Parliamentary Joint Committee on Human Rights

Inquiry into Australia's Human Rights Framework

May 2024

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Abbreviations

ACT HRA	*Human Rights Act 2004* (ACT)
Action Plan	National Action Plan on Human Rights 2012
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
AHRC Act	*Australian Human Rights Commission Act 1986*
APS	Australian Public Service
Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)
Consultation committee	National Human Rights Consultation Committee
CRPD	Convention on the Rights of Persons with Disability
Framework	Australia's Human Rights Framework (2010)
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OIL	Office of International Law
OPC	Office of Parliamentary Counsel
Queensland HRA	*Human Rights Act 2019* (Qld)
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UPR	Universal Periodic Review

Members

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Deputy Chair

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Terms of reference

On 15 March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report by 31 March 2024:

- to review the scope and effectiveness of Australia's Human Rights Framework and the National Human Rights Action Plan;
- consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- consider developments since 2010 in Australian human rights law (both at the Commonwealth and State and Territory levels) and relevant case law; and
- consider any other relevant matters.

Foreword

1.1 Human rights – the basic rights and freedoms applying to all people regardless of their background or belief, based on principles of dignity, equality and mutual respect. The idea of a 'fair go', of a just, fair and egalitarian society, is the idea of human rights. Australians expect that our rights and freedoms will be protected and respected, and on the whole, we can be rightfully proud of our system of democratic governance and vibrant, multicultural society. However, while Australians expect a fair go should be given to all, our laws and practices do not always match these expectations. As the evidence provided to this committee, and numerous previous inquiries, has amply demonstrated, there are significant human rights problems in Australia that must be addressed, from our relationship with Aboriginal and Torres Strait Islander peoples, the protection of privacy in the digital age and the treatment of minority groups, to name just a few.

1.2 The Attorney-General has tasked this committee with reviewing the scope and effectiveness of Australia's 2010 Human Rights Framework and 2012 National Human Rights Action Plan. These commitments were made with the aim of improving and promoting human rights in Australia. However, the Framework was largely abandoned following a change in government, with only those commitments that were legislated still remaining (namely the establishment of this committee and the obligation for statements of compatibility with human rights). By failing to legislate an enforceable requirement for government to consider people's rights when making decisions, policies or laws, the Framework's aims, while laudable, were largely ineffective.

1.3 We need a comprehensive and effective national human rights framework to tackle some of the difficult challenges facing Australia. Our current piecemeal approach to human rights protection is inadequate to ensure rights and freedoms are properly respected, protected and promoted. We need human rights to be made real in everyday decision-making – not considered, at most, as an afterthought. Numerous royal commissions have shown us what happens when officials, both elected and unelected, fail to properly consider the effect of government action on the rights of vulnerable people.

1.4 The 2010 Framework demonstrated that non-legislative approaches to building a culture of respect for human rights do not last. That is why, as overwhelmingly supported by submitters, we need a statutory federal Human Rights Act, as part of a revitalised human rights framework. A statutory model of a Human Rights Act respects parliamentary sovereignty – ensuring our elected representatives can continue to make the laws Parliament deems necessary. But with a Human Rights Act in place, Parliament would need to expressly consider human rights when making laws, and Commonwealth public authorities, including

government departments, agencies and the Australian Federal Police, would need to consider rights when making decisions and act compatibly with rights (unless Parliament specifically directs them otherwise). An enhanced human rights framework should also include a sustained commitment to human rights education; requirements for public servants to fully consider rights in the development of legislation and policies; enhancements to parliamentary scrutiny and the role of the Australian Human Rights Commission; review of existing legislation, policies and practices for compliance with rights; and measures to monitor progress on human rights. Of course, a federal Human Rights Act could only apply to federal bodies or those exercising federal functions. It would not directly impact on matters falling within the jurisdiction of the states and territories which is why over time, progress should be made towards all states and territories having their own Human Rights Act to ensure all Australians receive the same protection of rights regardless of residence.

1.5 I would like to thank the Attorney-General for referring this timely review to the committee and for giving us the time needed to give this the proper attention it deserves. The substantial work of the Australian Human Rights Commission in this space must be acknowledged – over the past five years the Commission has been working to identify the principles and key elements that would make up an effective system of human rights protection in Australia. The Commission's proposal for a statutory Human Rights Act has been the foundation on which the committee's recommendation on this point has been built. I would also like to thank the hundreds of individuals, organisations and experts who generously gave their time to contribute to this inquiry. Australia is well served by our vibrant and tireless civil society. Thanks are also due to the committee's hard working secretariat and to my fellow committee members who engaged in this inquiry with enthusiasm and in good faith.

1.6 The committee would like to particularly acknowledge the dedication and commitment of our former committee colleague, the late Peta Murphy MP. Peta was a passionate advocate for the need for an Australian Human Rights Act, saying in her maiden speech that one of the challenges we need to solve as a nation is the introduction of 'a federal bill of rights so that complex, important national debates can occur within a comprehensive national human rights framework'. Peta became a member of this committee so as to participate in this inquiry, and her insightful and incisive questions during the public hearings helped shape the evidence the committee received and a number of the committee's important recommendations.

1.7 As Peta said in her maiden speech, meeting the challenge of introducing appropriate statutory human rights protection requires a willingness to persist with complex debates over a sustained period, longer than the 24-hour news cycle. Building a genuine and sustained culture of respect for human rights among our federal institutions will take time, commitment and leadership –

together with legislative change. While there will be those that will seek to paint this reform as divisive and unnecessary, the adoption of a statutory Australian Human Rights Act strikes the right balance between protecting individual rights and freedoms and respecting parliamentary sovereignty and our constitutional system. Its major benefit will be, as Peta said, in driving a human rights culture within the federal public service, so that those who serve us have a clear framework to consider and balance the rights and freedoms of everyday people when making decisions and developing laws and policies that affect us all.

Mr Josh Burns MP

Chair

May 2024

List of recommendations

Recommendation 1

9.11 The committee recommends that the government re-establish and significantly improve Australia's Human Rights Framework, which should include:

- **comprehensive and effective protection of human rights in legislation, through the establishment of a Human Rights Act;**
- **a significant and ongoing commitment to national human rights education;**
- **requirements for public servants to fully consider human rights in the development of legislation and policies;**
- **enhancements to human rights parliamentary scrutiny;**
- **enhancements to the role of the Australian Human Rights Commission;**
- **review of Australia's legislation, policies and practices for compliance with human rights; and**
- **measures to monitor progress on human rights.**

Recommendation 2

9.42 The committee recommends that the government introduce legislation to establish a Human Rights Act. The committee considers the bill should broadly reflect the model proposed by the Australian Human Rights Commission, with the following modifications and considerations (the committee has prepared an example Human Rights Bill, see Appendix 5, in order to promote understanding of this proposed model):

- **ensure the drafting of all rights and freedoms:**
  - **is consistent with international human rights law (except with respect to the principle of progressive realisation in relation to economic, social and cultural rights). This should include ensuring rights, such as the right to freedom of religion and the prohibition of torture or cruel, inhuman or degrading treatment or punishment, are drafted consistently with the provisions of the International Covenant on Civil and Political Rights;**
  - **includes legislative notes where relevant to indicate if more specific limitation criteria apply under international human rights law to those rights (for example, the right to freedom of religion);**
  - **captures the immediately realisable aspects of economic, social and cultural rights, including obligations to ensure people enjoy rights without discrimination; satisfy certain minimum aspects of these rights; and not take backwards steps (or 'retrogressive measures') with respect to these rights;**

  - **captures the right of aliens not to be expelled without due process; the prohibition against advocacy of national, racial or religious hatred; and the right of all persons to take part in cultural life and to enjoy the benefits of scientific progress and its applications;**
  - **includes, where appropriate, notes referring to the elaboration of these rights in other United Nations (UN) treaties and the United Nations Declaration on the Rights of Indigenous Peoples, and is accompanied by detailed guidance materials to assist public authorities in interpreting and applying the law;**

- **consult with Aboriginal and Torres Strait Islander peoples in relation to the framing of Indigenous peoples' right to culture to ensure it adequately captures all applicable rights under international human rights law;**
- **further consideration be given to the drafting of the right to a healthy environment, including consultation with Aboriginal and Torres Strait Islander peoples on how best to recognise the relationship between the right to a healthy environment and the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander peoples;**
- **allow cases to be brought directly to a federal court, without the need for conciliation, when conciliation is not appropriate;**
- **specific provision should be made to protect individuals from adverse costs orders when bringing action against public authorities under a HRA, in line with the government's proposed equal access cost protection provisions for federal anti-discrimination claims (see Australian Human Rights Commission Amendment (Costs Protection) Bill 2023); and**
- **the first review of the Act should specifically be required to consider whether:**
  - **progressive realisation principles should be incorporated; and**
  - **additional rights relating to specific groups, such as Aboriginal and Torres Strait Islander people, people with disability, children, older persons and victim-survivors of crime, should be included.**

Recommendation 3

9.43 The committee recommends the government seek legal advice as to:

- **whether the collective right to self-determination could be recognised as a stand-alone right in a Human Rights Act (HRA);**
- **whether requiring the Attorney-General to monitor court cases involving a HRA and reporting to Parliament would raise constitutional issues;**
- **the appropriateness of including compliance with duties under a HRA as part of a judicial review claim;**
- **whether including courts in the definition of public authorities would raise constitutional issues; and**

- **whether there is a constitutionally sound way of reintroducing an intermediate adjudicative process that could determine complaints under the proposed HRA (a process sitting between conciliation by the Australian Human Rights Commission and litigation at the federal courts).**

Recommendation 4

9.44 The committee recommends the government consult with Aboriginal and Torres Strait Islander people, people with disability, children's groups, civil society and other experts on how the proposed participation duty and equal access to justice duty should operate, including whether it adequately captures the principle of free, prior and informed consent. Following this, the committee recommends the government develop detailed guidance material to assist public authorities to understand their specific obligations under these duties.

Recommendation 5

9.50 The committee recommends that the government commit to:

- **significant and ongoing funding of human rights education for the community, including in primary and secondary schools; and**
- **appropriately funding the Australian Human Rights Commission and representative non-government organisations to develop educational programs and resources.**

Recommendation 6

9.51 The committee recommends that the Attorney-General's Department republish on its website the 2009 National Human Rights Consultation report, associated submissions and commissioned research to operate as an educational resource, reflecting the large body of work done in reviewing the state of human rights in Australia.

Recommendation 7

9.54 The committee recommends that the government commit to significant and sustained funding to ensure greater respect for individual rights and freedoms, in particular by ensuring:

- **the Australian Human Rights Commission is effectively and sustainably funded to perform its community educative role, help lead cultural change within public authorities to better respect human rights, and conciliate human rights complaints;**
- **departments and agencies are appropriately resourced to develop internal human rights understanding and the Human Rights Office within the**

Attorney-General's Department is adequately resourced to establish a centre of expertise to provide whole-of-government human rights advice;

- **sufficient resources and expertise are provided to support the work of the Parliamentary Joint Committee on Human Rights; and**
- **non-government organisations, including those providing legal services, are sufficiently funded to allow them to advance human rights protection.**

Recommendation 8

9.59 The committee recommends that the government (in consultation with the Australian Human Rights Commission) provide ongoing training and resources for public authorities, including;

- **making basic human rights training mandatory for all Australian Public Service employees (including the Senior Executive Service);**
- **providing specific and tailored ongoing human rights training and guidance material to all public sector staff involved in:**
  - **delivering services to the community;**
  - **developing policy in areas that engage human rights; and**
  - **developing legislation;**
- **making human rights training available to all parliamentarians, including ministers, and their staff; and**
- **providing tailored human rights guidance material to those private entities that perform functions of a public nature (for example, aged care and National Disability Insurance Scheme providers).**

Recommendation 9

9.60 The committee recommends the government update the Australian Public Service (APS) Code of Conduct and Values to require APS employees to respect and promote human rights by making decisions and providing advice consistent with human rights, and implementing, promoting and supporting human rights.

Recommendation 10

9.63 The committee recommends that the Secretaries Board establish a standing senior leadership group or sub-committee comprising senior leaders of all departments and a representative of the Australian Human Rights Commission to regularly:

- **consider the human rights training needs of public servants;**
- **consider reports of the Parliamentary Joint Committee on Human Rights and responses to those reports;**
- **establish senior leaders as Human Rights Act champions;**

- **discuss emerging human rights issues and get updates on any complaints or cases taken under a Human Rights Act; and**
- **get updates on comments or decisions involving Australia by United Nations human rights treaty bodies and on Australia's Universal Periodic Review process.**

Recommendation 11

9.72 The committee recommends, in order to embed requirements for public servants to consider people's rights and freedoms when developing government policy and legislation, that the government:

- **set up specialised human rights units in each government department to provide advice on the applicability of human rights within each portfolio;**
- **establish a Human Rights Office in the Attorney-General's Department (AGD) with staff with human rights law expertise;**
- **update policy development guidelines to require policy makers to consider the potential impact of each decision on human rights and the need to consult with potentially affected groups, particularly those with relevant lived experience;**
- **develop tailored human rights impact assessment tools or checklists to guide decision makers in determining whether human rights are engaged by the proposed policy or legislation;**
- **amend budget documentation to include an assessment of the human rights compatibility of the budget measures in the statements of compatibility for the annual appropriations bills;**
- **update the Legislation Handbook and the Legislative Instrument Handbook to alert public servants to the need to consider human rights when developing legislation, and the need to involve their human rights unit and the Human Rights Office early in the development of legislation;**
- **require the Human Rights Office to provide advice on legislation and policies at the early stage of development, including;**
  - **to be provided with drafting instructions and early drafts of all bills to provide advice to instructing officers and the Office of Parliamentary Counsel (OPC) on how the proposed legislation can better protect human rights;**
  - **to review all statements of compatibility with human rights involving bills;**
- **require OPC to review their drafting practices, drafting guidance materials and drafting directions in line with a reformed human rights framework.**

Recommendation 12

9.80 The committee recommends that the House of Representatives and Senate amend their standing orders to provide that:

- **a member of the Parliamentary Joint Committee on Human Rights may move a motion for the adoption of an interim report setting out the bills the committee considers requires its detailed consideration and the day fixed for the committee to report on each bill;**
- **any member of the House or Senate may seek to amend such a motion, including the date by which the committee must report on a bill; and**
- **where the motion is agreed, those bills stated as requiring the committee's detailed consideration may not proceed after the second reading until the day after the committee reports (with no restriction on the passage of bills that the committee indicates it does not seek to consider in detail).**

Recommendation 13

9.85 The committee recommends that the government introduce amendments to the Human Rights (Parliamentary Scrutiny) Act 2011 to:

- **expand the functions of the committee to allow the committee to inquire into any matter relating to human rights (other than individual cases) on its own initiative (without requiring the Attorney-General's referral);**
- **if a Human Rights Act is introduced in accordance with recommendation 2, amend the definition of 'human rights' to refer to the rights and freedoms recognised in that Act;**
- **if a Human Rights Act is not introduced in accordance with recommendation 2, amend the definition of 'human rights' to include the United Nations Declaration on the Rights of Indigenous Peoples and the Refugees Convention; and**
- **empower the committee to review the results of individual communications against Australia from United Nations bodies, and Concluding Observations from the United Nations about Australia, from time to time and report on the adequacy of the Australian Government's response to these.**

Recommendation 14

9.89 The committee recommends that the government introduce amendments to the Human Rights (Parliamentary Scrutiny) Act 2011 to:

- **require the rule-maker in relation to all legislative instruments (not only disallowable legislative instruments) to cause a statement of compatibility to be prepared in respect of that instrument;**
- **require the statement of compatibility to explain how the bill or legislative instrument is compatible with human rights and if it is**

incompatible with rights, the nature and extent of the incompatibility; and

- **require a statement of compatibility to contain a description of the nature of any consultation undertaken on the bill (including by reference to the participation duty under the proposed Human Rights Act) and if no consultation took place, explain why.**

Recommendation 15

9.94 The committee recommends the government consider expanding the role of the Australian Human Rights Commission to enable, or better enable, the Commission to:

- **conduct own-motion inquiries into systemic human rights concerns;**
- **monitor, and report on, compliance by public authorities with a Human Rights Act (HRA);**
- **inquire into, investigate, and report on, any act or practice of a public authority that may be contrary to a HRA;**
- **intervene, with the court's leave, in court proceedings involving the interpretation or application of a HRA; and**
- **where the AHRC has identified systemic human rights concerns, commence proceedings to enforce compliance with a HRA if other methods have failed.**

Recommendation 16

9.99 The committee recommends that the government review all existing primary and delegated legislation for compatibility with human rights and bring forward any necessary amendments to legislation identified as raised human rights concerns, noting that such reviews:

- **could prioritise reviewing legislation that this committee has reported on as raising human rights concerns or that courts have found to be incompatible with a Human Rights Act;**
- **should be embedded within government processes, so that when existing Acts are being substantively amended, or legislative instruments subject to sunsetting are being remade, a review of their compatibility with human rights must be undertaken (if not already reviewed); and**
- **should be undertaken in good faith with a view to maximising the realisation of human rights in practice (rather than considering whether the legislation is arguably compatible with rights).**

Recommendation 17

9.104 The committee recommends that the government commits to monitoring and improving Australia's progress on human rights, particularly by reference to

the Australian Human Rights Commission's Free & Equal final report, including:

- **developing a national human rights indicator index to measure progress on human rights over time;**
- **requiring each department and agency to develop human rights action plans detailing how they will respect rights within their portfolio, and make annual reports on compliance with their plan;**
- **requiring the Attorney-General to make an annual statement to Parliament identifying areas of progress on human rights and areas of continued focus;**
- **establishing a publicly available database setting out all findings and recommendations of United Nations human rights treaty bodies about Australia, and individual communications involving Australia, and any Australian government responses;**
- **ensuring regular forums for dialogue with the non-governmental (NGO) sector on human rights and supporting the independent participation of NGOs in the UN human rights processes; and**
- **reviewing, with a view to withdrawing, all existing reservations and interpretive declarations under UN human rights treaties.**

Chapter 1
Introduction

Initiation of the inquiry

1.1 On 15 March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General wrote to the Parliamentary Joint Committee on Human Rights (the committee) to request that the committee:

- review the scope and effectiveness of [Australia's Human Rights] Framework and the National Human Rights Action Plan;
- consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- consider developments since 2010 in Australian human rights law (both at the Commonwealth and State and Territory levels) and relevant case law; and
- consider any other relevant matters.

1.2 The Attorney-General requested that the committee report to both Houses of Parliament by 31 March 2024. On 25 March 2024 the Attorney-General granted an extension to the reporting date to 30 May 2024.

Conduct of the inquiry

1.3 Following referral to the committee, the Chair of the committee, Josh Burns MP, issued a media release on 22 March 2023 to call for submissions and announce the committee's intention to hold a number of public hearings.

1.4 In inviting submissions, the committee indicated that it sought information regarding the terms of reference and in particular:

- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);[1]
- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
  - to the remit of the Parliamentary Joint Committee on Human Rights;
  - the role of the Australian Human Rights Commission;
  - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland,

[1] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022.

including relevant caselaw, and relevant work done in other states and territories.

1.5 The committee wrote to 141 relevant stakeholders inviting them to make a submission to the inquiry by 1 July 2023, and advertised the inquiry on its website.

1.6 The committee held six public hearings in relation to this inquiry. These hearings took place on 12 May 2023 (in Canberra), 15 August 2023 (in Brisbane), 25 August 2023 (in Melbourne), 27 and 28 September 2023 (in Sydney) and 20 October 2023 (in Canberra). The committee heard evidence from a range of government bodies, legal organisations, peak bodies, community groups, religious organisations, campaign organisations, academics and legal experts. A list of witnesses is included at Appendix 2, and the *Committee Hansard* transcript is available on the committee's website.

1.7 The committee received 335 public submissions, which were published on the committee's website, and seven confidential submissions. These submissions are listed in Appendix 1. The committee received a total of 4135 form or campaign letters and resolved to publish one example of each type (together with the number received). These are listed in Appendix 3.

Structure of the report

1.8 The report contains eight chapters, as follows:

- Chapter 1 sets out the details of the inquiry;
- Chapter 2 lays out the history of human rights protection in Australia and provides the background to the inquiry's terms of reference;
- Chapter 3 details the commitments made in Australia's Human Rights Framework and the status of those commitments;
- Chapter 4 summarises the key human rights concerns raised by submitters to the inquiry;
- Chapter 5 sets out the arguments for and against the adoption of an Australian Human Rights Act;
- Chapter 6 details the rights proposed for protection in a Human Rights Act;
- Chapter 7 outlines the elements of the proposed model for a Human Rights Act;
- Chapter 8 considers what is necessary to develop a culture of respect for human rights; and
- Chapter 9 sets out the committee's views and recommendations.

1.9 The report also includes a number of appendices, including a summary produced by the Australian Human Rights Commission of key elements of its model for a Human Rights Act (Appendix 4), and a draft bill setting out options and ideas for what a federal Human Rights Act could look like (Appendix 5).

Note on terminology

1.10 Witnesses have used a range of different terms to refer to individuals and groups. The committee appreciates the importance of using terminology that is respectful and inclusive, while acknowledging there are a range of views as to the most appropriate terminology. The committee has adopted throughout the report the following widely accepted terms for consistency,:

- Aboriginal and Torres Strait Islander people;
- LGBTIQA+ people;[2]
- transgender people;
- victim-survivors of crime;
- people experiencing homelessness;
- people from culturally and linguistically diverse communities.

Acknowledgements

1.11 The committee acknowledges and thanks the many organisations and individuals who assisted with, and contributed to, the inquiry by making submissions, giving evidence at the public hearings and providing additional information.

[2] Lesbian, gay, bisexual, transgender, intersex, queer/questioning and asexual people.

Chapter 2
Background to human rights protections in Australia

2.1 This chapter sets out the background to human rights protections in Australia, including the current legislative framework, relevant state and territory legislation, and a brief overview of the 2009 National Human Rights Consultation[1] and the resulting Human Rights Framework and National Human Rights Action Plan.

2.2 Current human rights protection in Australia is drawn from a diverse and scattered range of sources. As noted by many submitters, Australia is the only advanced democracy without a Human Rights Act (HRA) or Charter.

Current human rights legislative framework

Constitution and common law

2.3 Although Australia's Constitution does not include a bill of rights, a number of its provisions provide some protection for specific civil and political rights. These include the rights to vote (sections 7, 24 and 41) and to trial by jury (section 80),[2] freedom of religion (section 116), protection against acquisition of property except on just terms (section 51(xxxi)), and prohibition against discrimination on the basis of state of residency (section 117).[3] The separation of powers in Chapter III of the Constitution also allows the courts to determine the exercise of public power in a way that can protect human rights.[4]

2.4 The High Court has also found that the Constitution contains implied rights, most prominently freedom of political communication[5] and because of the separation of powers in Chapter III, the potential for considerations of the right

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1 National Human Rights Consultation, *Report*, September 2009, pp. 3–4.

2 The right to trial by jury guaranteed by section 80 is limited to trials on indictment against any law of the Commonwealth.

3 Attorney-General's Department, *Submission 114*, p. 2.

4 See, for example, most recently *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 and *Benbrika v Minister for Home Affairs & Anor* [2023] HCA 33.

5 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

to a fair trial[6] and requirements that only courts can impose punishment.[7] Freedom of political communication is implied based on requirements for the functioning of Australia's representative democracy and is accordingly limited in scope to 'what is necessary for the effective operation' of constitutionally prescribed representative and responsible government.[8]

2.5 Further, the common law contains protections for traditional rights and freedoms including fair hearing and fair trial rights, freedom of speech, religion, association and movement. The common law is open to continual development by the judiciary, but can also be overridden by statute. The common law also provides for statutory presumptions, the most important rights-protecting principle being the 'principle of legality'. This holds that the courts should not impute to Parliament an intention to interfere with fundamental rights. Statutes that interfere with fundamental rights 'must be clearly manifested by unmistakable and unambiguous language'[9] and it requires that statutes be construed 'to avoid or minimise their encroachment upon rights and freedoms at common law'.[10]

International treaties

2.6 Australia is a party to a number of international instruments that are designed to protect or respect human rights, including:

- International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols;[11]

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6 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

7 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Benbrika v Minister for Home Affairs* [2023] HCA 33 and *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. In *Nationwide News Pty Ltd v Wills*, one of the foundational cases upon which this implied freedom is based, the High Court ruled a section of the *Industrial Relations Act 1988* invalid. The relevant section prohibited any person from speaking or writing 'words calculated … to bring a member of the [Industrial Relations] Commission or the Commission into disrepute'. The Court found that this section 'purports impermissibly to prevent public discussion about an important agency of social regulation'. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 53. See also George Williams and David Hume, *Human Rights under the Australian Constitution*, 2nd edition, Oxford University Press, 2013, pp. 164–165.

9 *Coco v The Queen* (1994) 179 CLR 427, 437. For a further discussion on this see George Williams and David Hume, *Human Rights under the Australian Constitution*, 2nd edition, Oxford University Press, 2013, Victoria, pp. 33-46.

10 *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] per French CJ.

11 Optional Protocol to the International Covenant on Civil and Political Rights (establishing an individual communication mechanism); Second Optional Protocol to the International Covenant on Civil and Political Rights (aiming at the abolition of the death penalty).

- the International Covenant on Economic, Social and Cultural Rights;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol;[12]
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;[13]
- the Convention on the Rights of the Child and its Optional Protocols;[14] and
- the Convention on the Rights of Persons with Disabilities and its Optional Protocol.[15]

2.7 Australia has agreed to be bound by these treaties, but they are not part of Australian domestic law unless specifically legislated. Australia has periodic reporting obligations under these seven treaties, and has agreed to the UN being able to accept individual complaints procedures against Australia under five.[16] Australia also supports the United Nations Declaration on the Rights of Indigenous Persons as a non-binding legal document.[17]

2.8 Under the *Human Rights (Parliamentary Scrutiny) Act 2011*, these seven treaties form the basis of the work of the Parliamentary Joint Committee on Human Rights (the committee), which examines all legislation for compliance with international human rights law. The committee provides advice to Parliament but, where it finds legislation to be incompatible with international human rights law, that law is not invalidated. The committee's role and functions are considered further in Chapter 4.

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12 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (establishing an individual communication mechanism).

13 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

14 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

15 Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (establishing an individual communication mechanism).

16 Australia has not agreed to complaints procedures under the International Convention on Economic, Social and Cultural Rights or the Convention on the Rights of the Child. For more information, see OHCHR, *UN Treaty Body Database*. UN Treaty Body Database.

17 Attorney-General's Department, *International human rights system*.

Federal statute law

2.9 Numerous Commonwealth statutes protect human rights, including laws relating to employment and rights at work;[18] modern slavery;[19] privacy;[20] laws governing criminal and civil procedure;[21] and laws regulating the exercise of administrative power.[22]

2.10 In addition, there are laws protecting against discrimination; establishing the Australian Human Rights Commission (AHRC);[23] and requiring parliamentary scrutiny as to compatibility with human rights.[24] Federal anti-discrimination laws consist of the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992 and the Age Discrimination Act 2004*, prohibiting discrimination on the basis of age, disability, race, sex, intersex status, gender identity and sexual orientation.[25] Each state and territory also has its own anti-discrimination laws,[26] which vary as to the specific rights protected.[27]

2.11 The AHRC is an independent statutory body tasked with protecting and promoting human rights in Australia. The AHRC replaced the Human Rights Commission (established in 1981), which had narrower powers and functions.[28] It monitors Australia's performance under international human rights standards, receives complaints about human rights violations, and promotes human rights through education and research.[29]

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18 See, for example, *Fair Work Act 2009*.

19 *Modern Slavery Act 2018*.

20 See, for example, *Privacy Act 1988*.

21 See, for example, *Evidence Act 1995*.

22 See, for example, *Administrative Decisions (Judicial Review) Act 1977*.

23 *Australian Human Rights Commission Act 1986* (originally the *Human Rights and Equal Opportunity Commission Act 1986*).

24 *Human Rights (Parliamentary Scrutiny) Act 2011*.

25 Attorney-General's Department, *Submission 114*, p. 3.

26 *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 2010* (Vic), *Racial and Religious Tolerance Act 2001* (Vic), *Equal Opportunity Act 1984* (WA), *Spent Convictions Act 1988* (WA).

27 For details, see Australian Human Rights Commission, *A quick guide to Australian discrimination laws*.

28 *Human Rights Commission Act 1981*.

29 For more information on the AHRC's history, see Australian Human Rights Commission, *History of the Commission*.

Statutory charters of rights

2.12 In 2004, the Australian Capital Territory became the first Australian jurisdiction to pass a Human Rights Act. The *Human Rights Act 2004* (ACT) (the ACT HRA) operates under the 'dialogue' model (see below) and initially protected civil and political rights as set out in the ICCPR. The ACT HRA has been amended several times, and now also protects the right to education, the right to work, and Aboriginal and Torres Strait Islander cultural rights.[30]

2.13 The 'dialogue model' of human rights protection aims to prompt responses between the executive, legislative and judicial branches of government when a law or policy is inconsistent with human rights. Key features of this model include the executive making statements to Parliament regarding the human rights compatibility of proposed laws, Parliament having the ability to choose to pass legislation that is incompatible with human rights, and the judiciary being able to make statements of incompatibility with human rights that do not automatically override the affected laws.[31]

2.14 In 2006, Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The Charter protects 20 civil and political rights by requiring human rights to be considered in the law-making process and legal interpretation, and by imposing a duty on public authorities to consider human rights. The Charter has undergone two statutory reviews which have recommended a number of reforms to further improve human rights protection.[32]

2.15 Queensland became the most recent jurisdiction to pass a HRA with the passage of the *Human Rights Act 2019* (Qld) (the Queensland HRA). Based on the Charter, the QLD HRA protects 23 civil, political, social and cultural rights.[33]

2.16 Three attempts have been made to include rights in the Australian constitution by referenda, which have all failed.[34] Federal governments have also twice attempted to legislate a federal HRA. The Human Rights Bill 1973 (the 1973 bill) sought to protect rights along very similar lines to the ICCPR (then not in force) both at the federal level and within the states and territories, but lapsed at the double dissolution in 1974 and was not reintroduced. The Australian Bill of Rights Bill 1985, which unlike the 1973 bill was limited to federal and territory

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30 ACT Government, *Submission 73*, pp. 9–10.

31 National Human Rights Consultation, *Report*, September 2009, pp. 241–242.

32 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, pp. 5–7.

33 Queensland Human Rights Commission, *Submission 142*, pp. 6–9.

34 In 1944, 1988 and 2023. For the first two see National Human Rights Consultation, *Report*, September 2009, pp. 230–231.

legislation, passed the House of Representatives but encountered difficulties in the Senate, eventually being withdrawn in 1986.[35]

National Human Rights Consultation

2.17 In 2008, in fulfilment of an election commitment, the government created a National Human Rights Consultation Committee (consultation committee) to conduct an extensive public consultation process to determine how best to protect human rights in Australia.[36] The consultation committee, chaired by Father Frank Brennan AO, delivered its report to the government on 30 September 2009.[37]

2.18 During the ten months of consultation, the consultation committee received 35 014 written submissions, held 66 community roundtables in 52 locations around Australia, met with a range of relevant organisations and experts, conducted three days of public hearings, and commissioned dedicated social and economic research. Of the submissions that considered the possibility of a HRA, over 85 per cent were in favour.[38]

2.19 In its report, the consultation committee made 31 recommendations. 15 of these concerned the introduction of a federal HRA, constructed on a 'dialogue' model and incorporating a range of specific measures.[39] Additional recommendations included the establishment of a parliamentary human rights committee, the development of a whole-of-government human rights framework (particularly around human rights education), and a requirement that all bills and legislative instruments be accompanied by a statement of compatibility with human rights.[40]

Australia's Human Rights Framework and National Action Plan

2.20 In response to the consultation committee's report, the government released Australia's Human Rights Framework (the Framework) in 2010. The then Attorney-General the Hon Robert McClelland MP stated that the government agreed with the consultation committee that people's rights could be better acknowledged and protected, but said the Framework did not include a HRA.

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35 See National Human Rights Consultation, *Report*, September 2009, pp. 231–237.

36 The Hon Robert McClelland MP, Attorney-General, 'Rudd Government Announces National Human Rights Consultation', Media Release, 10 December 2008.

37 National Human Rights Consultation, *Report*, September 2009, pp. 3–4.

38 National Human Rights Consultation, *Report*, September 2009, p. 6.

39 For example, the committee recommended that economic and social rights be not justiciable (Recommendation 22), that a HRA include a limitation clause (Recommendation 23), and that it protect 24 specific rights.

40 For a full list of recommendations, see National Human Rights Consultation, *Report*, September 2009, pp. xxix–xxxviii.

The then Attorney-General said that while there is overwhelming support for human rights, 'many Australians remain concerned about the possible consequences of such an Act', and the government believed that the enhancement of human rights 'should be done in a way that as far as possible unites, rather than divides, our community'.[41] As set out in more detail in Chapter 3, the Framework included enhancements to human rights education in schools, communities and the public service; increased funding for the AHRC; the development of a National Human Rights Action Plan (Action Plan); the establishment of a Parliamentary Joint Committee on Human Rights; requirements for statements of compatibility to accompany all bills and disallowable legislative instruments; and a commitment to review anti-discrimination laws.[42]

2.21 The *Human Rights (Parliamentary Scrutiny) Act 2011* established this committee and introduced the requirement for statements of compatibility to accompany all bills and disallowable legislative instruments.

2.22 Australia's Action Plan was released in 2012. This followed previous national action plans released in 1994 and 2004.[43] The Action Plan documented a wide range of federal, state and territory government initiatives and measures being undertaken to advance the protection of human rights in Australia.[44]

2.23 Despite a commitment to review the Framework in 2014, no review took place. In large part, the Framework and the Action Plan lapsed following a change of government in 2013, with the exception of some legislated aspects such as the work of this committee and the requirement for statements of compatibility.

Developments since 2010 in Australian human rights law

2.24 Since 2010, systemic legislative developments in Australian human rights laws include those set out above – namely, the introduction of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the introduction of the Queensland HRA in 2009. There have also been amendments to individual Acts or the introduction of new legislation that has the effect of improving human rights. For example, at the federal level, the introduction of the National Disability Insurance Scheme has the object of helping to give effect to Australia's obligations under the Convention on the Rights of Persons with Disability.[45] There have also been

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41 Australia's Human Rights Framework (2010), p. 1.

42 Australia's Human Rights Framework (2010), p. 3.

43 For more information about these plans, see Australian Human Rights Commission, *Australia's 1st National Human Rights Action Plan (1994)* and Australian Human Rights Commission, *Australia's 2nd National Human Rights Action Plan*.

44 For full details, see Australia's National Human Rights Action Plan (2012).

45 *National Disability Insurance Scheme Act 2013*, section 3.

amendments to better protect people from discrimination. This includes amendments in 2013 to protect people from discrimination on the basis of sexual orientation, gender identity and intersex status,[46] and amendments in 2022 to provide better protection for workers from sexual harassment and other forms of sex discrimination, harassment and unfair treatment in the workplace.[47] Legislation providing for same-sex marriage passed in 2017,[48] laws designed to address modern slavery risks passed in 2018,[49] and a number of laws have been introduced strengthening the federal framework of offences relating to overseas child sexual abuse, forced marriage, online child sexual abuse and new trends in child sexual abuse material and activity.[50] There have also been legislative responses to recent royal commissions that are designed to better protect the rights of persons in aged care and provide remedies to victims of institutional child sexual abuse.[51] At an international level, Australia ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2017.

2.25 However, since 2010 there have also been numerous examples of federal legislation that raise human rights concerns, including in the areas of counter-terrorism, national security, refugees and asylum seekers, privacy, social welfare and citizenship.[52] There have also been a number of failed attempts to legislate in the area of human rights, including to consolidate anti-discrimination legislation, introduce religious discrimination legislation or to constitutionally enshrine a Voice to Parliament.

2.26 At the state and territory level, there has also been numerous examples of legislation seeking to protect and promote human rights. For example, the age of criminal responsibility was increased in the Northern Territory[53] and Australian Capital Territory (ACT)[54] and reforms have been introduced designed to give greater recognition and voice to Aboriginal and Torres Strait

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46 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

47 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*.

48 *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

49 *Modern Slavery Act 2018*.

50 See Attorney-General's Department, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, Australia, December 2020, para 95.

51 See Government responses to the Royal Commission into Aged Care Quality and Safety and the Royal Commission into Institutional Responses to Child Sexual Abuse.

52 See the reports of the Parliamentary Joint Committee on Human Rights. For a summary of the major themes of legislation from 2012-2022 see the Annual Reports of the committee.

53 *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022 (NT)*.

54 *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023 (ACT)*.

Islander people,[55] to promote good mental health and wellbeing[56] and to ban medically unnecessary non-consensual surgeries on children with intersex traits.[57] Reforms have also been made to the ACT HRA to expand its operation and provide for avenues of enforcement.[58] Yet there has also been legislation at the state and territory level interfering with individual human rights, in areas as diverse as children in the criminal justice system, pandemic lockdowns and protest laws.

2.27 Since 2010 there has also been significant amounts of caselaw relating to issues involving human rights[59] and to the interpretation of the state and territory HRAs. In particular, the High Court considered the constitutional validity of Victoria's Charter, considering the scope of its interpretative provision and validity of its declaration of inconsistent interpretation power.[60]

2.28 There is a vast amount of legislation across the Commonwealth, states and territories, and caselaw, touching on human rights – including that which promotes, and that which limits, rights – but it is piecemeal and scattered. It is not possible for this committee to assess all developments in this area over the last 14 years. The committee notes that the Australian Government is required as part of the Universal Periodic Review process at the United Nations to provide an update on Australia's human rights laws and refers to the most recent UPR process in this respect.[61]

Australian Human Rights Commission's *Free & Equal* report

2.29 In 2019 the AHRC commenced a project, *Free & Equal: An Australian conversation on human rights*, which sought to consider how we can better protect human rights and foster a culture of human rights across Australia. It involved extensive consultation commencing with the publication of an issues paper, and three subsequent discussion papers, engagement with over 1,000 stakeholders, including over 160 submissions, consultations, roundtables and technical

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55 See, for example, *First Nations Voice to Parliament 2023 (SA)*; *Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)*; *Treaty Authority and Other Treaty Elements Act 2022 (Vic)*; *Path to Treaty Act 2023 (Qld)*.

56 See, for example, *Mental Health and Wellbeing Act 2022 (Vic)*.

57 *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT)*.

58 See ACT Government, *Submission 73*, pp. 10–11.

59 See for example, relevant caselaw referenced in Lucy Geddes and Hamish McLachlan, *50 Human Rights Cases that Changed Australia*, The Federation Press, Sydney, 2023.

60 See *Momcilovic v The Queen* (2011) 245 CLR 1.

61 See Attorney-General's Department, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, Australia, December 2020.

workshops with stakeholders from legal, business, non-government organisations and public sectors, academia and parliamentarians.[62]

2.30 In 2021 and in March 2023 the AHRC released two position papers on key reform priorities: *Free & Equal: a reform agenda for federal discrimination laws* (2021) and *Free & Equal: A Human Rights Act for Australia* (2023). The second position paper proposes a model for a federal Human Rights Act.[63] In seeking submissions on Australia's human rights framework, the committee particularly sought submitters' views in relation to the AHRC's proposal as set out in its 2023 position paper.

2.31 On 7 December 2023, the AHRC released its final report of the *Free & Equal* project, *Free & Equal: Revitalising Australia's Commitment to Human Rights*.[64] In this report, the AHRC made 12 recommendations, including the re-establishment of a National Human Rights Framework, that a federal Human Rights Act be adopted; discrimination law reform, an expansion of the remit of the Parliamentary Joint Committee on Human Rights, and a National Human Rights Indicator Index to measure human rights progress in Australia.[65]

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62 Australian Human Rights Commission, *Submission 1,* pp. 5–7.

63 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022.

64 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023.

65 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report,* 2023 pp. 11–14, 185–192.

Chapter 3
Australia's human rights framework

Overview

3.1 In 2009, the National Human Rights Consultation chaired by Father Frank Brennan released its final report, which included 31 recommendations concerning protection of human rights in Australia. The main recommendations were that a federal Human Rights Act be adopted,[1] but recommendation 8 also stated, in part:

> The committee recommends as follows:
>
> - that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia's international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery and practice more generally…[2]

3.2 In 2010, in response to this and other recommendations, the government released Australia's Human Rights Framework (the Framework). It did not accept the recommendation to adopt a federal Human Rights Act (HRA) but outlined its other high-level commitments to improving human rights in Australia. The Framework arranged these commitments under five headings.

3.3 Firstly, the government reaffirmed its commitment to human rights and to the seven core international human rights treaties. It recognised the importance of creating a human rights culture in order to ensure all members of the Australian community are treated with dignity and respect.[3]

3.4 Secondly, the Framework included a 'comprehensive suite of education initiatives to ensure all Australians are able to access information on human rights'.[4] These initiatives included incorporating human rights into the work of the Australian Curriculum, Assessment and Reporting Authority for primary and secondary school students; funding for non-government organisations to deliver community education concerning human rights; additional funding for the Australian Human Rights Commission (AHRC) to enhance its community education role; a human rights education and training program for the

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1 National Human Rights Consultation, *Report,* September 2009, recommendations 17–31.

2 National Human Rights Consultation, *Report*, September 2009, p. xxxi.

3 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 4.

4 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 5.

Commonwealth public sector; and the potential for human rights to be included directly in the Australian Public Service (APS) Values and Code of Conduct.[5]

3.5 Thirdly, the government committed to continue its engagement with the international community, including through the development of a National Human Rights Action Plan. The government also pledged to engage with non-government organisations through forums on human rights hosted by the Attorney-General and the Minister for Foreign Affairs.[6]

3.6 Fourthly, the government committed to increasing parliamentary powers to protect human rights, specifically through the creation of this committee and a legislated requirement that bills and disallowable legislative instruments must be accompanied by a statement of compatibility with human rights.[7]

3.7 Finally, the government pledged to respect its human rights commitments by reviewing existing legislation, policies and practices to ensure compliance with international obligations. It also committed to a review of federal anti-discrimination legislation.[8]

3.8 The government committed to conducting a review of the Framework in 2014.[9] However, as noted by the Attorney-General's Department (AGD) in evidence, by 2014 the Framework and the National Human Rights Action Plan 'reflected the commitments of…the former government' and that consequently 'the department didn't continue with the implementation of those specific commitments, with the Framework and Action Plan as guiding documents'.[10]

3.9 The table below summarises some of the key commitments and the outcomes of these commitments, which are covered in more detail in the following sections.

Table 3.1 Status of key commitments in Australia's Human Rights Framework

Commitment	Status
The Government will provide funding of $2 million over four years to non-government organisations (NGOs) for the development and	*Partially delivered; discontinued*. Funding discontinued in 2012–13 and no further grants awarded.

5 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, pp. 5–6.

6 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 7.

7 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 8.

8 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 9.

9 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 11.

