byrnes (November 2012–September 2014); Professor Simon Rice (October 2014–December 2015); Dr Aruna Sathanapally (February 2016–December 2017); Dr Jacqueline Mowbray (February 2018 – current as at August 2022).
  - 28 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021), [2.19].
  - 29 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7(a), (b), (c).
  - 30 Summary set out in Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 2.
  - 31 The committee's resolution of appointment is linked at: <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/)>.
  - 32 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256. *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(b).
  - 33 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4, 6.
  - 34 The Senate Standing Committee on Delegated Legislation was given authority to scrutinise exempt delegated legislation. This took place following an own-motion inquiry into exempt delegated legislation. See, Commonwealth of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight, Final Report* (16 March 2021), recommendation 10.
  - 35 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [2.1]. The *Annual Report 2015–2016*, referred to this technical approach as 'non-partisan': 5.
  - 36 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 82–83.
  - 37 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [2.14].
  - 38 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [2.11], [2.12].
  - 39 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.
  - 40 A list of PJCHR inquiries is at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_Inquiries](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_Inquiries)>. Inquiries include: *ParentsNext: examination of Social Security (Parenting payment participation requirements – class of persons) instrument 2021* (4 August 2021); *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511]* (13 November 2019); *Review of Stronger Futures measures (16 March 2016); Stronger Futures in the Northern Territory Act 2012 and related legislation: Eleventh Report of 2013* (June 2013); *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (June 2013).
  - 41 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256, 263.
  - 42 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(c).
  - 43 PJCHR, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures of the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).
  - 44 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 85.
  - 45 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Inquiry report: Religious Discrimination Bill 2021 and related bills* (4 February 2022).
  - 46 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256, 260.
  - 47 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8, 9. This was recommended by the National Consultation: Rec 6.
  - 48 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 272 (Robert McClelland, Attorney-General).

- 49 Robert Orr, Genevieve Ebbeck, Robyn Briese and Andrew Yuile, 'Human Rights in Commonwealth Policy Development and Decision-making' (Legal Briefing No 100, Australian Government Solicitor, 20 August 2013) [3.30].
- 50 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.14], n 16.
- 51 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.14].
- 52 David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human rights' [2012] (1) *European Human Rights Law Review* 58, 68.
- 53 Robert Orr, Genevieve Ebbeck, Robyn Briese and Andrew Yuile, 'Human Rights in Commonwealth Policy Development and Decision-making' (Legal Briefing No 100, Australian Government Solicitor, 20 August 2013), [3.14].
- 54 PJCHR, Chair's Tabling Statement, 11 February 2014 Chair's, *Second Report of the 44th Parliament*: <[file:///C:/Users/AHRC%20User/Downloads/Second\\_Report\\_Statement\\_110214.pdf](file:///C:/Users/AHRC%20User/Downloads/Second_Report_Statement_110214.pdf)>.
- 55 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 2.
- 56 Linked at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>.
- 57 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Expectations for Statements of Compatibility* (November 2021) 2. The practice note was first published in September 2012, and revised in September 2014 and November 2021.
- 58 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence Provisions, Civil Penalties and Human Rights* (December 2014). First published in early 2014, and revised December 2014.
- 59 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015). First published in March 2014 and revised in June 2015.
- 60 Australian Government, Attorney-General's Department, 'Human Rights Scrutiny' <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny>>; <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-your-fingertips>> respectively. Robert Orr, Genevieve Ebbeck, Robyn Briese and Andrew Yuile, 'Human Rights in Commonwealth Policy Development and Decision-making' (Legal Briefing No 100, Australian Government Solicitor, 20 August 2013), [3.19]. The Attorney-General's Department has also developed resources, including general information on SOCs, SOC templates and a flowchart tool for assessing human rights compatibility: 'Tools for assessing compatibility with human rights' *Attorney-General's Department* <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/tools-assessing-compatibility-human-rights>>.
- 61 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 3, pointing to the committee's website for links to statements and speeches: <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Statements/2012](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements/2012)>.
- 62 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 3.
- 63 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.
- 64 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 498-499.
- 65 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93.
- 66 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93.
- 67 Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41, 53.
- 68 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256, 259 n 10 provides a list of examples. See also the collection of essays in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook Co, 2020); and Human Rights Law Centre, 'Human Rights Scrutiny in the Australian Parliament: are new Commonwealth laws meeting Australia's international obligations?' (2022).
- 69 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Kings College London, June 2014) [9].
- 70 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' [2013] 34(1) *Statute Law Review* 58; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2)

- Monash University Law Review* 469; Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256; Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 67.
- 71 Laura Grenfell and Sarah Moulds, 'The role of Committees in Rights Protection in Federal and State Parliament in Australia', (2018) 41(1) *UNSW Law Journal* 40, 44.
- 72 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.86]; Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 *Parliamentary Affairs* 772, 774.
- 73 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Kings College London, June 2014) [9].
- 74 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 73.
- 75 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 98.
- 76 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 99.
- 77 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 100.
- 78 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022.
- 79 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 17-34.
- 80 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 15.
- 81 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 102 and examples cited in nn 118-119.
- 82 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 15.
- 83 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021), [3.48].
- 84 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) 2020, [3.48]. Note 104 lists a number of specific examples.
- 85 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [2.3].
- 86 Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliament in Australia', (2018) 41(1) *UNSW Law Journal* 40, 44.
- 87 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 221.
- 88 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) 13.
- 89 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 89, nn 73, 74. Hutchinson, a Principal Research Officer of the PJCHR Secretariat, pointed to the workload during the 45<sup>th</sup> parliament, from August 2016 to March 2018, with the tabling of 20 scrutiny reports examining 463 bills and 3,286 instruments of delegated legislation. Earlier statistics are considered in George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' [2013] 34(1) *Statute Law Review* 58, 62.
- 90 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 2.
- 91 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 71.
- 92 Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [11]. Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 90-91.
- 93 Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [12]. Zoe Hutchinson, 'The Role, Operation and Effectiveness of the

- Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 93–94.
- 94 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 10. They also comment in relation to the assessment by George Williams and Daniel Reynolds ('The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469) that 'the combination of statistics relating to bills and legislative instruments would appear to have considerably skewed the final numbers': n 54.
- 95 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 9.
- 96 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 9.
- 97 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 9.
- 98 See the examples in Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 10, n 51.
- 99 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [3.14].
- 100 Noted in Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2019* (26 August 2020) [2.16]. Between 1901 and 1988, 104 private members' bills were introduced into the House; by the end of the 46th Parliament (April 2022) this figure had risen to 652. Since Federation, only 30 non-government bills have passed into law – 23 introduced by private members or private senators and 7 by the Speaker or President of the Senate.
- 101 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [2.16].
- 102 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015–2016*, 20. Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 11–13. Virtual Roundtable: 'Rights-protection' in policy development and law-making processes.
- 103 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 11.
- 104 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 13.
- 105 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 92.
- 106 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256, 266.
- 107 Citing the study by Professors Carolyn and Simon Evans that indicated that 'there was a need for parliamentarians, and parliamentary committees, to be given sufficient time to carry out their role seriously and responsibly': Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives of Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 343.
- 108 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.81] fn 124: See, eg, Law Council of Australia, Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee, 6 April 2010; Amnesty International, Submission No 18 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee, 6 April 2010; Combined Community Legal Centres NSW, Submission No 16 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee, 1 April 2010; Australian Human Rights Commission, Submission No 11 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee, 19 March 2010; Civil Liberties Australia, Submission No 7 to Senate Standing Committee for the Scrutiny of Bills, Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee, 19 March 2010.
- 109 Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 142, 157. George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 501; Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7, 26. Crawford notes Adam Fletcher's suggestion that it may be resisted because it will slow the passage of legislation: *Australia's Human*

- Rights Scrutiny Regime; Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) 502; Law Council of Australia, Submission 166, *Free & Equal Inquiry*; Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.89]. See also, Senate Standing Committee for the Scrutiny of Bills, 'Ten Years of Scrutiny: A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills' (Senate, Parliament of Australia, 1991), 97.
- 110 Amnesty International Australia, Submission 103, *Free & Equal Inquiry*.
- 111 Public Interest Advocacy Centre, Submission 133 [to ALRC inquiry]. Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.89]. See also Human Rights Law Centre, Submission 148.
- 112 Australian Human Rights Commission, Submission to the National Human Rights Consultation Committee (2009) 56.
- 113 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 94.
- 114 Legislative Assembly for the Australian Capital Territory, *Standing Orders and Continuing Resolutions of the Assembly* (as at June 2022).
- 115 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 501. They also refer to Standing Order 175.
- 116 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 501. Referring to George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' [2013] 34(1) *Statute Law Review* 58, 63-5; and Andrew Lynch, Nicol McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws* (NewSouth Publishing, 2015).
- 117 Commonwealth of Australia, 46<sup>th</sup> Parliament, *Senate Journals*, No 55, 15 June 2020, 1908-1909 (Senator Urquhart).
- 118 The Committee still considers legislation passed before it has reported, although it may not seek to engage in dialogue with Ministers at that point.
- 119 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 221.
- 120 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 220.
- 121 David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human rights' [2012] (1) *European Human Rights Law Review* 58, 61.
- 122 Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 142, 159.
- 123 Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1072.
- 124 Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 142, 159.
- 125 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021), [3.10], references omitted.
- 126 Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1072.
- 127 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256, 289. During a consultation, it was observed that 'Australian legislation would be a different ballgame' with a Human Rights Act in place.
- 128 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 10. Williams and others were particularly critical of the deferral of consideration of legislation, especially 'high profile or controversial legislation': George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 477. The example given is the deferral of consideration of the National Security Legislation Amendment Bill (No 1) 2014 (Cth), which sought to give the Australian Security Intelligence Organisation major new powers, including to conduct a new class of operations known as special intelligence operations. Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256, 298.
- 129 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 11.
- 130 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.

- 131 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.
- 132 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.
- 133 *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.66].
- 134 Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41, 44.
- 135 Following the report of Francesca Klug on how to enhance the effectiveness of the Committee: Francesca Klug, 'Report on the Working Practices of the JCHR', *Twenty-third Report of Session 2005-06*. Appendix 1. HL 239/HC1575.
- 136 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001-2005 Parliament: 19th Report of Session 2004-05*, HL Paper 112 HC 552 [46].
- 137 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001-2005 Parliament: 19th Report of Session 2004-05*, HL Paper 112 HC 552 [47]. Additional criteria were added in 2006, including whether: the European Court of Human Rights or United Kingdom higher courts have recently given a judgment on the issue raised; the Bill has attracted broad public or media attention; 'reputable' stakeholders such as non-governmental organisations have commented on the Bill; the Explanatory Notes are incomplete; and the Bill raises an issue that has consistently been a concern for the UK Human Rights Committee in the past, but which the Government does not appear to have addressed - Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices: 23rd Report of Session 2005-06* (July 2006) [29].
- 138 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022.
- 139 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 3-4.
- 140 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 6. They note that, in practice, the function in relation to legislative instruments is delegated to the committee secretariat, which brings to the committee's attention any legislative instruments that appear to raise human rights concerns: n 37.
- 141 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 6.
- 142 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 7.
- 143 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 19-29 November 2012 Legislative Instruments registered with the Federal Register of Legislative Instruments 17 November 2012-4 January 2013: First Report of 2013* (February 2013) 161-177.
- 144 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 17-20 June 2013 Legislative Instruments registered with the Federal Register of Legislative Instruments 18 May-7 June 2013: Tenth Report of 2013* (August 2014).
- 145 See eg, Law Council of Australia, Submission 166, *Free & Equal Inquiry*. See also Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256.
- 146 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 2 of 2018* (February 2018) ch 1; and all reports since that time.
- 147 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 7. They explain in n 42 that 'The committee's reports include an explanation of how to find the relevant legislative instruments under consideration - namely, to identify which legislative instruments have been scrutinised by the committee during a specific time period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function': 'Advanced search' *Federal Register of Legislation* (Web Page) <<https://www.legislation.gov.au/AdvancedSearch>>.
- 148 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.87], citing Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council Public Policy Series No 5, Arts & Humanities Research Council, 2012), 22.
- 149 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.87], citing Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic

- Deficit' (Arts & Humanities Research Council Public Policy Series No 5, Arts & Humanities Research Council, 2012), 41.
- 150 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (28 September 2021), [3.65].
- 151 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (28 September 2021), [3.66].
- 152 *Human Rights (Parliamentary Scrutiny Act 2011)* (2011) s 7.
- 153 On Freedom of Speech and Religious Discrimination.
- 154 The list of completed inquiries is at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_Inquiries](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_Inquiries)>.
- 155 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report of COVID-19 legislation: Report 5 of 2020* (29 April 2020). Subsequent reports included a section on COVID-19 measures: eg Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 6 of 2020* (20 May 2020) ch 1. The committee also compiled a list of all bills and legislative instruments introduced or registered in 2020 and 2021 in response (or partly in response) to the COVID-19 pandemic (including legislation which did not engage human rights). Legislative instruments registered in 2022 in response to COVID-19 were considered by the Senate Standing Committee for the Scrutiny of Delegated Legislation: <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_COVID-19\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments)>.
- 156 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny)>.
- 157 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 31. The media release was issued on 15 April 2020: 'Human rights committee to scrutinise COVID-19 related legislation'.
- 158 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny)>.
- 159 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2021) [3.19].
- 160 Standing Order 152B. See 'Human Rights (Joint Committee)' *UK Parliament* <<https://committees.parliament.uk/committee/93/human-rights-joint-committee/>>.
- 161 Standing Order 152B.—(2)(a). Further, all Committees, have the power under the linked Standing Orders 'to make a special report of any matters which it may think fit to bring to the notice of the House': Standing Order 133.
- 162 House of Commons and House of Lords Joint Committee on Human Rights, *Protecting human rights in care settings: Fourth Report of Session 2022–23* (13 July 2022).
- 163 Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256, 263.
- 164 Mr Graham Perrett MP, *House of Representatives Hansard* (22 November 2010) 3239.
- 165 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 94, 95.
- 166 Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 96.
- 167 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.69], drawing from the reports of each Committee from January 2013 until the time of the ALRC report.
- 168 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 225.
- 169 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).
- 170 As of that date, the Senate Standing Committee for the Scrutiny of Delegated Legislation can routinely scrutinise all legislative instruments. This was recommended by the SDLC committee in its report into the exemption of delegated legislation, rec 10. The motion to change the standing orders was agreed to on 16 June 2021 (and now standing order 23(4A) says 'The committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.').
- 171 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 32.
- 172 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 32.
- 173 Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1074.
- 174 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights

- Protection' (2013) 34(1) *Statute Law Review* 58, 75.
- 175 'Tools for assessing compatibility with human rights' *Attorney-General's Department* <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/tools-assessing-compatibility-human-rights>>.
- 176 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019) [3.47].
- 177 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019) [3.61]. For example, in his tabling statement accompanying Report 12 of 2018, the Chair highlighted the statement of compatibility for the Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018 (Cth). The statement of compatibility comprehensively set out each of the rights that were engaged and limited by the measures in the bill, which allowed for an assessment that the measures, in context, were permissible limitations on human rights: [3.61].
- 178 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019) [3.62].
- 179 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019) [3.62].
- 180 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 220
- 181 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 220.
- 182 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.78]. Note 117 refers to disagreement of the then Attorney-General with what the Committee was seeking.
- 183 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.78].
- 184 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.75]. Law Council of Australia, Submission 140. This was supported in Civil Liberties Australia, Submission 94.
- 185 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.76].
- 186 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.77].
- 187 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.9].
- 188 Department of the Prime Minister and Cabinet (Cth) *Legislation Handbook* (2017) 32, 41, 45; Office of Parliamentary Counsel, *Instruments Handbook* (2022) ch 8; Office of Parliamentary Counsel (Cth) *Drafting Direction No. 4.2* (2019); Attorney-General's Department (Cth) *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2013); Office of Parliamentary Counsel (Cth) *OPC's Drafting Services: A Guide for Clients* (7<sup>th</sup> ed, 2022).
- 189 'Tools for Assessing Human Rights Compatibility' *Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/tools-assessing-compatibility-human-rights>>. The Attorney-General's Department also provides guidance sheets on a range of rights, as well as guidance on 'permissible limitations' and 'absolute rights' included in the ICCPR, based on the Siracusa Principles: 'Public Sector Guidance Sheets' *Attorney General's Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets>>.
- 190 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.56].
- 191 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.57].
- 192 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.59].
- 193 Amnesty International Australia, Submission 103, *Free & Equal Inquiry*.
- 194 Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 142, 157. See also Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) 309–310.
- 195 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019), [3.64].
- 196 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 29–30.
- 197 Virtual Roundtable: 'Rights-protection' in policy development and law-making processes [notes].
- 198 Law Council of Australia, Submission 166, *Free & Equal Inquiry*.
- 199 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary

- Joint Committee on Human Rights, Senate Lecture Series, August 2022, 30. Such authorisation was given from June 2018, with a lapse from mid-2019 to September 2021.
- 200 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 30.
- 201 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 30.
- 202 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 30.
- 203 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 30. Notes omitted.
- 204 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93.
- 205 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93.
- 206 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 200.
- 207 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.61].
- 208 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.62].
- 209 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.63].
- 210 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report: Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012).
- 211 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report: Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) [3.12].
- 212 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.64].
- 213 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 68.
- 214 Parliamentary scrutiny processes include the Senate Standing Committee on Scrutiny of Delegated Legislation, Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on Human Rights, Senate Standing Committee on Legal and Constitutional Affairs, Parliamentary Joint Committee on Intelligence and Security and Parliamentary Joint Committee on Law Enforcement. Other review mechanisms include the Australian Human Rights Commission, Independent National Security Legislation Monitor and Australian Law Reform Commission.
- 215 AHRC + PJCHR meeting suggestions (2017).
- 216 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) [3.90].
- 217 *National Human Rights Consultation Report*, 173.
- 218 *National Human Rights Consultation Report*, 173-174.
- 219 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Kings College London, June 2014) fn xii.
- 220 Simon Rice, 'Allowing for Dissent: Opening Up Human Rights Dialogue in the Australian Parliament', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australia Jurisdictions* (Lawbook Co, 2020) 99, [4.30].
- 221 Simon Rice in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australia Jurisdictions* (Lawbook Co, 2020), [4.30].
- 222 Edward Santow, 'The Act That Dares Not to Speak Its Name: The National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33(1) *University of New South Wales Law Journal* 8, 26-34.
- 223 Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australia Jurisdictions* (Lawbook Co, 2020) [4.30], 105.
- 224 AHRC + PJCHR meeting suggestions (2017).
- 225 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 2.
- 226 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 4.



# Chapter 14: The role of the Australian Human Rights Commission

## 14.1 The Commission as NHRI

As Australia's national human rights institution, the Commission has over 40 years of experience in analysing, applying and promoting international human rights standards in the Australian context. This makes the Commission ideally placed to play a significant role in the implementation of a Human Rights Act; and to undertake various ongoing functions in relation to the Human Rights Act.

In addition to the complaints powers discussed in chapter 11, section 11.3, the Commission proposes that it have the following specific functions in relation to a Human Rights Act.