10 Ms Anne Sheehan, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 12.

delivery of community education and engagement programs to promote a greater understanding of human rights.	
The Government will provide an additional $6.6 million over four years to the Australian Human Rights Commission to enable it to expand its community education role on human rights and to provide information and support for human rights education programs.	*Delivered; discontinued*. Not renewed after four years.
The Government will invest $3.8 million in an education and training program for the Commonwealth public sector, including development of a human rights toolkit and guidance materials for public sector policy development and implementation of Government programs.	*Delivered; discontinued*. Not renewed after four years. The guidance material remains available on the AGD website.
The Government will consider appropriate recognition of the need for public servants to respect human rights in policy making in any revision of the APS Values or Code of Conduct.	*Partially delivered.* 'Respectful' Value added to APS Values. No specific reference to respecting human rights.
The Government will develop a new National Action Plan on Human Rights, working with our State and Territory counterparts to outline future action for the promotion and protection of human rights.	*Delivered; discontinued*. National Action Plan released in 2012, lapsed on change of government.
The Government will bring together the NGO Forums on Human Rights hosted by the Attorney-General and the Minister for Foreign Affairs, to ensure the forums provide a comprehensive consultation mechanism for discussion about	*Delivered; partially ongoing*. Department of Foreign Affairs holds regular forums ahead of UN sessions, but the conduct of forums by the AGD has been sporadic.

domestic and international human rights issues.	
The Government will introduce legislation to establish a Parliamentary Joint Committee on Human Rights which will provide greater scrutiny of legislation for compliance with our international human rights obligations under the seven core UN human rights treaties to which Australia is a party.	*Delivered; ongoing* Committee existence legislated by the *Human Rights (Parliamentary Scrutiny) Act 2011* and established in 2012.
The Government will introduce legislation requiring that each new Bill introduced into Parliament, and delegated legislation subject to disallowance, be accompanied by a statement which outlines its compatibility with the seven core UN human rights treaties to which Australia is a party.	*Delivered; ongoing* By requirements in the *Human Rights (Parliamentary Scrutiny) Act 2011*
The Government will review legislation, policies and practices for compliance with the seven core UN human rights treaties to which Australia is a party.	*Not delivered*
The Government will develop exposure draft legislation harmonising and consolidating Commonwealth anti discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly.	*Delivered, but bill not introduced into Parliament*
The Government will include the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council.	*Delivered, but Administrative Review Council discontinued in 2015*
The Government will review the operation of this Framework in 2014, to assess its effectiveness in the	*Not delivered*

protection and promotion of human rights in Australia.

Sources: Attorney-General's Department, *Australia's Human Rights Framework*, April 2010; Australian Human Rights Commission, *Submission 1;* Attorney-General's Department, *Submission 114.*

Reaffirm

3.10 The Framework's first section set out that the government reaffirmed its commitment to promoting awareness and understanding of human rights in the Australian community and to respecting the seven core UN human rights treaties to which Australia is a party. This part of the Framework contained no specific commitments. AGD submitted that in relation to this aspect of the Framework the government 'remains committed' to the seven core UN treaties and its obligations under them.[11]

Educate

3.11 The Framework's committed to supporting human rights education in primary and secondary schools. In its submission, the AGD included details on the implementation of the educational aspects of the Framework. AGD noted that the first version of the Australian Curriculum (the curriculum) was released in December 2010. The curriculum included a number of measures to support human rights education, particularly within the civics curriculum. AGD further noted that the curriculum had been revised 24 times since its initial release, and that the seven underlying principles of the curriculum include 'intercultural understanding, ethical understanding and personal and social capability', the inclusion of which 'enables students to recognise, examine and respond to human rights and responsibility issues broadly'.[12]

3.12 The Framework also included a commitment to provide $2 million in funding over four years to non-government organisations for the development of community education and engagement programs.[13] AGD reported that the resulting Human Rights Community Education Grants Program administered a total of $957 309 in grant funding to 30 recipients over two rounds in 2010–11 and 2011–12. Successful projects included:

- human rights education and skills development workshops for Aboriginal women in North-West New South Wales;
- an interactive program using the language of sport to teach human rights principles to children and young people;
- workshops engaging with individuals, local government and non-government organisations to adopt a human-rights approach to community work in Victoria;

11 Attorney-General's Department, *Submission 114*, p. 6.

12 Attorney-General's Department, *Submission 114*, pp. 11–12.

13 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 5.

- human rights workshops and resources to empower people with a disability from non-English speaking backgrounds run by the National Ethnic Disability Alliance; and
- human rights education through multi-lingual story telling for immigrant and refugee women in up to 17 community languages run by the Multicultural Centre for Women's Health.[14]

3.13 The government discontinued further funding for the program in 2012–13 and no further programs were funded.[15]

3.14 Further, the government committed $6.6 million over four years to enable the AHRC to expand its community education role.[16] In its submission, the AHRC reported that it established 'a community education team which led its activities under the Framework'.[17] Among these activities, the AHRC supported AGD in developing human rights training for federal public servants; consulted on the development of the curriculum with the Australian Curriculum, Assessment and Reporting Authority; developed resources for schools, early childhood education and vocational education, as well as for the business sector; conducted research and business partnerships; established a Human Rights Network for federal public servants; conducted a program of work on violence, harassment and bullying; and undertook community human rights education.[18]

3.15 This funding was delivered in full,[19] but was not continued after the initial four years elapsed.[20]

3.16 Under the Framework the government also committed $3.8 million to an education and training program for the Commonwealth public sector. AGD reported that the Human Rights Public Sector Education Program was launched on 7 September 2011, and delivered workshops to 706 public servants from 35 departments and agencies in 20 workshops held between August and October 2011.[21] Participants reported 'a significant increase in awareness of human rights principles, international obligations and the Framework', and the workshops were considered successful.[22] AGD also created an introductory booklet on human rights, public sector guidance sheets, and an e-learning

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14 Attorney-General's Department, *Submission 114*, pp. 12–13.

15 Attorney-General's Department, *Submission 114*, p. 13.

16 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 6.

17 Australian Human Rights Commission, *Submission 1*, p. 31.

18 Australian Human Rights Commission, *Submission 1*, pp. 31–32.

19 Attorney-General's Department, *Submission 114*, p. 13.

20 Australian Human Rights Commission, *Submission 1*, p. 31.

21 Attorney-General's Department, *Submission 114*, p. 13.

22 Attorney-General's Department, *Submission 114*, pp. 13–14.

module which was hosted from October 2012 to June 2015.[23] None of these initiatives were continued after the initial funding,[24] although the guidance sheets remain available on AGD's website.[25]

3.17 The government also committed to considering 'the need for public servants to respect human rights in policy making' in any revision to the APS Values or Code of Conduct.[26] The *Public Service Amendment Act 2013* inserted the 'Respectful' Value into the APS Values, which states: 'The APS respects all people, including their rights and their heritage'.[27] AGD submitted that the value of 'respect' also encompassed being respectful of people's human rights.[28] However, some submitters considered that there remains no formal obligation for the APS to consider human rights in their actions of decisions in the Code of Conduct, noting that the value of 'respect' does not require a consideration of human rights in decision making processes.[29]

3.18 In summary, active government support of human rights education initiatives under the Framework had all ceased by the end of the Framework's initial four-year timeframe. Numerous submitters called for the education commitments made in the Framework to be reinstated, including for the APS.[30]

Engage

National Action Plan on Human Rights

3.19 The Framework included a commitment to develop a National Action Plan on Human Rights. The government released Australia's National Human Rights Action Plan (the Action Plan) in 2012. The Action Plan contained 356 individual actions outlining what was being done to improve human rights. In doing so it articulated in detail how Australia would implement the commitments it made in 2011 during Australia's first Universal Periodic Review (UPR) at the United Nations (UN) Human Rights Council. The then Attorney-General the Hon Nicola Roxon MP stated that the Action Plan 'demonstrates how Australia is

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23 Attorney-General's Department, *Submission 114*, p. 14.

24 Australian Human Rights Commission, *Submission 1*, p. 31.

25 Attorney-General's Department, *Public sector guidance sheets*.

26 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 6.

27 Attorney-General's Department, *Submission 114*, p. 8. See *Public Service Act 1999*, subsection 10(3).

28 Ms Anne Sheehan, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 21. See also Attorney-General's Department, *Submission 114*, p. 8.

29 Queensland Human Rights Commission, *Submission 142*, p. 8.

30 See, for example, Law Council of Australia, *Submission 120*, p. 28; Refugee Legal, *Submission 129*, p. 19; Students for Sensible Drug Policy, *Submission 130*, p. 3; Save the Children and 54 Reasons, *Submission 168*, pp. 19–20.

turning the commitments made at the UPR into specific actions to improve and promote human rights'.[31] The Action Plan was lodged with the UN Human Rights Council in June 2013.[32]

3.20 The AHRC noted that the Action Plan 'had no funding attached to it, which limited the ability to achieve outcomes or even buy-in from federal government departments and state and territory governments',[33] a point supported by National Legal Aid.[34] Regarding its effectiveness, Professor Simon Rice (also considering previous action plans in 1994, 1995, 1996 and 2004) pointed out that 'there was never an evaluation of the national action plans, nor any measurement of their effect and effectiveness'.[35] The UNSW Law Society submitted that the Action Plan suffered from a 'lack of specialised and measurable performance indicators and timelines'.[36]

Universal Periodic Review

3.21 The UPR process was established in March 2006 by the UN General Assembly, and is 'designed to prompt, support, and expand the promotion and protection of human rights in every country'.[37] Each UN member state is reviewed across a four-year cycle, with the review led by the UN Human Rights Council with the participation of every other UN member state. Following interactive discussions between the reviewed state and other member states, a report consisting of questions, comments and recommendations made by any member state is released, also including responses from the reviewed state.[38]

3.22 Australia participated in its first UPR process in 2011, and accepted almost 95 per cent of the recommendations. As part of this process, Australia undertook to use these recommendations in formulating the Action Plan, and to use it in order to measure progress for the next UPR review in 2015.[39]

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31 Attorney-General's Department, *Australia's National Human Rights Action Plan*, 2012, p. 4.

32 Attorney-General's Department, *Submission 114*, p. 8.

33 Australian Human Rights Commission, *Submission 1*, pp. 41–42.

34 National Legal Aid, *Submission 118*, pp. 8–9.

35 Professor Simon Rice OAM, *Submission 204*, p. 5.

36 UNSW Law Society, *Submission 215*, p. 4.

37 United Nations Human Rights Council, *Universal Periodic Review*.

38 United Nations Human Rights Council, *Basic facts about the UPR*.

39 Attorney-General's Department, *Australia's National Human Rights Action Plan*, 2012, p. 5.

3.23 In its submission to the second UPR in 2015, the government indicated that it 'does not propose to establish a National Human Rights Action Plan'.[40] In an associated submission to the UPR, Amnesty International considered both the Framework and the Action Plan to be 'largely defunct'.[41] Consequently, no form of national action plan played any role in Australia's third UPR in 2021.

NGO Forums

3.24 The government also committed to improved engagement with non-government organisations, particularly concerning the Forums on Human Rights (the NGO Forums) hosted by the Attorney-General and the Minister for Foreign Affairs. The Framework indicates that the government will 'bring together' the NGO Forums so that they 'provide a comprehensive consultation mechanism for discussion about domestic and international human rights issues'.[42]

3.25 In its submission, AGD reported that there have been 11 NGO Forums since 2010, including three co-hosted with the Department of Foreign Affairs and Trade in 2010, 2011 and 2012.[43] AGD was not explicit in considering the length of time since a joint NGO Forum had been hosted, but the AHRC indicated that the joint NGO Forums prescribed by the Framework lapsed after its expiration.[44]

3.26 In its assessment of the Framework's effectiveness regarding NGO consultation, the AHRC submitted that the Department of Foreign Affairs and Trade's NGO Forums were 'internationally focused' while AGD's NGO Forums were 'domestically focused'. The AHRC also suggested that AGD 'has been sporadic in conducting NGO forums'.[45] In its submission, AGD noted that 'the COVID-19 pandemic has disrupted the frequency of the forums (there was no forum in 2020)'.[46]

3.27 The committee did not receive specific evidence on the effectiveness of joint NGO Forums.

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40 United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review – Australia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/31/14/Add.1 (2016), p. 3.

41 United Nations General Assembly, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 © of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, A/HRC/WG.6/23/AUS/3 (2015), p. 5.

42 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 7.

43 Attorney-General's Department, *Submission 114*, pp. 9, 16.

44 Australian Human Rights Commission, *Submission 1*, p. 38.

45 Australian Human Rights Commission, *Submission 1*, pp. 33, 38.

46 Attorney-General's Department, *Submission 114*, p. 16.

Protect

Parliamentary scrutiny

3.28 The Framework also included a commitment to 'protect' human rights. The first outcome relating to this was the introduction of legislation to establish a Parliamentary Joint Committee on Human Rights (PJCHR) to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations under the seven core UN human rights treaties to which Australia is a party.[47] This commitment was implemented via the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights (Parliamentary Scrutiny) Act

3.29 The Human Rights (Parliamentary Scrutiny) Act provides that the PJCHR consists of 10 members, five from the House of Representatives and five from the Senate.[48] The committee's functions are to: examine bills and legislative instruments for compatibility with human rights, and report to the Parliament on that issue; examine and report on Acts for compatibility with human rights and; inquire 'into any matter relating to human rights which is referred to it by the Attorney-General'. This legislation also establishes the committee's remit, defining 'human rights' as the rights and freedoms recognised or declared by specified international instruments.[49] These are seven core international human rights treaties to which Australia is a party, namely:

- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

3.30 All other matters relating to the powers and proceedings of the committee are determined by resolution of both Houses of the Parliament, which occurs at the beginning of each new Parliament.[50] This resolution has traditionally provided that the committee will elect a government member as its Chair and non-

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47 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 3.

48 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 5.

49 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 3.

50 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 6.

government member as its Deputy Chair, sets out the requirements for quorum, and other powers and procedural matters.[51]

3.31 The committee has been in operation since early 2012. In this time, the committee has examined an average of 250 bills and 1,800 legislative instruments per year, commenting substantively on 27 per cent of bills and three per cent of legislative instruments.[52] The Attorney-General has referred human rights matters to the committee for inquiry three times (including this inquiry),[53] and the committee has completed six self-initiated inquiry reports into proposed legislation (which included calling for submissions and holding public hearings).[54] The effectiveness of the committee in achieving the stated aims is examined in Chapter 8 of this report.

Statements of compatibility

3.32 The second element of the Framework to 'protect' human rights was the establishment of a requirement that each new bill introduced into Parliament, and delegated legislation subject to disallowance, must be accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties to which Australia is a party (a 'statement of compatibility').[55]

3.33 The explanatory memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2011, which subsequently established the requirement, stated that a statement of compatibility, to be prepared by the proponent of legislation, must assess whether the bill or legislative instrument is compatible with these human rights.[56] It noted that the bill itself did not prescribe a particular form for such statements, and that such statements are intended to be succinct assessments aimed at informing parliamentary debate and containing 'a level of analysis that is proportionate to the impact of the proposed legislation on human rights'.[57] The bill also provided that a statement of compatibility is not binding on any court or tribunal, and that a failure to prepare one does not affect the validity,

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51 Parliamentary Joint Committee on Human Rights, Resolution of Appointment, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, Tuesday 26 July 2022, p. 30.

52 For a detailed analysis of the work of the committee in the first 10 years of its operation, see Charlotte Fletcher and Anita Coles, *Reflections on the 10th anniversary of the Parliamentary Joint Committee on Human Rights* (August 2022).

53 See, Parliamentary Joint Committee on Human Rights, *Inquiry into freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (February 2017) and *Inquiry into the Religious Discrimination Bill 2021 and related bills* (February 2022).

54 These reports are all available on the committee's website.

55 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 8.

56 Human Rights (Parliamentary Scrutiny) Bill 2011, explanatory memorandum, p. 2.

57 Human Rights (Parliamentary Scrutiny) Bill 2011, explanatory memorandum, p. 4.

operation or enforcement of the Act or any other provision of a law of the Commonwealth.[58] It also, inexplicably, provided that a statement of compatibility is *only* required in relation to legislative instruments subject to parliamentary disallowance.[59] Consequently, while the committee is required to examine all legislative instruments for compatibility with human rights, those exempt from parliamentary disallowance (up to 20 per cent of all legislative instruments)[60] generally have no statement of compatibility against which to make such an assessment.

3.34 When the requirement to draft a statement of compatibility was first introduced in 2012, a suite of education resources was also developed to help public servants to draft them. As the AHRC noted in its *Free and Equal* Report, all public servants were required to complete a mandatory training module on human rights, with supporting toolkits, fact sheets and other guidance resources.[61] However, this initial resourcing under the Framework was not maintained after 2013. The AHRC 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.[62] However, it stated that funding for these initiatives ceased in 2017. Similarly, the AGD advised that they do not deliver training related to drafting statements of compatibility, though departments do contact them for advice on an ad hoc basis.[63] The Human Rights Unit of the AGD also developed a series of templates and other resources to assist departments in identifying whether and how a legislation or policy may engage human rights, and in preparing statements of compatibility.[64] When the committee commenced operation, it published a guidance note setting out its expectations for statements of compatibility, as well as continuously providing feedback on the varying quality of statements of compatibility through its scrutiny dialogue function.

3.35 The effectiveness of the statement of compatibility process is examined in Chapter 8 of this report.

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58 See, *Human Rights (Parliamentary Scrutiny) Act 2011*, sections 8–9.

59 See, *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

60 See, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight, Final report* (March 2021), pp. 8–9.

61 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report,* 2023, p. 107.

62 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report,* 2023, p. 108.

63 Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department, *Committee Hansard,* 12 May 2023, p. 13.

64 Attorney-General's Department, Statements of compatibility.

Respect

Review of existing legislation

3.36 The Framework and Action Plan stated that a comprehensive review of legislation, policies and practices for compliance with the seven core international treaties by the AGD was ongoing.[65] It stated that the review of legislation would incorporate a number of key elements, including: the identification of priority areas within portfolios particularly relevant to human rights for review, and ensuring that human rights obligations are considered as part of legislation reviews proposed in other contexts. It stated that reviews would be designed to suit the particular circumstances. For example, a review at the time of introducing substantial amendments to an Act may be appropriate. It also stated that, in some cases, the government may ask this committee to review particular legislation, while in others, a review team may be established or existing bodies may undertake a review. It stated that views expressed by UN human rights bodies would be taken into account in identifying areas for review. However, AGD advised 'there has not been a coordinated review of all pre-existing legislation, policies and practices'.[66]

3.37 As a result, hundreds of large, complex and significant laws—including the *Telecommunications (Interception and Access) Act 1979* and other surveillance legislation, *Migration Act 1958, Extradition Act 1988* and *Criminal Code Act 1995 and Crimes Act 1914*—have not been subject to a foundational human rights assessment. While statements of compatibility are prepared where such laws are proposed to be amended, it is often unclear how those proposed amendments may interact with the existing Act as a whole, and consequently the full extent of any limitation on human rights. The committee frequently states that it is not possible to conclude as to whether a limit on human rights may be permissible without a foundational assessment of such laws (and recommends that this take place), however no such assessments have occurred.[67]

3.38 The Framework also committed to ensuring that its national security laws and powers contain appropriate safeguards and are accountable in their operation.[68] In this respect, the Independent National Security Legislation Monitor was established with the role of reviewing the operation and effectiveness of counter

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65 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 11 and Attorney-General's Department, *National Human Rights Action Plan*, 2012, p. 12, outcome 28.

66 Attorney-General's Department, *Submission 114*, p. 10.

67 See most recently for example, Parliamentary Joint Committee on Human Rights, *Report 1 of 2024* (7 February 2024) pp. 94–110 (regarding a review of the sanctions regimes), and *Report 5 of 2022* (20 October 2022) pp. 31–32 regarding a review of the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Proceeds of Crime Act 2002* and the *Crimes Act 1914*.

68 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 10.

terrorism and national security legislation, including considering Australia's human rights obligations.[69] However, some submitters raised concerns that Australia's counter-terrorism laws are not compatible with human rights,[70] and this committee has raised concerns on multiple occasions about the human rights compatibility of proposed national security laws and powers (which subsequently pass Parliament without amendments to satisfy those human rights concerns).[71]

Anti-discrimination framework

3.39 The Framework also stated that the government would develop exposure draft legislation harmonising and consolidating Commonwealth anti- discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly.[72] The framework stated that it was timely to undertake this review to ensure that the legislation was working effectively, and would include consideration of the complaints handling processes and the related role and functions of the AHRC. An exposure draft bill was developed and consulted on, but the draft bill was not introduced into Parliament.[73]

3.40 The Framework noted that the National Anti-Discrimination Information Gateway was established to assist individuals and businesses find information on anti-discrimination laws, providing an overview of all Commonwealth, State and Territory anti-discrimination systems and links to further information about each jurisdiction's anti-discrimination schemes. This process also lapsed with the change in government in 2013.

Effectiveness of Framework and re-establishment

3.41 Most submitters gave evidence that the Framework, while it had laudable aims, was ineffective in achieving its goal of achieving 'positive and practical change to promote and protect human rights'.[74] Many submitters noted that while the objectives of the Framework were appealing they were either not completed or lapsed and as the Framework was limited to encouraging awareness of human

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69 See *Independent National Security Legislation Monitor Act 2010*, section 3.

70 See, for example, Mr Brian Wooler, *Submission 256*.

71 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2023* (18 October 2023), pp. 63–85 regarding the Counter-Terrorism and Other Legislation Amendment Bill 2023 and *Report 9 of 2020* (18 August 2020) pp. 1–114 regarding the Australian Security Intelligence Organisation Amendment Bill 2020.

72 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 9.

73 See Attorney General's Department, *Submission 114*, p. 10.

74 Attorney-General's Department, *Australia's Human Rights Framework*, April 2010, p. 1.

rights, it offered little guidance on the practical steps available when rights are breached.[75]

3.42 As to whether the Framework should be re-established, a large number of submitters agreed there should be a new National Human Rights Framework, but with substantial changes to ensure its effectiveness. For example, the AHRC submitted:

> Despite the failures of the 2010 Framework, the Commission supports the establishment of a new National Human Rights Framework to ensure human rights are appropriately advanced at the national level – one that is designed to be effective, addressing the weaknesses and failings of the 2010 Framework.[76]

3.43 Most submitters argued that the introduction of a federal HRA would establish a strong foundation for protecting and promoting human rights and it is a HRA that would provide the legal framework to reflect and implement Australia's international human rights law obligations.[77] Arguments regarding a HRA are set out in Chapter 5 of this report.

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[75] See, for example, UNSW Law Society, *Submission 215*, Community Legal Centres National Human Rights Network, *Submission 331*, p. 6.

[76] Australian Human Rights Commission, *Submission 1*, p. 42.

[77] See, for example, Mx Joel MacKay, *Submission 258*, p. 1–3.

Chapter 4
Human rights concerns

4.1 The committee heard evidence that the human rights of some of the most vulnerable are not adequately protected in Australia. Submitters also highlighted areas where human rights of the general community are not upheld. This echoes the evidence presented to the 2009 National Human Rights Consultation committee which 'heard from thousands of Australians who are troubled by human rights problems'.[1] This chapter sets out the key areas of concern raised in the evidence before this committee. The order in which these matters are set out does not indicate their level of importance.

Intersectionality

4.2 Intersectionality in relation to rights is the way in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation (for example, a person with disability who is also a member of a minority group). Numerous witnesses and submitters highlighted the importance of intersectionality as a key consideration for how people may experience breaches of their rights.[2]

4.3 For example, the Victorian Equal Opportunity & Human Rights Commission noted that people may experience multi-layered and cumulative discrimination due to multiple attributes and social categorisation, such as age, sex, gender, gender identity, sexual orientation, intersex status and ethnic origin or race:[3]

> Ultimately, taking an intersectional approach means that, for example, the experience of ageism in employment will differ between men and women and may be compounded by another attribute such as race or LGBTIQ+ status. An intersectional approach would consider these factors and design the policies and programs that address the intersections without just considering the age aspect in isolation.[4]

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1 National Human Rights Consultation, *Report*, September 2009, p. 17.

2 See, for example, Ms Alice Drury, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, Friday 25 August 2023, p. 21; Mr Craig Gear, CEO, Older Persons Advocacy Network, *Committee Hansard*, Wednesday 27 September 2023, p. 35; No To Violence, *Submission 53*, p. 5; Darwin Amnesty Action Group, *Submission 131*, p. 4; Australian Nursing and Midwifery Federation, *Submission 166*, p. 8; Jesuit Social Services, *Submission 173*, p. 2; Carers Australia, *Submission 207*, p. 4.

3 Victorian Equal Opportunity & Human Rights Commission, *Submission 162,* p. 10; All Means All, *Submission 186,* p. 2.

4 Ms Emily Yates, Head of Policy, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, Friday 25 August 2023, p. 7.

4.4 The Darwin Amnesty Action Group stated that intersecting features of a person's identity may have contributed to wide ranging and compounded impacts, including of inequality, inequity, trauma and injustice, as well as ripple effect on people's family, kin, community and on society as a whole.[5]

4.5 The Murdoch School Legal Clinic argued that Australia's current anti-discrimination framework fails to recognise intersectionality:

> [T]he complaints system is currently very siloed, in that the legal framework focuses on separate and distinct 'grounds' of discrimination (race, age, sex) but people actually experience discrimination in a multiple and overlapping way. Intersectionality become more important when also discussing disadvantage, because the more disadvantaged a person is the more likely they are to suffer discrimination on multiple grounds. The current discrimination framework is fundamentally ill-equipped for dealing with instances of intersectional discrimination.

Aboriginal and Torres Strait Islander people

4.6 Numerous submitters were concerned by a wide array of issues which impact on Aboriginal and Torres Strait Islander people, ranging from concerns regarding self-determination to housing and criminal justice. Professor Kim Rubenstein, for instance, urged a rethinking of Australia's human rights record and noted that 'there is [not] any other group in Australian society that is a greater litmus test of the place of human rights protection in Australian history than Indigenous Australians'.[6] A number of submitters raised the interaction between Aboriginal and Torres Strait Islander people and law enforcement as a concern.[7] The National Justice Project argued that 'over-policing of First Nations communities' was 'a primary reason for the criminalisation and over-incarceration of First Nations people and the unacceptably high rates of First Nations deaths in police and prison custody'.[8] The Indigenous Law and Justice Hub noted that Aboriginal and Torres Strait Islander people are the most incarcerated in the world, describing this as 'a pressing and egregious human rights violation'.[9]

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5 Darwin Amnesty Action Group, *Submission 131,* p. 4.

6 Professor Kim Rubenstein, *Committee Hansard*, 20 October 2023, p. 43.

7 See for example: Australian Catholic Bishops Conference, *Submission 31*, p. 4; Australian Lawyers Alliance, *Submission 83,* p. 2; Harm Reduction Australia, *Submission 126,* p. 9; Indigenous Law and Justice Hub, *Submission 157*, p. 7; National Justice Project, *Submission 225*, pp. 17–19; Human Rights Law Centre, *Submission 232,* p. 22; Aboriginal Legal Service of Western Australia Limited, *Submission 239,* p. 5; Ms Dixie Link-Gordon, Program Co-ordinator, New South Wales Aboriginal Women's Advisory Network, *Committee Hansard,* p. 21.

8 National Justice Project, *Submission 225*, p. 18.

9 Indigenous Law and Justice Hub, *Submission 157*, p. 7.

4.7 Several submitters identified a lack of self-determination as a fundamental issue in relation to Aboriginal and Torres Strait Islander people's rights.[10] Mr Les Malezer, Foundation for Aboriginal and Islander Research Action, emphasised that 'at no stage have Aboriginal and Torres Strait Islander people been given the right to choose their political status'.[11] The Human Rights Law Centre drew a link between the 'lack of respect for the right to self-determination' and the 'extraordinary level of federal government intervention in people's lives', noting particularly 'experimental' social policy initiatives in remote communities.[12]

4.8 A number of submitters also highlighted the incomplete and piecemeal application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[13] For example, the Indigenous Law and Justice Hub noted that UNDRIP 'has not been comprehensively, formally, or substantively reflected in Australian law',[14] while Maurice Blackburn Lawyers pointed out that 'the non-binding nature of such commitments means there is no effective enforcement of [UNDRIP's] principles'.[15]

Refugees and asylum seekers

4.9 A number of submitters highlighted significant concerns regarding Australia's treatment of refugees and asylum seekers. They raised Australia's policies of offshore processing in third countries and immigration detention as key examples of punitive, arbitrary and harmful measures. Evidence was provided that Australia's laws and policies breach the Refugees Conventions,[16] including breaching the prohibition of non-refoulement through maritime interception

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10 See for example: Foundation for Aboriginal and Islander Research Action, *Submission 124*, p. 3; Indigenous Law and Justice Hub, *Submission 157*, pp. 15–17; Reconciliation Australia, *Submission 190*, pp. 3–4; National Justice Project, *Submission 225*, pp. 19–21; Human Rights Law Centre, *Submission 232,* p. 50; Miss Kiana Coe, *Submission 263,* p. 2; Ms Emma Golledge, Director Kingsford Legal Centre, *Committee Hansard*, 28 September 2023, p. 26.

11 Mr Les Malezer, Chairperson, Foundation for Aboriginal and Islander Research Action, *Committee Hansard*, 15 August 2023, p. 34.

12 Human Rights Law Centre, *Submission 232*, p. 50.

13 See for example: Maurice Blackburn, *Submission 110,* p. 8; NSW Aboriginal Women's Advisory Network, *Submission 113,* p. 4; Indigenous Law and Justice Hub, *Submission 157*, pp. 8–9; Castan Centre for Human Rights Law, *Submission 160,* p. 16; Reconciliation Australia, *Submission 190*, pp. 2–6; South Australian Council of Social Service, *Submission 201,* p. 7.

14 Indigenous Law and Justice Hub, *Submission 157*, p. 9.

15 Maurice Blackburn Lawyers, *Submission 110*, p. 8.

16 See 1951 Convention relating to the Status of Refugees and its 1967 Protocol as well as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Statelessness Convention to which Australia has acceded.

and return policies.[17] For example, the Refugee Advice & Casework Service submitted that 'Australia's legislated framework of mandatory detention violates established common law principles and fundamental international human rights norms'.[18] Refugee Legal were of a similar view, stating:

> The practice of indefinite detention has been foundational to normalising a rights-violating culture in this country, which has, in turn, enabled policies which systematically perpetrate other serious violations and cause large-scale harm.[19]

4.10 The Asylum Seeker Resource Centre highlighted the effects of refugees and people seeking asylum being denied access to their rights to health care and work, that 'forces people, including families and children, into destitution and immense suffering'.[20]

4.11 Numerous submitters identified that these policies had been widely criticised by domestic and international bodies, including United Nations (UN) human rights bodies such as the Universal Periodic Review.[21] A number of submitters and witnesses also gave examples from their casework and legal services to demonstrate the broad-ranging limitations of their clients' economic, social and cultural rights, predominantly in work, education, housing, social security and health.[22]

4.12 Some submitters noted that this committee has a constrained and inadequate function as an oversight mechanism for scrutinising and preventing the

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17 See for example: Australian Catholic Bishops Conference, *Submission 31,* p. 4; Blue Mountains Refugee Support Group, *Submission 10,* p. 1; Kaldor Centre for International Refugee Law, *Submission 13*, p. 3; Grandmothers for Refugees Macnamara Electorate, *Submission 76*, p. 2; Office of the United Nations High Commissioner for Refugees, *Submission 91*, p. 2; Asylum Seeker Resource Centre, *Submission 111*, pp. 3–5; Refugee Legal (Refugee and Immigration Legal Centre), *Submission 129*, pp. 4–9, 10–11; Refugee Advice & Casework Service, *Submission 231,* pp. 7–22, 32–40; Refugee Action Collective (Victoria), *Submission 328,* p. 5.

18 Refugee Casework and Legal Services, *Submission 231,* p. 8.

19 Dr Adrienne Anderson, Senior Policy Lawyer, Refugee Legal, *Committee Hansard,* 25 August 2023, p. 26.

20 Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard,* 25 August 2023, p. 26.

21 See for example: Justice and Peace Office Catholic Archdiocese, *Submission 2,* p. 3; Kaldor Centre for International Refugee Law, *Submission 13*, p. 3; Peter McMullin Centre on Statelessness, *Submission 57*, pp. 14–15, 21; Office of the United Nations High Commissioner for Refugees, *Submission 91*, p. 2; Asylum Seeker Resource Centre, *Submission 111*, p. 4; Refugee Legal, *Submission 129*, p. 6; Refugee Advice & Casework Service, *Submission 231,* p. 3.

22 See for example: Asylum Seeker Resource Centre, *Submission 111*, pp. 8–14; Refugee Legal, *Submission 129*, pp. 12–14; Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard*, 25 August 2023, p. 28.

adoption of laws that contravene international law in the migration context.[23] They noted that the committee's governing statute excludes the Refugee Convention and Statelessness Conventions as part of its remit and recommended that these conventions be included as part of the committee's wider scrutiny role and for ensuring compatibility with Australia's international treaty obligations.[24]

Migrants and people from culturally and linguistically diverse communities

4.13 A number of submitters raised concerns that the current human rights framework does not adequately protect the rights of migrants or people form culturally and linguistically diverse communities. For example, Mr Elijah Buol OAM, Chairperson of the Ethnic Communities Council of Queensland, submitted that the current system in place to protect the rights of Australians leaves gaps, which means a large number of migrants are left vulnerable and exposed with no protection.[25] Submitters were strongly supportive of legislating a federal Human Rights Act.[26] In particular, Multicultural Australia stated that the rights of non-citizen residents need to be protected to build social inclusion and communicate that they are welcome in Australia.

4.14 While submitters recognised the increasing diversity in Australian society,[27] submitters also observed that people from culturally and linguistically diverse backgrounds encounter direct and systemic racism.[28] Multicultural Australia submitted that humanitarian entrants and migrants face particular inequities in access to services, a consequence of factors including their pre-migration experience, settlement stressors, and language or cultural barriers.[29] Submitters also observed that temporary visa holders often have conditions in their visas that disadvantage their enjoyment of rights and limit access to other services,

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23 See for example: Kaldor Centre for International Refugee Law, *Submission 13,* p. 2; Office of the United Nations High Commissioner for Refugees, *Submission 91*, p. 2; Refugee Legal (Refugee and Immigration Legal Centre), *Submission 129*, p. 17.

24 See for example: Grandmothers for Refugees Macnamara Electorate, *Submission 76*, p. 3; Office of the United Nations High Commissioner for Refugees, *Submission 91*, p. 2; Refugee Legal (Refugee and Immigration Legal Centre), *Submission 129*, pp. 16–18; Refugee Action Collective (Victoria), *Submission 328,* p. 8.

25 Mr Elijah Buol, Chairperson, Ethnic Communities Council Queensland, *Committee Hansard,* 15 August 2023, p. 32.

26 See for example, Multicultural Council of the Northern Territory, *Submission 132*, p. 1.

27 Federation of Ethnic Communities' Councils of Australia, *Submission 25,* p. 2; Mrs Kalpalata Iyer, Research and Advocacy Manager, Multicultural Australia, *Committee Hansard,* 15 August 2023, p. 27.

28 See, for example, Multicultural Council of the Northern Territory, *Submission 132*, p. 1; Loddon Campaspe Multicultural Services, *Submission 164*, p. 3.

29 Multicultural Australia, *Submission 100,* p. 5.

consequently limiting their understanding of their rights and their capacity to seek redress, particularly in the employment space.[30] Submitters noted that many migrants hold a fear that any complaint they make will impact on their employment or their visa, and that this fear is sustained as their need for income is greater than their need to make a complaint.[31]

4.15 A number of submitters observed that English is often an additional language for people from culturally and linguistically diverse backgrounds, and individuals may not have the level of comprehension required to understand discrimination complaints processes or use the courts to challenge inequality and discrimination.[32]

People with disability

4.16 Many submissions drew attention to the recent findings from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability to highlight the inadequacies of existing human rights mechanisms in the federal context in providing protections towards people with disability.[33] Ms Julie Phillips, Manager of Disability Discrimination Legal Service, gave evidence that people with disability 'could be the most vulnerable in Australia, the most discriminated against in Australia and the most abused in Australia'.[34] The Australian Federation of Disability Organisations submitted that people with disability are over-represented in places of detention and experience higher rates of violence, ill-treatment and torture.[35] DeafBlind Australia submitted that currently any attempts to rectify observed violations of the rights of DeafBlind people fall over as there is no law to compel action by those infringing on individual rights.[36]

4.17 Submitters also commented on Australia not fully upholding its obligations under the Convention on Rights of People with Disabilities (CRPD) within the domestic legal framework, despite its ratification.[37] As a consequence of this,

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30 Multicultural Australia, *Submission 100,* p. 5; Ethnic Communities Council Queensland, *Submission 71,* p. 6.

31 Ethnic Communities Council Queensland, *Submission 71,* p. 6.

32 Ethnic Communities Council Queensland, *Submission 71,* p. 9; Australian Council of Social Service, *Submission 220,* p. 2.

33 See for example: Queensland Advocacy for Inclusion, *Submission 140,* p. 6; Charter of Rights campaign coalition, *Submission 165,* p. 9; People with Disability Australia, *Submission 230,* p. 6.

34 Ms Julie Phillips, Manager, Disability Discrimination Legal Service, *Committee Hansard,* 25 August 2023, p. 47.

35 Australian Federation of Disability Organisations, *Submission 274*, p. 17.

36 Deafblind Australia, *Submission 87,* p. 1.

37 See for example: Consumers of Mental Health, *Submission 90,* p. 4; Queensland Advocacy for Inclusion, *Submission 140,* p. 6; Aged and Disability Advocacy Australia, *Submission 152,* p. 2; All

many submitters were of the view that there are significant gaps in legislation for people with disability which have not been overcome by a variety of existing Acts.[38] Some submitters highlighted the segregation of children with disability into special education classes or schools, with such discrimination deviating from the international standard of and right to inclusive education as stipulated by the CRPD.[39] In this context, some submitters called for a full review of anti-discrimination laws, and for an HRA to be an important step to harmonise and modernise discrimination laws and create a uniform approach to the rights of people with disabilities.[40]

Carers

4.18 Several submitters raised concerns in relation to the rights of carers and those people they care for (including people who require carer support due to illness, age, disability or for other reasons).

4.19 Carers NSW and Carers Australia highlighted that caring can have significant impacts on a carer's physical and mental health and wellbeing, economic security and social inclusion and community participation.[41] Carers Australia submitted that 'the "wellbeing gap" becomes larger with the intensity of the caring role.'[42]

4.20 The National Mental Health Consumer & Carer Forum submitted that Australia has a checkered human rights history in relation to how it treats people with mental-ill health and their family, carers and kin.[43] While carers are recognised under legislation (including the *Carer Recognition Act 2010* and state and territory legislation) their coverage varies,[44] and submitters noted that most states have limitations on the enforceability of these Acts which they argued

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Means All, *Submission 186,* p. 30; Australian Centre for Disability Law, *Submission 203,* p. 3; People with Disability Australia, *Submission 230,* p. 17; Australian Federation of Disability Organisations, *Submission 274,* p. 16.

38 *National Disability Insurance Scheme Act 2013* (and associated Rules); *Disability Discrimination Act 1992* (and associated Standards).

39 See for example: All Means All, *Submission 186*, pp. 11–12; Human Rights Law Centre, *Submission 232*, pp. 42–43.

40 Australian Centre for Disability Law, *Submission 203,* p. 3.

41 Carers NSW, *Submission 117,* p. 2; Carers Australia, *Submission 207,* pp. 1, 3.

42 Carers Australia, *Submission 207,* p. 1.

43 National Mental Health Consumer & Carer Forum, *Submission 75,* p. 75.

44 Carers NSW, *Submission 117,* p. 2; Carers Australia, *Submission 207,* p. 6.

make it 'difficult for carers to have their rights upheld or to challenge instances where they feel they have experienced injustice as a result of their caring role.'[45]

4.21 Carers NSW argued that a recent shift towards person-centred models of care has led to challenges for the support services, stating while this model is positive for promoting the autonomy and independence of care recipients, an unintended consequence has been a reduced focus on the experiences and needs of family and friend carers, who are often essential members of an individual's care or support team.[46]

Children and young people

4.22 Many submitters expressed concern that children's rights are not adequately protected in Australia. In particular, concerns were raised regarding the rate of imprisonment of children in Australia.[47] The Australian Lawyers Alliance described the imprisonment of children as a 'national crisis',[48] while the South Australian Commissioner for Children and Young People described children in youth detention as lacking 'proper education [and] cultural rights'.[49] Several submitters noted that Aboriginal and Torres Strait Islander children are imprisoned at disproportionately high rates.[50] Ms Rachel Atkinson, Board Member of SNAICC – National Voice for Our Children, stated:

> [Aboriginal and Torres Strait Islander children]…are significantly more likely to have contact with the youth justice system and to be held in detention. This is to say nothing of the horrifying breaches of human rights that our children and young people experience while in out-of-home care and youth detention.[51]

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45 Carers NSW, *Submission 117*, p. 2; Carers Australia, *Submission 207*, p. 6.

46 Carers NSW, *Submission 117*, p. 2.

47 See for example: Justice and Peace Office Catholic Archdiocese, *Submission 2*, p. 3; Legal Services Commission of South Australia, *Submission 59*, pp. 2–3; Australian Lawyers Alliance, *Submission 83*, pp. 15–22; Office of the Children's Commissioner of the Northern Territory, *Submission 122*, pp. 1–2; Darwin Amnesty Action Group, *Submission 131*; Save the Children and 54 reasons, *Submission 168*, p. 10; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 3; Commissioner for Children and Young People (SA), *Submission 194*, p. 4; UNICEF Australia, *Submission 210*, p. 8.

48 Australian Lawyers Alliance, *Submission 83*, p. 15.

49 Commissioner for Children and Young People (SA), *Submission 194*, p. 4.

50 See for example: Australian Lawyers Alliance, *Submission 83*, p. 17; Officer of the Children's Commissioner of the Northern Territory, *Submission 122*, pp. 1–2; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 3.

51 Ms Rachel Atkinson, Board Member, SNAICC – National Voice for Our Children, *Committee Hansard*, 25 August 2023, p. 33.

4.23 Another key concern was the age of criminal responsibility in most jurisdictions, with submitters noting that this was inconsistent with the UN Convention on the Rights of the Child.[52]

4.24 A number of submitters raised the rights of children with disability, expressing particular concern around their exclusion from mainstream education.[53] Other issues raised included the provision of gender-affirming care to children,[54] children being kept in immigration detention,[55] the effect of social media on children's development,[56] the rights of adopted children,[57] and the inadequate rate of youth allowance.[58]

4.25 The rate at which Aboriginal and Torres Strait Islander children are removed from the care of their families was cited by several submitters as a significant cause for concern.[59] Ms Atkinson, Board Member of SNAICC, stated:

> Aboriginal and Torres Strait Islander children's rights have been in crisis since colonisation, when we were dispossessed of our land and our cultural ways of growing up and nurturing our children, which we have done successfully for more than 65,000 years… Our children still remain over 10 times more likely to be in out-of-home care than non-Indigenous children, and, far from getting better, this trend has been increasing in every jurisdiction over the last decade.[60]

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52 See for example: Australian Lawyers Alliance, *Submission 83*, p. 17; National Legal Aid, *Submission 118*, pp. 19–21; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 5.

53 See for example: Good Shepherd Australia New Zealand, *Submission 42*, p. 21; JFA Purple Orange, *Submission 116*, pp. 25–26; SNAICC – National Voice for Our Children, *Submission 121*, p. 10; Centre for Law and Social Justice, *Submission 185*, p. 10; All Means All, *Submission 186*, p. 12; Commissioner for Children and Young People, *Submission 194*, p. 4.

54 See for example: Women Speak Tasmania, *Submission 72*, pp. 3–5; Australian Affiliation of Women's Action Alliances, *Submission 138*, pp. 5–7; Women's Rights Network Australia, *Submission 177*, pp. 6–7; Australian Feminists for Women's Rights, *Submission 211*, pp. 38–48, Victorian Women's Guild, *Submission 45*.

55 Asylum Seeker Resource Centre, *Submission 111*, pp. 6–7.

56 Association of Heads of Independent Schools of Australia, *Submission 74*, pp. 1–3.

57 Adoptee Rights Australia Inc, *Submission 224*.

58 Good Shepherd Australia New Zealand, *Submission 42*, pp. 15–16.

59 See for example: Good Shepherd Australia New Zealand, *Submission 42*, pp. 21–22; SNAICC – National Voice for Our Children, *Submission 121*, p. 14; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 3; Commissioner for Children and Young People (SA), *Submission 194*, p. 4.