The Commission has also provided background information and reasons underpinning the need for additional Commission powers in *Free & Equal: A reform agenda for discrimination laws*.<sup>1</sup>

## 14.2 Reporting, reviews and oversight

Currently, the Commission can hold public inquiries and conduct consultations, including to address systemic human rights or unlawful discrimination issues of national importance. The Commission may report to the Minister on laws that should be made or action the government should take on human rights<sup>2</sup> or compliance with Australia's international human rights obligations.<sup>3</sup> These powers should be extended to reporting on the operation of the Human Rights Act.

The Attorney-General should be required to table all Commission reports with recommendations relating to human rights compliance that are directed towards the Australian Government. For existing reporting

functions of the Commission (other than reports dealing with individual complaints about breaches of human rights or ILO 111 discrimination in employment), this is required within 15 sitting days of the transmittal of a report to the Minister. There should also be a statutory requirement for the Attorney-General to table the Government's response to those reports in Parliament within a set period of time. The response should indicate how the Government intends to address the recommendations made by the Commission in its report.

### (a) Systemic inquiries

The Commission has previously proposed that it should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination of a systemic nature, with effective enforcement mechanisms attached.<sup>4</sup> This recommendation should be implemented and extend to inquiries conducted in relation to breaches of human rights in a Human Rights Act that are of a systemic nature.

### (b) Public sector reporting

The Commission should have a specific power to review the policies and practices of public authorities to assess their compatibility with the Human Rights Act. This power should be exercisable on the Commission's own initiative. The Commission should have the power to require the production of documents, witnesses or other information necessary to conduct a proper review.

The Commission should be empowered to make recommendations to relevant public authorities after conducting reviews. For instance, the Commission might recommend changes to the policies or practices of a public authority to make them more compatible with the Human Rights Act. Public authorities should be required to respond to the Commission's recommendations.

### 14.3 Annual reports

All public authorities subject to the Human Rights Act should be required to report on Human Rights Act compliance as part of their annual reporting duties. Annual reporting should include information about efforts to ensure compliance with the Human Rights Act, including training and education undertaken; the development of internal guidelines, protocols; and the conduct of any compliance audits. Reporting should also disclose data about any complaints made with respect to the Human Rights Act, both internally to the public authority, and externally to the Commission or the courts (while respecting relevant privacy considerations). These reporting requirements would be an important tool for data collection about the effectiveness of the Human Rights Act.

An important tool to promote compliance, share best practice and monitor implementation of Human Rights Acts has been for the relevant human rights commission to prepare an annual report to Parliament. For example, s 91 of the *Human Rights Act 2019* (Qld) requires the Queensland Human Rights Commissioner to prepare an annual report about the operation of the Act during the year. The purpose of this report is to provide a resource for government, Parliament, and the community on the operation of the Act and the degree to which it is achieving its objectives. These reports include Commission complaints data as well as contributions from state and local government

entities, advocates, and functional public entities, and an analysis of the Act's impact on the courts and on Parliament.<sup>5</sup> There are similar requirements in Victoria.<sup>6</sup>

The Commission could be required to prepare regular reports on the operation of the Human Rights Act across the Commonwealth on a similar basis.

### 14.4 Intervention power

Presently, the Commission has a power to intervene and make submissions with the leave of the court in legal cases involving human rights issues.<sup>7</sup> The Commission and its special purpose Commissioners can also intervene or act as *amicus curiae* in cases involving discrimination issues.<sup>8</sup>

The special expertise the Commission has developed through performing its current statutory intervention and *amicus* functions places the Commission in a unique position to assist courts and tribunals on the meaning, scope and application of human rights, including the interpretation of international human rights jurisprudence.

These powers should also operate under a Human Rights Act, with the Commission having the power to intervene in court or tribunal proceedings involving the interpretation or application of the Act.

This would be consistent with state charters. For example, the Victorian Charter grants the Victorian Equal Opportunity and Human Rights Commission a right of intervention.<sup>9</sup> The Commission should be adequately resourced to perform this function.

Such intervention powers should be independently exercised by the Commission, with leave of the court.

## 14.5 Education and public awareness

The Commission's current statutory functions include promoting understanding, acceptance and public discussion of human rights in Australia.<sup>10</sup> The Commission has substantial expertise and experience in this area and is ready to play a leading role in engaging the Australian community on the content and effect of a Human Rights Act. The Commission's role in this regard may include:

- undertaking research
- developing public education programs and campaigns
- running community-based workshops
- holding public forums
- developing materials for use in schools.

## 14.6 Public sector training and guidance

The Commission should have a key role in developing initial training programs for the Australian public sector, designed to support the roll-out of the Human Rights Act, as well as ongoing education programs to improve human rights compliance.

The Commission should also develop public sector guidelines and protocols in coordination with public sector bodies to enable the implementation and compliance with the Human Rights Act in specific public sector contexts. The Commission should be adequately resourced to perform these functions.

## 14.7 Resourcing and independence

The Commission must be equipped with the necessary tools and resources to protect and promote human rights in line with the Paris Principles.<sup>11</sup> The Paris Principles set out internationally accepted standards that must

be met by National Human Rights Institutions (NHRIs) such as the Commission. The Paris Principles require NHRIs to be 'independent in law, membership, operations, policy and control of resources'. They also require that NHRIs have 'a broad mandate; pluralism in membership; broad functions; adequate powers; adequate resources; cooperative methods; and engage with international bodies'.<sup>12</sup>

The Commission has recommended that the AHRC Act be amended to ensure compliance with the Paris Principles, including to:

- specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process<sup>13</sup>
- include a reference to the Paris Principles in the objects clause of the legislation acknowledging that the Commission is intended to be a Paris Principles compliant national human rights institution
- include a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations, including ICESCR
- specify that all Commission functions may be exercised independently of government authorisation.

The Commission has also recommended that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions.<sup>14</sup> Specifically if the Commission was tasked with additional functions under a Human Rights Act, the government would need to provide sufficient resources to enable the Commission to properly fulfil those functions.

## Chapter 14: Endnotes

- 1 Australian Human Rights Commission, *Free & Equal: A reform agenda for discrimination laws* (December 2021) Chapters 3 and 4.
- 2 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(j).
- 3 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(k).
- 4 *Free & Equal, A Reform Agenda for Discrimination Laws* (Position Paper, 2021) Recommendation 14: <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- 5 See annual reports of the Queensland Human Rights Commission: <<https://www.qhrc.qld.gov.au/resources/reports>>.
- 6 See annual reports of the Victorian Equal Opportunity and Human Rights Commission: <<https://www.humanrights.vic.gov.au/resources/2020-charter-report/>>.
- 7 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o), s 3(1).
- 8 *Racial Discrimination Act 1975* (Cth) s 20(1)(e); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb); *Disability Discrimination Act 1992* (Cth) s 67(1)(l); *Age Discrimination Act 2004* (Cth) s 53(1)(g). Special purpose Commissioners have the specific function of assisting the Federal Court and Federal Court and Family Court of Australia as *amicus curiae* with leave of the court: *Australian Human Rights Commission Act 1986* (Cth) s 46PV.
- 9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 40(1).
- 10 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g).
- 11 NSW Young Lawyers, Submission 35, *Free & Equal Inquiry*; Uniting Church of Australia, Submission 91, *Free & Equal Inquiry*; Victorian Equal Opportunity and Human Rights Commission, Submission 135, *Free & Equal Inquiry*; Civil Liberties Australia, Submission 37, *Free & Equal Inquiry*; Law Council of Australia, Submission 166, *Free & Equal Inquiry*; ACTU, Submission 159, *Free & Equal Inquiry*.
- 12 See 'Accreditation' *Global Alliance of National Human Rights Institutions* (Web Page) <<https://ganhri.org/accreditation/>>.
- 13 The Commission welcomes the passage of the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022* (Cth), which implemented this recommendation.
- 14 *Free & Equal, A Reform Agenda for Discrimination Laws* (Position Paper, 2021) Recommendation 37, 310. <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.





# Appendix: Rights content with commentary

Proposed right	Commentary
<p><b>Recognition and equality before the law; and Freedom from discrimination</b></p> <p>(1) Every person has the right to recognition as a person before the law.</p> <p>(2) Every person has the right to enjoy the person's human rights without discrimination.</p> <p>(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.</p> <p>(4) Every person has the right to equal and effective protection against discrimination.</p> <p>(5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.</p> <p>(6) Discrimination in the context of the Human Rights Act has the same meaning as discrimination in federal discrimination laws (including any future discrimination legislation):</p> <p><i>Age Discrimination Act 2004</i> <i>Disability Discrimination Act 1992</i> <i>Racial Discrimination Act 1975</i> <i>Sex Discrimination Act 1984</i> <i>Fair Work Act 2009</i></p>	<p>Implements Articles 2(1), 3, 16 and 26 of the ICCPR, and Article 2(2) of ICESCR.</p> <p>Wording based closely on s 15 of the Queensland Human Rights Act s 8 of the Victorian Charter.</p> <p>CI 6 references federal discrimination laws and the <i>Fair Work Act 2009</i> (Cth). This links the Human Rights Act with the existing body of domestic discrimination laws that are relevant to implementation of equality rights, and ensures consistency between the Human Rights Act and discrimination law regime. Human Rights Act principles will be relevant to the interpretation of discrimination law, and vice versa.</p> <p><i>ICCPR</i></p> <p><i>Article 2</i></p> <p><i>1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p> <p><i>Article 3</i></p> <p><i>The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.</i></p>

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**Proposed right****Commentary**

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*Article 16*

*Everyone shall have the right to recognition everywhere as a person before the law.*

*Article 26*

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*ICESCR**Article 2*

*2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

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**Right to life**

Every person has the right to life and has the right not to be arbitrarily deprived of life.

Implements Article 6(1) of the ICCPR.

Wording based closely on s 9 of the Victorian Charter and s 16 of the Queensland Human Rights Act.

*ICCPR**Article 6*

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

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## Proposed right

## Commentary

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### Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without the person’s full, free and informed consent.

Implements Article 7 of the ICCPR.

Wording based closely on s 17 of the Queensland Human Rights Act, s 10 of the ACT Human Rights Act and s 10 of the Victorian Charter.

*ICCPR*

*Article 7*

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

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### Protection of children

- (1) Every child has the right, without discrimination, to the protection that is needed by the child by reason of being a child.
- (2) Public authorities shall take into account the best interests of every child as a primary consideration in all actions concerning them.
- (3) Every child shall be registered immediately after birth and shall have a name.
- (4) Every child has the right to acquire a nationality.

*Note: A child also has the other human rights set out in this Act.*

*Note: This right should be interpreted in light of Article 10(3) of ICESCR.*

Implements Article 24 of the ICCPR and Article 3 of the CRC.

References Article 10(3) ICESCR which elaborates on this right, and includes protections against economic and social exploitation, prohibiting child labour.

The wording is partially based on s 17 of the Victorian Charter, s 26 of the Queensland Human Rights Act and s 11 of the ACT Human Rights Act.

In the state and territory Human Rights Acts, the ‘protection of children’ right is included as part of the ‘protection of families’ right. The Commission considers that these two rights should be distinct (as in international law) to avoid the child’s distinct rights becoming subsumed by the ‘families’ right.

The right to acquire nationality is not incorporated in the state and territory Human Rights Acts. Nationality is a matter for the federal government and therefore belongs in the federal Human Rights Act.

*ICCPR*

*Article 24*

*1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

*2. Every child shall be registered immediately after birth and shall have a name.*

*3. Every child has the right to acquire a nationality.*

*CRC*

*Article 3*

*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

*2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

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## Proposed right

## Commentary

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ICESCR

Article 10

The States Parties to the present Covenant recognize that:

...

*3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.*

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### Protection of families

(1) The family is the fundamental group unit of society and is entitled to protection by society and the State.

(2) Every person of marriageable age has the right to marry or refuse to marry another person of their own free choice, and to found a family.

*Note: This article should be interpreted in light of Article 10 of ICESCR.*

Implements Article 23 of the ICCPR.

References Article 10 of ICESCR which elaborates on this right, noting that ‘family’ has a broad meaning, and highlighting the importance of parental support measures.

The wording of the first clause is based on s 17 of the Victorian Charter, s 26 of the Queensland Human Rights Act and s 11 of the ACT Human Rights Act.

The second clause embeds the marriage right in the ICCPR in gender neutral terms. This clause is not included in the state and territory instruments. Marriage is a federal jurisdictional responsibility.

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## Proposed right

## Commentary

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ICCPR

Article 23

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*

3. *No marriage shall be entered into without the free and full consent of the intending spouses.*

4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

ICESCR

Article 10

*The States Parties to the present Covenant recognize that:*

1. *The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*

2. *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*

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## Proposed right

## Commentary

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*3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.*

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### Privacy and reputation

A person has the right—

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

*Note: The right to privacy applies to the collection, processing or retention of personal data through all forms of technology, and includes state surveillance measures.*

Implements Article 17 of the ICCPR.