60 Ms Rachel Atkinson, Board Member, SNAICC – National Voice for Our Children, *Committee Hansard*, 25 August 2023, p. 33.

4.26 Good Shepherd Australia New Zealand noted that 'less than half of these children are placed with Aboriginal and Torres Strait Islander carers, causing irreparable separation from their culture and communities'.[61]

4.27 Other submitters highlighted the 'distinct set of rights' owed to Aboriginal and Torres Strait Islander children,[62] noting the intersectionality of their rights as children and rights as Indigenous peoples.[63] Ms Atkinson, Board Member of SNAICC, emphasised that:

> We're not asking for privilege or special changes unique to Indigenous people, but what we need is some sort of protection because the changes mean, like what's happening in Queensland, the overrepresentation of vulnerable people…that are obviously Aboriginal and Torres Strait Islander kids. As an Aboriginal person here today, I think there is a crisis in our community. We are vulnerable. The principle of self-determination is not being met here.[64]

Older people

4.28 Concerns were raised as to the treatment of older people in Australia, particularly in the area of aged care and discrimination. The Australian Human Rights Institute described ageism as:

> the individual, communal and institutional practices that embody stereotypes about the abilities, capacities, interests and contributions of older persons that homogenise and devalue them and often lead to their exclusion from economic and social opportunities on the basis of their older age.[65]

4.29 A number of submitters were critical of existing human rights protections,[66] noting that the fragmented state and federal human rights and anti-discrimination legislation is "unable to provide a comprehensive and robust basis" to guarantee human rights as people age.[67] These submitters argued the current existing federal mechanisms have not been effective in countering age discrimination and ageism that perpetuate tolerance of persistent human rights

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61 Good Shepherd Australia New Zealand, *Submission 42*, p. 21.

62 ChildFund Australia, *Submission 123*, pp. 1–2.

63 SNAICC – National Voice for Our Children, *Submission 121*, p. 9.

64 Ms Rachel Atkinson, Board Member, SNAICC – National Voice for Our Children, *Committee Hansard*, 25 August 2023, p. 39.

65 Australian Human Rights Institute, *Submission 69*, p. 9, referencing F Snellman, 'Whose ageism? The reinvigoration and definitions of an elusive concept' (2016) 68 Nordic Psychology 148–159.

66 Aged and Disability Advocacy, *Submission 152*, p. 2.

67 Dr Susan Cochrane, Member, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 31.

violations,[68] including of older jobseekers. A number of submitters also highlighted discriminatory access to the NDIS for people who acquire disability after the age 65, do not enjoy parity of access.[69]

4.30 Submitters highlighted the documentation of human rights violations of older people abused and neglected in institutions, and their lack of protections in the findings of the Royal Commission into Aged Care Quality and Safety.[70] Mr Craig Gear, Chief Executive Officer of Older Persons Advocacy Network, stated that human rights are impacted when restrictive practices are implemented, and that the current protections regulating the use of restrictive practices are inadequate.[71] Mr Geoff Rowe, Chief Executive Officer of Aged and Disability Advocacy Australia argued that 'older Australians have been required to check in their rights when they check in to aged care'.[72]

4.31 Evidence was received that during the Covid-19 pandemic older persons were disproportionately vulnerable, as evidenced by significant gaps in protections of their rights, including the rights to health, care and support, freedom from violence, abuse and neglect, and participation as full members of society.[73] Aged and Disability Advocacy argued that older persons were denied health care for Covid-19 unrelated conditions, suffered poverty and hunger, loneliness and isolation, and endured the trauma of being targets of hate speech and expressions of intergenerational resentment, perpetuating stigma and discrimination.[74]

Religious groups

4.32 A number of religious groups held concerns about the state of religious freedom in Australia. The Human Rights Law Alliance submitted that freedom of religion 'is repeatedly subjected to legislative encroachment, backed by an

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68 See, for example, Rights of Older Persons Australia, *Submission 136*, p. 2; Aged and Disability Advocacy, *Submission 152*, p. 2; Older Persons Advocacy Network, *Submission 11*, p. 11; Dr Susan Cochrane, Member, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 31.

69 See for example, Dr Susan Cochrane, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 31.

70 Older Persons Advocacy Network, *Submission 11*, p. 6; Rights of Older Persons Australia, *Submission 136*, p. 3; Aged and Disability Advocacy, *Submission 152*, p. 2–3.

71 Mr Craig Gear, Chief Executive Officer, Older Persons Advocacy Network, *Committee Hansard*, 27 September 2023, p. 32.

72 Mr Geoff Rowe, Chief Executive Officer, Aged and Disability Advocacy Australia, *Committee Hansard*, 15 August 2023, p. 48.

73 Aged and Disability Advocacy, *Submission 152*, p. 4–5.

74 Aged and Disability Advocacy, *Submission 152*, p. 5.

agenda which is antagonistic to religion and religious followers',[75] while Freedom for Faith referred to 'a gradual erosion of the right of faith-based organisations to maintain their religious beliefs and ethos'.[76] Many of these submitters focused on a lack of protection of the right for faith-based organisations, particularly faith-based schools, to require certain standards of practice and belief of their employees.[77] In the view of these submitters, state-based human rights legislation had prioritised freedom from discrimination above freedom of religion.[78]

4.33 Mr Mike Southon, Executive Director of Freedom for Faith, stated that '29 per cent of Australians have experienced religious discrimination. People of non-Christian faiths are twice as likely to experience that discrimination as Christians'.[79] The Australian Muslim Advocacy Network described anti-Muslim sentiment, particularly connected with media coverage, as a major challenge for the Muslim community:

> [Anti-Muslim sentiment] puts a huge psychological health burden on our community in terms of the health impact of racism and of fearing what's going to happen to our children who might be troubled…and also just being fearful because of how everyone looks at us and sees us and immediately has a lens over the way they see us because of that framing. So we want a sense of freedom. That is really key to our religious freedoms agenda—to have that removed from the law so we can be free to form our own narratives as a community and not be hostage to misinformation and disinformation online about our community.[80]

4.34 The Executive Council of Australian Jewry expressed concern at the lack of a consistent national system for dealing with hate-motivated crime.[81]

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75 Human Rights Law Alliance, *Submission 14*, p. 1.

76 Freedom for Faith, *Submission 119*, p. 6.

77 See, for example, Australian Association of Christian Schools, *Submission 19*, pp. 4–5; Christian Schools Australia, *Submission 64*, p. 6; National Catholic Education Commission, *Submission 98*, pp. 5–6; Freedom for Faith, *Submission 119*, p. 6; Mr Daniel Simon, Solicitor, Human Rights Law Alliance; Legal Representative, Australian Christian Lobby *Committee Hansard*, 20 October 2023, p. 21.

78 See, for example, National Catholic Education Commission, *Submission 98*, p. 6.

79 Mr Mike Southon, Executive Director, Freedom for Faith, *Committee Hansard*, 28 September 2023, p. 1.

80 Ms Rita Jabri Markwell, Advisor, Australian Muslim Advocacy Network, *Committee Hansard*, 15 August 2023, p. 58.

81 Executive Council of Australian Jewry, *Submission 26*, p. 8.

4.35 In contrast, some submitters argued that there was a need for freedom *from* religion, expressing concern about religious freedom being inappropriately applied to enable coercive control by religious groups.[82]

LGBTIQA+ people

4.36 Numerous submitters recalled the historical challenges the LGBTIQA+ community has faced in advocating for their rights, and many highlighted the recent escalation of prejudice and hate in public rallies transcending to the online sphere.[83] Submitters commented on the shortcomings in discrimination legislation and inadequate protection of LGBTIQA+ human rights.[84] Many submitters emphasised the broad ranging pervasiveness of discrimination, harassment and violence faced by the LGBTIQA+ community primarily evidenced in employment, home rental and health care,[85] and also by educational institutions against staff and students on the basis of sexuality and gender identity.[86] Submitters also highlighted that transgender people experience higher levels of violence and abuse than the general population.[87]

4.37 Submitters commented on the connections between lower health outcomes for LGBTIQA+ people, with barriers to access the healthcare system and have unique needs,[88] most notably the high suicide rates among this community.[89] Many submitters noted that many LGBTIQA+ people experience high levels of

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82 See, for example, Ms Larissa Kaput, *Submission 335*, pp, 7–9, 14.

83 Just.equal, *Submission 199,* p. 2, 3; Equality Australia, *Submission 214,* p. 7–8; Public Interest Advocacy Centre, *Submission 212,* p. 17; Human Rights Law Centre, *Submission 232,* p. 22; Dr Stephen Lake, *Submission 315,* p. 45.

84 Thorne Harbour Health, *Submission 54,* p. 3; University of Newcastle Centre for Law and Social Justice, *Submission 185,* p. 11; Amnesty International Australia National Rainbow Network, *Submission 189,* p. 1; Equality Australia, *Submission 214,* p. 3; LGBTIQ + Health Australia, *Submission 218,* p. 1.

85 Associate Professor Kate Seear, *Submission 30,* p. 5; Suicide Prevention Australia, *Submission 43,* p. 13; Charter of Rights campaign coalition, *Submission 165,* p. 21; Jesuit Social Services, *Submission 173,* p. 8; LGB Alliance Australia, *Submission 181,* p. 6; University of Newcastle Centre for Law and Social Justice, *Submission 185,* p. 11; Amnesty International Australia National Rainbow Network, *Submission 189,* p. 1; Just. equal, *Submission 199,* p. 3; Community Legal Centres National Human Rights Network, *Submission 331,* p. 26.

86 Thorne Harbour Health, *Submission 54,* p. 3; Public Interest Advocacy Centre, *Submission 212,* p. 16; Equality Australia, *Submission 214,* p 7.

87 Mr Rodney Croome, Spokesperson, Just.equal, *Committee Hansard*, 28 September 2023, p. 17; Australian Lawyers for Human Rights, *Submission 229,* p. 40; Community Legal Centres National Human Rights Network, *Submission 331,* p. 26.

88 Cancer Council, *Submission 88,* p. 7; LGBTIQ + Health Australia, *Submission 218,* p. 2.

89 Suicide Prevention Australia, *Submission 43,* p. 13; Australian College of Nursing, *Submission 208,* p. 7; LGBTQIA + Health, *Submission 218,* p. 2.

dissatisfaction with healthcare because of overt hostility and discrimination from healthcare professionals.[90] Mr James Zanotto, the Director of Policy at LGBTIQ + Health Australia, stated:

> … trans and gender-diverse people in Australia are persistently under threat through negative public debate [which]… has serious and profound health and mental health impacts on many people. Many LGBTIQ+ people face challenges in accessing health care because of past experiences with stigma and discrimination and expectations that will continue to happen in the future.[91]

Women

4.38 Many submitters highlighted that gender-based violence is a national problem, with the majority of victim-survivors of abuse in Australia are women.[92] Submitters noted the negative impacts that violence against women has, including reduction of women's wellbeing, prevention from fully participating in society in respect of employment, education and family life, which has a negative consequence for the whole country.[93] Our Watch submitted that Aboriginal and Torres Strait Islander women, in particular, experience disproportionate rates of violence, and this violence is often more severe and complex in its impacts.[94]

4.39 Numerous submitters also noted the disproportionate impact that violations of economic and social rights have on women, and exemplified the distress and harm of the ParentsNext mandatory programme upon women.[95] Chief Executive Women also noted that inequalities are even greater for people with intersecting identities including for First Nations women, women from migrant and refugee backgrounds, women with disability, and people of marginalised genders who experience diverse forms of discrimination and disadvantage.[96]

4.40 Submitters critiqued the effectiveness of the law in addressing systemic discrimination, and emphasised that existing protections are not readily

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90 Cancer Council, *Submission 88,* p. 9.

91 Mr James Zanotto, Director of Policy, LGBTIQ + Health Australia, *Committee Hansard*, 28 September 2023, p. 18.

92 No to Violence, *Submission 53,* p. 12; Women's Legal Service NSW, *Submission 97,* p. 6; Our Watch, *Submission 169,* p. 5.

93 Our Watch, *Submission 169,* p. 2; Australian Feminists for Women's Rights, *Submission 211,* p. 9.

94 Our Watch, *Submission 169,* p. 8.

95 Economic Justice Australia, *Submission 34,* p. 12; Castan Centre for Human Rights, *Submission 160,* p. 38.

96 Chief Executive Women, *Submission 234,* p. 4.

accessible or easy to understand.[97] Some submitters referred to a blurring of language regarding a change in women's sex-based rights, where rights are more often based on gender rather than being based on sex: the biological/chromosomal composition.[98] Some submitters raised that this was creating new forms of discrimination and incursions on women's rights, and highlighted examples of broader inclusions in women's sport, and sharing of bathrooms.[99] Submitters also raised concerns regarding problems of sexism, prostitution and people trafficking.[100]

Prisoners

4.41 Many submitters raised concerns regarding rights violations occurring within Australian prisons. Case studies were provided identifying occurrences of rights violations, including omission of culturally safe health care in prison for First Nations people, prison service providers' inability to maintain family and kinship connections, and experiences of women in custody.[101] The Australian College of Nursing submitted that many Aboriginal and Torres Strait Islander prison populations have experienced significant trauma, including domestic, family and sexual violence, in addition to the generational trauma of colonisation.[102] The National Justice Project submitted that prison staff responses are often punitive, resorting to the use of physical restraints and prolonged solitary confinement and isolation.[103] Harm Reduction Australia submitted that denial of access to harm reduction, in custodial settings as well as prisons, violates the prohibition of torture and other cruel, inhumane and degrading treatment.[104]

4.42 Numerous submitters highlighted pervasive drug challenges in Australian prisons, such that illicit drugs are readily available and that there are high levels of associated injecting drug use.[105] Harm Reduction Australia submitted that

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97 No to Violence, *Submission 53,* p. 13; see, for example, Queensland Nurses and Midwives' Union, *Submission 84,* pp. 9–10.

98 See, for example, Victorian Women's Guild, *Submission 45,* pp. 2–3; Women Speak Tasmania, *Submission 72,* p. 2; Affiliation of Australian Women's Action Alliances, *Submission 138,* p. 8.

99 See, for example, Women Speak Tasmania, *Submission 72,* p. 2; Coalition of Lesbian Activists, *Submission 167,* p. 12; Women's Rights Network Australia, *Submission 177,* p. 1.

100 See Victorian Women's Guild, *Submission 45*.

101 See, for example, Queensland Human Rights Commission, *Submission 142*, p. 62—64; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 39—41; National Justice Project, *Submission 225*, p. 15; Women's Action All, *Submission 138*; Women's Justice Network, *Submission 182*; Single Sex Prisons Australia, *Submission 154*.

102 Australian College of Nursing, *Submission 208*, p. 5.

103 National Justice Project, *Submission 225*, p. 16.

104 Harm Reduction Australia, *Submission 126*, p. 10.

105 Harm Reduction Australia, *Submission 126*, p. 10.

inmates are routinely forced to re-use and re-fashion injecting equipment incorporating the use of a single needle and syringe, and that there has been a failure to implement a program of regulated access to sterile injecting equipment.[106] Many submitters identified inconsistent approaches by prisons in their refusal to provide prisoners living with opioid use disorder with effective medical treatment, such as opioid substitution therapy.[107]

Privacy

4.43 Concerns were raised that Australia's existing legal framework does not adequately protect the right to privacy, and is not sufficient to regulate artificial intelligence technologies and privacy rights.[108] The Human Rights Law Centre argued that as people's lives are increasingly moving to the online space 'privacy is fast becoming one of the most casually and frequently breached, but immeasurably important, human rights' with breaches of privacy 'leading to a more dangerous world – be it online disinformation inciting violence, the use of biometric surveillance technologies by police and companies, or identity theft'.[109]

4.44 Others submitted that there is no clear legal process for litigating complaints related to companies failing to protect the privacy of its customers' personal information and sensitive health information from interference, loss, unauthorised access and unauthorised disclosure, such as the data breaches on Medibank and Optus.[110] Maurice Blackburn submitted that presently, the lack of a "modern, enforceable privacy protection regime means that organisations are not encouraged to value privacy or devote resources to protecting data against cybersecurity risks.[111]

4.45 The Queensland Youth Policy Collective submitted that "businesses avariciously stockpile huge quantities of personal data, which is then sold and used to analyse and manipulate data subjects without their knowledge."[112] Additionally, they expressed concern that Governments tap into the private sectors' stockpiles and also engage in constant surveillance, scrutinization and

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[106] Harm Reduction Australia, *Submission 126,* p. 10; Students for Sensible Drug Policy Australia, *Submission 130*, p. 14.

[107] Students for Sensible Drug Policy Australia, *Submission 130*, p. 6.

[108] Maurice Blackburn, *Submission 110,* p. 11; Queensland Youth Policy Collective, *Submission 141,* p. 18.

[109] Human Rights Law Centre, *Submission 232*, p. 21.

[110] Maurice Blackburn, *Submission 110,* p. 10–11.

[111] Maurice Blackburn, *Submission 110,* p. 11.

[112] Queensland Youth Policy Collective, *Submission 141,* p. 14.

profiling of the population.[113] Ms Drury, Acting Legal Director at the Human Rights Law Centre, gave evidence that marginalised groups in particular face more surveillance than other groups and the 'deep concern we have is that a continuation of this use and the rollout of very troubling technology like facial recognition will be combined with the overpolicing that already exists in these communities'.[114]

4.46 In addition, a few submitters raised concerns regarding the human rights implication of neurotechnology (which allows the human brain to connect directly to digital networks through processes and devices that permit the neural processes to be accessed, monitored and manipulated).[115] Evidence was received that there is a need for regulation to address the implications of devices inserted into the brain or are transcranial to wear, which have the potential to disrupt cognitive liberty, infringe upon freedom of thought, and affect personality and free will.[116] These submitters were supportive of a federal HRA inclusive of neurorights, and enshrining a right of mental privacy, regulating the collection, storage, and sale of neural data, or the protection of thoughts against disclosure.[117]

Freedom of expression and the right to protest

4.47 Some submitters raised concerns that there is little protection for the right to freedom of expression and the right to protest, and these rights have been slowly undermined in recent years. Submitters raised particular concerns that there has been a national trend towards criminalising peaceful protest.[118] The Human Rights Law Centre submitted:

> Australians' freedom of assembly and expression have been under sustained attack by state parliaments for the last ten years. Political sensitivity to climate protesters in particular has prompted a rolling wave of draconian penalties which undermine people's right to protest in Australia.[119]

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[113] Queensland Youth Policy Collective, *Submission 141,* p. 14.

[114] Ms Alice Drury, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 25 August 2023, p. 20.

[115] See, for example, Dr Nita Farahany, *Submission 22,* p. 1–3; Wotton + Kearney, *Submission 226,* p. 6.

[116] Dr Nita Farahany, *Submission 22,* p. 3–4; Wotton + Kearney, *Submission 226,* p. 4; Neurorights Foundation, *Submission 317,* p. 1.

[117] Neurorights Foundation, *Submission 317,* pp. 2–3.

[118] See Environmental Justice Australia, *Submission 150*, p. 4; Wilderness Society, *Submission 99*.

[119] Human Rights Law Centre, *Submission 232*, p. 24.

4.48 The Human Rights Law Centre gave as examples of recent interferences with these rights as a crack down on charities being involved with protests, and the decision to prosecute Bernard Collaery and Witness K.[120]

Environment

4.49 Concerns regarding climate change and environmental threats, and their impact on human rights were raised by a number of submitters. Submitters argued that current mechanisms to protect human rights, and particularly the right to a healthy environment and the associated First Nations substantive and procedural environmental rights, are either inadequate or non-existent.[121] Submitters stated that climate change and environmental degradation also affects people's rights to life, health, food, water and adequate standard of living, and disproportionately affects people with low-incomes or experiencing disadvantage.[122] Ms Frances Bradshaw, Senior Solicitor at the Environmental Defenders Office, stated that 'we, as humans, rely on the environment for our health, wellbeing and security' and that it is time to recognise, implement and protect the right to a healthy environment in Australia.[123] These submitters were strongly supportive of a federal HRA that contained substantive and procedural elements of a right to a healthy environment.[124]

4.50 Environmental Justice Australia submitted that the lack of broad-based and binding legal mechanisms to set and implement pollution and waste controls at the national level, including a duty requirement for prevention of environmental harm, is a fundamental weakness in Australia's current federal laws.[125]

4.51 Submitters observed increasing repression of environmental defenders and climate advocates in Australia.[126] In particular, submitters noted a national trend towards criminalising peaceful protest that restricts people's ability to stand

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120 Human Rights Law Centre, *Submission 232*, p. 25.

121 Environmental Defenders Office, *Submission 147,* p. 21; Environmental Justice Australia, *Submission 150,* p. 3.

122 Australian Council of Social Service, *Submission 220,* p. 3.

123 *Committee Hansard*, 28 September 2023, p. 33.

124 See, for example, Environmental Defenders Office, *Submission 147,* p. 13–15; Australian Conservation Foundation, *Submission 159,* p. 4; Ms Ally McAlpine, Environmental Justice Australia, *Committee Hansard,* 25 August 2023, p. 42; Mr Sam Szoke-Burke, The Wilderness Society, *Committee Hansard,* 28 September 2023, p. 34.

125 Environmental Justice Australia, *Submission 150,* p. 3.

126 Environmental Defenders Office, *Submission 147,* p. 11–12.

together and speak out on issues they care about.[127] The Environmental Defenders Office submitted that there had been increases in "proactive policing of climate activists across all Australian states and territories including, for example, police raids, seizure of devices, pre-emptive checks, and onerous bail conditions, which are increasingly being utilised as mechanisms for disrupting and isolating the environmental movement."[128]

Access to justice

4.52 Submitters identified that recommendations lack legal enforceability, and there is no authority to ensure compliance, and consequently individuals are left with the option of seeking a legal remedy through the court system.[129]

4.53 Many submitters acknowledged that for actions to be brought before a court would be extremely resource and time intensive.[130] As a result, meritorious complainants may decide not to pursue their claims.[131] National Legal Aid submitted that a major barrier to justice for people who have experienced discrimination and sexual harassment is the risk of having to pay legal costs of the respondent or their employer should they lose.[132] National Legal Aid also submitted that the experience of people who have faced discrimination and sexual harassment should be acknowledged, and that being listened to, believed holding the respondent accountable, and behaviour stopping, is also part of the pursuit of justice.[133]

4.54 Submitters emphasised that for people who are low paid and in insecure work, and when people are up against an organisation with large resources, the financial risk of pursuing their rights can often be a barrier.[134] Many submitters stated that the financial risk of complainants pursing their rights can often be a barrier for access to justice.[135]

4.55 Numerous submitters highlighted the need for adequate funding of the legal assistance sector across various jurisdictions, criminal, family and civil areas of

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127 The Wilderness Society, *Submission 99,* p. 5; Environmental Defenders Office, *Submission 147,* p. 11; Environmental Justice Australia, *Submission 150,* p. 4.

128 Environmental Defenders Office, *Submission 147,* p. 12.

129 Indigenous Law and Justice Hub, *Submission 157,* p. 14.

130 Australian Human Rights Commission, *Submission 1*, p. 54–55.

131 Australian Human Rights Commission, *Submission 1*, p. 54–55.

132 National Legal Aid, *Submission 118,* p. 49.

133 National Legal Aid, *Submission 118,* p. 49.

134 National Legal Aid, *Submission 118,* p. 49; Australian Feminists for Women's Rights, *Submission 211,* p. 63.

135 National Legal Aid, *Submission 118,* p. 49; Women's Rights Network Australia, *Submission 177,* p. 5.

law, to support equal access to justice, and noted a continued decrease in Commonwealth support.[136]

Victim-survivors of crime

4.56 Some submitters raised concerns that the human rights of victim-survivors of crime are not adequately protected. For example, knowmore submitted that Australia has no victims' rights charter at the federal level to specifically protect the rights of victims and survivors of crime.[137] The Queensland Human Rights Commission submitted that there were persistent difficulties experienced by institutions and professionals to adequately meet the expectations of victim-survivors of crime. They further submitted that "having violence inflicted on them and experienced victimisation separates victims from their usual place in society."[138] Women's Legal Service NSW similarly submitted that "[v]ictim-survivors who are subjected to gender-based violence can experience discrimination in areas of public life such as employment, education and housing and accommodation. For example, a woman may lose work or have their employment terminated as a result of a perpetrator harassing her at her workplace."[139]

4.57 Australian Centre for International Justice submitted that there is no compensation scheme for federal offences, leaving international crimes offences accounted for, and highlighted the experiences of Afghan and Yazidi victims in cases with a link to Australia.[140] They also submitted that victims of federal crimes have limited ways of participating in the criminal process in Australia.[141]

4.58 Women's Legal Service NSW submitted that failures to provide victim-survivor's with appropriate supports when reporting violence and during the criminal legal process can have profound impacts on victim-survivor rights, including rights to life, family, and not to be subjected to cruel, inhuman or degrading treatment.[142]

Poverty and social security

4.59 Many submitters observed that people can experience further entrenched disadvantages when poverty is combined with other structural and systemic

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136 National Legal Aid, *Submission 118,* p. 5; Australian Feminists for Women's Rights, *Submission 211,* p. 63.

137 knowmore, *Submission 222,* p. 12.

138 Queensland Human Rights Commission, *Submission 142,* p. 52.

139 Women's Legal Service NSW, *Submission 97,* p. 8.

140 Australian Centre for International Justice, *Submission 271,* p. 25.

141 Australian Centre for International Justice, *Submission 271,* p. 29.

142 Women's Legal Service NSW, *Submission 97,* p. 13.

factors, and that the people least able to protect their own human rights are the ones most likely to have them infringed.[143] Submitters highlighted that existing mechanisms have failed to protect people who face barriers to fair and equitable treatment, and these vulnerable and marginalised members of society are more likely to experience breaches of civil and political rights and seek recourse that is not experienced by others.[144]

4.60 For example, the Australian College of Nursing submitted that inadequate government income payments and housing stress result in denying basic rights and poverty.[145] Save the Children submitted that children live in poverty at higher rates than adults.[146] Jesuit Social Services submitted that the most disadvantaged people in society experience multiple and long-term disadvantages based on the location where they live, including greater impacts of climate change and pollution, higher rates of poverty, and less access to public transport or healthcare, and face systemic barriers to get out of poverty.[147]

4.61 Many submitters noted the structural weaknesses and issues in how human rights are treated at the federal level and highlighted the Robodebt Scheme as an example of an unlawful program that resulted in significant human cost, where recipients of government support were not treated with dignity and fairness.[148] Economic Justice Australia submitted that the evidence from the Royal Commission into the Robodebt Scheme's report showed that "our current legal frameworks and 'business as usual' approaches to public administration are insufficient to prevent systemic human rights abuses – particularly where they impact upon a vulnerable population" where decisions were based on "budgetary factors that did not take into consideration the broader range of relevant concerns through a human rights lens."[149] Compulsory income management and cashless welfare policies, which limits individual's ability to spend their social security entitlements, were also raised as impinging on rights

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143 Jesuit Social Services, *Submission 173*, p. 10; Australian Feminists for Women's Rights, *Submission 211*, p. 64; Australian Council of Social Services, S*ubmission 220*, p 2.

144 Australian Council of Social Services, *Submission 220*, p. 2.

145 Australian College of Nursing, *Submission 208*, p. 4.

146 Save the Children and 54 Reasons, *Submission 168*, p. 10.

147 Jesuit Social Services, *Submission 173*, pp. 9–10.

148 Ms Linda Forbes, Law Reform Officer, Economic Justice Australia, *Committee Hansard*, 27 September 2023, p. 26; Australian Human Rights Commission, *Submission 1*, p. 13; Economic, Social and Cultural Rights Network, *Submission 86*, p. 22; Australian College of Nursing, *Submission 208*, p. 4.

149 Economic Justice Australia, *Submission 34*, pp. 7–8.

to non-discrimination, social security and private life, particularly for First Nations People.[150]

People experiencing homelessness

4.62 Homelessness in Australia is an increasing problem that is both pervasive and enduring, manifesting in many forms such as street homelessness, overcrowding and 'couch surfing'.[151] The simultaneous rental and housing affordability crises have put many millions of people in Australia under enormous pressure.[152]

4.63 Many submitters noted that homelessness affects a broad range of individuals, most significantly from marginalised or disadvantaged backgrounds, including First Nations peoples, migrants and refugees, women experiencing family violence, young people, people with disabilities and mental health challenges, and other at risk groups.[153] The Victorian Aboriginal Child Care Agency submitted that Aboriginal people are significantly more likely to experience homelessness.[154] The Youth Affairs Council of South Australia submitted that young people remain the most likely age cohort to experience homelessness and are disproportionately impacted by perpetually high rents and the broader rental crisis.[155]

4.64 The public housing system in Australia is fraught with multiple challenges, including insufficient safe and affordable dwellings, demand exceeding supply, and extended public housing waitlists.[156] Many submitters provided examples of the range of clients they assisted who were experiencing near homelessness

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150 Economic Justice Australia, *Submission 34*, pp. 8– 9; Economic, Social and Cultural Rights Network, *Submission 86*, p. 21; Indigenous Law and Justice Hub, *Submission 157*, p. 5; Human Rights Law Centre, *Submission 232;* p. 50.

151 Valerio Daniel De Simoni Association Inc., *Submission 12*, p. 1; Castan Centre for Human Rights Law, *Submission 160*, p. 21; Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 19; Progressive Law Network, *Submission 127*, p. 2.

152 Federation of Community Legal Centres, *Submission 174*, p. 10; Human Rights Law Centre, *Submission 232*, p. 36.

153 Progressive Law Network, *Submission 127*, p. 2; Castan Centre for Human Rights Law, *Submission 160*, p. 21; Federation of Community Legal Centres, *Submission 174*, p. 10.

154 Victorian Aboriginal Child Care Agency, *Submission 175*, p. 4.

155 Youth Affairs Council of South Australia, *Submission 89*, p. 4; Human Rights Law Centre, *Submission 232*, p. 36.

156 Kingsford Legal Centre, *Submission 101*, p. 8; Progressive Law Network, *Submission 127*, p. 2; Castan Centre for Human Rights Law, *Submission 160*, p. 20.

and destitution, and some particularising client challenges to secure public housing and experiences living in public housing.[157]

4.65 Cross-cutting factors push people into homelessness and perpetuate structural challenges, which can consequentially lead to discriminatory treatment. For example, submitters observed that violence in the home is a leading cause of homelessness for women and children.[158] The National Justice Project noted that people experiencing homelessness are one vulnerable group that frequently face harassment, arbitrary detention and abusive treatment at the hands of police, often due to discrimination.[159]

Businesses and human rights

4.66 Unlike binding international human rights treaties ratified by Australia, the *UN Guiding Principles on Business and Human Rights* (UN Guiding Principles) affirms that businesses have a responsibility to respect human rights, which includes preventing or mitigating adverse impacts related to their operations and value chain.[160] Numerous submitters recommended a robust human rights framework incorporating legislative and policy elements which more comprehensively implement the UN Guiding Principles.[161]

4.67 Submitters noted a patchwork of laws regulating aspects of corporate activity, but there is no specific domestic legislation concerning human rights due diligence in Australia. The *Modern Slavery Act 2018* requires Australian businesses to report on the efforts taken to respond to modern slavery risk in their supply chains, however, some submitters argued it needs strengthening and greater accountability of reporting obligations.[162] University of Newcastle's Centre for Law and Social Justice submitted there is a 'liability deficit' or 'accountability gap' where lead firms are rarely subject to liability for the actions of other firms in their supply chain, even when those firms cause human rights

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157 Asylum Seeker Resource Centre, *Submission 11*, p. 11; Kingsford Legal Centre, *Submission 101*, p. 8; Queensland Human Rights Commission, *Submission 142*, pp. 57–59, 69; and Community Legal Centres Australia, *Submission 331*, pp. 19 and 29.

158 See, for example, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 19.

159 National Justice Project, *Submission 225*, p. 18.

160 KPMG, *Submission 108,* p. 1.

161 KPMG, *Submission 108,* p. 2; Law Council of Australia, *Submission 120,* p. 29; Australian Lawyers for Human Rights, *Submission 229*, p. 43.

162 Victorian Women's Guild, *Submission 45*; Law Council of Australia, *Submission 120*, p. 5; Ethical Partners, *Submission 178,* p. 4; Fiona David and Dr David Tickler, *Submission 223,* p. 4; Australian Lawyers for Human Rights, *Submission 229*, p. 43.

harms, and despite the lead firm being responsible for the coordinated organisation of the chain and gaining the most profit from the chain.[163]

Covid-19 pandemic

4.68 The Covid-19 pandemic and associated legislative and policy responses engaged numerous human rights. Measures imposed at the federal level and by the states and territories simultaneously promoted and limited a number of human rights, including the rights to life, health, privacy, freedom of movement, liberty, equality and non-discrimination, work, adequate standard of living and social security.[164] Submitters raised the response to the Covid-19 pandemic as one raising multiple human rights concerns – which is set out in Chapter 5 of this report. Some submitters also raised concerns regarding requirements for Covid-19 vaccinations which they submitted amounted to discrimination.[165]

National security laws

4.69 Several submitters expressed concern regarding the human rights compatibility of Australia's national security and counter-terrorism laws.[166] Dr Stephen Lake, an academic, stated that Australia has passed more counter-terrorism legislation since 2001 than any other Western democracy, despite Australia not having been threatened or attacked in the same way as other countries have been.[167] He estimated that approximately 92 laws and amendments had been made, and expressed concern about how the legislation is being extended to ordinary civil and criminal law, for which it was never justified and which potentially classify other forms of criminality as terrorism.[168] Mr Scott Lambert submitted that Australian governments over recent years have responded to the threat of terrorism by introducing counter-terrorism laws that 'go well beyond what might be deemed proportionate, creating a chilling effect on freedom of speech and the press and breaching the right to privacy.[169]

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163 University of Newcastle Centre for Law and Social Justice, *Submission 185*, pp. 5–6.

164 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny report of Covid-19 legislation* (29 April 2020).

165 See Ashley, Francina, Leonard & Associates, *Submission 329*, p. 38.

166 See, for example, NSW Council for Civil Liberties Inc, *Submission 77*, p. 14; National Legal Aid, *Submission 118*, p. 29; Josephite Justice Office, *Submission 197*, p. 3; Human Rights Law Centre, *Submission 232*, *Supplementary Submission 2*, p. 15; Australian Feminists for Women's Rights, *Submission 211*, p. 49. See further, Professor Ben Saul, *Submission 251*.

167 Dr Stephen Lake, *Submission 315*, p. 89.

168 Dr Stephen Lake, *Submission 315*, p. 90. Civil Liberties Australia, similarly, expressed concern at the volume of counter-terrorism legislation passed without evidence that the threat level in Australia is proportionate to the severity of that legislation. See, Civil Liberties Australia, *Submission 51*, p. 10.

169 Scott Lambert, *Submission 259*, p. 5.

4.70 National Legal Aid highlighted that, while much of Australia's counter-terrorism legislation was characterised as being temporary when introduced, it remains on the statute books today, arguing that this highlights the importance of the scrutiny of existing legislation and statutory review.[170] Further, the Australian Centre for International Justice noted that the 2012 National Human Rights Action Plan had listed counter-terrorism as being a priority area (on the basis that it was a human rights concern of the general community).[171]

4.71 Submitters also expressed concern regarding the absence of adequate legal protections for whistleblowers, noting recent prosecutions of whistleblowers and associated inquiries into journalists.[172]

[170] Mr Anthony Levin, Manager and Senior Solicitor, Human Rights Team, Legal Aid NSW, National Legal Aid, *Committee Hansard*, Thursday 28 September 2023, p. 44. See also, Dr Stephen Lake, *Submission 315*, p. 10.

[171] Australian Centre for International Justice, *Submission 271*, p. 10. See, Attorney-General's Department, *National Human Rights Action Plan*, 2012, p. 13.

[172] See, Australian Lawyers Alliance, *Submission 83*, p. 14; Amnesty International Margaret River Group, *Submission 107*, p. 2; Josephite Justice Office, *Submission 187*, pp. 6–7; Dr Stephen Lake, *Submission 315*, p. 91. See also, Ms Rita Jabri Markwell, Advisor, Australian Muslim Advocacy Network Ltd, *Committee Hansard*, Tuesday 15 August 2023, p. 58.

Chapter 5
Arguments regarding an Australian Human Rights Act

Overview

5.1 This chapter sets out the case both for and against a Human Rights Act (HRA), as set out by submitters and witnesses, and in evidence to the 2009 National Human Rights Consultation.

Public support for a Human Rights Act

5.2 The submissions received to this inquiry were overwhelmingly in favour of a federal HRA. Of the 335 submissions received:

- 87.2 per cent (292) supported the adoption of federal protection of rights via a HRA (including those who expressed support for a constitutionally enshrined model);[1]

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[1] See Australian Human Rights Commission, *Submission 1*; Justice and Peace Office Catholic Archdiocese, *Submission 2;* Rural Australians for Refugees Queanbeyan Inc, *Submission 3;* Professor George Williams AO, *Submission 4;* Amnesty International Eastern Suburbs and Redfern, *Submission 5;* Amnesty International Bendigo Group, *Submission 6;* Brisbane North Community Legal Service, *Submission 7;* NSW Activism Leadership Committee of Amnesty International, *Submission 8;* St Vincent de Paul Society, *Submission 9;* Blue Mountains Refugee Support Group, *Submission 10;* Older Persons Advocacy Network, *Submission 11;* Valerio Daniel De Simoni Association Inc., *Submission 12;* Kaldor Centre for International Refugee Law, *Submission 13;* Associate Professor Julie Debeljak, *Submission 15;* Professor Tamara Walsh and Associate Professor Dominique Allen, *Submission 16*; Australian Community Futures Planning, *Submission 17;* African Australian Advocacy Centre, *Submission 18;* Grandmothers for Refugees, *Submission 20;* Rural Australians for Refugees, *Submission 21;* Dr Nita Farahany, *Submission 22;* Queensland Council of Social Service, *Submission 23;* Mums 4 Refugees, *Submission 24;* Federation of Ethnic Communities' Councils of Australia, *Submission 25;* QUT – School of Public Health and Social Work, *Submission 27;* Professor Philomena Murray, *Submission 28;* Associate Professor Greg Carne, *Submission 29;* Associate Professor Kate Seear, *Submission 30;* Amnesty International Sunshine Coast Action Group, *Submission 32;* Elder Abuse Action Australia, *Submission 33;* Economic Justice Australia, *Submission 34;* Amnesty Southern Group, *Submission 35;* Professor Sarah Joseph, *Submission 36;* AbSec, *Submission 37;* Refugee Advocacy Network, *Submission 38;* Christians for Peace Newcastle, *Submission 39;* Brigidine Asylum Seekers Project, *Submission 40;* Quaker Peace and Justice Committee (Tasmania), *Submission 41;* Good Shepherd Australia New Zealand, *Submission 42;* Suicide Prevention Australia, *Submission 43;* Digital Rights Watch and Electronic Frontiers Australia, *Submission 44;* Victorian Women's Guild, *Submission 45;* Amnesty International Australia – Amnesty ACT/SNAW Activism Leadership Committee, *Submission 46;* Cultural Infusion, *Submission 47;* Zonta International – South Australia (District 23, Area 2), *Submission 49;* Associate Professor Laura Grenfell and Dr Sarah Moulds, *Submission 50;* Civil Liberties Australia, *Submission 51;* Queensland Council for Civil Liberties, *Submission 52;* No to Violence, *Submission 53;* Thorne Harbour Health, *Submission 54;* Murdoch University Legal Clinic, *Submission 55;* Council on the Ageing (COTA) NSW, *Submission 56;* Peter McMullin Centre on Statelessness, *Submission 57;*

- 3.9 per cent (13) were either opposed to a federal HRA,[2] or opposed the

Relationships Australia, *Submission 58;* Edmund Rice Centre for Justice, *Submission 60;* The Hon Pamela Tate AM KC, *Submission 61;* Australian Medical Students' Association, *Submission 62;* St Francis Social Services, *Submission 63;* Grata Fund, *Submission 65;* Church of Scientology Australia, *Submission 66;* ACT Council of Social Service, *Submission 67;* Climate Change Balmain Rozelle, *Submission 68;* Australian Human Rights Institute, UNSW Sydney, *Submission 69;* Dementia Australia, *Submission 70;* Ethnic Communities Council of Queensland, *Submission 71;* ACT Government, *Submission 73;* National Mental Health Consumer & Carer Forum, *Submission 75;* Grandmothers for Refugees Macnamara Electorate, *Submission 76;* New South Wales Council for Civil Liberties, *Submission 77;* Queensland Family and Child Commission, *Submission 78;* The Welcome Project, South Brisbane, *Submission 79;* Australian Lawyers Alliance, *Submission 83;* Queensland Nurses and Midwives' Union, *Submission 84;* National Centre for Action on Child Sexual Abuse, *Submission 85;* Economic, Social and Cultural Rights (ESCR) Network (Australia &Aotearoa/New Zealand), *Submission 86;* Deafblind Australia, *Submission 87;* Cancer Council Australia and McCabe Centre for Law and Cancer, *Submission 88;* Youth Affairs Council of South Australia, *Submission 89;* Consumers of Mental Health Western Australia, *Submission 90;* Office of the United Nations High Commissioner for Refugees, *Submission 91;* Australian Athletes' Alliance, *Submission 92;* Dr Pushkar Sebastian Cordoba, *Submission 93;* Professor Helen Ware, *Submission 94;* Equal Opportunity Commission, *Submission 95;* Dr Natalie Galea, Dr Aurelie Pankowiak, Dr Victoria Roberts and Dr Mary Woessner, *Submission 96;* Women's Legal Service NSW, *Submission 97;* Wilderness Society, *Submission 99;* Multicultural Australia, *Submission 100;* Kingsford Legal Centre, *Submission 101;* Inner City Legal Centre, *Submission 102;* National Council of Women Australia, *Submission 103;* Domestic Violence NSW, *Submission 104;* NSW Young Lawyers – Human Rights Sub-Committee, *Submission 106;* Amnesty International, Margaret River Group, *Submission 107;* KPMG Australia, *Submission 108;* Hume Riverina Community Legal Service, *Submission 109;* Maurice Blackburn Lawyers, *Submission 110;* Asylum Seeker Resource Centre, *Submission 111;* NSW Aboriginal Women's Advisory Network, *Submission 113;* Full Stop Australia, *Submission 115;* JFA Purple Orange, *Submission 116;* Carers NSW, *Submission 117;* National Legal Aid, *Submission 118;* Law Council of Australia, *Submission 120;* SNAICC – National Voice for Our Children, *Submission 121;* Office of the Children's Commissioner of the Northern Territory, *Submission 122;* ChildFund Australia, *Submission 123;* Foundation for Aboriginal and Islander Research Action, *Submission 124;* WA Feminist Lobby Network, *Submission 125;* Harm Reduction Australia, *Submission 126;* Progressive Law Network, *Submission 127;* Bonavero Institute of Human Rights, University of Oxford, *Submission 128;* Refugee Legal (Refugee and Immigration Legal Centre), *Submission 129;* Students for Sensible Drug Policy Australia, *Submission 130;* Darwin Amnesty Action Group, *Submission 131;* Multicultural Council of the NT, *Submission 132;* Voices of Influence Australia, *Submission 133;* Townsville Community Law, *Submission 134;* Great Lakes Rural Australians for Refugees, *Submission 135;* Rights of Older Persons Australia, *Submission 136;* Lived Experience Australia Ltd, *Submission 137;* Affiliation of Australian Women's Action Alliances, *Submission 138;* Queensland Advocacy for Inclusion, *Submission 140;* Queensland Youth Policy Collective, *Submission 141;* Queensland Human Rights Commission, *Submission 142;* People Just Like Us, *Submission 144;* Ballarat Rural Australians for Refugees, *Submission 145;* Emeritus Professor Chilla Bulbeck, *Submission 146;* Environmental Defenders Office, *Submission 147;* Change the Record, *Submission 148;* Women's International League for Peace and Freedom (WILPF) Australian Section, *Submission 149;* Environmental Justice Australia, *Submission 150;* Australian Muslim Advocacy Network, *Submission 151;* Aged and Disability Advocacy Australia, *Submission 152;* Forum of Australian Services for Survivors of Torture and Trauma (FASSTT), *Submission 153;* Single Sex Prisons Australia, *Submission 154;* Liberty Victoria, *Submission 155;* Humanists Victoria, *Submission 156;* Indigenous Law and Justice Hub, *Submission 157;* Dr Bruce Chen, *Submission 158;* Australian Conservation Foundation, *Submission 159;* Castan Centre for Human Rights Law, *Submission 160;* Australian Association of Social Workers, *Submission 161;* Victorian Equal Opportunity & Human Rights Commission, *Submission 162;* Australian Council of Human Rights

AHRC model of a HRA (particularly in relation to the drafting of freedom

Authorities, *Submission 163;* Loddon Campaspe Multicultural Services, *Submission 164;* Charter of Rights Campaign Coalition, *Submission 165;* Australian Nursing and Midwifery Federation, *Submission 166;* Coalition of Activist Lesbians, *Submission 167;* Save the Children and 54 reasons, *Submission 168;* Disaster Legal Help Victoria, *Submission 170;* South-East Monash Legal Service Inc., *Submission 172;* Jesuit Social Services, *Submission 173;* Federation of Community Legal Centres (Victoria) Inc, *Submission 174;* Victorian Aboriginal Child Care Agency, *Submission 175;* ACT Human Rights Commission, *Submission 176;* Women's Rights Network Australia, *Submission 177;* Ethical Partners Funds Management, *Submission 178;* Australian Child Rights Taskforce, *Submission 179;* National Council of Women SA, *Submission 180;* LGB Alliance Australia, *Submission 181;* Women's Justice Network, *Submission 182;* Racial and Religious Discrimination Legal Service Inc, *Submission 184;* Centre for Law and Social Justice, *Submission 185;* All Means All, *Submission 186;* Josephite Justice Office, *Submission 187;* Queensland Aboriginal and Torres Strait Islander Child Protection Peak, *Submission 188;* Amnesty International Australia National Rainbow Network, *Submission 189;* Reconciliation Australia, *Submission 190;* Mudgee Amnesty Action Group, *Submission 192;* ANTAR, *Submission 193;* Commissioner for Children and Young People (SA), *Submission 194;* Armidale Rural Australians for Refugees, *Submission 195;* Falun Dafa Association of Australia Inc, *Submission 196;* Just.Equal, *Submission 199;* Commissioner for Children and Young People (WA), *Submission 200;* South Australian Council of Social Service, *Submission 201;* New South Wales Aboriginal Land Council, *Submission 202;* Australian Centre for Disability Law, *Submission 203;* Professor Simon Rice OAM, *Submission 204;* Western Australia for a Human Rights Act, *Submission 205;* Uniting, *Submission 206;* Carers Australia, *Submission 207;* Australian College of Nursing, *Submission 208;* Human Rights Watch, *Submission 209;* UNICEF Australia, *Submission 210;* Australian Feminists for Women's Rights, *Submission 211;* Public Interest Advocacy Centre, *Submission 212;* Amnesty International Australia, *Submission 213;* Equality Australia, *Submission 214*; UNSW Law Society, *Submission 215;* Tasmanian Aboriginal Legal Service, *Submission 217;* LGBTIQ+ Health Australia, *Submission 218;* Freedom from Institutional Abuse, *Submission 219;* Australia Council of Social Service, *Submission 220;* Professor Kim Rubenstein, *Submission 221;* knowmore, *Submission 222;* Fiona David and Dr David Tickler, *Submission 223;* Adoptee Rights Australia, *Submission 224;* National Justice Project, *Submission 225;* Wotton + Kearney, *Submission 226;* Jumbunna Institute for Indigenous Education & Research, *Submission 227;* Run For It, *Submission 228;* Australian Lawyers for Human Rights, *Submission 229;* People with Disability Australia, *Submission 230;* Refugee Advice & Casework Service, *Submission 231;* Human Rights Law Centre, *Submission 232;* ANU College of Law South Asian Research and Advocacy Hub, *Submission 233;* Chief Executive Women, *Submission 234;* Family Advocacy, *Submission 235;* Community and Public Sector Union, *Submission 236;* Asia Research Institute for Environmental Law, *Submission 237;* Queensland Mental Health Commission, *Submission 238;* Aboriginal Legal Service of Western Australia Ltd, *Submission 239;* Ms Kathryn Kelly, *Submission 240;* Ms Rebecca Bishop, *Submission 241;* Dr Niko Leka, *Submission 242;* Mr Lance Reilly, *Submission 243;* Mr Sam Coten, *Submission 244;* Dr Val Kitchener, *Submission 245;* Ms Pamela Curr, *Submission 246;* Ms Lauren Jessup-Little, *Submission 247;* Mr Damien Linnane, *Submission 250;* Professor Ben Saul, *Submission 251;* Ms Elizabeth Maddox, *Submission 252;* Ms Leigh Dumpleton, *Submission 253;* Dr Peggy Goldsmith, *Submission 254;* Mr Brian Wooller, *Submission 256;* Ms Carol Bristow, *Submission* 257; Mx Joel MacKay, *Submission 258;* Mr Scott Lambert, *Submission 259;* Ms Ruth Gould, *Submission 261;* Miss Hannah Nebart, *Submission 262;* Ms Kiana Coe, *Submission 263;* Ms Rowena Kinner, *Submission 264;* Soroptimist International WA, *Submission 265;* Mr Benjamin Racz, *Submission 266;* Ms Caroline Davis, *Submission 267;* Dr Zagarelou-Mackieson, *Submission 268;* Mr Eugene White, *Submission 269;* Disability Discrimination Legal Service, *Submission 270;* Australian Centre for International Justice, *Submission 271;* Dr Michael Dudley and Dr Fran Gale, *Submission 272;* Ms Lauren Honcope, *Submission 273;* Australian Federation of Disability Organisations, *Submission 274;* Mr Simon Akkerman, *Submission 275;* Mr Nicholas Bulbeck, *Submission 276;* Mr Andrew Muller, *Submission 277;* Dr David Throp, *Submission 278;* Ms Yabbo Thompson, *Submission 279;* Mr Frederick Hoekstra,

of religion);[3] and

- 8.9 per cent (30) either did not reference a HRA or did not express a position on whether a HRA should be adopted.[4]

5.3 In addition, 4 107 form letters were received, all of which were in support of a HRA.

5.4 Similar extensive support for a HRA has been evident in multiple consultation processes. In 2009, the National Human Rights Consultation conducted a

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Submission 280; Dr Ed Wensing and Paul Girrawah House, *Submission 281;* Ms Jeanene Williams, *Submission 283;* Name Withheld, *Submission 284;* Miss Jayanna Gibson, *Submission 285;* Name Withheld, *Submission 286;* Name Withheld, *Submission 287;* Mr Stephen Rowe, *Submission 288;* Name Withheld, *Submission 290;* Professor Patrick Keyzer, *Submission 291;* Ms Sarah Jackson, *Submission 292;* Mrs Donna McWilliam, *Submission 293;* Mr Geoffrey Robin, *Submission 294;* Mrs Dale Dumpleton, *Submission 297;* Ms Sue Wasterval, *Submission 298;* Ms Betty McGeever, *Submission 299;* Ms Delia Crabbe, *Submission 300;* Ms Marion Davie, *Submission 301;* Ms Margaret Stewart, *Submission 302;* Ms Lynn West, *Submission 303;* Ms Lyn Wallace, *Submission 304;* Ms Coral Clarke, *Submission 305;* Ms Elizabeth Dangerfield, *Submission 306;* Ms Elizabeth O'Hara, *Submission 307;* Mr Gerd Hollander, *Submission 308;* Ms Judith Reynolds, *Submission 310;* Name Withheld, *Submission 311;* Ms Nancy Oosterhoff, *Submission 313;* Dr Stephen Lake, *Submission 315;* Ms Erika Fish, *Submission 316;* Neurorights Foundation, *Submission 317;* Confidential, *Submission 319;* Confidential, *Submission 320;* Name Withheld, *Submission 321;* Confidential, *Submission 322;* Confidential, *Submission 323;* Confidential, *Submission 324;* Mr Peter Capomolla Moore, *Submission 325;* Refugee Action Collective (Victoria), *Submission 328;* Ashley, Francina, Leonard and Associates, *Submission 329;* Community Legal Centres National Human Rights Network, *Submission 331;* Canberra Community Law, *Submission 332;* GeneEthics, *Submission 334;* Ms Larissa Kaput, *Submission 335.*

2 See, Rule of Law Institute of Australia, *Submission 327*; Professor Nicholas Aroney, Professor Richard Ekins and Dr Benjamin Saunders, *Submission 333*.

3 See, Dr Paul Taylor, *Submission 216*; Bernard Warnick, *Submission 282*; Human Rights Law Alliance, *Submission 14*; Christian Schools Australia, *Submission 64*; Freedom for Faith, *Submission 119*; Australia Christian Lobby, *Submission 143*; Christian Faith and Freedom Inc, *Submission 191*; Associate Professor Mark Fowler, *Submission 139*; Australian Association of Christian Schools, *Submission 19*; Australian Catholic Bishops Conference, *Submission* 31; National Catholic Education Commission, *Submission 98*.

4 See, Executive Council of Australian Jewry, *Submission 26*; Minerals Council of Australia, *Submission 48*; Legal Services Commission of South Australia, *Submission 59*; Women Speak Tasmania, *Submission 72;* Association of Heads of Independent Schools of Australia, *Submission 74*; Circle Green Community Legal, *Submission 80;* Alcohol Tobacco & Other Drug Association ACT (ATODA), *Submission 81;* Australian Fair Trade and Investment Network, *Submission 82;* The Oaktree Foundation, *Submission 105*; Minding Rights Network, *Submission 112;* Attorney-General's Department, *Submission 114*; Our Watch, *Submission 169*; Dr Jane Tiller and Associate Professor Paul Lacaze, *Submission 171;* Feminist Legal Clinic Inc, *Submission 183;* Commonwealth Ombudsman, *Submission 197;* National Preventative Mechanism, *Submission 198;* Miss Emily Musra, *Submission 248;* Mr Joshua Bollard, *Submission 249;* Mr Robert Heron, *Submission 255;* Ms Susan Kopittke, *Submission 260;* Name Withheld, *Submission 289;* Mr R. V. Barbero, *Submission 295;* Ms Evelyn Williams, *Submission 296;* Name Withheld, *Submission 309;* Name Withheld, *Submission 312;* Name Withheld, *Submission 314;* Confidential, *Submission 318;* Name Withheld, *Submission 321;* Confidential, *Submission 326;* Mrs Alison Quigley, *Submission 330.*

substantial inquiry into human rights in Australia.[5] Of the 33 356 submissions received which considered an HRA, 29 153 (87.4 per cent) of those supported a HRA.[6] As part of that inquiry, a telephone survey of 1 200 people was commissioned, the results of which also indicated significant support for a HRA.[7]

5.5 More recently, in its 2022 *Free and Equal* position paper, the Australian Human Rights Commission (AHRC) noted that recent opinion polling has consistently found large majorities in support of a federal HRA.[8]

Constitutional or statutory protection?

5.6 The AHRC HRA model proposes that a federal HRA should be an Act of Parliament that would not override other legislation, similar to the HRAs in the ACT, Victoria and Queensland and other Australian traditions of statutory protections, and inspired by HRAs overseas, predominantly in the United Kingdom (UK) and New Zealand.[9]

5.7 The AHRC model is built on the legislative dialogue model, which incorporates a formal 'dialogue' between the executive, legislature and judiciary, with each branch of government sharing responsibility for respecting and protecting human rights.[10] The statutory protections in the proposed model do not allow for the invalidation of primary legislation, in contrast to constitutional bills of human rights, such as in Canada and the United States of America.[11]

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5 See, National Human Rights Consultation, *Report*, September 2009.

6 National Human Rights Consultation, *Report*, September 2009, p. 264.

7 National Human Rights Consultation, *Report*, September 2009, p. 50. In particular, 57 per cent of respondents indicated support for an HRA and 30 per cent were neutral. Further, an Amnesty International poll, which used different wording, returned a result of 81 per cent support, 11 per cent neutral and eight per cent opposed. See, p. 264.

8 See Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 68 in reference to polling by the Human Rights Law Centre and Amnesty International. Where the position paper deals with a particular issue in greater detail than the final report (Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023) the position paper is referenced See also Professor Sarah Joseph, *Submission 36*, p. 9; National Legal Aid, *Submission 118*, pp. 11–12.

9 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 107. See also Dr. Bruce Chen, *Submission 158*, p. 5; Nicholas Bulbeck, *Submission 276*, p. 8. See further, *Human Rights Act 1998 (UK)* and *New Zealand Human Rights Act 1990.*

10 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 16.

11 Dr Bruce Chen, *Submission 158*, p. 6 in reference to *Canadian Bill of Rights (1960)* and *Bill of Rights 1789 (USA).*

5.8 Some submitters considered that a constitutional Bill of Rights was preferable to a statutory HRA, although most conceded that this was unlikely in the short term.[12] For example, Dr Julie Debeljak, Associate Professor with the Faculty of Law at Monash University, argued that statutory HRAs 'risk falling prey to legislative inertia'.[13] She contended:

> …under statutory models, the rights-incompatible law remains valid, operative and effective, and legislative inertia may prevent or delay remedial legislation. Legislative inertia poses a greater risk in the Australian jurisdictions than the British jurisdiction because the international human rights treaties that Australia is a party to are effectively unenforceable in international law, compared to the obligation on Britain to implement decisions of the European Court of Human Rights…[14]

5.9 Associate Professor Debeljak advocated for the *Canadian Charter of Rights and Freedoms 1982* (Canadian Charter) as a model for constitutional protection of human rights, arguing that it has 'mechanisms that promote and maintain parliamentary sovereignty' and 'numerous mechanisms which allow parliament to restrict and limit rights in the public interest'.[15] However, she stated that, '[i]f an entrenched constitutional instrument is not politically viable', a statutory instrument modelled on the UK or state and territory legislation would be preferable to one modelled on the New Zealand law, which she argued fails to significantly improve on the current protections available under common law.[16]

5.10 The Castan Centre for Human Rights Law, while recognising that constitutional amendment was unlikely to be achievable, nonetheless recommended 'a subsequent independent review [to] explore the opportunity for constitutional entrenchment of rights' included in an HRA.[17] Professor Ben Saul, Challis Chair of International Law and current United Nations (UN) special rapporteur on human rights and counter-terrorism, considered statutory protection a 'poor

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12 See, for example, Associate Professor Julie Debeljak, *Submission 15*, pp. 28–29; Professor Sarah Joseph, *Submission 36*, pp. 2–3; NSW Council for Civil Liberties, *Submission 77*, p. 3; Professor Helen Ware, *Submission 94*; Castan Centre for Human Rights Law, *Submission 160*, p. 9; Just.Equal, *Submission 199*, pp. 2–3; National Justice Project, *Submission 225*, p. 4; Jumbunna Institute for Indigenous Education and Research, *Submission 226*, p. 6; Professor Ben Saul, *Submission 251*, p. 5; Mr Scott Lambert, *Submission 259*.

13 Associate Professor Julie Debeljak, *Submission 15*, p. 29.

14 Associate Professor Julie Debeljak, *Submission 15*, p. 29.

15 Associate Professor Julie Debeljak, *Submission 15*, p. 28.

16 Associate Professor Julie Debeljak, *Submission 15*, p. 28. See also National Justice Project, *Submission 225*, p. 4.

17 Castan Centre for Human Rights Law, *Submission 160*, p. 2. See also, Jumbunna Institute for Indigenous Education and Research, *Submission 227*, p. 6.

cousin' of constitutional entrenchment.[18] Professor Sarah Joseph, a Professor of Human Rights Law at Griffith University, stated:

> …if the opportunity arose, I would be in favour of a constitutional bill of rights, but I also know that's not on the table at the moment. It would obviously be a very difficult thing to achieve because changing the Constitution is extremely difficult…[19]

5.11 Australian Community Futures Planning argued that constitutional protection is required on the basis that the Constitution currently enables Pariament to make laws which violate rights, stating that 'Until this constitutional permission is specifically revoked Australians cannot expect to feel secure in their human rights'.[20]

5.12 Numerous other submitters did not directly address the question of whether rights protection should be in the Constitution or in statute, but implicitly endorsed the statutory model by calling for a HRA.[21]

The case for a Human Rights Act

5.13 The committee received a range of arguments in support of a HRA. Many of these were similar to those considered in the 2009 National Human Rights Consultation,[22] and the AHRC's project, *Free and Equal: An Australian conversation on human rights*. The AHRC inquiry involved extensive consultation commencing in 2019 with the publication of an issues paper, and two subsequent discussion papers[23] (as set out in chapter 2).

5.14 The AHRC identified there to be an implementation gap between human rights standards and actual protections in the law, government policies and processes. It proposed a human rights reform agenda to modernise Australia's human rights protection system, including the introduction of a federal HRA.[24] In this regard, Emeritus Professor Rosalind Croucher, AHRC President, stated:

> There is nothing exceptional about the idea that, when making laws or taking actions or decisions under them, parliamentarians and public

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18 Professor Ben Saul, *Submission 251*, p. 5.

19 Professor Sarah Joseph, *Committee Hansard*, 15 August 2023, p. 53.

20 Australian Community Futures Planning, *Submission 17*, pp. 8–9.

21 Kingsford Legal Centre, *Submission 101,* p. 2; Hume Riverina Community Legal Service, *Submission 109,* p. 1; Law Council of Australia, *Submission 120,* p. 5; Loddon Campaspe Multicultural Services, *Submission 164,* pp. 2–4; South-East Monash Legal Service Inc, *Submission 172,* p. 5; Federation of Community Legal Centres Victoria, *Submission 174,* pp. 8–9; Ms Nikita White, Campaigner, Amnesty International, *Committee Hansard,* 27 September 2023, p. 1.

22 National Human Rights Consultation, *Report,* September 2009, pp. 263–280.

23 Australian Human Rights Commission, *Submission 1,* pp. 5–7.

24 Australian Human Rights Commission, *Submission 1,* pp. 10–11.

> officials should consider the human rights impact of their actions and should favour options that positively protect human rights or cause the least possible harm to them.[25]

Current protections for human rights insufficient

5.15 Many submitters argued that current human rights protections are piecemeal and provide inadequate protection, positing that a federal HRA could simplify and clarify human rights protections.[26] Chapter 2 sets out Australia's current human rights legislative framework and chapter 4 sets out some of the key human rights concerns submitters raised as existing in Australia today.

5.16 The AHRC considered the varied and disconnected ways in which some human rights are protected, including in the Constitution, in common law, through parliamentary scrutiny, through anti-discrimination law and by the AHRC itself, and concluded:

> The current rights framework is not easily explainable, or readily comprehensible, to all people in Australia…[It] is difficult to explain to everyday Australians, whose rights are meant to be protected.[27]

5.17 It noted that UN treaty bodies 'have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system'.[28]

5.18 JFA Purple Orange, a disability organisation, submitted that there are too many gaps in Australia's legislation, Constitution, and common law, as well as 'outdated and ineffective human rights frameworks and action plans'.[29] Similarly, Western Australia for a Human Rights Act described 'a patchwork that has extensive gaps and does not reflect the universal, inalienable and interrelated nature of human rights, and Australia's international human rights law obligations'.[30]

5.19 The NSW Young Lawyers – Human Rights Sub-Committee argued that Australia's current framework is not accessible for ordinary people, positing

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25 Emeritus Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 27.

26 See, for example, Grata Fund, *Submission 65*, p. 2; NSW Centre for Civil Liberties, *Submission 77*, pp. 6–8; National Legal Aid, *Submission 118*, pp. 10–11; Voices of Influence Australia, *Submission 133*, pp. 4–9; Dr Bruce Chen, *Submission 158*, p. 2; Castan Centre for Human Rights Law, *Submission 160*, pp. 6–7; Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, p. 7; Charter of Rights campaign coalition, *Submission 165*, p. 6; Save the Children and 54 reasons, *Submission 168*, p. 14; and Centre for Law and Social Justice, *Submission 185.1*, pp. 2–5.

27 Australian Human Rights Commission, *Submission 1*, p. 46.

28 Australian Human Rights Commission, *Submission 1*, p. 46.

29 JFA Purple Orange, *Submission 116*, p. 38.

30 Western Australia for a Human Rights Act, *Submission 205*, p. 14.

that 'it is extremely difficult for most Australians to know and understand their existing human rights protections'.[31]

5.20 Submitters also raised concerns regarding the time and cost associated with the absence of a comprehensive human rights framework. For example, Voices of Influence Australia stated that the inconsistencies are confusing and ineffective, as well as being costly.[32] The Centre for Law and Social Justice considered that the disparate approach 'sends mixed messages about [Australia's] human rights commitment to both domestic and global constituencies'.[33]

5.21 Other submitters also expressed concerns that, with dedicated human rights legislation in force only in Victoria, Queensland and the ACT, Australians in different jurisdictions may have significantly different human rights protections available to them. The Tasmanian Aboriginal Legal Service argued that a person's access to rights protections is wholly contingent on where they live because of the lack of an overarching federal instrument.[34] Similarly, the NSW Aboriginal Women's Advisory Network stated:

> The extent to which an individual has their human rights protected should not depend on where they live in Australia. An evolution of human rights protections for every person in Australia is needed from a national level in the form of a federal Human Rights Act. A federal Act can then become a blueprint for the development of Human Rights Acts across the remainder States and Territories.[35]

5.22 Some submitters noted the existing requirement to prepare statements of compatibility for bills and certain legislative instruments, and this committee's role in scrutinising at legislation, but argued that these features were not adequate to respect and protect human rights.[36] A number also noted the lack of legal consequences where no statement of compatibility, or an insufficient statement of compatibility, is provided.[37] In this regard, the AHRC *Free and Equal* report included extensive consideration of the role of the committee, and the

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31 NSW Young Lawyers – Human Rights Sub-Committee, *Submission 106*, p. 5.

32 Voices of Influence Australia, *Submission 133*, p. 9.

33 Centre for Law and Social Justice, *Submission 185.1*, p. 4.

34 Tasmanian Aboriginal Legal Service, *Submission 217*, p. 6.

35 NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 4.

36 See, for example, Refugee Legal, *Submission*, p. 18; Dr Bruce Chen, *Submission 158*, pp. 4–5; Nicholas Bulbeck, *Submission 276*, pp. 4–5.

37 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 319; Refugee Legal, *Submission 129*, p. 18.

effectiveness of parliamentary scrutiny of laws for compatibility with human rights.[38] It concluded that in the absence of an HRA:

> … 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.[39]

5.23 The committee's role and the adequacy of statements of compatibility are further considered in chapter 8.

COVID-19 pandemic

5.24 A significant number of submitters argued that government actions taken during the COVID-19 pandemic highlighted gaps and inadequacies or, at the very least, inconsistencies in current human rights protections.[40]

5.25 The AHRC, while considering overall that 'Australia's COVID response was relatively effective in protecting rights to life and to health', submitted that there were 'key failures which resulted in human rights breaches, and insufficient consideration for certain vulnerable and marginalised groups throughout the COVID response'.[41] It particularly highlighted travel restrictions, where 'hundreds if not thousands of Australians [had] no access to remedies when they were stranded overseas and locked out of their home country'.[42] The Charter of Rights campaign coalition highlighted the India travel ban, which 'violated the right of people being able to return home' yet was upheld by the Federal Court.[43]

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38 See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 13. Where the position paper deals with a particular issue in greater detail than the final report (Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023) the position paper is referenced.

39 See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 57.

40 See, for example, Australian Human Rights Commission, *Submission 1*, pp. 62–64 and *Submission 1.1*, pp. 11–15; Justice and Peace Office Catholic Archdiocese, *Submission 2*, p. 2; Older Persons Advocacy Network, *Submission 11*, pp. 5–6; Australian Fair Trade and Investment Network, *Submission 82*, p. 12; Australian Lawyers Alliance, *Submission 83*, p. 32; The Law Council of Australia, *Submission 120*, p. 7; Rights of Older Persons Australia, *Submission 136*, pp. 4–5; Lived Experience Australia, *Submission 137*, pp. 6–7; Queensland Human Rights Commission, *Submission 142*, pp. 15–16; Dr Bruce Chen, *Submission 158*, pp. 3–5; Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, p. 28; Charter of Rights campaign coalition, *Submission 165*, pp. 9–11; Save the Children and 54 reasons, *Submission 168*, pp. 11–13; Centre for Law and Social Justice, *Submission 185*, pp. 9–10; National Justice Project, *Submission 225*, p. 6; Ashley, Francina, Leonard & Associates, *Submission 329*.

41 Australian Human Rights Commission, *Submission 1*, p. 63.

42 Australian Human Rights Commission, *Submission 1*, p. 64.

43 Charter of Rights campaign coalition, *Submission 165*, p. 11.

5.26 Dr Bruce Chen, Senior Lecturer in Deakin Law School, argued that COVID-19 related litigation had revealed significant gaps in Australians' legal human rights protections.[44] He highlighted, in particular, the absence of an implied constitutional freedom of movement, limits on the common law right to bodily integrity evidenced by compulsory vaccination requirements, and a lack of common law rights to privacy or work.[45]

5.27 Some submitters argued that the pandemic exposed gaps relating to the protection of specific groups in society. For example, the Older Persons Advocacy Network (OPAN) submitted that during the COVID-19 pandemic, there was clear demonstration of ageism, stereotyping, prejudice and discrimination against older people on the basis of their age.[46] They highlighted daily 'public debate about "competition for ventilators" and "older people taking up beds" as thought their lives were negotiable and expendable'.[47] OPAN also identified 'gaps in protection of older persons' right to non-discrimination as a right in itself and in the realisation of other rights including the rights to health, care and support, freedom from violence, abuse and neglect, and participation as full members of society'.[48]

5.28 Save the Children and 54 reasons noted significant impacts on children's wellbeing and right to education in the response to the COVID-19 pandemic, and considered that 'requirements to take into account children's rights would have enabled a much better informed, more comprehensive and more effective policy response'.[49] The Centre for Law and Social Justice expressed concern that 'the sudden shift to remote learning…exposed the unequal resources available to families and schools within Australia's education system', which 'highlights the limitations' of a federal decision-making framework that fails to engage with fundamental human rights'.[50]

5.29 A number of witnesses and submitters commented on the impact of existing state and territory HRAs during the COVID-19 pandemic. Ashley, Francina, Leonard & Associates, a law firm in Sydney, submitted that there were unprecedented impacts on fundamental human rights during the pandemic and noted the quasi-legislation enacted daily by state and territory governments'

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44 Dr Bruce Chen, *Submission 158*, p. 3.

45 Dr Bruce Chen, *Submission 158*, p. 3.

46 Older Persons Advocacy Network, *Submission 11*, p. 5.

47 Older Persons Advocacy Network, *Submission 11*, p. 5.

48 Older Persons Advocacy Network, *Submission 11*, p. 6. See also, Relationships Australia, *Submission 58*, p. 9; Rights of Older Persons Australia, *Submission 136*, p. 5.

49 Save the Children and 54 reasons, *Submission 168*, pp. 12–13.

50 Centre for Law and Social Justice, *Submission 185*, pp. 9–10.

executive arm.[51] They argued that there were very few direct legal human rights protections in Australia which became evident during the COVID-19 pandemic.[52] Associate Professor Mark Fowler, a legal academic, argued that the Charter made no difference to affecting policy decisions as compared in the positions taken by the NSW and Victorian supreme courts.

> In terms of COVID-19, if we compare the decision of the New South Wales Supreme Court in *Kassam v Hazzard* [challenging COVID-19 restrictions and vaccination mandates], with that of the Victorian Supreme Court in *Loielo v Giles* [challenging curfews] we can see that, in the Victorian case where there was a charter and in the New South Wales case where there wasn't, there was no material difference. In both cases the court said that this is a matter of policy; this is a concern for the parliament. From a separation of powers perspective, we might say that's a good outcome. But it does raise the question as to whether or not there was any material difference.[53]

5.30 However, the Queensland Supreme Court recently held that a failure by decision-makers to give proper consideration to human rights before directing workers to receive COVID-19 vaccinations and boosters was a breach of their obligations under the Queensland HRA.[54]

5.31 The respective Human Rights Commissions in jurisdictions with HRAs argued that they had made a positive impact. The Victorian Equal Opportunity & Human Rights Commission described the Charter as 'a vital mechanism to frame concerns expressed by organisations and community members that public health measures unfairly limited their human rights'.[55] It highlighted instances of direct Charter impact:

> The Charter required that public authorities considered and acted in accordance with human rights in decisions made by them to introduce and update public health measures, as well as in the implementation of public health orders. The Charter remained relevant to decisions by the Chief Health Officer about whether limitations on rights were necessary and proportionate when making public health orders. Furthermore, in 2021 the government introduced a new legal framework to manage pandemics – setting out how the Charter applies to the making of pandemic orders, with new checks and balances designed to further embed human rights considerations into government responses.[56]

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51 Ashley, Francina, Leonard & Associates, *Submission 329*, p. 12.

52 Ashley, Francina, Leonard & Associates, *Submission 329*, p. 11.

53 Associate Professor Mark Fowler, *Committee Hansard*, 20 October 2023, p. 25.

54 See, *Johnston & Ors v Commissioner of Police; Sutton & Ors v Commissioner of Police; Witthahn & Ors v Wakefield* [2024] QSC 2.

55 Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, p. 28.

56 Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, p. 28.

5.32 The Hon Pamela Tate AM KC, Adjunct Professor of Law at Monash University and formerly a judge of the Supreme Court of Victoria, stated that:

> …at least people…were able to come to a court and have a court carefully dissect whether the particular restrictions that had been placed on their freedom, including a curfew, were a defensible interference with human rights, given the importance of the objectives of the curfew, or whether, in fact, they were a breach of an obligation of human rights…There was a provision of an analytical framework which enabled people who had a grievance to have that grievance intelligently considered in a formal and analytical way.[57]

5.33 The Queensland Human Rights Commission submitted:

> Many public entities indicated a willingness to engage in human rights dialogue when issues were raised, and to consider less restrictive alternatives to rights' limitations. Advocates also reported positive outcomes from raising human rights arguments in their dealings with public entities.[58]

5.34 The ACT Human Rights Commission reported that its 'oversight and advocacy' under the ACT HRA 'contributed to the Government building in more balanced restrictions on human rights that were targeted, necessary and proportionate'.[59]

Impact of a Human Rights Act

5.35 Submitters and witnesses in support of a HRA argued that it could address the current patchwork approach to protecting human rights and provide an effective enforcement mechanism. Numerous submitters were of the view that a HRA would bolster and give expression to basic Australian values such as equality, diversity, respect and inclusion.[60]

5.36 The Human Rights Law Centre argued that a HRA would improve the processes for developing laws by embedding human rights 'into the DNA' of government and politics and increase public awareness and discussion of aspects of human rights.[61]

5.37 Numerous submitters provided case studies to illustrate how a HRA has made positive differences to the protection of human rights in Victoria, Queensland and the ACT. For example, the Queensland Human Rights Commission

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57 The Hon Pamela Tate AM KC, *Committee Hansard*, 25 August 2023, p. 67.

58 Queensland Human Rights Commission, *Submission 142*, pp. 15–16.

59 ACT Human Rights Commission, *Submission 176*, p. 4.

60 See, for example, Justice and Peace Office Catholic Archdiocese, *Submission 2*, p. 4; Professor Philomena Murray, *Submission 28*, p. 1; Australian Lawyers Alliance, *Submission 83*, p. 5; South-East Monash Legal Service, *Submission 172*, p. 6; Tasmanian Aboriginal Legal Service, *Submission 217*, p. 4.

61 Human Rights Law Centre, *Submission 232,* Attachment 3 (*Charters of Human Rights Make Our Lives Better*), p. 8.

submitted that even in the early stages of the implementation of the *Human Rights Act 2019 (Qld)* (Queensland HRA), it had observed a 'growing culture of human rights awareness in the government sector and wider community.'[62] The ACT Human Rights Commission similarly observed that the 'most significant impact of the *Human Rights Act 2004 (ACT)* (ACT HRA) has been its influence on the culture and development of legislation in executive and legislative processes.'[63] They also submitted that the ACT HRA has 'benefited from being a non-entrenched law, allowing both incremental and substantial changes to be introduced over the decades since its introduction.'[64]

5.38 The AHRC submitted that the 2015 review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) found that it had helped to build a greater consideration of, and adherence to, human rights principles by the public sector, and concluded that the Charter had helped to promote and protect human rights in Victoria.[65] It highlighted research by the Human Rights Law Centre on the first five years of the Charter's operation which found that 'the Charter played a crucial preventative role in stopping human rights abuses (and the associated social and economic costs) before they occur).'[66] Further evidence regarding the impact of these HRAs on the culture of the public sector is detailed in chapter 8.

5.39 The Victorian Federation of Community Legal Centres submitted examples of positive impacts from the Charter related to coronial inquests into deaths in custody, and preventing homelessness and eviction from social housing.[67] For example, it cited a case in which a student with a learning disability was threatened with expulsion from their school due to behavioural issues.[68] It stated that the child's advocate raised the child's human rights with both their school and the Department of Education, and as a result the child was provided with additional supports which assisted in managing their behavioural issues, and enabled the child to remain at school.[69]

5.40 A number of submitters highlighted a series of case studies collated by the Charter of Rights campaign, which demonstrate how HRAs have been

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62 Queensland Human Rights Commission, *Submission 142*, p. 6.

63 ACT Human Rights Commission, *Submission 176*, p. 3.

64 ACT Human Rights Commission, *Submission 176*, p. 3.

65 Australian Human Rights Commission, *Submission 1.1*, p. 5.

66 Australian Human Rights Commission, *Submission 1.1*, p. 5.

67 Federation of Community Legal Centres Victoria, *Submission 174*, pp. 9–14.

68 Federation of Community Legal Centres Victoria, *Submission 174*, p. 14.

69 See also, Ms Matilda Alexander, Chief Executive Officer, Queensland Advocacy for Inclusion, *Committee Hansard*, 15 August 2023, p. 51.

beneficial.[70] This campaign analysed 101 cases to demonstrate the practical effect of state and territory HRAs. [71] In one example, an older person made a human rights complaint regarding the replacement of escalators at a train station with steep, inaccessible stairs. Following the complaint, a conciliation process was commenced, which led to an agreement that escalators would be installed as part of the train station upgrade.

5.41 The Charter of Rights campaign coalition argued that:

> By ensuring human rights are at the heart of our laws, and that people can take action when their rights are violated, a Charter makes a huge difference to the lives of people across our community. Charters are of particular importance for parts of the community marginalised by a combination of neglect with respect to critical services, or cultural attitudes that lead to discrimination, and as a result are prevented from fully enjoying their rights. People need enforceable human rights to help redress the wrongs they face, but more importantly improve government laws and decisions so that they properly consider human rights at the outset.[72]

5.42 The Human Rights Law Centre argued that these case studies highlighted the ways in which HRAs have helped 'governments make better decisions when faced with tough choices about how to protect life and health without unduly restricting other rights'.[73] In particular, it posited that these cases exemplified how HRAs had improved people's lives, including by: helping governments identify and address human rights issues at an early stage of policy development; ensuring transparency around how governments and parliaments have considered people's human rights; promoting better understanding of human rights and preventing human rights issues from escalating; and providing a way for people to resolve human rights issues by raising them with government and other agencies, or through complaint mechanisms and in the court.[74]

5.43 The NSW Young Lawyers – Human Rights Sub-committee submitted that the government should build on the examples highlighted in this campaign for the development and implementation of a federal HRA.[75]

5.44 Maurice Blackburn considered that the establishment of a HRA alongside an appropriate cause of action would have a positive impact on the experiences of

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70 Charter of Rights, *Charters of Human Rights Make Our Lives Better – Here are 101 cases showing how*.

71 Human Rights Law Centre, *Submission 232,* Attachment 3 (*Charters of Human Rights Make Our Lives Better*), p. 8.

72 Charter of Rights campaign coalition, *Submission 165,* p. 13.

73 Human Rights Law Centre, *Submission 232,* Attachment 3 (*Charters of Human Rights Make Our Lives Better*), p. 3.

74 Human Rights Law Centre, *Submission 232,* Attachment 3, p. 8.

75 NSW Young Lawyers – Human Rights Sub-committee, *Submission 106,* p. 3.

their clients in accessing justice, including relating to the protection of cultural heritage, the refugee experience and the right to the protection of personal data.[76] For example, it submitted that if 'cultural rights' were embedded in a federal HRA, traditional owners and decision makers would understand that there would be a legal requirement to ensure that in any decision made, the right of Aboriginal and Torres Strait Islander people to enjoy, control, protect and develop their identity and cultural heritage could not be denied.[77] It argued that the existence of such a right, that Aboriginal and Torres Strait Islander people could call on and that decision makers would be obliged to comply with, would elevate matters for clients to a level of legal significance more likely to engender meaningful engagement.[78]

5.45 Melbourne University's Indigenous Law and Justice Hub submitted that charters have been a powerful tool in promoting state accountability and improving individuals' circumstances, in the specific instances of the abuse of Aboriginal and Torres Strait Islander peoples' human rights. [79] For example, it stated that the Charter has been used to protect children being held in an adult prison pursuant to a published ministerial decision, and that litigation in the Supreme Court of Victoria found that the 'Minister failed to consider the children's rights under the charter, including their right to protection of the child's best interest, and humane treatment when deprived of liberty'.[80] It stated that, pursuant to litigation brought under the Charter, the court ordered the minister to stop detaining children in the adult prison unit and transfer all children back to the Youth Justice Centres'.[81]

5.46 Emeritus Professor Rosalind Croucher of the AHRC also argued that a HRA 'actually ends up in a saving to the community and an enhancement of human rights', avoiding 'enormous expenses in royal commissions'.[82] The AHRC submitted:

> Dealing with human rights breaches after the fact can give rise to vast consequences including unexpected costs from failing to consider human rights early. Robodebt led to a resulting class action, and prompted its own Royal Commission. Dealing with human rights issues early has obvious economic benefits.

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76 Maurice Blackburn, *Submission 110,* pp. 6–11.

77 Maurice Blackburn, *Submission 110,* p. 8.

78 Maurice Blackburn, *Submission 110,* pp. 7–8.

79 Indigenous Law and Justice Hub, *Submission 157,* p. 11.

80 Indigenous Law and Justice Hub, *Submission 157,* p. 11.

81 Indigenous Law and Justice Hub, *Submission 157,* p. 11.

82 Emeritus Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 61.

> 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.[83]

Protecting marginalised and disadvantaged groups

5.47 Several submitters argued that Australia's existing human rights mechanisms provide insufficient protection especially to marginalised and disadvantaged groups, who are particularly vulnerable to human rights abuses.

5.48 The AHRC highlighted that marginalised and disadvantaged groups were particularly affected by human rights problems, including subject to unfair administrative decision making by public bodies.[84] The NSW Council for Civil Liberties, likewise, posited that in Australia's current patchwork system 'many who suffer human rights violations have no tangible means to seek redress. This is especially detrimental to minorities and people experiencing vulnerability, who routinely experience discrimination, disadvantage and marginalisation'.[85] Professor Sarah Joesph stated:

> There is generally no requirement, outside the ACT, Victoria, and Queensland for public officials to act in accordance with human rights in making decisions which affect the lives of individuals, substantively or procedurally. Individuals, particularly the vulnerable, such as the elderly, children, the homeless, prisoners or other detainees, or the mentally ill, are susceptible to being treated as problems to be dealt with rather than persons with human rights that deserve respect when decisions are made that affect their lives (eg their health, their houses, or their liberty).[86]

5.49 Similar concerns were expressed by witnesses at committee hearings, with numerous witnesses highlighting that marginalised groups (including Aboriginal and Torres Strait Islander people,[87] children, people with disabilities, migrants and ethnic minorities, older persons and asylum seekers) face frequent disadvantages and discrimination, are the least able to defend themselves, and are frequently subject to rights violations.[88] These human rights concerns are further discussed in chapter 4.

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83 Australian Human Rights Commission, *Submission 1.1,* p. 18.

84 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 16.

85 NSW Council for Civil Liberties, *Submission 77*, p. 7. See also, NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 4–5; Save the Children and 54 reasons, *Submission 168*, p. 14.

86 Professor Sarah Joesph, *Submission 36*, p. 6.

87 Mr Alex Walters, *Committee Hansard,* 25 August 2023, pp. 34–35.

88 See, for example, Brisbane North Community Legal Service, *Submission 7,* p. 1; Progressive Law Network, *Submission 127,* p. 1; Students for Sustainable Drug Policy, *Submission 130,* p. 2; South-East Monash Legal Service, *Submission 172,* p. 10.

5.50 The Australian Centre for Disability Law argued that this lack of protection is related to the fact that many of the rights within the Universal Declaration of Human Rights and the Convention on the Rights of Persons with Disability are yet to be fully realised within Australian domestic legislation:

> As we have seen through our work in the disability discrimination sphere, Australia's current legislative frameworks and policies do not take a proactive approach to human rights. Often our clients, as people with disability, experience multiple barriers to accessing their inherent human rights.[89]

5.51 National Legal Aid identified the social security system as one that marginalised and disadvantaged people are more likely to encounter, and be required to engage with:

> While Australia has a comprehensive social security system, there are regularly discussions around the adequacy and eligibility of such payments, and these are matters that fall within the ambit of the right to social security at the international level…The eligibility criteria for [disability support pension], new migrants and asylum seekers in accessing social security are examples that clearly demonstrate why social security is a human rights issue, and how a Human Rights Act could lead to a more dignified social security system.[90]

5.52 The Progressive Law Network submitted that those in most need of human rights protections are also most vulnerable to homelessness:

> [A] Human Rights Act would not only directly address housing insecurity through a right to adequate housing, it would also uphold other rights of marginalised groups – ultimately, preventing the circumstances which drive these cohorts into homelessness in the first place…A Human Rights Act protecting the right to adequate housing can also be used to guide policy-making at all levels of government.[91]

5.53 The AHRC expressed a similar view, arguing that the consideration of human rights can lead to just outcomes:

> 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.[92]

5.54 The Older Persons Advocacy Network posited that a HRA would support the human rights of diverse, marginalised and disadvantaged groups, as

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89 Australian Centre for Disability Law, *Submission 203,* p. 1.

90 National Legal Aid, *Submission 118,* p. 24.

91 Progressive Law Network, *Submission 127,* p. 3.

92 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 16.

irrespective of their identity, if their rights were breached or disregarded, there would be pathways to enable them to seek and receive justice.[93]

Robodebt

5.55 Numerous submitters highlighted the Robodebt scheme as one example of a significant breach of human rights that occurred as a result of government policy and practice.

5.56 The Robodebt scheme was an automated debt assessment and recovery scheme implemented from 2017 to late 2019 by the Department of Human Services to recover social security payments. It resulted in thousands of welfare recipients being sent inaccurate Centrelink debt notices.[94] The AHRC stated that the scheme caused significant anguish and stress for many vulnerable and disadvantaged welfare recipients, and noted that it resulted in a class action which led to a $1.8 billion settlement.[95]

5.57 A Royal Commission was established in 2022 to inquire into the establishment, design and implementation of the scheme. The Royal Commission issued an extensive final report and made damning findings, concluding that the scheme was unlawful, and describing the scheme as:

> … a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. In essence, people were traumatised on the off-chance they might owe money. It was a costly failure of public administration, in both human and economic terms.[96]

5.58 The Royal Commission criticised the implementation of the policy and the scheme, stating:

> It is remarkable how little interest there seems to have been in ensuring the Scheme's legality, how rushed its implementation was, how little thought was given to how it would affect welfare recipients and the lengths to which public servants were prepared to go to oblige ministers on a quest for savings.[97]

5.59 The Royal Commission made numerous observations regarding the fraught environment in which the scheme developed, which was characterised by a 'powerful drive for savings, strongly expressed ministerial policy positions, cultural conflicts on an inter and intra-departmental level and intense pressure

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93 Older Persons Advocacy Network, *Submission 3,* p. 3; Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 16.