Wording closely based on s 13 of the Victorian Charter, s 25 of the Queensland Human Rights Act and s 12 of the ACT Human Rights Act.

The note clarifies that privacy rights extend to technological surveillance measures, noting the increased capacity of the state collect personal data and make decisions based on that data through artificial intelligence.

*ICCPR*

*Article 17*

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks.*

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## Proposed right

## Commentary

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### Freedom of movement

(1) Every person lawfully within Australia has the right to move freely within Australia and to leave it, and has the freedom to choose where to live.

(2) No person shall be arbitrarily deprived of the right to enter their own country.

Implements Article 12 of the ICCPR.

Wording closely based on s 13 of the ACT Human Rights Act, s 19 of the Queensland Human Rights Act and s 12 of the Victorian Charter.

The second clause is not included in state and territory instruments. International borders are a federal responsibility and this clause should therefore be included in a federal Human Rights Act (implementing Article 12(4) ICCPR).

### *ICCPR*

#### *Article 12*

*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*2. Everyone shall be free to leave any country, including his own.*

*3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*

*4. No one shall be arbitrarily deprived of the right to enter his own country.*

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## Proposed right

## Commentary

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### Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief. This right includes—

(a) the freedom to have or to adopt a religion or belief of their choice; and

(b) the freedom to manifest their religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would impair their freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Implements Article 18 of the ICCPR.

Wording based on s 14 of the Victorian Charter, s 20 of the Queensland Human Rights Act and s 14 of the ACT Human Rights Act. Some alterations have been made from the state and territory Human Rights Acts to ensure clarity by reflecting accepted terminology used in Article 18 of the ICCPR and the body of international human rights law. (For example the phrase ‘manifest religion’ has been chosen in preference to ‘demonstrate religion’. ‘Manifest religion’ has an established meaning in international law.<sup>1</sup>)

Note that Article 18(4) ICCPR (regarding religious education) has been included in the right to education.

### ICCPR

#### Article 18

*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

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## Proposed right

## Commentary

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*4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

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### **Peaceful assembly and freedom of association**

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

Implements Articles 21 and 22 of the ICCPR and Article 8 of ICESCR (See also 'Right to Work' below regarding the latter).

Wording based closely on s 16 of the Victorian Charter and s 22 of the Queensland Human Rights Act.

#### *ICCPR*

##### *Article 21*

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

##### *Article 22*

*1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

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*3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

*ICESCR*

*Article 8*

*1. The States Parties to the present Covenant undertake to ensure:*

*(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*

*(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

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## Proposed right

## Commentary

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*2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

*3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

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### Freedom of expression

(1) Every person has the right to hold opinions without interference.

(2) Every person has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another form or medium of their choice.

Implements Article 19 of the ICCPR.

Wording based closely on s 21 of Queensland Human Rights Act and s 16 of ACT Human Rights Act. Avoids the approach in the Victorian Charter (s 15) that includes limitations on freedom of expression within the right itself, as this would be covered by the overarching limitations section.<sup>2</sup>

#### *ICCPR*

#### *Article 19*

*1. Everyone shall have the right to hold opinions without interference.*

*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

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## Proposed right

## Commentary

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### Taking part in public life

(1) Every person in Australia has the right and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

(2) Every eligible person has the right, and is to have the opportunity, without discrimination—

(a) to vote and be elected at periodic elections that guarantee the free expression of the will of the electors; and

(b) to have access, on general terms of equality, to the Australian public service and public office.

*(a) For respect of the rights or reputations of others;*

*(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Implements Article 25 of the ICCPR.

Wording based closely on s 18 of the Victorian Charter and s 23 of the Queensland Human Rights Act.

*ICCPR*

*Article 25*

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country.*

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### Right to liberty and security of person

(1) Every person has the right to liberty and security of person.

(2) A person must not be subjected to arbitrary arrest or detention.

Implements Article 9 and Article 11 of the ICCPR.

Based closely on wording of s 18 of the ACT Human Rights Act and partially on s 21 of the Victorian Charter and s 29 of the Queensland Human Rights Act – adapted for closeness of language to the ICCPR.

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## Proposed right

(3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.

(5) A person who is arrested or detained on a criminal charge—

(a) must be promptly brought before a court; and

(b) has the right to be brought to trial without unreasonable delay; and

(c) must be released if paragraph (a) or (b) is not complied with.

(6) Anyone who is awaiting trial must not be detained in custody as a general rule, but their release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

(7) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide the lawfulness of the detention and the court must make a decision without delay and order the person's release if the detention is unlawful.

## Commentary

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The ACT is the only Australian jurisdiction that provides a right to compensation for unlawful arrest or detention in its Human Rights Act.

### *ICCPR Article 9*

*1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

*2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

*4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

*5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

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## Proposed right

## Commentary

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(8) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.

(9) A person must not be imprisoned only because of the inability to carry out a contractual obligation.

### *Article 11*

*No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.*

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### **Humane treatment when deprived of liberty**

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from convicted persons except in exceptional circumstances.

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Implements Article 10 of the ICCPR.

Based closely on s 19 of the ACT Human Rights Act (which adopts wording that is closest to the ICCPR right).

Note that Articles 10(2)(b) and 10(3) are implemented by the 'rights of children in the criminal process'. This aligns with the approach taken in the state and territory Human Rights Acts.

### *ICCPR Article 10*

*1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

*2.*

*(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*

*(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*

*3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

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## Proposed right

## Commentary

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### Children in the criminal process

(1) A child charged with or convicted of a criminal offence must be segregated from adults charged with or convicted of a criminal offence.

(2) A child charged with a criminal offence must be treated in a way that is appropriate for a person of the child's age who has not been convicted.

(3) A child charged with a criminal offence must be brought to trial as quickly as possible.

(4) A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.

(5) A child who has been convicted of an offence must be treated in a way that is appropriate for a person of the child's age.

(6) Children should only be imprisoned as a last resort and for the shortest necessary period of time.

Implements Articles 10(2)(b) and 10(3) and 14(4) of the ICCPR. Also implements Articles 37(b) and (c) of the CRC, for children deprived of their liberty.

Wording partially based on ss 23 and 25(3) of the Victorian Charter, ss 33 and 32(3) of the Queensland Human Rights Act and ss 20 and 22(3) of the ACT Human Rights Act.

### CRC Article 37

States Parties shall ensure that:

...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

....

See also Article 10 extracted above and Article 14 extracted below.