94 Royal Commission into the Robodebt Scheme, *Final Report*, 2023.

95 See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 77.

96 Royal Commission into the Robodebt Scheme, *Final Report*, 2023, p. xxix.

97 Royal Commission into the Robodebt Scheme, *Final Report*, 2023, Preface, p. iii.

experienced by public servants, including those in positions of seniority.'[98] Further, it was particularly critical of the scheme's unfairness, the failure to consult peak bodies, and the impact the scheme had on vulnerable people, noting that the averaging scheme was essentially unfair:

> It subverted the rationale on which income support was provided in the first place: as a safety net to ensure that people received help when they most needed it.
>
> There were other fundamental unfairnesses in the program. No regard was had to the sheer unreasonableness of placing the onus on recipients to attempt to establish what their earnings were for periods going back as long as five years when they had been given no reason to expect anything of the kind at the time they declared their income and received their benefits….
>
> The system was set up with the intention of forcing recipients to respond online to the PAYG data and to minimise contact with DHS officers, in the interests of economy; this was vital to the anticipated savings. (Indeed, having had the benefit of "behavioural insights," DHS employees setting up the system made a conscious decision not to include any telephone number for the Customer Compliance division in the letters sent to recipients, so as to force them to respond online, while compliance officers were told to direct recipients online.) No outside parties with an interest in welfare were consulted in order to understand how the Scheme might actually affect people. There appears to have been an obliviousness to, or worse a callous disregard, of the fact that many welfare recipients had neither the means nor the ability to negotiate an online system. The effect on a largely disadvantaged, vulnerable population of suddenly making demands on them for payment of debts, often in the thousands of dollars, seems not to have been the subject of any behavioural insight at all.[99]

5.60 Economic Justice Australia, the peak organisation for community legal centres providing specialist advice on social security, considered that Robodebt 'shows that our current legal frameworks and "business as usual" approaches to public administration law are insufficient to prevent systemic human rights abuses'.[100] It stated that evidence to the Royal Commission highlighted the profound disregard that particular senior public servants and ministers had toward the application of the rule of law, human rights standards, and the humanity of the vulnerable people affected, against the mounting evidence of the inaccuracy of the debt collection system.[101] In this regard, it argued that the Administrative Appeals Tribunal was not effective in providing adequate review in the context of the ineffectiveness of existing safeguards.[102]

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98 Royal Commission into the Robodebt Scheme, *Final Report*, 2023, p. 28.

99 Royal Commission into the Robodebt Scheme, *Final Report*, 2023, p. xxvi.

100 Economic Justice Australia, *Submission 34*, p. 7.

101 Economic Justice Australia, *Submission 34*, pp. 7–8.

102 Economic Justice Australia, *Submission 34*, p. 7.

5.61 The AHRC identified automated decision-making (such as that involved in the Robodebt scheme) as a human rights concern, and noted particularly that algorithmic bias can lead to unlawful discrimination.[103] It argued that a HRA with a positive duty on public authorities to comply with human rights 'would encourage a level of oversight that could reduce the likelihood of individual and systemic failures of the scope that occurred during the Robodebt scheme'.[104] It also argued that a participation duty, requiring consultation with certain affected groups, would go some way to supporting recommendations from the Royal Commission's report.[105] Numerous other submitters argued that the Robodebt scheme could have been avoided with a HRA.[106] For example, Ms Elizabeth Dangerfield submitted that:

> If politicians had just taken time to speak to, and actually listen to a whole range of people receiving welfare payments and the people who worked in Centrelink they may have developed a more sophisticated understanding of the challenges such people face in their lives and Robodebt may never have happened.[107]

5.62 Several submitters argued that a HRA could have reduced the likelihood of the Robodebt scheme occurring and provided clearer recourse for victims in the event it did occur. For example, National Legal Aid considered that if government agencies had been required to consider and justify any restriction on 'rights around not depriving people of property unlawfully, as well as fair and public hearing rights' and 'rights around privacy and reputation', the unlawfulness of the scheme could have been identified earlier.[108] Australian Lawyers for Human Rights submitted that:

> If a federal Human Rights Act was in force at the time of the Robodebt scheme, it would have required relevant decision-makers to give proper consideration to the scheme's human rights impacts and implement necessary safe-guards to limit any impacts on those rights, prior to

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103 Australian Human Rights Commission, *Submission 1.1*, p. 16.

104 Australian Human Rights Commission, *Submission 1.1*, p. 18.

105 Australian Human Rights Commission, *Submission 1.1*, p. 17.

106 See, for example, Australian Human Rights Commission, *Submission 1.1*, pp. 15–18; Justice and Peace Office Catholic Archdiocese, *Submission 2*, p. 2; Economic Justice Australia, *Submission 34*, pp. 6–8; Suicide Prevention Australia, *Submission 43*, p. 4; National Legal Aid, *Submission 118*, p. 24; Australian College of Nursing, *Submission 208*, p. 4; Australian Lawyers for Human Rights, *Submission 229*, pp. 9, 25–26; Human Rights Law Centre, *Submission 232*, p. 37; Ms Elizabeth Dangerfield, *Submission 306*, pp. 4, 17; Community Legal Centres National Human Rights Network, *Submission 331*, pp. 12–13; Canberra Community Law, *Submission 332*, p. 13.

107 Ms Elizabeth Dangerfield, *Submission 306*, p. 17.

108 National Legal Aid, *Submission 118*, p. 24.

> implementing the scheme. It would have also provided avenues for remedy and a language in which to contextualise the harm suffered.[109]

5.63 The Human Rights Law Centre agreed that 'demonstrably bad outcomes' like those arising from the Robodebt scheme 'can be challenged far more quickly and effectively' with a HRA in place.[110] Similarly, Economic Justice Australia submitted that the social security context highlighted a need for an HRA, which would:

> …enable a rights-based approach to social security law, policy development and administration, with social security recipients treated as rights-holders having certain legal entitlements. It would preclude discriminatory programs and arbitrary eligibility exclusions; ensure accessibility measures are built into the system; provide for procedurally fair, transparent and accountable decisions; enable decisions that do not meet human rights standards to be challenged and redressed; require justification for any limitations on the right – including steps to reduce access or payment rates; and set the foundations for monitoring and accountability measures to assess progressive realisation over time.[111]

5.64 The Human Rights Law Centre commented that royal commissions invariably detail experiences of abuse, neglect and harm, which collectively amount to systemic injustice, and are accompanied by significant media coverage, political condemnation and promises to do better.[112] They emphasised that it should not be for people with lived experiences of institutional harm and abuse to campaign over decades for governments to implement recommendations to prevent further harm and abuse to others.[113] They stated that a HRA should act as a vital safeguard against abuses taking place at all, build a public culture of respect for rights, and provide clear frameworks to hold governments and individuals accountable.[114]

Culture of respect for human rights

5.65 Many submitters identified the passage of human rights legislation as a necessary first step in creating a human rights culture in Australia to inculcate new respect for promoting and upholding human rights.[115] Many argued that

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[109] Australian Lawyers for Human Rights, *Submission 229*, p. 26.

[110] Human Rights Law Centre, *Submission 232*, p. 37.

[111] Economic Justice Australia, *Submission 34*, pp. 2–3.

[112] Human Rights Law Centre, *Submission 232,* p. 8.

[113] Human Rights Law Centre, *Submission 232,* p. 8.

[114] Human Rights Law Centre, *Submission 232,* p. 8.

[115] See, for example, Queensland Council for Civil Liberties, *Submission 52,* p. 4; Murdoch University Legal Clinic, *Submission 55,* p. 4; Multicultural Australia, *Submission 100,* p. 5; Indigenous Law and

Australians want to live in a society that cares for, and respects, the fundamental human rights of all individuals living in society, through everyday actions and decisions, and working together for a more sustainable, just and prosperous society.[116]

5.66 Australian Lawyers for Human Rights submitted that:

> It is only through the implementation of a federal human rights regime that we can properly create a culture of respect for human rights in Australia. Only when we foster a culture of respect for human rights in the work of government will we be able to meaningfully address harmful and discriminatory practices.[117]

5.67 Some submitters stated that the lack of a comprehensive and definitive statement of the human rights which apply within Australia is one of the most significant deficiencies which may weaken our current human rights framework.[118] Submitters argued that a federal HRA would rectify this by providing a coherent set of protections and clear statements to enhance public understanding of the duties we are owed and owe each other, and can act as a moral force of the human rights that are recognised throughout Australia.[119] Multicultural Australia submitted that the passage of a HRA would be an important opportunity to drive commitment for education, training and information dissemination to help with a cultural transformation.[120] The Human Rights Law Centre similarly submitted:

> A human rights culture is essential to creating a society grounded in dignity and respect, a recognition of a common humanity and where substantive equality is valued both for our diverse communities now and for future generations.[121]

5.68 Many submitters stated that human rights education is critical to building awareness and understanding of human rights which is essential to the reduction of human rights violations and building free, just and peaceful

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Justice Hub, *Submission 157,* p. 9; South Australian Council of Social Service, *Submission 201,* p. 11; Western Australia for a Human Rights Act, *Submission 205,* p. 5; Joel MacKay, *Submission 258,* p. 1.

116 Amnesty International Australia - Amnesty ACT/SNSW Activism Leadership Committee, *Submission 46,* p. 6; Australian Lawyers for Human Rights, *Submission 229,* p. 11.

117 Australian Lawyers for Human Rights, *Submission 229,* p. 27.

118 Murdoch University Legal Clinic, *Submission 55,* p. 4; Centre for Law and Social Justice, *Submission 185,* p. 5.

119 Indigenous Law and Justice Hub, *Submission 157,* pp. 9–10; Centre for Law and Social Justice, *Submission 185,* p. 5; Josephite Justice Office, *Submission 187,* p. 3.

120 Multicultural Australia, *Submission 100,* p. 6.

121 Human Rights Law Centre, *Submission 232,* p. 10.

societies, which would be vital to support the implementation of a HRA.[122] The Indigenous Law and Justice Hub further submitted that:

> Broad education on Indigenous rights, supported by a Charter, has an important and potentially a transformative role in supporting better experiences for Aboriginal and Torres Strait Islander people.[123]

5.69 Chapter 8 sets out in greater detail evidence received in relation to building a human rights culture and the need for human rights education.

Australia's global standing

5.70 Many submitters highlighted that Australia remains the only liberal democracy that does not have a bill of rights or human rights charter of some kind, giving effect to a full range of judicially enforceable human rights.[124] Professor Patrick Keyzer, a constitutional and human rights lawyer, submitted that, as a consequence, while Australia has signed international human rights treaties, Australians cannot avail themselves of these rights.[125]

~~5.71~~ As the 2009 National Human Rights Consultation Report noted, by not having a HRA this could leave Australia isolated from legal developments in other corresponding jurisdictions.[126] It highlighted that Australian common law has developed with the 'assistance of large bodies of cases' in comparable common law countries, namely the UK, Canada and New Zealand, and each has a form of a HRA.[127] It stated that the Australian judiciary will not be able to play a part in the important debates and developments associated with human rights that are taking place in other international jurisdictions.[128]

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122 See, for example, Australian Human Rights Commission, *Submission 1,* pp. 88–89; Blue Mountains Refugee Support Group, *Submission 10,* p. 2; Multicultural Australia, *Submission 100,* p. 6; Kingsford Legal Centre, *Submission 101,* p. 1; JFA Purple Orange, *Submission 116,* p. 43; Human Rights Law Centre, *Submission 232,* p. 10.

123 Indigenous Law and Justice Hub, *Submission 157,* p. 10.

124 Justice Peace Office Sydney Archdiocese, *Submission 2*, p. 4; Blue Mountains Refugee Support Group, *Submission 10*, p. 1; Dementia Australia, *Submission 70*, p. 4; Grandmothers for Refugees, Macnamara Electorate, *Submission 76*, p. 1; Australian Lawyers Alliance, *Submission 83*, pp. 5, 29; Maurice Blackburn, *Submission 110*, p. 6; Rural Australians for Refugees, *Submission 135*, p. 1; Queensland Advocacy for Inclusion, *Submission 140*, p. 5; People Like Us, *Submission 144*, p. 11; Charter of Rights, *Submission 165*, pp. 6, 12; Australian Lawyers for Human Rights, *Submission 229*, p. 10; Chief Executive Women, *Submission 234*, p. 2; Professor Patrick Keyzer, *Submission 291*, p. 1; Dr Stephen Lake, *Submission 315*, pp. 36, 46; Australian Centre for Disability Law, *Submission 203,* p. 1

125 Professor Patrick Keyzer, *Submission 291*, p.1.

126 National Human Rights Consultation, *Report,* September 2009, p. 278.

127 National Human Rights Consultation, *Report*, September 2009, p. 278.

128 National Human Rights Consultation, *Report*, September 2009, pp. 278–279.

5.72 A number of submitters argued that enacting a HRA would greatly strengthen Australia's international standing and begin to address the significant damage human rights breaches from consecutive governments have caused, including the rights of First Nations peoples, refugees, people living with mental distress, people with disabilities, children, women and the right to a healthy environment.[129]

The case against a Human Rights Act

5.73 Only four submissions to this inquiry argued against a federal HRA.[130] This section discusses those submissions, and notes similar arguments made at the time of the extensive 2009 National Human Rights Consultation.

Human rights already sufficiently protected

5.74 In 2009, arguments against the establishment of a HRA were set out in a publication by the Menzies Research Centre entitled *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights*.[131] In this publication, the Hon John Howard AC argued that Australia has a 'well developed domestic sense of human rights' such that the current human rights framework was adequate, and posited that a HRA would 'not enhance freedom or expand liberty'.[132] He described that the argument to bring Australia in line with other liberal democracies was 'quite humiliating' because 'left to our own devices, the natural instinct for freedom that exists in Australia would not assert itself and that somehow we need the discipline of adherence to international treaties and conventions to stay on the democratic straight and narrow'.[133] The Hon Julian Leeser MP, similarly, stated:

> While Australians are right to examine the rights protections we have in this country it would be wrong to abandon the system we have out of a desire to keep up with developments in other countries which have different

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[129] Kaldor Centre for International Refugee Law, *Submission 13,* p. 5; Civil Liberties Australia, *Submission 51,* p. 22; Dr Sebastian Cordoba, *Submission 93*, p. 2; South-East Monash Legal Service Inc, *Submission 172,* p. 4; South Australian Council of Social Service, *Submission 201,* p. 3; Community Legal Centres National Human Rights Network, *Submission 331,* pp. 7–8.

[130] Associate Professor Mark Fowler, *Submission 139;* Mr Bernard Warnick, *Submission 282;* Rule of Law Institute of Australia, *Submission 327;* Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333.*

[131] Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009.

[132] The Hon John Howard AC, 'Don't Risk What We Have' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009), pp. 68, 71.

[133] The Hon John Howard, AC, 'Don't Risk What We Have' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 70.

> institutions, different rights protections, different national imperatives and different histories to Australia.[134]

5.75 He argued that most examples of 'rights abuses' amount to failures in bureaucratic and political leadership which can be corrected in other ways rather than the requirement of a HRA.[135] The Hon George Brandis KC argued that there is no case for the enactment of a HRA in the absence of any demonstrated need for one, a fact which demonstrates the strength and protection of rights and liberties, not weaknesses.[136] Professor Helen Irving (a constitutional law academic) stated that much of what was included in the state and territory HRAs (at 2009) already existed at the Commonwealth level, in legislation and in parliamentary bodies and practices.[137]

5.76 In a joint submission to this inquiry, Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, constitutional law academics, argued that Australia has high levels of personal freedom, political rights, civil liberties and the rule of law, irrespective of there not being a bill of rights.[138] They argued that policies are subjected to parliamentary scrutiny and media critique, and asserted that only occasionally have legislation and policies been adopted that were considered to interfere with human rights.[139]

Does not prevent human rights abuses

5.77 One argument against a HRA is that, in countries where a HRA is already present, it has not addressed human rights concerns. In the 2009 publication by the Menzies Research Centre, contributors highlighted countries that have human rights abuses often also have a bill of rights.[140] For example, Cardinal

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134 Julian Leeser, 'Responding to some arguments in favour of a bill of rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights*, The Menzies Research Centre, 2009, p. 56.

135 Julian Leeser 'Responding to some arguments in favour of the bill of rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights*, The Menzies Research Centre, 2009, p. 31.

136 The Hon George Brandis KC, 'The debate we didn't have to have: the proposal for an Australian Bill of Rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill; The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, pp. 21, 28.

137 Professor Helen Irving, 'A Legal Perspective on Bills of Rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights*, The Menzies Research Centre, 2009, p. 181.

138 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 3.

139 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 3.

140 Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, pp. 43, 109, 234.

George Pell AC noted that Zimbabwe has a constitutional bill of rights protecting numerous rights including personal liberty, deprivation of poverty, but nevertheless it has human rights abuses.[141] In this publication, Mr Alan Anderson, a lawyer, similarly stated:

> The conceit that embodying a set of vague aspirations in a document and declaring it enforceable can alter underlying physical and cultural realities is shared only by the cappuccino class. Does the quality of rights protections in Canada and New Zealand bear more resemblance to that in Australia, which lacks a charter of rights, or Zimbabwe?[142]

5.78 In their joint submission, Professors Aroney and Ekins KC and Dr Saunders submitted that when the UK Human Rights Act came into force in October 2000, it was not a watershed moment for the country where it suddenly decided to respect rights, stating that the UK did not fail to protect rights even without the Act.[143] They submitted that a federal HRA would not produce a dialogue between the three branches of government, providing an analysis of case law and subsequent political debate in jurisdictions with a federal HRA suggests that these HRAs have not meaningfully contributed to dialogue or discussion. They contested that this was because 'agreement on an abstract set of words contained in a statutory charter or bill of rights does nothing to resolve debate' and the ability and willingness of parties to engage in genuine deliberation over contested political matters is dependent on factors that have nothing to do with the existence of a HRA.[144]

5.79 Mr Daniel Simon, providing evidence on behalf of the Human Rights Law Alliance and Australian Christian Lobby also argued that a HRA would not result in better laws, stating that a federal HRA cannot claim to provide the effective protections as required in the International Convention on Civil and Political Rights.[145]

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141 Cardinal George Pell, 'Four Fiction: An Argument Against a Charter of Rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 234.

142 Alan Anderson, 'Solomon's Heirs? Dissecting the Campaign for Judicial Rule in Australia' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 109.

143 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, pp. 3–4.

144 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 2.

145 Mr Daniel Simon, Human Rights Law Alliance, Australian Christian Lobby, *Committee Hansard*, 20 October 2023, p. 16.

Too much power to unelected judges

5.80 Some of the submitters against a HRA argued that a HRA would weaken Australia's system of parliamentary sovereignty by requiring the judiciary, rather than the legislature, to make value-based judgments to set limits on fundamental rights, and so would distort judicial decision-making.[146]

Human rights are too broad and vague

5.81 Professors Aroney and Ekins KC and Dr Saunders argued that human rights standards are broad and vague, meaning that a federal HRA would require courts to make decisions using open-ended moral and political reasoning, and engage in a balancing exercise of different rights.[147] They submitted that this may transform the judiciary into a law-making institution, rather than law applying, because the judiciary would take an activist approach in interpreting a HRA.[148] They also submitted that human rights laws would require judges to apply their own value judgments to the cases at hand, and that it is 'better that these value judgments are made in a democratically accountable way in the Parliament'.[149]

5.82 Mr Bernard Warnick, a former judge of the Family Court, submitted that human rights contain a semantic challenge because there is a failure of meaning, given the ambiguity and vagueness of each rights which are posited as being fundamental, innate and inalienable.[150] He goes on to conclude:

> By wrongly locating the source of human rights in ideology, rather than in the democratic legislation of a sovereign state, the paper and the suggested Preamble open the way to misunderstandings of the nature of human rights. The discommoded citizen is moved to argue, "How can you take away my birth right, my inalienable and immutable right?"
>
> Rights legislated by a democratic government need no further foundation – no indefinable sacredness of human life or inherent dignity of humanity. They need merely be stated.
>
> Ideological statements in Human Rights legislation carry ramifications beyond the meaning of the legislation itself. They generate misunderstanding about our nature. As humanity enters the 21st century, faced with issues of sustainability and scientific developments that may

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146 See, Rule of Law Institute of Australia, *Submission 327*, p. 1; Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 9.

147 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, pp. 5–6.

148 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, pp. 7.

149 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, Submission 333, p. 11.

150 Mr Bernard Warnick, *Submission 282*, p. 5.

> enable us to alter our nature, a sound understanding of what we are has never been more significant.[151]

5.83 Associate Professor Mark Fowler raised concerns that rights contained in a HRA are expressed in general and abstract terms, and that judges would be required to interpret against these imprecise principles to determine the content of the law.[152] In this regard, Mr Chris Merritt of the Rule of Law Institute of Australia argued that the 'legislature is the branch of government that is best equipped to gauge community standards and make value judgements on behalf of the nation as a whole'.[153]

Erosion of Parliamentary sovereignty

5.84 Some submitters argued that Parliament is the place to make decisions involving political debate, such as the limits on the freedom to manifest religious beliefs and freedom of speech. Professors Aroney and Ekins and Dr Saunders argued that a HRA would require judges to participate in public debates, leading to the politicisation of the judiciary and undermining public confidence in the court's independence to decide cases in a politically impartial manner.[154] They argued that the requirement for courts to interpret legislation consistently with a HRA could alter the relationship between the legislature and judiciary, including concern that declarations of incompatibility would place political pressure on the government and legislature to change the law.[155] Associate Professor Mark Fowler stated:

> Because human rights are politically contested, canvassing matters such as the entitlements of suspected terrorists, restrictions in a pandemic, the limits of surveillance or the expression of religious views in public life, judges can then be seen to be taking sides in a particular political debate, undermining confidence in the impartiality of the judiciary and its independence from executive government. Such matters should be resolved through vigorous, democratically accountable parliamentary debate, not unelected and unaccountable judges.[156]

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151 Mr Bernard Warnick, *Submission 282*, p. 11.

152 Associate Professor Mark Fowler, *Committee Hansard*, 20 October 2023, p. 17. See also, Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 3.

153 Mr Chris Merritt, Rule of Law Institute of Australia, *Committee Hansard*, 20 October 2023, p. 38.

154 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 9.

155 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 5.

156 Associate Professor Mark Fowler, *Committee Hansard*, 20 October 2023, p. 17.

5.85 However, it is noted that declarations of incompatibility are not a feature of the model proposed by the AHRC, see chapter 7. Further, as noted by the Queensland Council of Civil Liberties:

> …statutory human rights protections such as the HRA may be amended, leaving the ultimate power with the Parliament, whereas constitutionally entrenched rights are much more permanent and give courts significantly more power.[157]

Parliament can best protect rights

5.86 Some submitters argued that the Parliament has access to sufficient mechanisms to inform itself of human rights concerns, including via Senate committees and committee inquiries.[158] Professors Aroney and Ekins KC and Dr Saunders argued that parliamentary committees have the qualities to undertake human rights assessments to test the appropriateness and proportionality of laws that are better suited than the courts. [159] They submitted that parliamentary committees may: initiate own motion inquiries;[160] may have regard to many factors and considerations; publicise findings and stimulate public debate by disseminating findings freely.[161] They argued that parliamentary committees demonstrate independence of judgment and willingness to scrutinise government policies, actions and proposed legislation that is not generally shared by the courts, and submitted that a democratically elected Senate secures the committee system and facilitates better quality debate and deliberation within Parliament and the broader community.[162]

5.87 Mr Merritt, Rule of Law Institute of Australia, highlighted the role the media plays in oversight, arguing that it can also inform parliamentary decisions.[163] Associate Professor Mark Fowler submitted that this committee is a suitably placed forum, as the pre-eminent legislative committee, to which the Parliament

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157 Queensland Council of Civil Liberties, *Submission 52,* pp. 4–5.

158 See, Mr Chris Merritt, Rule of Law Institute of Australia, *Committee Hansard*, 20 October 2023, p. 39. See also, Professor Helen Irving, 'A legal perspective on Bills of Rights' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, pp. 171–172.

159 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 13.

160 However, it is noted that most parliamentary committees do not have an own motion inquiry referral power but need inquiries to be referred to them by the minister or the House or Senate, see Senate Standing Order 25(2)(a)(ii) and (b) and House of Representatives Standing Order 215(b).

161 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 13.

162 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 13.

163 Mr Chris Merritt, Rule of Law Institute of Australia, *Committee Hansard*, 20 October 2023, p. 39.

looks for guidance regarding Australia's international human rights obligations.[164]

5.88 However, a number of submitters argued there are inherent constraints to the impact of the work of this committee, particularly in the context of rushed legislation and reporting where a bill has already passed, with 'limited evidence that it has helped prevent the most serious intrusions upon rights'[165], as well as limited powers to conduct own-motion investigations.[166] See chapter 8 for a discussion of the role of this committee.

Opens the floodgates and leads to a compensation culture

5.89 In the 2009 publication by the Menzies Research Centre, Mr Alan Anderson argued that the introduction of a federal HRA could result in excessive litigation because individuals and public interest groups would seek to challenge various forms of legislation and policy, creating a litigation-centric culture, and 'lawyers' picnic'.[167] He argued that the those people whose rights are infringed are likely to be already disadvantaged and so unable to afford litigation.[168] Further, he argued that 'the additional ambiguity created by a charter would mean that cases which are today unarguable would tomorrow become contentious'.[169]

5.90 Such concerns were also raised in the 2009 National Human Rights Consultation. The report noted arguments that additional litigation could be generated by a desire to clarify meaning and content of the general rights outlined in the HRA or for a strategic purpose containing political motives. Further, that increased litigation could lead to increased government costs in responding and addressing the various challenges, in addition to the increased costs for the courts in managing cases, and its impact on access to justice for other litigants seeking vindication of their rights.[170] It also noted arguments that

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164 Associate Professor Mark Fowler, *Submission 139,* p. 3.

165 Save the Children and 54 Reasons, *Submission 168,* p. 9.

166 Castan Centre for Human Rights Law, *Submission 160,* p. 5.

167 Alan Anderson, 'Solomon's Heirs? Dissecting the Campaign for Judicial Rule in Australia' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 108.

168 Alan Anderson, 'Solomon's Heirs? Dissecting the Campaign for Judicial Rule in Australia' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 108.

169 Alan Anderson, 'Solomon's Heirs? Dissecting the Campaign for Judicial Rule in Australia' in Julian Leeser and Ryan Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights,* The Menzies Research Centre, 2009, p. 108.

170 National Human Rights Consultation, *Report*, September 2009 pp. 291–293.

the economic costs associated with introducing a federal HRA would outweigh any potential benefits.[171]

5.91 However, Professor Sarah Joseph submitted that concerns expressed in 2009 have not manifested:

> The experience thus far from the ACT, Queensland and Victoria indicates that the impact of their respective charters on overall litigation has been minimal. None of the respective governments have expressed concerns over the impact of human rights legislation on caseloads. Indeed, human rights litigation in the ACT has dropped since 2009, when it adopted a free-standing cause of action.[172]

5.92 The Law Council of Australia has similarly observed that:

> The experience of the ACT, Victoria and Queensland has shown that Australian courts are perfectly capable of implementing statutory rights instruments in a manner that respects the sovereignty of Parliament, and none of those jurisdictions has seen a 'flood' of human rights litigation, as was feared by some.[173]

5.93 Numerous submitters and witnesses also highlighted that the concerns regarding 'floodgates' have not been supported by evidence from other Australian or comparable jurisdictions, such as the UK or New Zealand.[174]

Protects criminals not ordinary people

5.94 In her submission to this inquiry, Professor Sarah Joseph noted, and rebutted, the argument that a bill of rights would be 'a villain's charter'.[175] That is, that a HRA would be abused by criminals. She argued that the use of human rights arguments by suspected criminals is most likely to arise in the context of criminal procedure laws, and so would engage procedural fairness rights which the judiciary already deals with regularly. She also stated that human rights are premised on the idea that human beings have these rights 'simply by virtue of being human', meaning that criminals have the same human rights as others, and the same limits to their human rights as others. In this regard, she stated

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171 National Human Rights Consultation, *Report*, September 2009 pp. 294–295.

172 Professor Sarah Joseph, *Submission 36*, pp. 14–15.

173 Law Council of Australia, *Submission 120*, p. 8.

174 The Hon Pamela Tate AM KC, *Submission 61*, p. 2; University of Newcastle, Centre of Law and Social Justice, *Submission 185*, p. 13; Mr Sean Costello, Principal Lawyer, Queensland Human Rights Commission, *Committee Hansard*, 15 August 2023, p. 9; Professor Melissa Castan, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 25 August 2023, p. 13; Mr Derek Schild, Head of Practice, Civil Justice Legal Practice, Legal Aid ACT, National Legal Aid, *Committee Hansard*, 28 September 2023, p. 40.

175 Professor Sarah Joseph, *Submission 36*, p. 15.

that '[w]e are all more vulnerable to rights abuses if a lesser standard of human rights protection is tolerated with regard to any person or group'.[176]

5.95 Professor Joseph also considered the contention that there are 'no rights without responsibilities', relating to the breadth of rights owed to people.[177] She noted that most rights may be permissibly limited, but argued that this does not imply that a person who has failed to fulfil their 'responsibilities' does not mean they should not have rights:

> Though the language of "responsibilities" is not used, one's rights are largely limited by one's responsibilities to others and to society. That is, the qualifications to rights essentially take account of the legitimate responsibilities that may be imposed on a person. I disagree, however, with any premise that fulfilment of one's responsibilities is a precondition to recognition of one's rights.[178]

[176] Professor Sarah Joseph, *Submission 36*, p. 15.

[177] Professor Sarah Joseph, *Submission 36*, p. 15.

[178] Professor Sarah Joseph, *Submission 36*, p. 15.

Chapter 6
What rights to protect?

6.1 This chapter outlines the various views of submitters and witnesses in relation to the rights that should be protected in a federal Human Rights Act (HRA).

6.2 The Australian Human Rights Commission's (AHRC) recommended HRA model incorporates human rights derived from the core international treaties to which Australia is party, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] The AHRC model also incorporates overarching principles derived from those international treaties and declarations that relate to particular groups, such as the Convention on the Rights of Persons with Disabilities and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] The UNDRIP provides context and clarification as to how human rights standards under international law, including under the ICCPR and the ICESCR, apply to the particular situation of Indigenous peoples. In addition, the AHRC model seeks to codify a number of common law rights and freedoms, and is intended to complement protections against discrimination.[3]

6.3 The AHRC model recommends including the following rights in a HRA:

- right to equality and non-discrimination;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- rights of the child;[4]
- right to protection of the family;

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1 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 106. Where the position paper deals with a particular issue in greater detail than the final report (Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023) the position paper is referenced.

2 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 106.

3 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 106; Australian Human Rights Commission, *Submission 1*, p. 45.

4 The AHRC model lists the following rights under the heading 'protection of children': right to the protection that is needed by the child by reason of being a child; public authorities shall take into account the best interests of every child as a primary consideration in all actions concerning them; right to be registered immediately after birth and shall have a name; and right to acquire a nationality. The AHRC noted that children are guaranteed the other rights set out in its model HRA and that the right of protection of children should be interpreted in light of article 10(3) of the ICCPR. See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 110.

- right to privacy;
- rights to freedom of movement; thought, conscience, religion and belief; assembly; association; and expression;
- right to take part in public life;
- right to liberty and security of person;[5]
- right to humane treatment when deprived of liberty;
- criminal process rights, including as relates to children;
- right to a fair hearing;
- right to compensation for wrongful conviction;
- right not to be tried or punished more than once;
- prohibition against retrospective criminal laws;
- freedom from slavery and forced work;
- cultural rights, both generally and as they relate to First Nations peoples;
- right to education;
- right to health;
- right to an adequate standard of living;
- right to a healthy environment;
- rights to work and just and favourable conditions of work; and
- right to social security.[6]

6.4 Submitters and witnesses generally agreed with the premise that a federal HRA should protect those rights that are included in the core international human rights treaties to which Australia is party. The Law Council of Australia, for instance, stated that the starting point for a HRA should be the international formulation of those rights included in the ICCPR, ICESCR and other core international human rights treaties, adapted as appropriate to the Australian context.[7] It submitted that 'any right protected by the principal UN human rights treaties to which Australia is party should be considered for inclusion', subject to a number of factors, including constitutional support, drafting which facilitates justiciability, and the responsibilities of Commonwealth public authorities/entities.[8] The Law Council also noted:

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5 The AHRC model incorporates the right to not be imprisoned on the ground of inability to fulfil a contractual obligation (article 11 of the International Covenant on Civil and Political Rights) in the right to liberty and security of person.

6 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 110–115. The rights are listed in the order they generally appear in the report.

7 Law Council of Australia, *Submission 120*, p. 12. See also, for example, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 7; National Legal Aid, *Submission 118*; Environmental Justice Australia, *Submission 159*, p. 3; Victorian Equal Opportunity & Human Rights Commission, *Submission 162,* p. 11; Australian Lawyers for Human Rights, *Submission 229,* p. 4.

8 Law Council of Australia, *Submission 120*, p. 12.

> It must, of course, be kept in mind that there is a division of responsibilities between the Commonwealth and state/territory governments, and the rights which are appropriate for inclusion in a federal Human Rights Act must reflect that division. For example, the right to education may differ in its content in the federal context, whereas the right to social security might be more appropriate for inclusion in a federal Act than in any of the state or territory Acts.[9]

6.5 Dr Julie Debeljak, Associate Professor at Law at Monash University, similarly submitted that 'Australia should fully and comprehensively protect and promote civil, political, economic, social and cultural rights, as per its international le gal obligations', including under the ICCPR and ICESCR.[10]

6.6 There was wide support among submitters and witnesses for the inclusion of both civil and political rights and economic, social and cultural rights, although there were a range of views with respect to the extent of protection that should be afforded to the latter. In addition, some submitters and witnesses advocated for the inclusion of new rights, such as the right to a healthy environment, as well as additional rights specific to vulnerable groups, such as the rights of Aboriginal and Torres Strait Islander people and victim-survivors of crime. These various views are canvassed below.

6.7 The following discussion of which rights to protect draws a distinction between civil and political rights, and economic, social and cultural rights. This distinction reflects the evidence received. A number of submitters and witnesses, however, have highlighted the artificial nature of this distinction and emphasised the indivisibility of human rights. The Castan Centre for Human Rights Law, for instance, submitted:

> …such a distinction between civil and political rights and economic, social and cultural rights does not stand up to closer scrutiny. The distinction is both unhelpful and erroneous, as human rights under international law are 'independent, indivisible and interrelated'. Both categories of rights involve obligations to respect, protect and fulfil.[11]

6.8 The AHRC's *Free and Equal* 2022 position paper also acknowledged the independent, indivisible and interrelated nature of human rights, stating:

> 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').

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9 Law Council of Australia, *Submission 120*, p. 12.

10 Associate Professor Julie Debeljak, *Submission 15*, p. iv.

11 Castan Centre for Human Rights Law, *Submission 160*, p. 12. See also, Associate Professor Julie Debeljak, *Submission 15*, pp. 32–34; Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 7; Australian Human Rights Institute, *Submission 69*, p. 2; Economic Justice Australia, *Submission 34*, p. 74; Professor Sarah Joseph, *Submission 36*, p. 22.

> In this regard, many civil and political rights cannot be realised unless economic, social and cultural rights are also secured, and vice versa.[12]

6.9 Given the submissions stressed that a federal HRA should reflect Australia's international human rights obligations, it is important to consider the status of reservations and interpretive declarations made by Australia in respect of certain rights in the international treaties to which it is a party. Australia's international obligations are limited by its reservations. A reservation is a statement 'made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State'.[13] For example, Australia has entered reservations with respect to articles 10, 14, and 20 of the ICCPR.[14] Australia has also made interpretive declarations with respect to certain rights, such as the rights to legal capacity, respect for physical and mental integrity and liberty of movement under the Convention on the Rights of Persons with Disabilities.[15] An interpretive declaration is a declaration made by a State 'about its understanding of a matter contained in, or the interpretation of, a particular provision in a treaty'.[16] While reservations render the reserved provisions of the treaty non-binding and thus 'act partially to reduce the effect of a certain guarantee', interpretive declarations 'essentially give notice of a State's interpretation of the treaty'.[17] Interpretive declarations 'do not purport to exclude or modify the legal effects of a treaty', but they still affect how a state implements international law in their domestic legal system.[18]

6.10 UN treaty committees have consistently requested that Australia review and withdraw its reservations and interpretive declarations, and have raised

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12 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 106. See also, pp. 124–125.

13 United Nations Office of the High Commissioner of Human Rights, *Glossary of technical terms related to the treaty bodies*. It is noted that '[r]eservations are governed by the Vienna Convention on the Law of Treaties, and cannot be contrary to the object and purpose of the treaty'.

14 See, United Nations, *Treaty Series*, vol. 1197 (1980), pp. 411–413. A full list of Australia's reservations to human rights treaties is set out in Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 116.

15 See, United Nations, *Treaty Series*, vol. 2515 (2008), pp. 3–4.

16 United Nations Office of the High Commissioner of Human Rights, *Glossary of technical terms related to the treaty bodies*.

17 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, pp. 886–887.

18 United Nations Office of the High Commissioner of Human Rights, *Glossary of technical terms related to the treaty bodies*.

concerns regarding Australia's lack of progress in this respect.[19] The AHRC's final *Free and Equal* report draws attention to this fact, stating:

> It is unsatisfactory that there has been no formalised approach to reviewing reservations and interpretive declarations on a periodic basis to ensure their relevance to modern Australian life.
>
> The Australian Government should ultimately strive to ensure that it can meet all human rights standards to the fullest extent and be open to scrutiny for how it is seeking to do so. Reservations and interpretive declarations work against this outcome and should only be maintained for the shortest time necessary and in the narrowest form possible.

6.11 The AHRC therefore recommends that the 'Joint Standing Committee on Treaties conduct a review of all existing reservations and interpretive declarations under UN human rights treaties'.[20] It states that this recommendation goes towards 'ensuring appropriate levels of accountability and transparency exist in relation to Australia's international human rights obligations'.[21] A number of submitters echoed the AHRC's concerns and recommended that Australia review and withdraw its reservations and interpretive declarations.[22]

Civil and political rights

6.12 Civil and political rights refer to those rights primarily derived from the ICCPR. In its *Free and Equal* 2022 position paper, the AHRC summarises these rights as follows:

> Many [civil and political rights] 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

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[19] See, for example, UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) p. 2; UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (2019) p. 2; UN Committee on the Rights of the Child, *Concluding observation on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6 (2019) p. 2.

[20] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, Recommendation 6F, p. 13.

[21] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 117.

[22] See, for example, Coalition of Activist Lesbians (Inc) Australia, *Submission 167*, p. 2; Save the Children, *Submission 168*, pp. 6, 20; Australian Centre for Disability Law, *Submission 203*, pp. 2–3; Professor Simon Rice, *Submission 204*, pp. 3, 20; UNICEF Australia, *Submission 210*, p. 8; Miss Emily Mursa, *Submission 248*, p. 1.

> free from torture, as well as freedom of movement, freedom from arbitrary detention, and the right to a fair trial.[23]

6.13 The AHRC HRA model includes most civil and political rights as articulated in the ICCPR, although there is some variation in terms of suggested wording of certain rights (see discussion below). Additionally, the model proposes that some civil and political rights are not to be protected as stand-alone rights, as they are in international human rights law. For example, the AHRC model proposes to include the right to self-determination, protected in common article 1 of the ICCPR and ICESCR, within a preamble as an overarching principle of the HRA rather than a stand-alone right.[24] In this regard, the AHRC explains:

> The Commission's proposal…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…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.[25]

6.14 The views of submitters and witnesses with respect to the inclusion of the right to self-determination is considered further below. Other rights that are not expressly protected in the AHRC's HRA model include the right of aliens not to be expelled without due process[26] and the prohibition against advocacy of national, racial or religious hatred.[27] The exclusion of these rights is not addressed by the AHRC in its *Free and Equal* reports and, as such, limited evidence was received by the committee on this matter. The right of aliens not to be expelled without due process is protected by article 13 of the ICCPR, which provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his

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23 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022, p. 105.

24 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022, p. 133.

25 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022, p. 191. See also, pp. 192–195.

26 International Covenant on Civil and Political Rights, article 13.

27 International Covenant on Civil and Political Rights, article 20.

> expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

6.15 The article incorporates notions of due process also reflected in article 14 of the ICCPR, which protects the right to a fair hearing. Article 14 does not ordinarily apply to migration decisions as such decisions are not captured by the concept of 'suit at law' (noting that article 14 requires that in the determination of a person's 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 UN Human Rights Committee has stated that article 13 encompasses 'the guarantee of equality of all persons before the courts and tribunals as enshrined in [article 14(1)] and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'.[28]

6.16 The prohibition against any propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is set out in article 20 of the ICCPR. Australia has entered the following reservation with respect to article 20:

> Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (o*rdre public*), the right is reserved not to introduce any further legislative provision on these matters.[29]

6.17 The rights in articles 13 and 20 are closely related to other human rights that are included in the AHRC's model, including the rights to a fair hearing, freedom of expression, freedom of religion and equality and non-discrimination. These related rights, depending on how they are drafted, may afford sufficient protection to the rights contained in articles 13 and 20 of the ICCPR. For example, if a 'civil proceeding' in the context of the right to a fair hearing were defined to include migration and refugee decisions, the right of aliens to not be expelled without due process may be adequately protected. In this regard, Refugee Legal, a free specialist legal advice clinic, recommended 'expanding the AHRC's proposal for "rights in criminal proceedings" to certain civil proceedings, including migration and refugee proceedings, because of the importance of (funded) legal assistance and interpreters to the equality and

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[28] UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial (2007)* [17], [63].

[29] See, United Nations, *Treaty Series*, vol. 1197 (1980), p. 412.

fairness of proceedings'.[30] Other submitters argued that the rights should be included as stand-alone rights.[31]

6.18 Additionally, the AHCR model does not include right to an effective remedy as a stand-alone right, but it still appears to be protected insofar as the model provides for a direct cause of action for rights violations. This would appear to satisfy the international human rights law requirement that a remedy be available that is effective.[32] In particular, the AHRC 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.
>
> 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.[33]

6.19 The AHRC further references the Hon Pamela Tate AM KC (Adjunct Professor of Law and former justice of the Supreme Court of Victoria) on this issue, stating:

> The Hon Pamela Tate [AM KC] 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

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30 Refugee Legal, *Submission 129*, p. 16.

31 See, for example, Church of Scientology Australia, *Submission 66*, p. 13.

32 International Covenant on Civil and Political Rights, article 2(3). The right to an effective remedy includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective. See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia*, UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

33 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022, p. 108.

> 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)'.[34]

6.20 A number of submitters and witnesses provided evidence on the right to an effective remedy in the context of more general discussions regarding remedies.[35] Dr Julie Debeljak, for instance, submitted that in order to comply with the right to an effective remedy, a federal HRA 'must include a freestanding cause of action supported by a freestanding remedy where public authorities fail to meet their substantive and procedural human rights obligations'.[36] The AHRC's proposed approach to remedies and views of submitters in this regard are further discussed in Chapter 7.

6.21 Among those submitters and witnesses who supported a federal HRA, the inclusion of civil and political rights was considered uncontroversial.[37] The Law Council of Australia, for example, submitted that 'comprehensive incorporation of the ICCPR should be expected' and noted that 'statutory human rights instruments in comparable jurisdictions predominantly protect civil and political rights'.[38] Indeed, the HRAs in the ACT, Victoria and Queensland all primarily protect civil and political rights (although the ACT and Queensland, to a lesser extent, include some economic, social and cultural rights) and submitters observed that the AHRC model is broadly similar to these state and territory instruments in terms of rights content.[39] The United Kingdom (UK), New Zealand and Canada's approach to rights protection also primarily focuses on civil and political rights.[40] The Victorian Equal Opportunity and Human

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34 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia*, December 2022, p. 268, quoting 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), p. 20.