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## Proposed right

## Commentary

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### Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to a fair and public hearing by a competent, independent and impartial court or tribunal.

(2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.

(3) Each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

Implements Article 14(1) of the ICCPR.

Wording based closely on s 31 of Queensland Human Rights Act and s 21 of ACT Human Rights Act.

### *ICCPR Article 14*

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

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**Proposed right****Commentary**

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*(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

*(c) To be tried without undue delay;*

*(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

*(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*

*(g) Not to be compelled to testify against himself or to confess guilt.*

*4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*

*5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

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## Proposed right

## Commentary

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*6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

*7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

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### Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees, equally with everyone else—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;

(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;

Implements Articles 14(2) 14(3), 14(5) of the ICCPR.

Wording based closely on s 22 of the ACT Human Rights Act, s 32 of the Queensland Human Rights Act and s 25 of the Victorian Charter.

In particular, adapts the ACT wording for legal assistance clauses, and the Victoria/Queensland wording for the communication assistance clause. Aspect relating to children moved to 'children's rights in the criminal process'.

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**Proposed right****Commentary**

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(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person;

(e) to be informed, if the person does not have legal assistance, about the right to legal assistance chosen by the person;

(f) to have legal assistance provided to the person, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if the person cannot afford to pay for the assistance;

(g) to examine, or have examined, witnesses against the person;

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

(i) to have the free assistance of an interpreter if the person cannot understand or speak English;

(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;

(k) not to be compelled to testify against themselves or to confess guilt.

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## Proposed right

## Commentary

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(3) A person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

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### Compensation for wrongful conviction

Implements Article 14(6) of the ICCPR.

(1) This section applies if—

Wording based on s 23 of the ACT Human Rights Act. The ACT is the only Australian jurisdiction that implements this right.

(a) anyone is convicted by a final decision of a criminal offence; and

(b) the person suffers punishment because of the conviction; and

(c) the conviction is reversed, or the person is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

(2) If this section applies, the person has the right to be compensated according to law.

(3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

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### Right not to be tried or punished more than once

Implements Article 14(7) of the ICCPR.

A person must not be tried or punished more than once for an offence in respect of which the person has already been finally convicted or acquitted in accordance with law.

Wording closely based on s 24 of the ACT Human Rights Act, s 34 of Queensland Human Rights Act and s 26 of the Victorian Charter.

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## Proposed right

## Commentary

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### Retrospective criminal laws

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

Implements Article 15 of the ICCPR.

Wording based closely on s 27 of the Victorian Charter and s 35 of the Queensland Human Rights Act.

#### *ICCPR Article 15*

*1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

*2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

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### Freedom from forced work

(1) A person must not be held in slavery or servitude.

(2) A person must not be made to perform forced or compulsory labour.

(3) For the purposes of subsection (2) *forced or compulsory labour* does not include—

(a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or

Implements Article 8 of the ICCPR.

Wording based closely on s 11 of the Victorian Charter and s 26 of the ACT Human Rights Act.

Reference to the Modern Slavery Act added to incorporate the definition of ‘modern slavery’ within that Act as it is more specific and references relevant international law.

#### *ICCPR Article 8*

*1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*

*2. No one shall be held in servitude.*

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## Proposed right

## Commentary

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(b) work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or

(c) work or service that forms part of normal civil obligations.

Slavery includes 'modern slavery' defined within the *Modern Slavery Act 2018* (Cth) s 4.

3.

*(a) No one shall be required to perform forced or compulsory labour;*

*(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;*

*(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:*

*(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;*

*(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;*

*(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;*

*(iv) Any work or service which forms part of normal civil obligations.*

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## Proposed right

## Commentary

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### Cultural rights

Implements Article 27 of the ICCPR.

#### Cultural rights—generally

All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

Wording based on ss 27 and 28 of the Queensland Human Rights Act.

Consultation input indicated that the Queensland section is preferable as it is the most comprehensive articulation of cultural rights, and separates general cultural rights from First Nations cultural rights.

#### Cultural rights — First Nations peoples

#### *ICCPR Article 27*

(1) First Nations peoples hold distinct cultural rights.

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

(2) First Nations peoples must not be denied the right, with other members of their community—

(a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

(b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and

(c) to enjoy, maintain, control, protect and develop their kinship ties; and

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## Proposed right

## Commentary

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(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

(3) First Nations peoples have the right not to be subjected to forced assimilation or destruction of their culture.

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### Right to education

(1) Every child has the right to have access to free primary and secondary education without discrimination.

*Note: This right should be interpreted in light of Article 24 of the CRPD.*

(2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

(3) A child's parents or guardian may choose schooling for the child to ensure the religious and moral education of the child in conformity with their convictions, provided that the schooling conforms to the minimum educational standards required under law.

Implements Articles 13 and 14 of ICESCR.

Both the ACT and Queensland have implemented this right—s 36 of the Queensland Human Rights Act and s 27A of the ACT Human Rights Act. Wording is partially based on these rights—it has been adapted for clarity and to reflect international law.

A note is included to indicate that this right should be interpreted in light of Article 24 of the CRPD. This elaborates on the requirements for disability inclusive education, which is required to meet the standard for non-discrimination.

*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(a) Primary education shall be compulsory and available free to all;*

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**Proposed right****Commentary**

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*(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

*(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

*(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education*

*(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

*3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*

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*4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

*Article 14*

*Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.*

*CRPD*

*Article 24*

*1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:*

*a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*

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## Proposed right

## Commentary

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*b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*

*c. Enabling persons with disabilities to participate effectively in a free society.*

*2. In realizing this right, States Parties shall ensure that:*

*a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*

*b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*

*c) Reasonable accommodation of the individual's requirements is provided;*

*d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;*

*e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.*

*3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:*

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**Proposed right****Commentary**

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*a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;*

*b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;*

*c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.*

*4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.*

*5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.*

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## Proposed right

## Commentary

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### Right to health

(1) Every person has the right to access physical and mental health services without discrimination.

(2) Every person has the right to emergency medical treatment that is immediately necessary.

Implements Article 12 of ICESCR.

Queensland has implemented this right—s 37. Wording partially based on Queensland right.

It would enable access to health services, including mental health services, without discrimination. It would also prevent the refusal of emergency medical treatment that is immediately necessary. Determinants that impact upon the right to health are also addressed through other rights protected in the Human Rights Act – for example, under the right to an adequate standard of living, everyone has the right to adequate food and housing.

#### *ICESCR Article 12*

*1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

*(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*

*(b) The improvement of all aspects of environmental and industrial hygiene;*

*(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

*(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

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## Proposed right

## Commentary

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### Right to adequate standard of living

(1) Every person has the right to access adequate housing.