35 See, for example, Law Council of Australia, *Submission 120*, p. 22; Dr Bruce Chen, *Submission 158*, p. 13; Human Rights Law Centre, *Submission 232*, p. 18.

36 Associate Professor Julie Debeljak, *Submission 15*, p. 81.

37 See, for example, Australian Human Rights Institute, *Submission 69*, p. 2; National Legal Aid, *Submission 118*, p. 32; Law Council of Australia, *Submission 120*, p. 12; Castan Centre for Human Rights Law, *Submission 160*, p. 13; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 11; Racial and Religious Discrimination Legal Service, *Submission 184*, p. 1; Western Australia For a Human Rights Act (WA4HRA), *Submission 205*, pp. 10–11; Amnesty International Australia, *Submission 213*, p. 20; Human Rights Law Centre, *Submission 232*, pp. 20–32.

38 Law Council of Australia, *Submission 120*, p. 12.

39 See, for example, National Legal Aid, *Submission 118*, p. 32; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 11.

40 *Human Rights Act 1988* (UK), excepting the right to education: schedule 1, part II, article 2; *New Zealand Bill of Rights Act 1990* (NZ); and *Canadian Charter of Rights and Freedoms 1982*, excepting minority language educational rights: section 23.

Rights Commission submitted that '[e]nshrining civil and political rights in domestic law through a national Human Rights Act would help bring Australia into compliance with our international treaty obligations'.[41]

Proposed wording of civil and political rights

6.22 While most submitters and witnesses agreed with the civil and political rights proposed for inclusion by the AHRC, there was some difference of opinion as to the suggested wording of some of these rights. In particular, some submitters raised concerns that the AHRC model diverged too substantially from the text of the ICCPR. Dr Paul Taylor, Honorary Senior Lecturer and Fellow of the Centre for Public International and Comparative law at the University of Queensland, submitted that:

> …the AHRC's "list of rights for inclusion" takes the ICCPR as its reference point, but extensively redrafts the treaty text for ICCPR rights for no adequately accounted reason…The result of the federal charter would be to establish in Australia a radically different ordering of ICCPR rights from that envisaged by the ICCPR, in conflict with Australia's ICCPR obligations…A federal charter in this form would reinforce and accentuate the serious imbalances which already exist in the protection available for human rights in Australian law…. The cure is straightforward: ICCPR rights could simply be reproduced faithfully in the AHRC's "list of rights for inclusion", including their respective terms of limitation and qualification.[42]

6.23 Dr Taylor further argued that '[b]y re-casting rights in the proposed federal charter in divergence from their ICCPR counterparts, the process of interpreting them is not simplified but mystified'.[43] He considered that the result of redefining the civil and political rights as well as the 'unusual selection of some rights as absolute' and the application of a single limitation clause, would result in the promotion of some rights over others without any apparent justification'.[44]

Right to freedom of religion

6.24 A number of submitters raised particular concerns with respect to the AHRC's proposed wording of the right to freedom of thought, conscience, religion and belief. Article 18 of the ICCPR provides:

> 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.

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41 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 11.

42 Dr Paul Taylor, *Submission 216*, pp. 1–2.

43 Dr Paul Taylor, *Submission 216*, p. 5.

44 Dr Paul Taylor, *Submission 216*, p. 5. See Chapter 7 for a more detailed discussion of the AHRC's proposed limitation clause and approach to absolute rights.

> 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.
>
> 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.

6.25 The AHRC model proposes the following wording:

> (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.[45]

6.26 The AHRC explains that the wording proposed is based on equivalent provisions in the Victorian, ACT and Queensland HRAs, with some alterations to 'ensure clarity by reflecting accepted terminology used in Article 18 of the ICCPR and the body of international human rights law'.[46] The AHRC's model proposes a single limitation clause which sets out the criteria to follow when considering whether a limit on rights is permissible, and as such article 18(3) is not directly replicated (see chapter 7 regarding this clause). The AHRC notes that it included article 18(4) of the ICCPR in the right to education, which would provide:

> 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.[47]

6.27 Dr Taylor raised concerns that the AHRC's proposed wording did not differentiate between those elements of the right that are absolute (namely, the right to *hold* a religious or other belief or opinion) and those that are subject to the specific limitations clause contained in article 18(3) of the ICCPR (namely,

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45 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 349.

46 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 349.

47 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 349, 365.

the freedom to *manifest* one's religion or beliefs).[48] Dr Taylor also raised concerns with respect to the reassignment of article 18(4) to the right to education.[49]

6.28 Mr Daniel Simon, representing the Human Rights Law Alliance and the Australian Christian Lobby, raised similar concerns:

> The AHRC's proposal diminishes the freedom of religion right as it's found in the ICCPR. It rewords it in such a way that it softens the protection, and it actually removes some elements of it altogether. So the right in the ICCPR is an absolute right, and it includes the right of parents to ensure the education of their children in accordance with their own convictions. That element, in particular, has been removed from the proposal: the right of parents to educate their children in accordance with their own convictions…Rather than being under the right of freedom of religion, it's now a right to education…It rearranges the right by moving it elsewhere and rewords the right so that it's ambiguous with regard to a parent's ability to have their own choice consistent with their own convictions for their children.[50]

6.29 Similarly, the National Catholic Education Commission submitted that the AHRC's proposed wording 'varies significantly enough from that of Article 18 of the ICCPR to cast doubt on the far-reaching and profound nature of the proposed right'. It considered that 'a federal human rights Act may, if enacted with this wording, not provide effective protection according to the intent of Article 18 of the ICCPR' and recommended that any future HRA 'must be appropriately conceived and constructed, and not dimmish or favour recognised and protected right[s]'.[51]

6.30 Some submitters indicated that if certain rights were to be redrafted, particularly the right to freedom of religion, they would be more supportive of the AHRC's proposed model. Dr Taylor, for instance, concluded that he would support a federal HRA if it faithfully reproduced the rights as set out in the ICCPR, including the limitation clauses specific to each of those rights, in combination with a selection of rights from the ICESCR.[52] The Church of Scientology similarly recommended that the wording proposed by the AHRC with respect

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48 Dr Paul Taylor, *Submission 216*, p. 6.

49 Dr Paul Taylor, *Submission 216*, p. 6. See also, Mrs Vanessa Cheng, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, Thursday 28 September 2023, p. 8; Ms Monica Doumit, Director of Public Affairs and Engagement, Catholic Archdiocese of Sydney, *Committee Hansard*, Thursday 28 September 2023, p. 12.

50 Mr Daniel Simon, Solicitor for Human Rights Law Alliance, Legal Representative for Australian Christian Lobby, *Committee Hansard*, 20 October 2023, pp. 18–19. See also, Human Rights Law Alliance, *Submission 14*; Australian Christian Lobby, *Submission 143*; Rule of Law Institute of Australia, *Submission 327*, p. 2.

51 National Catholic Education Commission, *Submission 98*, pp. 5, 8.

52 Dr Paul Taylor, *Submission 216*, p. 10. See also, Rule of Law Institute of Australia, *Submission 327*, p. 2.

to the right to freedom of religion be 'replaced with a duplication of article 18 of the ICCPR'.[53] Australian Lawyers for Human Rights (an association of legal professionals practicing and promoting awareness of international human rights standards in Australia) also recommended that the right to freedom of religion 'be drafted in such a way as to fully reflect the substantive scope and content of this right and its limitations as articulated within Article 18 of the ICCPR'.[54] More specifically, they recommended adding to the AHRC's proposed provision 'words to the effect that "limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others"'.[55] As to the importance of such a limitations clause, Dr Tania Penovic, appearing on behalf of Australian Lawyers for Human Rights, gave evidence that:

> For rights which are not absolute, clear parameters need to be set for balancing those rights against other competing rights or pressing societal interests such as public health in accordance with international law and jurisprudence, and the various iterations of the previous government's draft religious freedoms legislation demonstrate the importance of balancing countervailing rights in accordance with international jurisprudence, ensuring that the enjoyment of the rights of some, such as the freedom to manifest one's religion or beliefs, do not become a vehicle for legitimising violations of the rights of others, including LGBTIQ-plus people.[56]

6.31 Ms Larissa Kaput, an advocate for victim-survivors, argued there was a need to balance freedom of religion and freedom *from* religion, arguing it is critical that any legislative change permitting religious freedoms does not permit it to be used by the religious institutions as a means to cause harm.[57]

Prohibition of torture or cruel, inhuman or degrading treatment or punishment

6.32 Some submitters also raised concerns about the AHRC's proposed wording of the prohibition of torture or cruel, inhuman or degrading treatment or punishment.[58] This right is protected in article 7 of the ICCPR, which provides:

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53 Church of Scientology, *Submission 66*, p. 18.

54 Australian Lawyers for Human Rights, *Submission 229*, p. 40.

55 Australian Lawyers for Human Rights, *Submission 229*, p. 40.

56 Dr Tania Penovic, Senior Chair, Women and Girls' Rights, Australian Lawyers for Human Rights, *Committee Hansard*, 27 September 2023, p. 11.

57 Larissa Kaput, *Submission 335*, p. 8.

58 See, for example, Human Rights Law Alliance, *Submission 14*, p. 12; Australian Association of Christian Schools, *Submission 19*, pp. 8–9; Freedom for Faith, *Submission 119*, p. 10; Australian Christian Lobby, *Submission 143*, pp. 4, 8–9; Dr Paul Taylor, *Submission 216*, p. 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.[59]

6.33 The prohibition of torture or cruel, inhuman or degrading treatment or punishment is absolute and may never be subject to any limitations.[60] In this regard, the UN Human Rights Committee has stated:

> The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the [ICCPR], no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.[61]

6.34 The AHRC model proposes framing the right as 'protection from torture and cruel, inhuman or degrading treatment' and suggests the following wording:

> (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.[62]

6.35 The AHRC stated that this right is intended to implement article 7 of the ICCPR and the wording is based closely on the equivalent provisions in state and territory HRAs.[63] The AHRC recommended that this right, alongside other absolute or non-derogable civil and political rights, be carved out of any limitation clause as such rights must not be subject to any limitation.[64]

6.36 Some submitters were concerned that the AHRC's rewording of the right in article 7 of the ICCPR may have the effect of broadening its scope and altering

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59 See also, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

60 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992) [3].

61 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992) [3].

62 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 343.

63 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia* December 2022, p. 343. See, Queensland HRA, section 17, ACT HRA, section 10 and Victorian Charter, section 10.

64 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255. See also, Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, Recommendation 24, p. 181.

its meaning.[65] The Human Rights Law Alliance considered the AHRC's proposed wording to be 'very different' from the text of article 7, particularly the phrase '*treated*…in a cruel, inhuman or degrading way' (which differs from the language used in article 7, that of subjecting a person to 'cruel, inhuman or degrading *treatment*').[66] The Human Rights Law Alliance submitted that the different wording used in the AHRC's model would:

> …[prohibit] conduct at a new low threshold, of "treating" someone in a "degrading way." It would be an absolute right (like the prohibition of torture), meaning that every right in its path must give way. This is inconsistent with the ICCPR because the redrafting is so radical that it would impinge in a major way on other rights.[67]

6.37 The Australian Association of Christian Schools raised similar concerns. It considered that the AHRC's proposed wording extended the prohibition against torture or cruel, inhuman or degrading treatment or punishment in article 7 'to a much broader and ill-defined prohibition against "treating" someone in a "degrading way"'. The Australian Association of Christian Schools was concerned that 'certain aspects of Christian teaching' may be 'claimed to be degrading and prohibited' by this right.[68] It recommended that the exact text of article 7 be incorporated into a federal HRA.[69] Similarly Freedom for Faith submitted that the AHRC's 'proposed reframing of Article 7 materially lowers the threshold [of what would constitute degrading treatment], because "treated… in a degrading way" could include speech and/or religious practice that an individual claims is "degrading"'.[70] The Australian Christian Lobby were likewise concerned that the AHRC's version of the right 'would be capable of suppressing various forms of free speech (e.g., on biblical texts) and religious practice, and could stand in the way of basic parental support for children'.[71] Dr Taylor also disagreed with the AHRC's proposed wording of this right but acknowledged that such concerns could generally be addressed if a HRA faithfully reproduced the rights in the ICCPR.[72]

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65 See, for example, Human Rights Law Alliance, *Submission 14*, p. 12; Australian Association of Christian Schools, *Submission 19*, pp. 8–9; Freedom for Faith, *Submission 119*, p. 10; Australian Christian Lobby, *Submission 143*, pp. 4, 8–9; Dr Paul Taylor, *Submission 216*, p. 7.

66 Human Rights Law Alliance, *Submission 14*, p. 12.

67 Human Rights Law Alliance, *Submission 14*, p. 12.

68 Australian Association of Christian Schools, *Submission 19*, pp. 8–9.

69 Australian Association of Christian Schools, *Submission 19*, pp. 8–9.

70 Freedom for Faith, *Submission 119*, p. 10.

71 Australian Christian Lobby, *Submission 143*, p. 4. See also pp. 8–9.

72 Dr Paul Taylor, *Submission 216*, pp. 7, 10.

Economic, social and cultural rights

6.38 Economic, social and cultural rights are those rights primarily derived from the ICESCR, summarised by the AHRC in its *Free and Equal* 2022 position paper as follows:

> 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.[73]

6.39 The AHRC model includes various economic, social and cultural rights, including the rights to education, health, an adequate standard of living and social security as well as cultural rights as they relate to Aboriginal and Torres Strait Islander people. The AHRC emphasises the importance of protecting economic, social and cultural rights in a federal HRA, noting that:

> …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. And the restriction of these rights is often linked to civil and political rights – like the right to non-discrimination.[74]

6.40 The AHRC notes that a clear majority of stakeholders consulted in relation to its *Free and Equal* 2022 position paper supported the inclusion of economic, social and cultural rights in a HRA and considered there to be strong support among the Australian public of these rights.[75] In light of this, the AHRC 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.[76]

6.41 Of those who supported a federal HRA, the vast majority of submitters and witnesses supported some form of inclusion of economic, social and cultural rights, although there were a range of views as to what extent these rights should be protected and how they should be framed in legislation.[77] As outlined

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73 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 105.

74 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 125.

75 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 125–126.

76 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 127.

77 See, for example, Amnesty International, *Submission 213*, p. 20; ACT Human Rights Commission, *Submission 176*, p. 15; Aboriginal Legal Service of Western Australia, *Submission 239*, p. 14; National

below, some submitters supported the model proposed by the AHRC, while others advocated for more extensive protection of economic, social and cultural rights more closely reflective of the text of the ICESCR. Additionally, some submitters noted the relevance of how these rights are to be interpreted. For instance, Ms Kate Eastman AM SC, a barrister and expert in human rights law, stated:

> [T]hat idea about what rights we put in and what we don't put in probably doesn't need as much time on it if we also are very clear about how the rights will be interpreted in the future and whether all the rights have that capacity to evolve over time.[78]

6.42 National Legal Aid supported the inclusion of rights primarily drawn from the ICCPR and some areas of the ICESCR.[79] It considered that the inclusion of economic, social and cultural rights in a federal HRA was:

> especially important…given the prominent role played by the federal government in relation to economic and social matters, including in the administration and funding of the [National Disability Insurance Scheme] and social security system, and funding of health care and housing.[80]

6.43 National Legal Aid submitted that it was 'particularly supportive of the inclusion of the right to an adequate standard of living and the right to a healthy environment in the AHRC's proposed [HRA]', based on the case work experience of Legal Aid Commissions with respect to disasters and housing.[81] Legal Aid NSW, for example, provided advice to people whose homes were destroyed or uninhabitable following floods and observed the lack of legal protections afforded to residents who were relocated to temporary accommodation (which was not subject to residential tenancy legislation).[82] National Legal Aid stated that it hoped a federal HRA would 'lead to upstream decision making that is more conscious of the interrelationship between disasters and rights, and its relevance to disaster prevention and disaster resilience in the context of the right to an adequate standard of living'.[83]

6.44 Mr Chris Stamford, National Human Rights Act Campaign Manager for Civil Liberties Australia, stated that it supported the AHRC model as a 'workable

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Legal Aid, *Submission 118*, p. 32; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 13; Aboriginal Legal Service of Western Australia Limited, *Submission 239*, p. 14.

78 Ms Kate Eastman AM SC, *Committee Hansard*, 28 September 2023, p. 52.

79 National Legal Aid, *Submission 118*, p. 32.

80 National Legal Aid, *Submission 118*, p. 33.

81 National Legal Aid, *Submission 118*, p. 33.

82 National Legal Aid, *Submission 118*, pp. 33–34.

83 National Legal Aid, *Submission 118*, p. 34.

starting point'.[84] The model can then develop and evolve over time, as has been done in the ACT, for example, where various economic, social and cultural rights were subsequently included. Mr Stamford argued that a federal HRA would 'have to start with civil and political rights' and economic, social and cultural rights could be added over time, noting:

> the fact that…[the committee] make[s] a decision at this point around the cut-off point for…economic, social and cultural rights doesn't preclude the opportunity to come back and have a look at the act later on and continue to build on it.[85]

6.45 The ACT Human Rights Commission also supported an evolutionary model. It noted that while the ACT HRA only protected human rights derived from the ICCPR when it was first introduced, subsequent law reforms led to the protection of some economic, social and cultural rights, such as the rights to education and work, and, most recently, the right to a healthy environment.[86] The ACT Human Rights Commission considered that the ACT HRA 'reflects a balanced approach to introduction of rights protection and demonstrates an effective way of achieving cultural change'.[87]

Constitutional concerns

6.46 In considering how to frame economic, social and cultural rights in a federal HRA, the AHRC model flags some potential constitutional concerns. The main concern identified relates to ensuring that economic, social and cultural rights are framed compatibly with the exercise of judicial power under Chapter III of the Constitution, which requires criteria or standards to be applied in a 'sufficiently definite' manner.[88] The National Human Rights Consultation Committee (Consultation committee) sought advice with respect to this for their 2009 report,[89] and in particular:

> whether it would be a valid exercise of judicial power for a court to interpret a provision of Commonwealth legislation consistently with rights, make a declaration of incompatibility or determine that a public authority had acted incompatibly with four named economic and social rights [those being the

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84 Mr Chris Stamford, National Human Rights Act Campaign Manager, *Committee Hansard,* 20 October 2023, pp. 12.

85 Mr Chris Stamford, National Human Rights Act Campaign Manager, *Committee Hansard,* 20 October 2023, pp. 11–12.

86 ACT Human Rights Commission, *Submission 176*, pp. 14–15.

87 ACT Human Rights Commission, *Submission 176*, p. 15.

88 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 127.

89 National Human Rights Consultation, *Report*, September 2009.

> rights to just and favourable conditions of work, an adequate standard of living, health and education].[90]

6.47 Having regard to the 'very general terms' in which economic, social and cultural rights are expressed in the ICESCR, Stephen Gageler AC (then Commonwealth Solicitor-General, and now Chief Justice of the High Court of Australia) and Henry Burmester AO KC opined:

> We think that the prescription in the ICESCR of rights of that nature - which might be sought to be achieved through any one or more of a range of measures - would be likely to be regarded by the High Court as lacking "sufficient specificity" to support the making of a law under the external affairs power…[91]

6.48 The advice continued:

> An examination of the content of those rights as set out in the ICESCR demonstrates a general absence of what would traditionally be regarded as judicially manageable standards. Given the issues of resource allocation that are necessarily involved, how is a court to assess, for instance, whether or not a person is being denied "just and favorable conditions of work" (Art 7), "an adequate standard of living'" (Art 11) or "the enjoyment of the highest attainable standard of physical and mental health" (Art 12)?[92]

6.49 Mr Gageler and Mr Burmester noted, however, that the rights to just and favourable conditions of work and education include 'some more specific rights that may represent judicially manageable standards', such as the obligations to equal pay for equal work, remuneration for public holidays and free and compulsory primary education.[93] They concluded that:

> Allowing for the possibility of these limited exceptions we therefore consider that any general provision for enforcement of the rights set out in Arts 7, 11, 12 and 13 of the ICESCR would be unlikely to be held to involve the exercise of judicial power within the meaning of Ch III of the Constitution. The position would be the same whether or not an issue concerning those rights arose in the course of proceedings for some other relief or remedy.[94]

6.50 At the time, the Human Rights Law Centre commissioned advice from Peter Hanks KC, Debra Mortimer SC (now Chief Justice of the Federal Court),

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90 National Human Rights Consultation, *Report*, September 2009, p. 317.

91 Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009) [40].

92 Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009) [49].

93 Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009) [50].

94 Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009) [51].

Associate Professor Kristen Walker (now Justice of Appeal, Supreme Court of Victoria) and Graeme Hill (now SC) on this matter.[95] Their advice concluded that there 'is no necessary constitutional objection to including economic and social rights in any federal [HRA]'[96] for the following main reasons:

> 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. Some broadly expressed social and economic rights are, for example, found in the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the **Victorian Charter**).
>
> …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. For example, the right not to be subjected to an unfair trial requires the government to put in place structures that enable a fair trial (including appropriate arrangements for legal aid).[97]

6.51 As to those economic, social and cultural rights that are broadly expressed, the legal advice stated that 'the mere breadth of the rights in the ICESCR does not make them non-justiciable' and that 'the courts can apply judicial technique to very general provisions, by giving content to those provisions on a case-by-case basis, and by requiring the criteria to be satisfied by evidence'.[98] It stated that although broadly expressed, the rights in the ICESCR 'do impose obligations on the signatory states' and 'do require "common action" by the signatory states, and therefore engage the external affairs power'.[99] The advice concluded that '[f]or these reasons, the real issue is whether economic and social rights can be appropriately expressed, and the courts' role appropriately limited. This would seem possible'.[100] The advice considered:

> It would seem to be possible, for example, to frame statutory provisions that give more specific content to the very general language of the introductory parts of the identified ICESCR rights. Admittedly, those more specific provisions might be only a partial implementation of the ICESCR; however, that fact alone would not prevent reliance on the external affairs power.[101]

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95 Human Rights Law Centre, *Submission 232.1*.

96 Human Rights Law Centre, *Submission 232.1*, p. 1.

97 Human Rights Law Centre, *Submission 232.1*, p. 1.

98 Human Rights Law Centre, *Submission 232.1*, p. 9.

99 Human Rights Law Centre, *Submission 232.1*, p. 9.

100 Human Rights Law Centre, *Submission 232.1*, p. 1.

101 Human Rights Law Centre, *Submission 232.1*, pp. 15-16.

6.52 The legal advice also opined that it would be possible to confine the 'role of the courts through the limitations that (1) measures need only be reasonable, and (2) reasonableness is assessed within available resources'.[102]

6.53 The AHRC references this advice in their *Free and Equal Report*.[103] A number of submitters and witnesses also responded to these constitutional concerns, including the legal advice outlined above. The Economic, Social and Cultural Rights Network (Australia & Aotearoa/New Zealand) (ESCR Network), for instance, said the following with respect to the advice of Gageler and Burmester:

> …while it was provided by eminent constitutional experts, it was informed by decontextualised reading of the text of the ICESCR, rather than drawing on established international jurisprudence and theory on the content of [economic social and cultural rights] and the nature of the obligations imposed by the ICESCR.[104]

6.54 Dr Genevieve Wilkinson, co-convenor of the ESCR Network, gave further evidence that they 'disagree with the outdated suggestion that there are any constitutional barriers to the enforceability or suitability of these rights or that they lack clarity'.[105]

6.55 The Human Rights Law Centre considered the advice of Gageler and Burmester to be 'contentious' and submitted:

> The debate regarding the justiciability and enforceability of economic, social and cultural rights can be put to rest. We know from burgeoning international jurisprudence that many aspects of economic, social and cultural rights are immediately applicable and capable of judicial application. Successful adjudication of these rights has taken place now for decades, debunking the assertion that ICESCR rights cannot be legitimately justiciable. Courts have a role to play in actively monitoring and assessing whether states are fulfilling their obligations to protect and promote ICESCR rights.[106]

6.56 Professor George Williams AO, a constitutional law expert, also gave evidence on this point, stating the Gageler and Burmester advice indicated:

> …that it would be possible in conformity with the Constitution to have some level of enforcement for those [economic, social and cultural rights]. There are limits and parameters, but that is where the exposure draft comes in. There is no threshold no; it is just that it has to be done carefully and

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102 Human Rights Law Centre, *Submission 232.1*, p. 16.

103 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 127.

104 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 9.

105 Dr Genevieve Wilkinson, *Committee Hansard*, 20 October 2023, p. 1.

106 Human Rights Law Centre, *Submission 232*, pp. 34–35.

> properly. But that is true for any Commonwealth legislation. There is nothing unusual here.[107]

6.57 Professor Williams stated that he favoured the view that economic, social and cultural rights are no more broadly expressed than many civil and political rights and they can be interpreted and applied in the exercise of judicial power. He argued:

> …there's good evidence internationally, such as in South Africa, for example, where economic, social and cultural rights are enforced. There are other examples as well. I favour that view. I think it is the better view. But I can't say it will be the view that the High Court adopts. It hasn't been litigated. Again, I think it's a risk based analysis for parliament essentially. I would favour taking that risk because I think there is a good and strong basis for it, but you have to recognise it's not without risk.[108]

6.58 Regarding the issue of enforceability of economic, social and cultural rights, Ms Kate Eastman emphasised that many of these rights, such as the rights to housing, health and employment, are already protected to some extent in domestic law:

> For example, if we take economic, social and cultural rights with respect to employment rights, they're clearly articulated in the international convention. One only needs to open the Fair Work Act and those rights are replete there. There is the right to minimum wages and the right to rest and leisure and paid public holidays. A lot of our employment laws very much recognise and respect those rights and probably go even further than our international obligations. We have a right to universal health care in this country—that meets that right. We have rights that protect tenants from eviction. We have a range of rights against discrimination in relation to accommodation.
>
> In some senses, the important issue around these rights is not to look at them only in the abstract…we're comfortable with the recognition of these rights in other laws that are quite subject-matter specific. It's not a great leap to bring them into a framework of rights where the rights work together.[109]

6.59 Ms Eastman noted that if a court was asked to change broad policies for a group of people 'rather than just determining a matter or dispute between two individuals or a group', then 'the exercise of judicial power would be stretched'. However, she considered that 'this is about framing the rights and also being really clear about what remedies are available for economic, social and cultural rights'.[110]

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107 Professor George Williams AO, *Committee Hansard,* 28 September 2023, p. 50.

108 Professor George Williams AO, *Committee Hansard,* 28 September 2023, p. 52.

109 Ms Kate Eastman AM SC, *Committee Hansard,* 28 September 2023, pp. 52–53.

110 Ms Kate Eastman AM SC, *Committee Hansard,* 28 September 2023, p. 53.

Framing of economic, social and cultural rights

6.60 Having regard to the above constitutional concerns, the AHRC states that it has aimed to frame economic, social and cultural rights in a constitutionally sound manner (while noting that it would be 'constructive to seek updated advice from the Solicitor-General on this question [of constitutionality]').[111] In effect, this has meant articulating these rights more narrowly than they are expressed in the ICESCR and not requiring progressive realisation principles to be considered by the courts (see below for further discussion of how rights are to be realised).[112] The AHRC 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.[113]

6.61 The AHRC states that its model focuses 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.[114]

6.62 Mr Darren Dick, Senior Policy Executive of the AHRC, elaborated on this narrower approach to economic, social and cultural rights, stating:

> Everything doesn't have to be in the human rights act, I guess is what we're saying. We know that's a flavour of some of the criticisms of our model: why doesn't it include the whole of this treaty, for example, all the rights in CEDAW and all the rights in the CRC? This isn't necessarily the place to do everything. We need better discrimination laws, we need a human rights act, we need human rights indicators, we need better government processes for setting priorities and making decisions, we need human rights education. It fits across all of them. It's not in one spot.[115]

6.63 The AHRC explains that the full range of economic, social and cultural rights would still form part of the AHRC's educational and advocacy functions and

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111 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

112 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

113 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

114 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

115 Mr Darren Dick, *Committee Hansard*, 27 September 2023, p. 68.

'inform upstream consideration of decisions about the framing of laws, through requiring a statement of compatibility to address the compliance with ICESCR as a whole'.[116] The AHRC further notes that its approach to framing economic, social and cultural 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.[117]

6.64 The AHRC model closely draws on similar legislation in comparable international and domestic jurisdictions. For instance, the ACT and Queensland HRAs have 'taken a similar qualified approach to ICESCR rights'.[118] The AHRC explains that its model would protect those economic, social and cultural rights already protected by state and territory instruments, including the rights to education, health services and work, as well as some additional rights, including the rights to an adequate standard of living, social security and a healthy environment (which derives its core elements from other rights in the ICESCR).[119] The AHRC argues that this approach would 'incorporate all the key ICESCR rights'.[120]

6.65 As to the proposed wording for each right, the AHRC model states:

> 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.[121]

6.66 In particular, the rights to education, health and work largely reflect the language used in state and territory HRAs. For instance, regarding the right to education, the AHRC explains that its proposed wording is partially based in section 36 of the Queensland HRA and section 27A of the ACT HRA but 'has

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116 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia* December 2022, p. 128.

117 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

118 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 129. The ACT HRA protects cultural rights, right to education and right to work; the Victoria HRA protects cultural rights and the Queensland HRA protects cultural rights, right to education and right to health services.

119 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 129.

120 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 129.

121 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 129. The proposed wording for each right is discussed on pp. 129–131.

been adapted for clarity and to reflect international law'.[122] Other rights, such as the rights to an adequate standard of living and social security, are not yet protected in state and territory HRAs and thus are solely derived from international law.

6.67 With respect to some rights, the proposed wording of the right closely reflects the language used in international law. For example, article 9 of the ICESCR recognises 'the right of everyone to social security, including social insurance'. The AHRC's proposed wording for this right is very similar: 'every person has the right to have access to social security'.[123] However, with respect to other rights, the AHRC's proposed wording differs, in some instances quite substantially, from the language used in the ICESCR. For instance, article 11 of the ICESCR protects 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'. In contrast, the AHRC's model proposes the following wording:

> (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.[124]

6.68 With respect to the right to health, article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and sets out the steps States parties should take to achieve full realisation of this right, such as those steps necessary for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases' (namely, public health measures).[125] Whereas, the AHRC proposes the following for the 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.

6.69 The right to health under international law not only encompasses the right to available, accessible, acceptable and quality health *services*, but also health-care facilities and goods (such as medicines) as well as the right to live in conditions

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[122] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 365.

[123] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia* December 2022, p. 376.

[124] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 371–372.

[125] International Covenant on Economic, Social and Cultural Rights, article 12(1) and (2)(c).

that promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[126] The articulation of the right to health in the ICESCR is therefore much broader than the proposed right in the AHRC's model.[127]

6.70 With respect to rights that are, to varying degrees, protected in both the ICCPR and ICESCR, the AHRC often proposes wording that more closely reflects the ICCPR rather than the ICESCR, the result being the apparent removal of some elements of the right. For example, the AHRC proposes including the right to protection of families, which would provide:

> (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

6.71 The AHRC explains that this right implements article 23 of the ICCPR and references article 10 of the ICESCR.[128] The proposed wording more closely reflects the language used in article 23 of the ICCPR, although it does not expressly include article 23(4), which provides that States parties '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'. Additionally, the AHRC's proposed right does not expressly protect article 10(2) of the ICESCR, which provides that:

> 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.

6.72 This element of the right may, however, be protected in practice by other economic, social and cultural rights, including the rights to social security and work (which provides protection from lack of work-related income due to maternity).[129]

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[126] UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food* (article 11) (1999); *General Comment No. 15: the right to water* (articles 11 and 12) (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016)

[127] See, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 17.

[128] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 345.

[129] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 130.

6.73 Similarly, the AHRC proposes a general cultural right (in addition to First Nations cultural rights – which are discussed further below), which would provide that:

> 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.[130]

6.74 This right implements article 27 of the ICCPR and is based on sections 27 and 28 of the Queensland HRA.[131] Article 27 of the ICCPR provides:

> 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.

6.75 By framing the right to culture by reference to article 27 of the ICCPR, rather than article 15 of the ICESCR, the AHRC arguably narrows the scope of this right. Article 15 of the ICESCR recognises the right of everyone (not just those belonging to ethnic, religious or linguistic minorities) to 'take part in cultural life'; to 'enjoy the benefits of scientific progress and its applications'; and to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they are] the author'.

6.76 Of those who supported the inclusion of economic, social and cultural rights, a large number of submitters and witnesses considered the AHRC model to be too narrow and advocated for the full inclusion of all economic, social and cultural rights, including all elements of those rights, as protected in the ICESCR.[132] The Australian Human Rights Institute, a research body at the University of NSW, for example, submitted:

> We urge the adoption of a broader approach to ESC rights than the 'somewhat narrow[er]' approach of the AHRC and recommend that ESCR should be included as fully justiciable rights consistent with our obligations under the international human rights treaties to which Australia is a party.
>
> The Institute supports the inclusion of all ESCR rights as set out in ICESCR. We submit that the AHRC model fails to protect important dimensions of

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130 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 364.

131 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 364.

132 See, for example, Associate Professor Julie Debeljak, *Submission 15*, p. v; Economic Justice Australia, *Submission 34*, p. 3; Professor Sarah Joseph, *Submission 36*, p. 22; Australian Human Rights Institute, *Submission 69*, p. 1; Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 7; Law Council of Australia, *Submission 120*, p. 15; Castan Centre for Human Rights Law, *Submission 160*, p. 2; National Justice Project, *Submission 225*, p. 8.

> ESCR and that these would be better protected by more generous and explicit protection of ESCR.[133]

6.77 The ESCR Network similarly argued for the full inclusion, on an equal basis, of all economic, social and cultural rights, civil and political rights as well as environmental rights in any federal HRA.[134] Dr Genevieve Wilkinson gave evidence that the ESCR Network 'disagree[d] with the narrow and limited approach the commission has adopted in relation to economic, social and cultural rights, particularly its suggestion to remove obligations of progressive realisation from the reach of courts' (see below for further discussion on progressive realisation).[135] The ESCR Network advocated for a visionary rather than evolutionary federal HRA, stating:

> Once bills of rights are enshrined, they can be legally or politically difficult to update or change. This is why it is vital for Australia to embrace the potential of future-facing human rights. The major challenges of the 21st century (which include climate change, unregulated AI, economic inequality, democratic erosion, insecurity and growing inequality) require a visionary approach to human rights that equips our society and governments with the tools to ensure these challenges are informed by appropriate rights and rights frameworks.[136]

6.78 The ESCR Network pointed to the inclusion of economic, social and cultural rights in the Queensland and ACT HRAs as 'evidence that these rights are in fact consistent with our human rights culture as a country and are constitutionally, legislatively and judicially capable of operating effectively to hold government to account on key rights such as health care, education, housing, workplace rights, culture and, most recently, the environment'. They submitted that while the incremental expansion of these rights in the ACT HRA is 'necessary and desirable', a federal HRA presents an 'opportunity to extend these successful [state and territory] models and provide full equivalence of all human rights at the national level'.[137] The ESCR Network recommended framing economic, social and cultural rights as fully justiciable rights, using language more closely reflective of the text of the ICESCR. For example, it recommended including 'a fully justiciable right for individuals to the highest

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133 Australian Human Rights Institute, *Submission 69*, p. 1.

134 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 7; Dr Genevieve Wilkinson, *Committee Hansard,* 20 October 2023, p. 1.

135 Dr Genevieve Wilkinson, *Committee Hansard,* 20 October 2023, p. 1.

136 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 6.

137 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 8.

attainable standard of physical and mental health, reflecting Australia's obligations to respect, protect and fulfil all elements of the right'.[138]

6.79 Professor Sarah Jospeh, Professor of Human Rights Law at Griffith University and former Director of the Castan Centre for Human Rights Law, endorsed the views of the ESCR Network and considered the AHRC's model to be 'too conservative and possibly reflective of outmoded views of ESC rights', in terms of the view that these rights are not justiciable.[139] Professor Joseph emphasised the indivisibility, interdependence and equal importance of all human rights and cautioned that the 'inclusion of civil and political rights without economic social and cultural rights however could risk the elevation of the former rights at the potential expense of the latter, when such rights might clash'.[140]

6.80 Dr Julie Debeljak acknowledged the cautious approach of the AHRC but considered the proposed model did not go far enough. She submitted:

> Although it is understandable that the AHRC Position Paper takes a risk-averse approach to the protection and promotion of economic, social and cultural rights in a federal human rights instrument, it does not adequately reflect the state of international and comparative jurisprudence regarding the content of economic, social and cultural rights, the obligations on States to (eventually) fully realise those rights, and the numerous methods and modes of enforceability including their justiciability.[141]

6.81 The Law Council acknowledged that 'the approach suggested by the AHRC is logical, and would minimise any potential for provisions of the Human Rights Act to be found to be unconstitutional, in line with the [legal advice sought by the Human Rights Law Centre]'.[142] It observed that the partial inclusion of economic, social and cultural rights in the ACT HRA, for example, 'reflects the reality that such legislation is the result of political consensus as well as expert opinion on legal feasibility and/or constitutionality'. Nevertheless, the Law Council recommended that a federal HRA 'should reflect the broadest possible range of Australia's international human rights obligations', including the provisions of the UNDRIP.[143] It recommended that at a minimum, a federal HRA should protect all the rights already protected by existing state and territory HRAs, adapted as appropriate to a federal enactment, and that 'additional

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138 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 18.

139 Professor Sarah Joseph, *Submission 36*, p. 24; Professor Sarah Joseph, *Committee Hansard*, 15 August 2023, p. 56.

140 Professor Sarah Joseph, *Submission 36*, p. 22.

141 Associate Professor Julie Debeljak, *Submission 15*, p. v.

142 Law Council of Australia, *Submission 120*, p. 15. The legal advice sought by the Human Rights Law Centre is set out in its *Submission 232.1*.

143 Law Council of Australia, *Submission 120*, p. 16.

economic, social and cultural rights…should be included, but with careful attention to framing to ensure they are compatible with the Australian Constitution and amenable to judicial enforcement'.[144]

6.82 Numerous submitters and witnesses drew on South Africa as an illustrative example of how various economic, social and cultural rights can be justiciable.[145] The Constitution of South Africa enumerates both civil and political rights and economic, social and cultural rights. Dr Debeljak, for example, submitted:

> The [South African] Constitutional Court's decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making; that is, the State is to act rationally and reasonably in the provision of social and economic rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were reasonable. This type of judicial supervision is well known to the Australian legal system, being no more and no less than what we require of administrative decision makers – that is, a similar analysis for judicial review of administrative action is adopted.
>
> Given the jurisprudential emphasis on the negative obligations associated with economic, social and cultural rights, the limited approach to the progressive realisation of the positive obligations, and the focus on rationality and reasonableness, there is no reason to preclude formal and justiciable protection of economic, social and cultural rights in Australia.[146]

Exclusion of economic, social and cultural rights

6.83 The committee did not receive any specific evidence that economic, social and cultural rights should be excluded altogether from a federal HRA. As outlined above, submitters and witnesses who supported a federal HRA were generally supportive of the inclusion of some, if not all, of the rights set out in the ICESCR. A small number of submitters and witnesses were, however, of the view that a federal HRA should not be enacted at all (as outlined in chapter 5). The main arguments against a federal HRA include:

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144 Law Council of Australia, *Submission 120*, p. 16.

145 See, for example, Professor Sarah Jospeh, *Submission 36*, p. 24; Cancer Council Australia and McCabe Centre for Law and Cancer, *Submission 88*, p. 14; Professor Simon Rice, *Submission 204*, p. 12; Professor Beth Goldblatt, Co-Convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Committee Hansard*, 20 October 2023, p. 4; Professor George Williams AO, *Committee Hansard,* 28 September 2023, p. 52; Dr Tania Penovic, Senior Chair, Women and Girls' Rights, Australian Lawyers for Human Rights, *Committee Hansard*, 27 September 2023, p. 11.

146 Associate Professor Julie Debeljak, *Submission 15*, p. 34. Associate Professor Debeljak continues on pages 34–36 to provide examples of jurisprudence from the South African Constitutional Court to demonstrate this argument.

- human rights should be defined by the legislature, not the judiciary, as it requires a value judgment based on community standards; and
- by inviting judges to interpret legislation against 'broad and vague' standards, the 'the proper functioning of courts' would be distorted.[147]

6.84 Some of these arguments, such as those relating to courts interpreting legislation against broad and imprecise standards, may be particularly applicable to economic, social and cultural rights given their broad expression in the ICESCR. However, as set out above, the majority of submitters and witnesses considered that notwithstanding their breadth, economic, social and cultural rights could be framed in such a way as to ensure their constitutionality and justiciability. In this regard, Professor Joseph submitted:

> ESC rights are justiciable: there is simply too much evidence to argue to the contrary. Courts across the world, largely in States that are poorer than Australia, have issued numerous decisions on ESC rights. Furthermore, the UN Committee on Economic Social and Cultural Rights has issued numerous General Comments which add flesh to the bare bones of the words of the ICESCR.[148]

Other rights

6.85 Many submitters and witnesses supported the inclusion of other rights in addition to those contained the ICCPR and ICESCR. Some of these rights are new rights, such as the right to a healthy environment, whereas other rights relate to specific groups, such as Aboriginal and Torres Strait Islander people, children, people with disability, older persons and victim-survivors of crime. Several rights relating to these groups are protected by subject matter specific treaties that expand or elaborate on the overarching rights contained in the ICCPR and ICESCR in relation to particular individuals or groups (such as women, people with disabilities, children and racial groups).[149] Some submitters and witnesses provided evidence that these subject matter specific rights should be included in addition to the core rights contained in the ICCPR and ICESCR.[150]

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147 See, Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 2; Rule of Law Institute of Australia, *Submission 327*, pp. 1–2; Associate Professor Mark Fowler, *Submission 139* and *Committee Hansard*, 20 October 2023, pp. 16–17.

148 Professor Sarah Joseph, *Submission 36*, p. 24.

149 The relevant treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); and Convention on the Rights of Persons with Disabilities (CRPD). While not a treaty, the United Nations Declaration on the Rights of Indigenous Persons is also relevant.

150 See, for example, Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 14; Environmental Defenders Office, *Submission 147*, p. 6; Tasmanian Aboriginal Legal Service, *Submission 217*, p. 7; No to Violence, *Submission 53*, p. 4; Refugee Legal, *Submission 129*, pp. 18–19;

Right to a healthy environment

6.86 In July 2022, the UN General Assembly adopted a resolution that specifically recognised the 'right to a clean, healthy and sustainable environment' as a human right and noted its relationship to other rights and existing international law. The resolution affirmed that the promotion of this right 'requires the full implementation of the multilateral environmental agreements under the principles of international environmental law' and called on States parties, as well as other relevant stakeholders, to 'adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all'.[151] Australia was one of 161 UN member states that voted in favour of the resolution.

6.87 As to the content of this right, the UN Special Rapporteur's report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment distinguishes between the substantive and the procedural elements of the right. These elements are summarised as follows:

> The procedural elements are access to information, public participation, and access to justice and effective remedies. The substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.[152]

6.88 The AHRC's model HRA recommends including the right to a healthy environment, to provide:

> Every person has the right to an environment that does not produce adverse health consequences in the following respects:
>
> (d) Every person has the right not to be subject to unlawful pollution of air, water and soil.
> (e) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.
> (f) No unjustified retrogressive measures should be taken with regard to this right.
> (g) No one should be subject to discrimination regarding the realisation of this right.

Canberra Community Law, *Submission 332*, p. 14; SNAICC, *Submission 121*, pp. 4 and 10; Human Rights Law Centre, *Submission 232*, pp. 11–12.

[151] UN General Assembly, *The human right to a clean, healthy and sustainable environment*, UNGA Res. A/RES/76/300 (2022), p. 3. See also, UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53 (2019).

[152] See also, UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53 (2019), p. 3.

6.89 The AHRC states that its decision to include this right 'reflects growing international consensus and practice around the role and importance of environmental protections', noting that 'approximately 80% of UN member States recognise the right to a healthy environment in constitutional or legislative texts'. The AHRC also indicates that there was 'support for the inclusion of environmental considerations by a number of *Free & Equal* stakeholders'.[153]

6.90 As to the proposed wording of the right, the AHRC explains:

> 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 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).[154]

6.91 In particular, clause (a) reflects States parties' obligations with respect to the rights to health and life, including obligations to refrain from unlawfully polluting air, water and soil, and to take measures to preserve the environment and protect it against harm, pollution and climate change.[155] Clause (b) reflects obligations with respect to the rights to health and an adequate standard of living, and clauses (c) and (d) reflect 'overarching ICESCR principles to avoid retrogressive measures and discrimination', meaning 'that there should be no unjustified backward movement with respect to the enjoyment of this right'.[156] The AHRC's proposal appears to reflect some of the substantive elements of the right, such as access to safe and uncontaminated water, but does not appear to capture the procedural elements of the right (as outlined below). The proposed wording also differs from that used in the General Assembly resolution (which provides for the 'right to a *clean, healthy and sustainable* environment').

6.92 The right to a healthy environment is currently being considered for inclusion in the ACT HRA. The Human Rights (Healthy Environment) Amendment Bill 2023 (ACT) seeks to insert the right to a clean, healthy and sustainable

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153 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 131.

154 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 131.

155 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 373, citing the UN Human Rights Committee's commentary regarding States parties' obligations with respect to the rights to health and life.

156 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia* December 2022, pp. 131, 373.

environment, which is to be enjoyed without discrimination.[157] While public authorities would have an obligation to act in a way that is compatible with this right and to consider this right in decision-making, there would not initially be a direct right of action to the ACT Supreme Court for a breach of these obligations.[158] The operation of these provisions would, however, be reviewed by the minister five years after commencement.[159] The explanatory memorandum explains that while a direct right of action is not available, all other enforcement mechanisms under the ACT HRA would apply, such as the requirement for the Attorney-General to certify compatibility of new government bills; the requirement for courts and decision-makers to interpret laws consistently with human rights; the ability for the ACT Supreme Court to issue a declaration of incompatibility with respect to this right; and the ability to bring complaints for breaches of this right to the ACT Human Rights Commission.[160] The ACT Human Rights Commission submitted that it strongly supports the inclusion of this right in the ACT HRA, stating:

> The inclusion of such a right would promote early consultation by agencies about the implications of proposed legislation on the right to a healthy environment, even if that legislation was not environmentally focused itself. There would also need for agencies to provide justification as to whether any actions or decision taken that limit the human right to a healthy environment would be reasonable, necessary and proportionate. Coupled with the proposed accessible complaints mechanism that would allow individuals to take action when they believe their right to a healthy environment has been infringed, such a right will in our view create further incentives for organisational change to enable better consideration of the impacts on the human rights of those impacted by decisions affecting the environment.[161]

6.93 With respect to a federal HRA, a significant number of submitters and witnesses supported the inclusion of the right to a healthy environment.[162] For example,

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157 Human Rights (Healthy Environment) Amendment Bill 2023 (ACT), item 6, proposed section 27C.

158 Human Rights (Healthy Environment) Amendment Bill 2023 (ACT), item 7.

159 Human Rights (Healthy Environment) Amendment Bill 2023 (ACT), item 8.

160 Human Rights (Healthy Environment) Amendment Bill 2023 (ACT), explanatory memorandum, p. 8.

161 ACT Human Rights Commission, *Submission 176*, p. 15.

162 See, for example, Dr Genevieve Wilkinson, Co-Convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Committee Hansard*, 20 October 2023, p. 2; Australian Human Rights Institute, *Submission 69*, pp. 13–17; National Legal Aid, *Submission 118*, p. 34; Queensland Youth Policy Collective, *Submission 141*, pp. 9–14; Environmental Defenders Office, *Submission 147*, p. ii; Environmental Justice Australia, *Submission 150*, p. 3; Federation of Community Legal Centres (Victoria) Inc, *Submission 174*, p. 18; ACT Human Rights Commission, *Submission 176*, p. 15; Australian Lawyers for Human Rights, *Submission 229*, pp. 41–43; Human

the Victorian Equal Opportunity and Human Rights Commission submitted that the right should be included 'as it brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity'.[163] Emeritus Professor Andrew Byrnes, appearing on behalf of the Australian Human Rights Institute (and formerly the committee's legal adviser), welcomed the inclusion of the right and noted that:

> When Australia voted in favour of the United Nations General Assembly resolution in July last year on the subject, it recognised and affirmed the importance of this right for the enjoyment of all rights. The inclusion in a Commonwealth human rights act of this right, in the broad form adopted by the General Assembly, will provide guard rails to protect our most vulnerable communities and will support good governance in the current climate era.[164]

6.94 The Asian Research Institute for Environmental Law similarly emphasised the interrelationship between human rights and the environment, submitting that 'human rights cannot be enjoyed without a safe, clean, healthy and sustainable environment, and sustainable environmental governance cannot exist without an enabling environment for exercising environmental rights'.[165] Environmental Justice Australia likewise submitted that a 'safe and healthy environment is broadly accepted as a precondition to the realisation of most other human rights' and while other rights, such as the rights to life or health, 'arguably can be interpreted to include a right to a safe and healthy environment, they are not sufficient to safeguard this right'.[166] The Human Rights Law Centre argued that the right to a healthy environment is also 'inseparable from the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander people' and noted the importance of including this right in light of the acute and disproportionate 'threats and impacts on Aboriginal and Torres Strait Islander peoples' connection to Country, culture and wellbeing'.[167] A 2022 decision of the UN Human Rights Committee against Australia is relevant in this regard. It found that Australia's failure to provide adaptation and mitigation measures to address climate change impacts violated the rights to culture and a private life of eight Torres Strait Islanders.[168]

Rights Law Centre, *Submission 232*, p. 51–53; Asian Research Institute for Environmental Law, *Submission 237*, p. 3.

163 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 14.

164 Emeritus Professor Andrew Byrnes, *Committee Hansard*, 27 September 2023, p. 46.

165 Asian Research Institute for Environmental Law, *Submission 237*, p. 3.

166 Environmental Justice Australia, *Submission 150*, p. 5.

167 Human Rights Law Centre, *Submission 232*, p. 52.

168 *Daniel Billy et al. v Australia*, UN Human Rights Committee Communication No. 3624/2019 (2022).

6.95 As to the constitutionality of including the right to a healthy environment in a federal HRA, the Law Council of Australia noted 'that constitutional support for the enactment of rights not specifically included in either the ICCPR, ICESCR or the other human rights treaties to which Australia is party would need to be considered carefully'.[169] Other witnesses, however, were not concerned about any potential constitutional challenge. Professor Williams and Ms Eastman gave evidence that there were multiple heads of constitutional power that may be used to protect this right.[170] Several submitters also provided evidence with respect to other comparable jurisdictions that have protected the right to a healthy environment, such as Canada.[171] As noted above, 80 per cent of UN member states have also recognised the right to a healthy environment in domestic law.[172]

6.96 While many submitters supported including the right to a healthy environment in a federal HRA, there were some concerns raised with respect to the AHRC's proposed wording of the right, with views varying as to which, and to what extent, the substantive and procedural elements of the right should be protected.

Substantive element of the right

6.97 Several submitters argued that the right to healthy environment should be broadly expressed and reflective of international standards. Environmental Defenders Office submitted that the right should 'include the right to a "clean", "healthy" and "sustainable" environment, consistent with the General Assembly's resolution'.[173] Environmental Justice Australia agreed, submitting that:

> Express recognition of the necessity of a 'safe' environment as a component of the right reflects the necessary need to recognise and respond to the reality of climate change when articulating and realising the right to a healthy environment.[174]

6.98 Submitters considered the AHRC's proposed framing of the right to be too narrow and argued that the right should not be limited to an exhaustive list of

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169 Law Council of Australia, *Submission 120*, p. 14.

170 Professor George Williams AO and Ms Kate Eastman, *Committee Hansard*, 28 September 2023, pp. 51–52.

171 See, for example, Australian Human Rights Institute, *Submission* 69, p. 14; Cancer Council Australia and McCabe Centre for Law and Cancer, *Submission 88*, p. 14.

172 UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/49/53 (2022) p. 2.

173 Environmental Defenders Office, *Submission 147*, p. 5.

174 Environmental Justice Australia, *Submission 150*, p. 6.

substantive elements (as is currently proposed).[175] The Australian Human Rights Institute, for instance, submitted:

> Particularly in light of the Special Rapporteur's six substantive protections, limiting such protection to 'unlawful' pollution resulting from 'air, water and soil', or access to 'safe' food and water, is unduly narrow. A fuller and broader expression of the right would offer a more holistic suite of protections, inclusive of healthy eco-systems and biodiversity for example, consistent with view of the Special Rapporteur and ought to be embraced.[176]

6.99 The Environmental Defenders Office reasoned that the right should not be restricted to an exhaustive list of substantive elements because:

> …interpretation of the right will evolve as our understanding of State obligations under international human rights law in relation to the environment evolves, noting that human rights treaties are considered living instruments that must evolve over time and be interpreted in light of present conditions.[177]

6.100 Environmental Justice Australia similarly submitted that to 'account for the continued development in emerging international law and environmental science, the right should not include substantive elements' but rather should be defined broadly.[178] However, if substantive elements were to be included, it submitted that those elements proposed by the AHRC 'may be too prescriptive' and instead, the substantive elements 'should include but not be limited to' those elements identified by the Special Rapporteur. They reiterated 'that any substantive element must not limit the ways in which the right will evolve at international law and in a changing environment (and with changing scientific knowledges)'.[179]

6.101 As to the specific wording of the proposed right, a number of submitters raised concerns with the AHRC's proposal to include the term 'unlawful' with respect to the right not to be subject to air, water or soil pollution of air. The Australian Human Rights Institute submitted:

> The term 'unlawful' should not be adopted as it implies that lawful pollution is acceptable even where it produces adverse health consequences, an implication which contradicts the very definition of the right to a healthy environment.[180]

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[175] See, for example, Environmental Justice Australia, *Submission 150*, p. 6; Environmental Defenders Office, *Submission 147*, p. 5.

[176] Australian Human Rights Institute, *Submission 69*, p. 17.

[177] Environmental Defenders Office, *Submission 147*, p. 5.

[178] Environmental Justice Australia, *Submission 150*, pp. 4, 7.

[179] Environmental Justice Australia, *Submission 150*, p. 7.

[180] Australian Human Rights Institute, *Submission 69*, p. 17.

6.102 The Environmental Defenders Office similarly disagreed with the inclusion of the term 'unlawful' and further considered that doing so 'contradicts the Commission's proposed definition of the right to a healthy environment as the right to an environment that does not produce adverse health consequences'.[181] Environmental Justice Australia raised similar concerns, submitting:

> The right to not be subjected to harmful pollution should not be confined to legal interpretation of what is 'lawful' and 'unlawful' or potential 'carve-outs' in legislation that could make harmful pollution lawful…Such framing has the potential to seriously reduce the circumstances in which the right would be relied upon and implies that lawfulness eliminates the need for protection of the right.[182]

Procedural elements of the right

6.103 The procedural elements of the right are reflected in the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and the UN Framework Principles on Human Rights and the Environment (UN Framework Principles). The Aarhus Convention links environmental rights and human rights and imposes obligations on States parties with respect to various procedural rights.[183] As articulated in article 1 of the Aarhus Convention:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

6.104 The UN Framework Principles contain 16 principles that articulate the human rights obligations of States in relation to environmental matters.[184] Principles 7, 9 and 10 of the UN Framework Principles reflect the procedural rights articulated in the Aarhus Convention, that is, States parties should provide for:

- public access to environmental information;
- public participation in environmental decision-making, including considering the views of the public in decision-making; and

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[181] Environmental Defenders Office, *Submission 147*, p. 5.

[182] Environmental Justice Australia, *Submission 150*, p. 8.

[183] The procedural rights include access to information (articles 4 and 5), public participation in decision-making (articles 6–8) and access to justice in environmental matters (article 9).

[184] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/37/59 (2018), annex, pp. 7–20.

- access to effective remedies for violations of human rights and environmental laws.[185]

6.105 The former UN Special Rapporteur emphasised that these principles 'do not create new obligations'; rather they reflect 'actual or emerging international human rights law' and apply 'existing human rights obligations in the environmental context'.[186] For example, the procedural right of access to information is reflected in multiple human rights instruments, including article 19 of the ICCPR, which protects the right to freedom of expression.[187] The UN Human Rights Committee has observed:

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[188]

6.106 Several submitters argued that the procedural elements of the right to a healthy environment should be specifically protected as they are essential for the realisation of the right. In particular, submitters recommended the inclusion of the procedural rights protected in the Aarhus Convention, including the rights to access information, participate in decision-making and access to justice.[189] Environmental Justice Australia further submitted that additional specific procedural and participation rights for, and developed by, Aboriginal and Torres Strait Islander people should be included to 'remedy historical and ongoing exclusion from government decision making'.[190] Some submitters also

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[185] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/37/59 (2018), annex, pp. 11–13. See also, Asian Research Institute for Environmental Law, *Submission 237*, pp. 4–5; Environmental Defenders Office, *Submission 147*, p. ii; Environmental Justice Australia, *Submission 150*, pp. 4, 8–9, 23–24.

[186] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/37/59 (2018).

[187] International Covenant on Civil and Political Rights, article 19; UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [18]. See also Asian Research Institute for Environmental Law, *Submission 237*, p. 7.

[188] UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [19].

[189] See for example Environmental Defenders Office, *Submission 147*, p. 9; Australian Human Rights Institute, *Submission* 69, pp. 16–17; Environmental Justice Australia, *Submission 150*, pp. 8 and 23.

[190] Environmental Justice Australia, answers to questions on notice, 25 August 2023 (received 14 September 2023) pp. 4–6; Environmental Justice Australia, *Submission 150*, pp. 8, 23. See also, Asian Research Institute for Environmental Law, *Submission 237* Australian Lawyers for Human Rights, *Submission 229*, pp. 41–43.

recommended that Australia ratify the Aarhus Convention in order to better recognise these rights.[191]

6.107 The committee also received evidence as to whether the procedural elements of the right to a healthy environment, as enshrined in the Aarhus Convention, could be extended to apply to other human rights. Environmental Justice Australia stated:

> By extending participation rights enshrined in the Aarhus Convention to other human rights, Australia would be considered a leader by its international counterparts in the protection of participation in human rights. However, to the extent that there are already some participation rights articulated within Australian domestic law and in other international instruments, it would not be entirely novel nor unprecedented to implement these procedural rights.[192]

6.108 The AHRC's proposed model includes 'cross-cutting procedural duties', including a participation duty[193] and equal access to justice duty,[194] which may, to some extent and in a more generalised way, encompass the procedural elements of the right to a healthy environment (although noting the proposed participation duty would only apply in respect of decisions affecting Aboriginal and Torres Strait Islander people, people with disability and children). The AHRC's proposed procedural duties are further discussed in chapter 7. Additionally, as noted above, some procedural elements, such as access to information, are somewhat reflected in international human rights law. Limited evidence was received as to whether existing rights, such as the right to freedom of expression, would be sufficient to capture all procedural elements of the right to a healthy environment, as set out in the Aarhus Convention.

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191 See, for example, Environmental Defenders Office, *Submission 147*, p. 9.

192 Environmental Justice Australia, answers to questions on notice, 25 August 2023 (received 14 September 2023) pp. 4–6. See also, Ms Elke Nicholson, Lawyer, Environmental Justice Australia, *Committee Hansard*, 25 August 2023, pp. 43–44.

193 The AHRC explains its participation duty as follows: '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 incorporate a binding procedural obligation to engage in participation processes where a decision disproportionately affects the rights of Aboriginal or Torres Strait Islander people, people with disability, or children. See, Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 58. 7.40

194 The AHRC model also proposes a complementary 'equal access to justice duty' for public authorities, which would mean that public authorities have a positive duty to realise access to justice principles. 'Access to justice' is an umbrella concept associated with the rule of law, common law principles and several human rights (in particular, the right to a fair hearing, the right to an effective remedy, equality before the law and non-discrimination). See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 215.

Related environmental rights

6.109 Further, a number of submitters argued that additional related rights should be protected and specific principles recognised, including with respect to:

- **environmental human rights defenders** – including those rights and obligations set out in the Aarhus Convention and Escazú Agreement (particularly article 9). Some submitters further recommended the establishment of a rapid response mechanism to protect defenders exercising their rights from penalisation, persecution, harassment or any other form of retaliation for their involvement;[195]
- **environmental protest** – recognising the 'trend towards criminalising peaceful protest, specifically environmental protest'. Some submitters suggested drafting specific rights in similar terms to article 9 of the Escazú Agreement and at a minimum, consistent with the rights guaranteed in articles 19, 20, 21 and 22 of the ICCPR;[196]
- **nature** – including that there be no strict delineation between human rights and the rights of nature;[197]
- **Aboriginal and Torres Strait Islander people and culture** – including 'distinct and additional cultural rights for Aboriginal and Torres Strait Islander people highlighting the importance of protection and conservation of Country';[198] and
- **inter-generational equity** – which 'provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for future generations'.[199]

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[195] The Escazú Agreement refers to the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. Environmental Justice Australia made recommendations regarding suggested wording of such rights, see *Submission 150*, p. 24. See also, Environmental Defenders Office, *Submission 147*, p. ii–iii and Asian Research Institute for Environmental Law, *Submission 237*, pp. 5, 14–15.

[196] See, Environmental Justice Australia, *Submission 150*, pp. 20–22; Environmental Justice Australia, answers to questions on notice, 25 August 2023 (received 14 September 2023) pp. 1–4.

[197] See, Environmental Defenders Office, *Submission 147*, p. 6.

[198] See, Queensland Youth Policy Collective, *Submission 141*, pp. 13–14; Environmental Defenders Office, *Submission 147*, p. ii; Environmental Justice Australia, *Submission 150*, pp. 4, 8–9, 11–24; Asian Research Institute for Environmental Law, *Submission 237*, p. 4, 13–15; Dr Genevieve Wilkinson, Co-Convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Committee Hansard,* 20 October 2023, p. 2.

[199] Queensland Youth Policy Collective, *Submission 141*, p. 12, quoting Preston CJ, *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [399].

Rights of Aboriginal and Torres Strait Islander people

6.110 The AHRC's HRA model proposes to reflect the rights of Aboriginal and Torres Strait Islander peoples in the following way, subject to further consultations with Aboriginal and Torres Strait Islander peoples:

- a 'participation duty', to reflect principles of self-determination through practical measures by public authorities (see chapter 7);
- the inclusion of cultural rights, non-discrimination rights and ICESCR rights to ensure the incorporation of key UNDRIP rights;
- a standalone cause of action, with capacity for organisations to bring claims on behalf of communities, 'recognising the collective aspect of these rights';
- a requirement to list in statements of compatibility steps taken to ensure that participation of Aboriginal and Torres Strait Islander peoples has occurred, where relevant;
- a clause enabling human rights in the HRA to be interpreted in light of UNDRIP where the rights of Aboriginal and Torres Strait Islander people have been affected;
- the right to self-determination articulated in a preamble to the HRA as an overarching principle of the instrument.[200]

6.111 In its final *Free and Equal* report, the AHRC considers that additional steps (to those set out above) should be taken to implement the rights of Aboriginal and Torres Strait Islander peoples, including 'through the introduction of a National Plan to implement UNDRIP, national and regional representative mechanisms to ensure participation in decision making, and the implementation of the Uluru Statement from the Heart'.[201] Other steps proposed in its *Free and Equal* 2022 position paper include adding the UNDRIP to the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*, reforming the race power in the Constitution, improving anti-discrimination legislation to strengthen protections for First Nations peoples, adequate resourcing of Aboriginal-controlled organisations, and the fulfilment of Closing the Gap framework targets in order to practically realise rights over time.[202]

6.112 As to specific rights, in addition to a general cultural right, the AHRC model proposes to include cultural rights as they relate to Aboriginal and Torres Strait Islander peoples. The AHRC proposes the following wording:

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200 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 57.

201 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 57. See also, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 132.

202 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 132.

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.[203]

6.113 The AHRC states that these cultural rights implement article 27 of the ICCPR and are reflected in, and should be interpreted in light of, the UNDRIP.[204] It notes that the proposed wording reflects sections 27 and 29 of the Queensland HRA, explaining that '[c]onsultation 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'.[205]

6.114 As to how these cultural rights could apply in practice, the AHRC states that they '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'.[206]

6.115 A large number of submitters supported the inclusion of specific rights with respect to Aboriginal and Torres Strait Islander people, modelled on those rights

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[203] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 114.

[204] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 130, 364–365.

[205] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 364.

[206] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 130.

contained in the UNDRIP.[207] The NSW Aboriginal Land Council, for instance, submitted that the UNDRIP 'must underpin the development of national and state-based Human Rights legislation to ensure the protection of the rights of Aboriginal peoples'.[208] The Australian Lawyers Alliance submitted that a federal HRA 'provides a unique opportunity' for the government to codify the UNDRIP into law and in doing so, it would 'better represent and protect the rights of Aboriginal and Torres Strait Islander peoples'.[209] Submitters emphasised, however, that any such law reform must be undertaken in consultation with, and with the free, prior and informed consent of, Aboriginal and Torres Strait Islander peoples.[210] The Law Council of Australia, for example, submitted:

> In the federal jurisdiction, the Law Council also recommends that provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) be incorporated as appropriate into a new Human Rights Act. Key principles of UNDRIP, such as 'free, prior and informed consent', ought to be incorporated into relevant provisions of the Human Rights Act, including those protecting cultural rights and property.
>
> The Law Council acknowledges that the implementation of UNDRIP is not straightforward, given that international instruments other than treaties may not support enactment under the external affairs power. However, in the Law Council's view, other heads of power should suffice to support such enactment.
>
> The Law Council urges appropriate consultation be conducted with First Nations peoples before deciding on the best way to incorporate it into a Human Rights Act.[211]

6.116 The NSW Aboriginal Women's Advisory Network also submitted that:

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[207] See, for example, Associate Professor Julie Debeljak, *Submission 15*; Australian Lawyers Alliance, *Submission 83*, p. 9; NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 4–7, 11–12; Law Council of Australia, *Submission 120*, p. 14; SNAICC, *Submission* 121, p. 4; Environmental Justice Australia, *Submission 150*, p. 4; Indigenous Law and Justice Hub, *Submission 157*, p. 6, 8–9; Castan Centre for Human Rights Law, *Submission 160*, p. 2–3; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, pp. 11–12; Victorian Aboriginal Child Care Agency, *Submission 175*, pp. 1–2; Queensland Aboriginal and Torres Strait Islander Child Protection Peak, *Submission 188*, p. 2; New South Wales Aboriginal Land Council, *Submission 202*, pp. 1, 4; Tasmanian Aboriginal Legal Service, *Submission 217*, pp. 8–10; Jumbunna Institute for Indigenous Education and Research, *Submission* 227, p. 3; Human Rights Law Centre, *Submission 232*, p. 47; Aboriginal Legal Service of Western Australia Limited, *Submission 239*, p. 14.

[208] New South Wales Aboriginal Land Council, *Submission 202*, pp. 1, 4.

[209] Australian Lawyers Alliance, *Submission 83*, p. 9.

[210] See, for example, Australian Lawyers Alliance, *Submission 83*, p. 10; NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 4; Law Council of Australia, *Submission 120*, p. 14; Castan Centre for Human Rights Law, *Submission 160*, pp. 2–3; Tasmanian Aboriginal Legal Service, *Submission 217*, p. 10; Jumbunna Institute for Indigenous Education and Research, *Submission* 227, pp. 7–8; Human Rights Law Centre, *Submission 232*, p. 50.

[211] Law Council of Australia, *Submission 120*, p. 14.

> In the process of enacting a federal Human Rights Act there must be serious and genuine consultation by the Government with Aboriginal and Torres Strait Islander peoples. This consultation must respect the rich history of Aboriginal peoples as the longest continuous living culture in the world, and as the first peoples of Australia. The consultation must also acknowledge the disproportionate impact of human rights breaches on Aboriginal and Torres Strait Islander peoples in Australia.[212]

6.117 The Victorian Aboriginal Child Care Agency (an Aboriginal Community Controlled Organisation) further recommended that the preamble to a federal HRA recognise the 'historical and ongoing injustices and human rights abuses experienced by Aboriginal people' and the 'distinct collective rights of Aboriginal people consistent with the UNDRIP'.[213]

6.118 Submitters were generally supportive of the AHRC's proposed inclusion of cultural rights, including cultural rights specific to Aboriginal and Torres Strait Islander peoples. The Indigenous Law and Justice Hub highlighted the importance of recognising distinct Indigenous cultural rights, submitting:

> While all people have cultural rights, Aboriginal and Torres Strait Islander peoples cultural rights manifest in specific ways based on the elements of their cultural life as custodians of the oldest living culture on earth, such as rights relating to caring for and maintaining relationship to Country.[214]

6.119 The Human Rights Law Centre submitted that incorporating cultural rights in a federal HRA 'would be a powerful, and enforceable, way of ensuring the Australian government makes good on its word to respect Aboriginal and Torres Strait Islander culture, heritage and Country' and would 'clearly signal that cultural rights are part of the broader human rights framework'.[215] The Australian Lawyers Alliance further submitted that alongside cultural rights, including a right to the protection of cultural heritage, a federal HRA should incorporate the principle in article 19 of the UNDRIP, which requires States to consult with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing measures that may affect them.[216] They argued that the destruction of the Juukan Gorge by Rio Tinto in 2020 exemplified the need for proper consultation with Aboriginal and Torres Strait Islander peoples in order to identify and protect culturally important sites.[217]

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212 NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 4.

213 Victorian Aboriginal Child Care Agency, *Submission 175*, p. 7.

214 Indigenous Law and Justice Hub, *Submission 157*, p. 12.

215 Human Rights Law Centre, *Submission 232*, p. 47.

216 Australian Lawyers Alliance, *Submission 83*, p. 11.

217 Australian Lawyers Alliance, *Submission 83*, pp. 10–11.

6.120 Many submitters were supportive of the AHRC's other recommendations, including incorporating a participation duty.[218] The participation duty is discussed in more detail in chapter 7.

6.121 With respect to the right to self-determination, as noted above, the AHRC HRA model proposes including the right as an overarching principle within a preamble, rather than as a stand-alone right.[219] The right to self-determination, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.[220] It is contained in common article 1 of the ICCPR and ICESCR as well as article 3 of the UNDRIP, and has particular relevance for Aboriginal and Torres Strait Islander peoples in Australia.[221] The AHRC does not recommend including the right to self-determination as a stand-alone right 'because of the vagueness and complexity of the term, and the associated potential difficulties with litigating collective self-determination claims in court'.[222] The AHRC notes that previous attempts to incorporate a right to self-determination in state and territory HRAs were not successful due to a 'lack of clarity' in relation to its potential application and a 'lack of consensus' as to the content of the right.[223] Instead, the preambles of the ACT, Queensland and Victorian HRAs all recognise the special importance of human rights for First Nations peoples.[224] For example, the ACT HRA preamble states:

> Although human rights belong to all individuals, they have special significance for Aboriginal and Torres Strait Islander peoples—the first owners of this land, members of its most enduring cultures, and individuals

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218 See, for example, NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 10, 14; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 12; Tasmanian Aboriginal Legal Service, *Submission 217*, p. 9; Human Rights Law Centre, *Submission 232*, p. 50; Aboriginal Legal Service of Western Australia Limited, *Submission 239*, p. 14.

219 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 133.

220 International Covenant on Civil and Political Rights, article 1; and the International Covenant on Economic, Social and Cultural Rights, article 1. See, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

221 Article 4 of the UNDRIP elaborates on the content of the right to self-determination, providing that 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.

222 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 191, 192–195.

223 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 192.

224 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 133.

> for whom the issue of rights protection has great and continuing importance.[225]

6.122 The AHRC further notes that the UN Human Rights Committee only has jurisdiction over individual complaints and cannot adjudicate the right to self-determination due to its collective nature, although it can seek reports from States parties on the protection of the right.[226] For these reasons, the AHRC 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"'.[227] Notwithstanding this conclusion, the AHRC does acknowledge that a right to self-determination could be practically implemented in a HRA if it was articulated as a 'process right':

> Self-determination is focused on free pursuit and free choice. Since it does not prescribe a 'type' of outcome, it can be construed as a 'right of due process'. 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.[228]

6.123 Additionally, the AHRC recommends a participation duty, which would reflect principles of self-determination.[229] This duty is discussed in detail in chapter 7. As to the relationship between a participation duty and the right to self-determination, the AHRC explains that:

> 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.
>
> …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.[230]

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225 *Human Rights Act 2004* (ACT), preamble, [7].

226 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 192.

227 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 193.

228 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 191, 192–195.

229 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 186.

230 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 189–190.

6.124 The AHRC considers that the participation duty and protection of rights relating to self-determination, such as cultural rights, would help to 'operationalise self-determination in a manner that can lead to practical outcomes'.[231] The AHRC reiterates, however, 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.[232]

6.125 However, many submitters supported the inclusion of the right to self-determination in a federal HRA.[233] Some submitters expressly advocated for the inclusion of the right to self-determination as a stand-alone right.[234] The Foundation for Aboriginal and Islander Research Action (FAIRA), for example, recommended the 'right of the Aboriginal and Torres Strait Islander Peoples to self-determination be defined and enshrined in legislation'.[235] The NSW Aboriginal Women's Advisory Network submitted that the right to self-determination should be included in line with articles 3 and 4 of the UNDRIP.[236]

6.126 The Indigenous Law and Justice Hub submitted that 'self-determination remains paramount to the aspirations of Indigenous peoples' and a federal HRA 'must support self-determination, either as a distinct right in itself or through various rights which underpin self-determination'.[237] It supported the AHRC's other proposals with respect to a participation duty and an interpretive principle (which would require interpretation of the provisions in light of the UNDRIP), but argued that 'these welcome measures do not amount to anything close to a realisation of the right to self-determination for Indigenous peoples'.[238] The Indigenous Law and Justice Hub argued that failing to realise the right to

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231 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 192.

232 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 193.

233 See, for example, NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 6; SNAICC, *Submission 121*, pp. 4–5; Foundation for Aboriginal and Islander Research Action, *Submission 124*, pp. 3–4; Indigenous Law and Justice Hub, *Submission 157*, p. 15; Castan Centre for Human Rights Law, *Submission 160*, p. 2–3; Save the Children and 54 reasons, *Submission 168*, p. 22; Jumbunna Institute for Indigenous Education and Research, *Submission* 227, p. 5.

234 See, NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 6 and 13; Foundation for Aboriginal and Islander Research Action, *Submission 124*, pp. 3–4; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 3; National Justice Project, *Submission 225*, p. 8.

235 Foundation for Aboriginal and Islander Research Action, *Submission 124*, pp. 3–4.

236 NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 6, 13.

237 Indigenous Law and Justice Hub, *Submission 157*, p. 15.

238 Indigenous Law and Justice Hub, *Submission 157*, p. 15.

'self-determination will negatively impact the realisation of the individual rights of Indigenous peoples', noting that self-determination is a foundational right – the 'river in which all other rights swim'.[239] It concluded that the specific content of the right, as articulated in a federal HRA, must ultimately be informed by consultation:

> Consultation with Aboriginal and Torres Strait Islander peoples will identify what self-determination should look like in the federal Charter and the institutional architecture supporting it. Consultation must be widespread, culturally appropriate, and deliberate. A Charter which is nurtured through First Nations Communities will be a more effective instrument.
>
> We must be upfront about what self-determination is and halt the watering-down of this important principle; participation duties must not be equated with self-determination.[240]

6.127 The Human Rights Law Centre endorsed the Indigenous Law and Justice Hub's submission with respect to the inclusion of the right to self-determination. It argued that a lack of respect for the right to self-determination has thus far led to an 'extraordinary level of federal government intervention' in the lives of Aboriginal and Torres Strait Islander people, such as 'the Government's disastrous remote work-for-the-dole program and income management schemes'.[241] The Human Rights Law Centre acknowledged that while a federal HRA cannot 'undo the effects of colonialism, and adequately honour the right to determination of Aboriginal and Torres Strait Islander people', it 'can go some way to restraining ongoing and future interventions by governments into the lives and affairs of Aboriginal and Torres Strait Islander people'.[242]

6.128 Further, many submitters highlighted the indivisibility of human rights and the need to protect a broad range of rights in order to protect the rights of Aboriginal and Torres Strait Islander peoples. With respect to the right to a healthy environment, for example, the Human Rights Law Centre submitted:

> The right to a clean, healthy and sustainable environment is inseparable from the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander people. All of them must be protected to fully realise Aboriginal and Torres Strait Islander people's rights. The drafting of the

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239 Indigenous Law and Justice Hub, *Submission 157*, p. 15, quoting Michael Dodson (1995) in C Scott, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea', *Human Rights Quarterly*, vol. 18, no. 4, 1996, p. 814.

240 Indigenous Law and Justice Hub, *Submission 157*, p. 17.

241 Human Rights Law Centre, *Submission 232*, p. 50.

242 Human Rights Law Centre, *Submission 232*, p. 48.

> right in a federal Charter, should explicitly recognise this relationship for Aboriginal and Torres Strait Islander people.[243]

6.129 The ESCR Network also recommended that the right to a healthy environment include 'specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to lands and waterways and the related right to free, prior and informed consent in relation to any proposed projects that might impact their territories'.[244]

6.130 Other submitters highlighted the intersectionality of the rights of children and Aboriginal and Torres Strait Islander people. SNAICC (Secretariat of National Aboriginal and Islander Child Care, a national peak body Aboriginal community-controlled organisation), for example, submitted that:

> Human rights, including children's rights, are interconnected, inalienable and indivisible, unable to be considered in isolation or delivered only in part. As such, any Human Rights Act in Australia must reflect the unique set of rights for Aboriginal and Torres Strait Islander children in full by explicitly referencing and protecting all of the rights set out in the UNCRC, UNCRDP and the UNDRIP, and reflecting the special measures required to protect the rights of Indigenous children. SNAICC supports the addition of these rights to the rights currently proposed in the Australian Human Rights Commission Position Paper.[245]

The rights of the child

6.131 Children have special rights under human rights law taking into account their particular vulnerabilities.[246] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children up to the age of 18 years are guaranteed these rights, without discrimination on any grounds.[247] Children would be entitled to all of the rights in the proposed HRA, but the rights of the child would be especially protected in the AHRC's HRA model in the following way:

> 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

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243 Human Rights Law Centre, *Submission 232*, p. 52.

244 Dr Genevieve Wilkinson, Co-Convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Committee Hansard*, 20 October 2023, p. 2.

245 SNAICC, *Submission 121*, p. 10. See also, Victorian Aboriginal Child Care Agency, *Submission 175*, pp. 1–2; Queensland Aboriginal and Torres Strait Islander Child Protection Peak, *Submission 188*, p. 2.

246 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

247 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also, International Covenant on Civil and Political Rights, articles 2 and 26.

drawn directly from the CRC and focus on children (for example, children's rights in the criminal process).[248]

6.132 In particular, the AHRC HRA model includes the following rights under the heading '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.[249]

6.133 The AHRC explains that the above rights incorporate article 24 of the ICCPR and article 3 of the CRC and should be interpreted in light of article 10(3) of the ICESCR.[250] Additionally, the AHRC's model proposes to protect the rights of children in the criminal process, including:

> (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.[251]

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248 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 196.

249 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 343. The AHRC noted that children are guaranteed the other rights set out in it's HRA model and that the right of protection of children should be interpreted in light of article 10(3) of the ICCPR.

250 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 343–344.

251 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 356.

6.134 The above rights seek to implement articles 10 and 14 of the ICCPR and article 37 of the CRC, and the wording is partially based on equivalent sections in the Victorian, Queensland and ACT HRAs.[252]

6.135 In addition to the protection of specific rights, the AHRC proposes to 'directly reflect two overarching CRC principles in the Human Rights Act through the participation duty', stating that this is necessary to 'adequately reflect key elements of the CRC and ensure cohesive protection of children's rights'.[253] These two principles are the best interests of the child and the right to be heard, protected in articles 3 and 12 of the CRC respectively. Article 3 provides that in all actions concerning children, the best interests of the child shall be a primary consideration.[254] It also requires States parties to ensure the child such protection and care as is necessary for their well-being and that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities.[255] The UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[256]

6.136 Article 12 provides children who are capable of forming their own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with the age and maturity of the child.[257] In particular, the child must be given the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative body.[258]

6.137 The AHRC explained that it proposes to include the best interests principle as a distinct child's right as well as incorporating it into the participation duty

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252 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 356. The AHRC stated that the wording is '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'.

253 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 196.

254 Convention on the Rights of the Child, article 3(1).

255 Convention on the Rights of the Child, article 3(2) and (3).

256 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication, No.3/2016 (2018) [11.8].

257 Convention on the Rights of the Child, article 12(1).

258 Convention on the Rights of the Child, article 12(2).

alongside the right to be heard.[259] The participation duty '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'.[260] The participation duty is further discussed in chapter 7.

6.138 Several submitters advocated for the inclusion of all rights set out in the CRC. UNICEF Australia, for example, submitted that:

> …our federal Human Rights Act should be as comprehensive as possible, particularly for children given the unique nature of their needs including increased vulnerability when compared with adults. Although there may be challenges in the full expression of these rights in a federal Human Rights Act, including associating direct remedies with specific rights, they can likely be overcome, particularly when viewed within the context of our federal Human Rights Act as more than an expression of legal rights – it is an expression of the things we as a society value most, which must surely include children.[261]

6.139 The Victorian Equal Opportunity and Human Rights Commission also supported 'broadening the notion of children's rights [in any federal HRA] to recognise the right to participation commensurate with their age and maturity, in line with the Convention on the Rights of the Child.'[262] Good Sheperd Australia New Zealand further recommended explicitly referencing the core guiding principles of the CRC, including the best interests of the child, the right to survival and development, the right to express views on all matters affecting them, and the right to enjoy all rights of the CRC without discrimination.[263] The AHRC model proposes to include some of these guiding principles, including the best interests of the child and the right to equality and non-discrimination.

6.140 Some submitters emphasised the need to protect the rights of other distinct groups, particularly Aboriginal and Torres Strait Islander peoples, having

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259 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 196.

260 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 202.

261 UNICEF Australia, *Submission 210*, p. 5. See also, Queensland Family and Child Commission, *Submission 78*, p. 2; Northern Territory Office of the Children's Commissioner, *Submission 122*, p. 1; Darwin Amnesty Action Group, *Submission 131*, pp. 1–2; Queensland Youth Policy Collective, *Submission 141*, p. 5; Ms Natalie Lewis, Commissioner, Queensland Family and Child Commission, *Committee Hansard*, 15 August 2023, p. 13.

262 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 14.

263 Good Shepherd Australia New Zealand, *Submission 42*, pp. 18–19.

regard to the intersectional experiences and needs of children. For instance, SNAICC submitted that:

> Aboriginal and Torres Strait Islander children and young people have a distinct set of rights and the only way to fully protect these is to specifically acknowledge them as a concept and ensure they are explicitly named and incorporated in human rights instruments. Aboriginal and Torres Strait Islander children's rights include those owed to all children as well as their unique rights as Indigenous Peoples.[264]

6.141 UNICEF Australia also submitted that the full spectrum of rights set out in the CRC and in the UNDRIP should be protected, stating:

> This inclusion would recognise the significant intersection between the rights of children and the rights of Aboriginal and Torres Strait Islander peoples, the importance of a child's right to culture as an enabler for the access of all their rights, and the specific attention needed on the rights of Aboriginal children who continue to face unacceptable disparities in life outcomes.[265]

6.142 Save the Children and 54 reasons (a child rights organisation) submitted that a federal HRA should protect all rights in the CRC and the UNDRIP (beyond those already included in state and territory HRAs) as well as explicitly recognising the government's responsibility for upholding children's rights and 'addressing the root causes and underlying conditions leading to children's rights being violated', such as poverty and the impacts of climate change.[266] They stated that:

> …in some cases, these matters may not be able to be readily expressed as specific rights that are, in themselves, amenable to specific direct remedies of the type available for other rights. Nonetheless, they are essential preconditions for children's rights to be respected, protected and fulfilled in Australia, and the international human rights framework to which Australia is committed makes it very clear that the Australian Government is responsible for addressing them. This should be explicit in a federal Human Rights Act.[267]

6.143 Further, Save the Children and 54 reasons recommended protecting children's participatory rights in line with the CRC. As to the adequacy of the AHRC's proposed participation duty, they submitted that:

> In principle, a 'participation duty' on public authorities in a federal Human Rights Act, along with appropriate guidelines and other supporting material, as proposed by the AHRC in its position paper could contribute to

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264 SNAICC, *Submission 121*, p. 9. See also, Northern Territory Office of the Children's Commissioner, *Submission 122*, p. 2.

265 UNICEF Australia, *Submission 210*, p. 5.

266 Save the Children and 54 reasons, *Submission 168*, pp. 15–16.

267 Save the Children and 54 reasons, *Submission 168*, p. 15.

these requirements being met, supported by other provisions and mechanisms.[268]

6.144 The National Justice Project submitted that in addition to those rights listed in the ARHC's 2022 *Free and Equal* position paper, a federal HRA should address the following issues (although it did not specify how these issues should be addressed in federal HRA or propose wording as to additional rights that should be included):

- Seeking asylum is not a crime and refugee and asylum seeker children under 18 years must not under any circumstances be detained in immigration detention facilities.
- Specifically address raising the minimum age of criminal responsibility to an 'internationally acceptable level' of a minimum of 14 years, in line with repeated calls from the Committee on the Rights of the Child, and reiterated by the Universal Periodic Review in 2021.
- Specifically address the overrepresentation of First Nations people, including children and young people, in the legal system due to discrimination and bias in policing, the courts and the health, social service and legal systems more broadly.
- Specifically address the overrepresentation of First Nations children in out-of-home care (OOHC) resulting from systemic discrimination in health, social service and legal systems.[269]

6.145 Additionally, several submitters raised concerns with Australia's reservation to article 37(c) of the CRC and recommended that the reservation be withdrawn.[270] Article 37(c) provides that:

> 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.[271]

6.146 Australia has made the following reservation with respect to this right:

> Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia,

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[268] Save the Children and 54 reasons, *Submission 168*, p. 17.

[269] National Justice Project, *Submission 225*, pp. 8–9.

[270] See, for example: Save the Children and 54 reasons, *Submission 168*, p. 6; UNICEF Australia, *Submission 210*, pp. 4 and 8; and Emily Mursa, *Submission 248*, [7.2].

[271] Convention on the Rights of the Child, article 37(c).

> therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37(c).[272]

6.147 Regarding this reservation, Save the Children and 54 reasons observed:

> Australia has historically refused to be bound by this obligation, and continues to detain children in adult facilities and with adults in violation of the standard that the article requires. Australia has previously argued that the country's geography and demography make it difficult to always detain children in juvenile facilities while also allowing them to maintain contact with their families. The UN and Australia's peers have repeatedly criticised Australia for its reservation.[273]

6.148 Indeed, the UN Committee on the Rights of the Child has consistently recommended Australia consider withdrawing its reservation, particularly given Australia's 'acceptance of the principle of separation and the existence in [Australia]…of many facilities separating children from adults'.[274]

6.149 Submitters further recommended Australia ratify the Third Optional Protocol to the CRC, which would enable children to raise concerns about their rights directly with the UN. Save the Children and 54 reasons submitted that Australia's failure to do so thus far 'reflects poorly on Australia's commitment to children's rights and to international human rights norms and UN engagement, and denies children in Australia access to this ultimate forum for upholding their rights'.[275] UNICEF Australia argued that by ratifying the protocol, 'Australia could show a renewed and more ambitious commitment to children's rights'.[276]

Rights of people with disabilities

6.150 The Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disability are guaranteed all human rights without discrimination, including those rights set out in other human rights treaties. The CRPD 'clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced'.[277] While the AHRC HRA model does not specifically incorporate the rights contained in

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272 United Nations, *Treaty Series*, vol. 1577 (1990), p. 3.