(2) No one may be unlawfully or arbitrarily evicted from their home.

(3) Every person has the right to have access to adequate food, water and clothing.

Implements Article 11(1) of ICESCR.

Not protected in state and territory human rights instruments.

This would require the adequate provision of necessities required to maintain a basic standard of living and dignity, and to ensure survival through the prevention destitution, homelessness and starvation.

ICESCR

#### *Article 11*

*1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

*2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

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## Proposed right

## Commentary

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*(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*

*(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.*

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### **Right to a healthy environment**

Every person has the right to an environment that does not produce adverse health consequences in the following respects:

(a) Every person has the right not to be subject to unlawful pollution of air, water and soil.

(b) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.

Implements Articles 11 and 12 of ICESCR and reflects Article 6 of the ICCPR (extracted above).

In July 2022, the UN General Assembly adopted a resolution to declare access to a clean, healthy and sustainable environment to be a universal human right. There were 161 votes in favour, including Australia, and eight abstentions.<sup>3</sup> The resolution was based on similar text adopted in 2021 by the Human Rights Council.<sup>4</sup>

This articulation of the right is an amalgamation of aspects of key rights that reflect environmental considerations.

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## Proposed right

## Commentary

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(c) No unjustified retrogressive measures should be taken with regard to this right.

(d) No one should be subject to discrimination regarding the realisation of this right.

Clause (a) reflects that the right to health (Article 12 of ICESCR) includes an obligation on states to refrain from ‘unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities’.<sup>5</sup> It also reflects Human Rights Committee commentary on the right to life (Article 6 of the ICCPR): ‘[i]mplementation of the obligation to respect and ensure the right to life ... depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors’.<sup>6</sup>

Clause (b) reflects core obligations of the right to health to ‘ensure access to the minimum essential food which is nutritionally adequate and safe’ and to ‘an adequate supply of safe and potable water’.<sup>7</sup> It also reflects aspects of the right to an adequate standard of living (Article 11, extracted above): specifically the obligation to protect against the ‘contamination of water supplies’.<sup>8</sup>

Clauses (c) and (d) reflect overarching ICESCR principles to avoid retrogressive measures and discrimination.

This right is not implemented in state and territory HR instruments.

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### **Right to work and other work related rights (trade union, just and favourable conditions)**

(1) Every person has the right to work, including the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Implements Articles 6 and 7 of ICESCR.

See also related right to freedom of association, including the right to form and join trade unions, which also reflects Article 8 of ICESCR.

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## Proposed right

(2) Every person has the right to the enjoyment of just and favourable conditions of work.

(3) Every person has the right to strike in conformity with the law.

Note: These rights are to be read in context with the *Fair Work Act 2009* (Cth); the *Work Health and Safety Act 2011* (Cth) and federal discrimination laws, as well as Articles 6, 7 and 8 of ICESCR.

## Commentary

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ACT has implemented this right – s 27B of the ACT Human Rights Act. This wording has been adapted to reflect existing work-related rights in federal laws, by referencing key legislation that expound upon the core of the right included here. These federal instruments include provisions for industrial action, working conditions and minimum wage, amongst other things. This will serve to link the Human Rights Act with existing federal protections and ensure that those instruments are read in light of the Human Rights Act and the broader ICESCR obligations.

### *ICESCR*

#### *Article 6*

*1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

#### *Article 7*

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

*(a) Remuneration which provides all workers, as a minimum, with:*

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## Proposed right

## Commentary

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*(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*

*(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;*

*(b) Safe and healthy working conditions;*

*(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*

*(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

### *Article 8*

*1. The States Parties to the present Covenant undertake to ensure:*

*(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*

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**Proposed right****Commentary**

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*(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

*2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

*3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

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**Right to social security**

Every person has the right to have access to social security.

Implements Article 9 of ICESCR.

Not protected in state and territory HR instruments.

The right to social security encompasses the right to access and maintain benefits without discrimination in order to secure protection from lack of work-related income (including caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member); unaffordable access to health care; insufficient family support, particularly for children and adult dependents.

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**Proposed right****Commentary**

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This would ensure that everyone has a right of access to social security and that the social security must not be denied or limited in a discriminatory manner.

*ICESCR*

*Article 9*

*The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*

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Note. The Victorian Charter (s 20) and the Queensland Human Rights Act (s 24) include a property right that prevents arbitrary deprivation of a person's property. The Commission has not included this right because it is protected within the Australian Constitution (Acquisition of property on just terms - s 51(xxxi)). Additionally, unlike the other listed rights, it is not included in one of the core treaties - it is found only within the Universal Declaration of Human Rights.

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# Appendix: Table of abbreviations

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ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social, Economic and Cultural Rights
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CAT	Convention against Torture
AHRC Act	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
PJCHR	Parliamentary Joint Committee on Human Rights
NHRCC	National Human Rights Consultation Committee (2009)
ALRC	Australian Law Reform Commission
DOI	Declaration of Incompatibility

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## Appendix: Endnotes

- 1 See *Human Rights Committee, General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4]. See also Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, 2001) 103–132.
- 2 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 149.
- 3 ‘UN General Assembly declares access to clean and healthy environment a universal human right’ *UN* (Web Page, 28 July 2022) <<https://www.un.org/africarenewal/magazine/july-2022/un-general-assembly-declares-access-clean-and-healthy-environment-universal-human>>.
- 4 ‘UN General Assembly declares access to clean and healthy environment a universal human right’ *UN* (Web Page, 28 July 2022) <<https://www.un.org/africarenewal/magazine/july-2022/un-general-assembly-declares-access-clean-and-healthy-environment-universal-human>>.
- 5 CESCR Committee, *General Comment No 14 – The right to the highest attainable standard of health*, August 2000, UN Doc E/C.12/2000/4 [34], [43].
- 6 Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, September 2019, UN Doc CCPR/C/GC/35 [62].
- 7 CESCR Committee, *General Comment No 14 – The right to the highest attainable standard of health*, August 2000, UN Doc E/C.12/2000/4 [43].
- 8 CESCR Committee, *General Comment No. 15 – The right to water*, January 2003, UN Doc. E/C.12/2002/11, [10], [23], [28], [44(a)]. Pollution of water resources is identified as a specific violation of the right to water. [44]. General Comment No 15 identifies the right to water as emanating from the right to an adequate standard of living in Article 11, as water ‘is one of the fundamental conditions for survival’ (as well as the right to health).



## AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

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