273 Save the Children and 54 reasons, *Submission 168*, p. 20.

274 UN Committee on the Rights of the Child, *Concluding observation on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6 (2019) p. 2.

275 Save the Children and 54 reasons, *Submission 168*, p. 20.

276 UNICEF Australia, *Submission 210*, p. 8.

277 United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities (CRPD)* (accessed 20 February 2024).

the CRPD, the general rights proposed for inclusion would apply to people with disability, as these rights must be guaranteed to all people without discrimination. In the AHRC's final *Free and Equal* report, it noted that the CRPD as well as other 'thematic treaties' would be 'reflected through the inclusion of a clause that requires the Human Rights Act to be interpreted in light of international human rights instruments', which would include the CRPD.[278]

6.151 Additionally, the AHRC considers that its proposed participation duty would be a means of realising key procedural elements of the rights contained in a HRA in relation to people with disability (as well as First Nations peoples and children).[279] As to what this participation duty would require, the AHRC explains

> 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.[280]

6.152 The AHRC further notes in its 2022 *Free and Equal* position paper that a participation duty would specifically embed certain rights protected in the CRPD, including the 'right to equal recognition before the law (Article 12) and the overarching principle of "full and effective participation and inclusion in society" for people with disability'.[281] The AHRC's complementary 'equal access to justice duty' would also, among other things, require 'public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system'.[282] These two procedural duties are further discussed in chapter 7.

6.153 Further, the AHRC notes that since its 2022 *Free and Equal* position paper, the Disability Royal Commission released its final report, which included a

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278 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 56. It is noted that the AHRC's proposed wording for the right to education includes a note that this right should be interpreted in light of article 24 of the CRPD. See, Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 115, 129.

279 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 59.

280 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 59.

281 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 206.

282 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 60.

recommendation for a Disability Rights Act.[283] The object of such an Act would be to 'respect, protect and fulfil all rights in the CRPD, as well as the rights of First Nations people with disability not specifically articulated in the CRPD'.[284] With respect to the AHRC's proposed HRA model, the Disability Royal Commission stated:

> …a Commonwealth Human Rights Act and reforms to anti-discrimination laws in the general terms proposed by the AHRC have the potential to enhance human rights protection for all Australians, including people with disability.
>
> Regardless of whether a Commonwealth Human Rights Act is ultimately enacted, we consider more specific and tailored protections are required for people with disability through the enactment of a DRA [Disability Rights Act]. Specific provisions tailored to the rights of people with disability are required to address the decades of disadvantage and mistreatment people with disability in Australia have experienced.[285]

6.154 In response to the Disability Royal Commission's recommendation for a Disability Rights Act, the AHRC stated:

> The individual rights and obligations proposed by the Disability Royal Commission [DRC] to be included in a DRA [Disability Rights Act] have, for the most part, been incorporated in the Commission's proposal for a Human Rights Act.
>
> There are 2 proposals by the DRC that require further consideration in relation to the Commission's model Human Rights Act:
>
> - a specific right to live free from violence, abuse, neglect and exploitation, consistent with Article 16 of the CRPD
> - a positive duty to promote disability equality and inclusion.
>
> The Commission considers that the right to be free from violence would form part of the interpretation of rights included in the model Human Rights Act. For example, the right to non-discrimination and equality for persons with a disability, as well as specific measures to support persons with disability experiencing violence being included within rights to social security, adequate housing and health.
>
> Similarly, a duty to promote disability equality will fall within the 3 elements of the positive duty proposed in the Commission's model –

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283 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, p. 68.

284 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations*, September 2023, p. 57. Chapter 4 of the final report, *Realising the human rights of people with disability*, elaborates on this recommendation: p. 166.

285 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Realising the human rights of people with disability*, September 2023, p. 166.

> relating to equal access to justice, effective participation and the general positive duty.
>
> Nonetheless, these recommended actions could be included more explicitly in the model Human Rights Act – either through explanatory materials to the Human Rights Act or as standalone provisions.
>
> The DRC's recommendations could be implemented through the legislative drafting stage of the Human Rights Act.286

6.155 Much of the evidence received by the committee responded to the AHRC's proposed HRA model as set out in its 2022 *Free and Equal* position paper. The final reports of the AHRC and the Disability Royal Commission were not released until after the call for submissions closed. As such, the question of whether a Disability Rights Act is needed in addition to a federal HRA was not addressed.

6.156 Several submitters advocated for the inclusion of specific rights for people with disability, as set out in the CRPD, in addition to those rights proposed by the AHRC.[287] People with Disability Australia, for example, submitted that the CRPD should be expressly incorporated in a federal HRA, either by 'individually listing each CRPD right or by reference to incorporation of the CRPD into the legislation'.[288] It stated:

> To ensure the full rights of people with disability are captured in national human rights legislation, the Government must expressly incorporate our CRPD rights rather than relying on the ICCPR and ICESCR as some governments have done in other jurisdictions.
>
> Expressly incorporating the CRPD in national human rights legislation will also help parliaments, courts, public servants and the public understand our specific rights, and ensure that old conceptualisations of disability are not applied. It will provide people with disability a clear enunciation of our rights and confirm that they form part of Australian law.[289]

6.157 People with Disability Australia further recommended that the government engage 'an international human rights law expert to examine and identify which rights and components of rights in the CRPD are subject to immediate realisation' and work with disability representative organisations to identify which rights should be prioritised for incorporation in a federal HRA,

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286 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report,* 2023, p. 68.

287 See, for example, Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 14; Australian Centre for Disability Law, *Submission 203,* pp. 2–3; Queensland Advocacy for Inclusion, *Submission 140*, p. 8; Australian Federation of Disability Organisations, *Submission 274*, pp. 8–9, 16; All Means All, *Submission 186*, p. 2; Canberra Community Law, *Submission 332*, p. 14; SNAICC, *Submission 121*, pp. 4, 10; Human Rights Law Centre, *Submission 232*, pp. 11–12.

288 People with Disability Australia, *Submission 230*, pp. 16–17.

289 People with Disability Australia, *Submission 230*, p. 17.

acknowledging that 'a phased approach will be necessary'.[290] People with Disability Australia was also supportive of an interpretation provision, requiring decision-makers to consider international human rights law jurisprudence, such as the CRPD Committee's General Comments, in interpreting a HRA.[291] An interpretive provision is part of the AHRC's proposed model and is discussed further in chapter 7.

6.158 The Victorian Equal Opportunity and Human Rights Commission also supported specific recognition of the rights of people with disability, as articulated in the CRPD. It submitted that these rights 'should include respect for individual autonomy, the right to enjoy legal capacity on an equal basis with others, and protection of the integrity of the person'.[292]

6.159 All Means All submitted that the right to inclusive education protected under article 24 of the CRPD should be explicitly included within the right to education in a federal HRA. It reasoned that a reference to the general right to education is not sufficient because of the need to specifically encompass 'inclusive equality':

> …in light of our experience and expertise in this area and the experiences of our stakeholders, our view and recommendation differ from the AHRC Submission, in that we consider that there is a need to go beyond merely requiring a general right to education that ought to be interpreted in light of Article 24 of the CRPD, given the risk that the specific rights to education of students with disability as one of the most marginalised and disadvantaged groups who nonetheless are estimated to comprise a significant proportion of all students, will continue to be overlooked. In addition, recognition of a right to inclusive education should enable people with disability to bring specific complaints related to the failure to access inclusive education.[293]

6.160 All Means All (a multi-stakeholder organisation working towards the implementation of an inclusive education system) further recommended that the right to education 'reference and incorporate the rights to education of cultural and linguistic minorities, recognised under a range of international human rights instruments applicable to Australia, such as…the UNDRIP, which is relevant to First Nations people'.[294]

6.161 As to other specific rights to include, Mr Geoff Rowe, CEO of Aged and Disability Advocacy Australia, gave evidence that a HRA must 'include a requirement for supported decision-making to become part of the landscape for

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290 People with Disability Australia, *Submission 230*, p. 17.

291 People with Disability Australia, *Submission 230*, p. 18.

292 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 14.

293 All Means All, *Submission 186*, pp. 11–12.

294 All Means All, *Submission 186*, p. 12.

those people who have impaired or questioned capacity'.[295] He stated that 'the fact that someone has limited capacity should not exclude them from experiencing the same human rights protections as the rest of the community'.[296] The right to be supported to exercise legal capacity is derived from article 12 of the CRPD, which reaffirms the right of people with disability to recognition everywhere as persons before the law and the right to enjoy legal capacity on an equal basis with others in all aspects of life. While the ICCPR protects the right to equality before the law, the CRPD elaborates on the content of this right as it relates to people with disability.

6.162 In addition, a number of submitters argued that Australia should withdraw its interpretive declarations with respect to certain rights in the CRPD.[297] As noted above, Australia has made interpretive declarations with respect to the rights to legal capacity, respect for physical and mental integrity and liberty of movement under the CRPD.[298] The UN Committee on the Rights of Persons with Disabilities has recommended that Australia review and withdraw its interpretive declarations and has raised concerns about Australia's lack of progress with respect to this 'urgent' measure.[299] The Australian Federation for Disability Organisations, for instance, echoed the UN Committee's recommendation and submitted that Australia's interpretive declarations 'allow for the continuation of outdated laws, practices and policies that are in breach of Australia's obligations under the CRPD'.[300]

Older persons

6.163 The AHRC's proposed HRA model does not specifically reference the rights of older persons nor does its *Free and Equal* reports. Emeritus Professor Rosalind Croucher, President of the AHRC, acknowledged that while the rights of older persons were not specifically included, 'it does not mean that they are excluded from the ambit of the model', as human rights apply to everybody:

> In our protections already we have an Age Discrimination Act which specifically implements the ideas that would be embraced to some extent in a convention on the rights of older people. We have certain areas of federal

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295 Mr Geoff Rowe, CEO, Aged and Disability Advocacy Australia, *Committee Hansard*, 15 August 2023, p. 48.

296 Mr Geoff Rowe, CEO, Aged and Disability Advocacy Australia, *Committee Hansard*, 15 August 2023, p. 48.

297 See, for example, Australian Centre for Disability Law, *Submission 203,* p. 3; Australian Federation of Disability Organisations, *Submission 274*, pp. 9, 19–20.

298 See, United Nations, *Treaty Series*, vol. 2515 (2008), pp. 3–4.

299 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (2019) [5(b)], [6(b)] and [63].

300 Australian Federation of Disability Organisations, *Submission 274*, p. 20.

> responsibility, like aged care, that are captured in our model. Older people may not be expressly mentioned as a dot point, but they are by no means excluded from the embrace of the ideas.[301]

6.164 Some submitters raised concerns about the AHRC's lack of consideration of the specific rights of older persons and advocated for the inclusion of such rights in a federal HRA.[302] The Australian Human Rights Institute submitted that the rights of older persons are systematically violated, as evidenced by the findings of the Royal Commission into the Quality and Safety of Aged Care, and that existing domestic laws have failed to effectively protect the rights of older persons.[303] Emeritus Professor Andrew Byrnes, appearing on behalf of the Australian Human Rights Institute, elaborated on this, stating:

> In the context of widespread, documented and largely accepted ageism and institutional and systemic age discrimination and exclusion in many areas in our country, a human rights act that does not explicitly include references to older persons' human rights fails our community—something which seems extraordinary in light of the recent experience at the height of the COVID pandemic. Part of the reason for this silence is that, as has already been mentioned, there is no comprehensive international framework or convention on the human rights of older persons, unlike in other areas.[304]

6.165 The Australian Human Rights Institute considered that:

> The lesson to be drawn from international and national experience is that there needs to be explicit reference to older person and older age in any general bill of rights and also that such charters should contain rights which are tailored specifically to the circumstances faced by specific subgroups of older persons such as older women, older persons with disabilities, older LGBTQI+ people or older indigenous persons (among other groups).
>
> In the absence of an agreed comprehensive and coherent international catalogue of relevant rights such as those that exist in other areas, it is difficult to provide a definitive list of particular rights or specifically tailored provisions. Nevertheless, the discussion at the United Nations Open-ended Working Group on Ageing and the Human Rights Council, the United Nations Principles for Older Persons 1991, regional treaties on the subject (in particular the Inter-American Convention on Protecting the Rights of Older Persons) and the Madrid International Plan of Action on Ageing 2002

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301 Emeritus Professor Rosalind Croucher, President, AHRC, *Committee Hansard*, 27 September 2023, p. 59.

302 See, for example, Australian Human Rights Institute, *Submission 69*, pp. 7–12; Dr Susan Cochrane, Member, Organising Committee, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 31; Mr Craig Gear, CEO, OPAN, *Committee Hansard*, 27 September 2023, p. 32; Professor Catherine Renshaw, Member, Organising Committee, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 34.

303 Australian Human Rights Institute, *Submission 69*, pp. 7–11. See also, Dr Susan Cochrane, Member, Organising Committee, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 31.

304 Emeritus Professor Andrew Byrnes, *Committee Hansard*, 27 September 2023, pp. 45–46.

(to the implementation of which Australia has committed) provide some guidance.[305]

6.166 The Australian Human Rights Institute considered that the following rights of older persons should be considered for inclusion in a HRA:

1. The right not to be subjected to discrimination in any field on the basis of ageism of age discrimination

2. The right to autonomy and independence

3. The right to be free from torture and other cruel, inhuman treatment (including in relation to restrictive practices)

4. The right to be free from elder abuse, including financial abuse

5. The right to life-long learning and education

6. The right to continue to work without discrimination on the basis of older age

7. The right to reasonable accommodation in terms and conditions of employment

8. The right to economic security, including necessary social support

9. The right to live independently and in the community and to have access to the financial and other forms of support required to make this possible.

10. The right to freedom of movement and an accessible physical and social environment

11. The right to digital inclusion and the right of access to public and other services in various formats

12. The right to palliative care

13. The right to access technology and the benefits of other scientific developments

14. The right to be included in decision-making about matters that affect older persons, including but not limited to disaster and emergency planning.[306]

6.167 The Australian Human Rights Institute further recommended that a HRA 'provide protection against intersectional or multiple bases of discrimination'.[307] It also urged the 'government to support the elaboration of a new United Nations convention on the human rights of older persons and engage actively and constructively in the United Nations processes considering this matter'.[308]

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305 Australian Human Rights Institute, *Submission 69*, pp. 11–12 (footnotes omitted).

306 Australian Human Rights Institute, *Submission 69*, pp. 12.

307 Australian Human Rights Institute, *Submission 69*, pp. 12.

308 Australian Human Rights Institute, *Submission 69*, pp. 13. See also, Mr Craig Gear, CEO, OPAN, *Committee Hansard*, 27 September 2023, p. 32.

6.168 Professor Catherine Renshaw, a member of the Organising Committee of Rights of Older Persons Australia, also acknowledged the difficulty in identifying a specific list of rights with respect to older persons due to the lack an international thematic convention. Nonetheless, she considered such a list could be developed, stating:

> We lack a coherent body of universally recognised rights that apply to older people. A lot of work has been done, particularly in the past 15 years, at the international level, to pull together the sorts of rights that you would need to articulate as being relevant to the rights of older people. They would include…rights to freedom of movement that are currently jeopardised by the current systems of restraints we have that apply to older people, rights to privacy, rights to digital inclusion, social and economic rights, rights to adequate standards of food and access to health care, for example. There shouldn't just be rights not to be discriminated against in relation to those things; there should be rights to the highest possible standard of enjoyment of those rights as well. It is possible to bring together a list of rights that would apply specifically to older persons and to people as we age.[309]

6.169 Professor Renshaw further noted that while the other core human rights treaties, such as the ICCPR and ICESCR, apply to older persons, they do so in 'very different and specific ways; they are currently being avoided, breached and overlooked, but they need to be clearly stated as they apply to older persons'.[310]

6.170 As to whether there would be possible constitutional concerns arising from the fact that there is no thematic convention on the rights of older persons, Professor Byrnes considered that the lack of a specific treaty would not be 'fatal':

> It makes the task much harder, as we have seen with the reforms of the Aged Care Act; the royal commission was really struggling with that. The government's formal position is that there are no gaps: the existing norms cover everything that needs to be said. I think that is not quite right. If we work through each of the individual rights, we are not so much asking for new rights; we are saying that older people have all the human rights which are guaranteed in the instruments. But just like people with disability, children, and other groups, some of these rights need to be spelt out in more detail as to how they apply. For example, the right to housing for older people, their right to live where they want, needs to be spelt out in cases where they need care and support at home, or where they need some form of institutional living or alternative. There is a sufficient argument to interpret each of these provisions to apply to most of the circumstances, but it involves more effort than if we had a convention which dealt exactly with these issues tailored to the circumstances.[311]

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309 Professor Catherine Renshaw, Member, Organising Committee, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 33.

310 Professor Catherine Renshaw, Member, Organising Committee, Rights of Older Persons Australia, *Committee Hansard*, 27 September 2023, p. 36.

311 Emeritus Professor Andrew Byrnes, *Committee Hansard*, 27 September 2023, p. 48.

6.171 Ms Kate Eastman AM SC, a barrister and expert in human rights law, agreed that the absence of a specific treaty would not preclude the addition of rights relating to older persons in a HRA.[312] She stated that the reference to 'any other status' in the context of the right to equality and non-discrimination (article 26 of the ICCPR) encompasses older persons and this right can be used as a basis for federal anti-discrimination legislation. Additionally, Ms Eastman noted that the rights of older persons is a 'matters of international concern that has been raised with Australia in its engagement with the UN Human Rights Council and its engagement on its human rights practices generally'.[313] Ms Eastman further pointed to the *Age Discrimination Act 2004* as an example of legislation with respect to the rights of older persons:

> We've had an age discrimination act since 2004 and there have been complaints to the Federal Court. I'm not aware that anyone has sought to challenge the validity of our Age Discrimination Act on the basis that we don't have an international convention. Again, sometimes for an exercise like this I don't think we should start on the basis that it's never been looked at before. We wouldn't have had an age discrimination act unless the Commonwealth felt it had sufficient heads of power to enact that law.[314]

6.172 Professor George Williams AO, a constitutional law expert, was similarly of the view that there were constitutional bases for legislating with respect to the rights of older person, although he considered that the rights contained in the core treaties would be sufficient.[315]

Rights of victim-survivors of crime

6.173 Some submitters recommended adding specific rights for victim-survivors of crime in a federal HRA. The Queensland Human Rights Commission, for instance, made such a recommendation, stating that several rights proposed for inclusion, such as the rights to fair hearing, privacy and freedom of expression, can be applied to victims of crime. It referred to the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,[316] which provides that 'victims should be treated with compassion and respect for their dignity, and are entitled to access mechanisms of justice and prompt redress as provided for by national legislation, for the harm that they have suffered',[317] and noted that:

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312 Ms Kate Eastman AM SC, *Committee Hansard*, 28 September 2023, p. 51.

313 Ms Kate Eastman AM SC, *Committee Hansard*, 28 September 2023, p. 51.

314 Ms Kate Eastman AM SC, *Committee Hansard*, 28 September 2023, p. 51.

315 Professor George Williams AO, *Committee Hansard*, 28 September 2023, p. 51.

316 UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGA Res. 40/34 (1985).

317 Queensland Human Rights Commission, *Submission 142*, pp. 50–51.

> …promoting rights for victims is an attempt to address the persistent difficulties experienced by institutions and professionals to adequately meet the expectations of victims of crime. Having violence inflicted on them and experienced victimisation separates victims from their usual place in society. It disrupts the sense of trust and belonging people generally (though variably) have in others.[318]

6.174 The Queensland Human Rights Commission further referred to the Victorian Law Reform Commission's 2016 recommendation that:

> …the *Victorian Charter of Human Rights and Responsibilities Act 2006* be amended to include a right for a victim of a criminal offence to have certain specific minimum guarantees, including to be acknowledged as a participant with an interest in the proceedings, to be treated with respect at all times, and to be protected from unnecessary trauma, intimidation, and distress when giving evidence.[319]

6.175 The Queensland Human Rights Commission further noted that the Queensland government has committed to considering whether to include victims' rights in the Queensland HRA.[320]

6.176 knowmore (a free, independent legal service for survivors of child sexual abuse) also recommended that a federal HRA 'should include specific protection for the rights of victims and survivors of crime, taking state and territory victims' rights charters in Australia as a starting point' for considering what rights to protect.[321] Likewise, Women's Legal Service NSW submitted that the rights of victim-survivors should be better recognised, including the right to live free from discrimination on the basis of being a victim-survivor of gender-based violence.[322] In order to effectively protect this right, Women's Legal Service NSW argued that the status of 'being a victim-survivor of gender-based violence' should be included as a protected attribute for the purposes of the right to equality and non-discrimination.[323] As to the importance of including this status, Women's Legal Service NSW submitted:

> Victim-survivors who are subjected to gender-based violence can experience discrimination in areas of public life such as employment, education and housing and accommodation. For example, a woman may

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318 Queensland Human Rights Commission, *Submission 142*, p. 51.

319 Queensland Human Rights Commission, *Submission 142*, p. 51, referring to the Victorian Law Reform Commission, *Report on the Role of Victims of Crime in the Criminal Trial Process* (August 2016) p. xxi.

320 Queensland Human Rights Commission, *Submission 142*, p. 51.

321 knowmore, *Submission 222*, p. 12.

322 Women's Legal Service NSW, *Submission 97*, pp. 3, 5.

323 Women's Legal Service NSW, *Submission 97*, pp. 7–8. See also Domestic Violence NSW, *Submission 104*, p. 2.

> lose work or have their employment terminated as a result of a perpetrator harassing her at her workplace.
>
> Including the status of being a victim-survivor of gender-based violence as a protected attribute would also play an important role in educating and raising awareness within the wider community about gender-based violence, and, we hope, fostering more empathetic approaches to people who are, or who have experienced it. It would also serve an important normative function, acknowledging that the harm experienced by victim-survivors can be exacerbated by negative or prejudicial attitudes and inflexible policies.
>
> We believe that specific protection is required to protect women from discrimination on the basis of their experience of gender-based violence in areas of public life. Securing this right is vital to ensuring women's right to equality under Article 3 of the ICCPR, in addition to the rights protected under CEDAW.[324]

6.177 Women's Legal Service NSW further recommended adding the 'right of victim-survivors to be treated with dignity and compassion in the legal process' and considered that this 'can be done so by extending to them the [AHRC's proposed] duty of equal access'.[325] For a discussion of the equal access duty see chapter 7.

6.178 Further, the Australian Centre for International Justice (a specialist legal centre working to develop Australia's capacity to investigate and prosecute atrocity crimes) argued that the rights of victims of international crimes should be reflected in a federal HRA:

> In determining the content of a Human Rights Act for Australia, regard must be had to incorporation of provisions on the rights of victims (including of international crimes), and the jurisdictional scope must be wide enough for these victims to seek recourse under the Act's complaint and claim mechanism where their complaints or claims have a sufficient link to Australia. This would help to bring the Commonwealth's approach to victims of crime in line with the general practice in Australian States and Territories and international human rights standards.[326]

How rights are to be realised

6.179 A related consideration when thinking about what rights to protect is how such rights are to be realised. This consideration is particularly relevant with respect to economic, social and cultural rights as well as other rights such as the right to a healthy environment (which incorporates elements of both civil and political, as well as economic, social and cultural, rights). Under international human rights law, civil and political rights are generally considered to be capable of

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[324] Women's Legal Service NSW, *Submission 97*, p. 8.

[325] Women's Legal Service NSW, *Submission 97*, p. 11.

[326] Australian Centre for International Justice, *Submission 271*, p. 33 (see also p. 32).

immediate realisation, whereas most economic, social and cultural rights may be progressively realised, meaning that States parties have some flexibility in terms of the timing for realisation of these rights given that they require resources from the State party in order to be fulfilled.[327] States parties have an obligation to progressively realise these rights to the maximum of the State party's available resources. The UN Committee on Economic, Social and Cultural Rights explained the meaning of this obligation:

> The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time…Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[328]

6.180 Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These require the government to:

- take 'deliberate, concrete and targeted' steps, by all appropriate means, towards full realisation of the rights;
- satisfy, at the very least, certain minimum aspects of the rights (known as minimum core obligations);
- ensure that people enjoy economic, social and cultural rights without discrimination; and
- adhere to certain process requirements by ensuring accountability and transparency in decision making and to ensure people can access relevant information and constructively participate in decisions that affect them.[329]

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[327] International Covenant on Economic, Social and Cultural Rights, article 2. For a general discussion on this topic, see Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, pp. 10–13.

[328] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (1990) [9].

[329] See generally, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (1990); Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford University Press, Oxford, 2014, pp. 136–163; Andrew Byrnes, 'Economic

6.181 The UN Committee on Economic, Social and Cultural Rights has emphasised that the obligations to guarantee all rights without discrimination and to take steps by all appropriate means towards full realisation of rights are of particular importance.[330] The ESCR Network also argued that the obligation on States parties to use the maximum available resources is of immediate effect:

> It is of the utmost importance to understand that the obligation of progressive realisation applies only where the state has run out of resources to fulfil the right in question. It is distinct from the obligation to use the maximum available resources. The obligation to use maximum available resource is an immediate obligation. It is only when resources are not available that a state may progressively work toward full realisation of ESCRs.[331]

6.182 As the economic, social and cultural rights scheme is built on the premise of continual improvement (or progressive realisation) in enjoyment of these rights, any 'retrogressive measures' (or backwards steps) are a particular type of violation that is immediately identifiable.[332] The presumption against retrogressive measures means that States parties cannot unjustifiably take deliberate steps that negatively affect the enjoyment of existing economic, social and cultural rights. As a type of limitation, retrogressive measures may be permissible under international human rights law providing that they are shown to address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. Whether a retrogressive measure is permissible will depend on the State party proving that it first carefully considered all alternative measures, including looking at the competing priorities presented by the range of economic and social rights and in the context of the full use of the maximum available resources.[333] The UN Committee on Economic, Social and Cultural Rights has stressed that where

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and Social Rights in the Australian Parliamentary Human Rights Scrutiny Process' in Julie Debeljak and Laura Grenfell, eds, *Law Making and Human Rights*, Thomson Reuters, Sydney, 2020, pp. 140–141; See also, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, pp. 11–13.

330 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (1990) [1]–[2].

331 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, pp. 10–11.

332 International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), article 14(e).

333 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (1990) [10]. See also UN Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant: Statement* (2007) [9]–[10].

retrogressive measures are adopted, the 'burden of proof rests with the State party' to justify their permissibility.[334]

6.183 As noted above, the AHRC proposes that all rights in a HRA be subject to immediate realisation, including economic, social and cultural rights. The AHRC explains that in order to ensure constitutionality, it proposes framing economic, social and cultural rights more narrowly to include 'essential, core and/or immediately realisable aspects' of these rights and not requiring 'progressive realisation principles to be considered by the courts'.[335] The AHRC reasons that removing the principle of progressive realisation:

> …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.
>
> …
>
> 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.[336]

6.184 The AHRC considers that progressive realisation of economic, social and cultural rights 'occurs primarily outside of the courts' and would be best addressed through a human rights framework that included human rights legislation and national targets and measurable indicators – analogous to the Closing the Gap framework.[337] It states:

> 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

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334 UN Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant: Statement* (2007) [9].

335 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 128.

336 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 128.

337 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 131–132.

> progressive realisation remains part of [the] 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.[338]

6.185 Mr Darren Dick, Senior Policy Executive of the Australian Human Rights Commission, elaborated on the AHRC's approach to progressive realisation, explaining the approach as being both ambitious and conservative at the same time:

> It's ambitious in that it's broader in its coverage than any of the state human rights acts and indeed the New Zealand and the UK models as well. But it's also conservative, because we've made a very explicit decision, which is on page 128 of the [2022 *Free and Equal* position] paper, that we are prioritising there being a direct cause of action for all the rights that are included here, and that once you broaden that out into other issues around progressive realisation, you start getting into questions about whether you have different pathways for different rights and those types of things, which we thought was not the way to go.[339]

6.186 Mr Dick emphasised that 'the progressively realisable elements of the economic, social and cultural rights are often going to sit outside the judicial process'.[340]

6.187 The AHRC model notes that similar approaches had been adopted in comparable international jurisdictions, such as the UK, and that the ACT and Queensland HRAs had also 'taken a similar qualified approach to ICESCR rights'.[341] The ACT HRA, however, does incorporate the principle of progressive realisation with respect to certain aspects of economic, social and cultural rights. For example, with respect to the right to work, the ACT HRA includes notes stating that aspects of these rights 'are considered at international law to be subject to an obligation of progressive realisation' and provides examples of international law jurisprudence to assist in the interpretation of progressively realisable rights.[342] With respect to the right to education, the ACT HRA specifies

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338 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 131.

339 Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 68.

340 Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 68.

341 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 129.

342 *Human Rights Act 2004* (ACT), s 27B, notes 2 and 3. Note 3 for example states: 'An international law relevant to interpreting progressively realisable rights is Article 8 (4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. That article provides for consideration of the reasonableness of steps taken to progressively realise rights and notes that a range of possible policy measures for the implementation of rights may be adopted'.

which aspects of the right is immediately realisable.[343] Further, the Human Rights (Healthy Environment) Amendment Bill 2023 proposes to apply these notes (which clarify that some aspects of the rights are progressively realisable) to all economic, social and cultural rights in the ACT HRA, which includes the rights to education and work, and possibly the right to a healthy environment.[344] The explanatory memorandum states that this amendment reflects the distinction between immediate and progressive obligations under international human rights law.[345]

6.188 While the AHRC's HRA model would not require the courts to consider the principle of progressive realisation, it does propose that Australia should not take unjustified retrogressive measures with respect to the right to a healthy environment. The prohibition on retrogressive measures under international human rights law is the corresponding duty to the obligation on states parties to take steps to progressively realise rights. The AHRC explains that this element of the right to a healthy environment reflects 'overarching ICESCR principles to avoid retrogressive measures'.[346] The AHRC's *Free and Equal* reports do not specifically address whether the presumption against retrogressive measures would extend to other economic, social and cultural rights proposed for inclusion in a HRA.

6.189 The committee received evidence in support of the AHRC's proposed approach to progressive realisation. National Legal Aid, for example, agreed with the AHRC's approach to framing economic, social and cultural rights, submitting:

> …in terms of the expression of economic and social rights that are directly enforceable under the Human Rights Act, at this time we agree with the AHRC proposed approach that such rights will need to be expressed in a more prescriptive manner than they are under the ICESCR to ensure there is clarity in their application and that such provisions are constitutionally sound.[347]

6.190 The Human Rights Law Centre took a slightly different view, submitting that it:

> …agrees with the AHRC's position that progressive realisation principles are not inherently non-justiciable. Nonetheless, as a first step for legislating these rights, we believe that economic, social and cultural rights should be framed in the federal Charter so as to give them specific content, and

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343 *Human Rights Act 2004* (ACT), subsection 27A(3).

344 Human Rights (Healthy Environment) Amendment Bill 2023, items 4 and 5.

345 Human Rights (Healthy Environment) Amendment Bill 2023, explanatory memorandum, p. 13.

346 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 373.

347 National Legal Aid, *Submission 118*, pp. 34–35. See also, for example, No to Violence, *Submission 53*, p. 5.

> confining the court's role to the consideration of whether the government's action was reasonable within the available resources.[348]

6.191 The Bonavero Institute of Human Rights (at the University of Oxford) acknowledged that there are a range of ways in which economic, social and cultural rights can be progressively realised, noting that '[d]irect legal enforcement is not the only option'.[349] It recommended that the approach to be adopted to the progressive realisation of economic, social and cultural rights be informed by five principles:

> The first principle is that, in the case of those human rights that impose positive obligations, legislation should be passed stipulating the benefits that will be provided by government to fulfil the rights and a process provided through which those benefits can be obtained.
>
> The second principle is that government needs to ensure that state agencies tasked with fulfilling human rights are properly resourced and function responsively, effectively, and openly.
>
> The third principle is that government needs to provide an effective process for monitoring the implementation of the rights and the budgetary allocation for that implementation.
>
> The fourth principle is that government should consider a pluralistic model for rights enforcement involving parliamentary committees, courts, tribunals, and integrity institutions such as ombuds and human rights commissions.
>
> The fifth principle is for government to identify what institutional provision will be made for circumstances where government fails to act progressively to realise rights.[350]

6.192 Economic Justice Australia considered that progressive realisation obligations may be reviewed through the courts but 'can also be monitored through other accountability measures, such as through national indicators and benchmarks within a policy framework, Parliamentary scrutiny measures, public sector oversight, and annual departmental reporting'.[351] It recommended that economic, social and cultural rights be framed to reflect their articulation in international law, including the obligation of progressive realisation.[352] With respect to the right to social security, it submitted that:

> There should be a direct cause of action, that at least encompasses the minimum core elements of the right, alongside measures to ensure

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348 Human Rights Law Centre, *Submission 232*, p. 34.

349 Bonavero Institute of Human Rights, *Submission 128*, pp. 4–5.

350 Bonavero Institute of Human Rights, *Submission 128*, pp. 4–5.

351 Economic Justice Australia, *Submission 34*, p. 19.

352 Economic Justice Australia, *Submission 34*, p. 3.

> progressive realisation of the right, including through ongoing monitoring and reporting against set human rights indicators.[353]

6.193 Other submitters more firmly argued that economic, social and cultural rights should be progressively realised, as well as there being obligations of immediate realisation with respect to the core elements of these rights. The ESCR Network, for instance, recommended that a HRA should 'include justiciable economic, social and cultural rights, including obligations of progressive realisation that go beyond existing state and territory human rights laws'.[354] It considered that 'it is possible to find clear, meaningful content within the standard of progressive realisation (even in the context of genuine resource scarcity)'.[355] The ESCR Network pointed to the South African Constitutional Court as a 'leading example of developing a distinct jurisprudence around the concept of progressive realisation'.[356]

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353 Economic Justice Australia, *Submission 34*, p. 3.

354 Dr Genevieve Wilkinson, Co-Convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Committee Hansard*, 20 October 2023, p. 68. See also, Associate Professor Julie Debeljak, *Submission 15*, p. 38.

355 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 12.

356 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 11. Footnotes 30 and 31 outline relevant jurisprudence relating to progressive realisation of economic, social and cultural rights.

Chapter 7
A Human Rights Act model

7.1 This chapter considers the legislative features that a federal Human Rights Act (HRA) could include, including those governing how a HRA would operate, who it would apply to, how it would be enforced and what remedies would be available.

7.2 In 2022, the Australian Human Rights Commission (AHRC) proposed a comprehensive HRA model in its position paper *Free and Equal: A Human Rights Act for Australia*, underpinned by a lengthy consultation process.[1] The committee sought evidence in relation to what elements a federal HRA should include, including by reference to the AHRC's model. Several submitters to this inquiry endorsed the AHRC's proposed model as a whole.[2] Many commented on distinct legislative features that a federal HRA, as canvassed by the AHRC, could include. These comments are set out below.

The dialogue model

7.3 The AHRC model proposes that a federal HRA should be based on a dialogue model.[3] That is, one in which a HRA sets out the human rights to be protected, and provides each arm of government (the legislature, executive and judiciary) a distinct role in relation to its application and enforcement, thereby facilitating a 'dialogue' between them. It requires the executive to act in a manner consistent with human rights in its decision making; permits the federal courts to determine whether legislation is incompatible with the HRA and if a public authority has acted compatibly with human rights; requiring Parliament to determine whether to amend that legislation, while retaining its power to pass laws that override human rights should it choose to.[4]

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1 See, Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022. This position paper deals in more detail with the Commission's HRA model than its final report (Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report*, 2023, and so this chapter primarily references that position paper.

2 See, for example, Multicultural Australia, *Submission 100*, p. 4; Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney, *Submission 13*, p. 5; Australian Association of Social Workers, *Submission 161*, p. 3; Cancer Council Australia and McCabe Centre for Law and Cancer, *Submission 88*, p. 4.

3 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 101.

4 See, National Human Rights Consultation, *Report,* September 2009, pp. 241–242.

7.4 This proposal reflects that of the National Human Rights Consultation in 2009, which formed the conclusion that a dialogue model 'strikes the best balance between parliamentary sovereignty and judicial protection of human rights'.[5] Both the National Human Rights Consultation and AHRC noted that potential features of a dialogue model may raise constitutional challenges,[6] but observed that these may be addressed by careful drafting.

7.5 Numerous submitters endorsed the proposal that a federal HRA reflect a dialogue model.[7] Professor Sarah Joseph, a professor of human rights law, noted that existing state and territory HRAs adopt a dialogue model, with specific roles for the legislature, executive and judiciary.[8] In this regard, the Australian Capital Territory (ACT) Government stated that it has had positive experiences with the dialogue model and recommended its adoption at the federal level.[9] Dr Julie Debeljak, Associate Professor of Law, similarly stated that modern human rights instruments establish an inter-institutional dialogue between the arms of government about the definition, scope and limits of democracy and human rights: 'With such models, all arms of government have a legitimate and constructive role to play in interpreting and enforcing the guaranteed human rights; and no arm has a monopoly over human rights'.[10] The Law Council of Australia similarly stated that a dialogue model of human rights is widely accepted and largely settled.[11]

7.6 By contrast, Professor Ben Saul, the Challis Chair of International Law at the University of Sydney (and current United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), described a legislative 'dialogue' model as the 'poor

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5 National Human Rights Consultation, *Report,* September 2009, p. 303.

6 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 261. The NCHR stated that 'there are some constitutional and practical difficulties associated with its application, but…these could be resolved by careful drafting. National Human Rights Consultation, *Report,* September 2009, p. 303.

7 See, for example, Economic Justice Australia, *Submission 34*, p. 21; Queensland Council of Civil Liberties, *Submission 52*, p. 4; No To Violence, *Submission 53*, p. 5; Church of Scientology, Submission 66, p. 6; Australian Lawyers Alliance, *Submission 83*, p. 8; Western Australia for a Human Rights Act, *Submission 205*, p. 8; Amnesty International Australia, *Submission 213*, p. 19; Australian Lawyers for Human Rights, *Submission 229*, p. 32; Dr Val Kitchener, *Submission 245*, p. 1.

8 Professor Sarah Joseph, *Submission 36*, p. 9.

9 ACT Government, *Submission 73*, p. 11.

10 Associate Professor Julie Debeljak, *Submission 15*, p. iv. Other submitters also supported the approach. See, for example, National Legal Aid *Submission 118*, p. 40, Castan Centre for Human Rights Law, *Submission 150*, p. 2.

11 Law Council of Australia, *Submission 120*, p. 7.

cousin of a constitutional bill of rights', but stated that he supported it if a constitutional bill of rights were not possible.[12]

Jurisdiction

7.7 The AHRC model proposes that a HRA should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination, meaning that it should apply to citizens and non-citizens.[13] As to its geographical application, the AHRC proposed that a HRA apply in relation to people in Australia's territory, and those subject to Australia's jurisdiction (including when they are located overseas):

> 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. Determining whether 'effective control' exists involves the application of a factual test, to prove either 'control over persons' or 'control over territory'. For example, Australia's offshore immigration detention centres have been recognised as falling under Australia's 'effective control' by international Treaty bodies. A Human Rights Act should include individuals under Australia's 'effective control' overseas in order to fully implement Australia's international obligations.[14]

7.8 The AHRC noted that similar forms of extraterritorial jurisdiction already exist in Australian federal law and are exercised by federal entities, citing the power of the Commonwealth Ombudsman to perform functions in relation to immigration and detention, including oversight of offshore processing sites, and certain federal criminal conduct subject to extraterritorial jurisdiction for conduct that has a sufficient nexus with Australia.[15] Numerous submitters supported this approach.[16] The Australian Centre for International Justice posited that care should be taken to ensure that the jurisdiction of a HRA was not unduly limited in a way that would prevent victims of international crimes

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12 Professor Ben Saul, *Submission 251*, p. 5.

13 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 243. It notes that some rights may rightly be limited only to citizens (for example, the right to vote in Australian elections). knowmore expressed its support for this approach. See, *Submission 222*, p. 5.

14 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 243.

15 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 243.

16 See, for example, National Legal Aid *Submission 118*, p. 43; Law Council of Australia, *Submission 120*, p. 16; Western Australia for a Human Rights Act, *Submission 205*, p. 10; National Justice Project, *Submission 225*, p. 8; Refugee Advice and Casework Service, *Submission 231*, p. 5; Benjamin Rancz, *Submission 266*, p. 4; Professor Patrick Keyzer, Dean of the Thomas More Law School, Australian Catholic University, *Submission 291*, p. 1.

from seeking recourse under the Act.[17] It stated that victims of Australia's international crimes may in many cases reside outside Australia and argued that the jurisdictional test should require only that the complaint or claim have a nexus with Australia.

7.9 The AHRC model further proposes that, noting Australia's constitutional structure and the existing human rights laws in some states and territories, a federal HRA should only apply to federal laws and federal public authorities.[18] It provides that any legislation would need to be clear that it is not intended to override state and territory laws, noting that, pursuant to section 109 of the Constitution, where state laws are incompatible with federal laws, the state law is invalid to the extent of the inconsistency. It noted the advice of the then Solicitor-General Stephen Gageler AC to the National Human Rights Consultation in 2009 that this could be dealt with by a 'concurrency provision',[19] meaning a provision that makes clear that a federal HRA is intended to operate concurrently with state law:

> The result would be effectively to limit situations of inconsistency under s 109 of the Constitution to cases of direct inconsistency: where the State law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the [Act] … In a case of direct inconsistency, the State law would be invalid to the extent, but only to the extent, of the direct inconsistency.[20]

7.10 The ACT Government stated that it supported the use of a concurrency provision to allow the ACT *Human Rights Act 2004* (ACT HRA) to continue operating unaffected by the introduction of federal human rights protection laws.[21] It stated that a concurrency provision would ensure that: ACT protections remain intact in the event that the federal law is more restrictive than existing provisions; the scope of territory rights will apply in the event a federal HRA does adopt the same rights; and the ACT retains the power to expand

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17 Australian Centre for International Justice, *Submission 271*, p. 33.

18 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 243.

19 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 243.

20 See, National Human Rights Consultation, *Report*, September 2009, p. 306, in reference to Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009).

21 ACT Government, *Submission 73*, p. 12. See also, Ms Tara Cheyne, Minister of Human Rights, ACT Legislative Assembly, *Committee Hansard*, Friday 12 May 2023, p. 41. The Queensland Human Rights Commission, similarly, stated that state and territory HRAs should be unaffected by a federal Act. See, *Submission 142*, p. 43.

protections consistent with the promotion of human rights.[22] Commissioner, Dr Helen Watchirs, stated:

> I think we have the model of the discrimination legislation, where our state and territory legislation is allowed to operate concurrently. I know the federal government covers the field, but that's operated cooperatively quite well. The Australian Council of Human Rights Authorities gets together twice a year to talk about issues of common interest. That's a good mechanism for making sure the systems work well together.[23]

7.11 The Law Council of Australia also supported this approach, adding that states and territories which do not have a HRA could be encouraged to adopt mirror legislation for national consistency.[24] By contrast, Australian Feminists for Women's Rights argued that a federal HRA should logically supersede and take precedence over existing state and territory HRAs, arguing that this would be appropriate as 'Australia's human rights obligations are without exception a national and not a state matter'.[25]

Duty on public authorities

7.12 The AHRC model proposes that a federal HRA should establish a positive duty on public authorities and two procedural duties. The positive duty would require public authorities to act in a way that is compatible with the human rights included in the HRA, and to give proper consideration to those rights when making decisions. The procedural duty would have two limbs, operating as an aspect of the binding positive duty. The first limb would incorporate a binding procedural obligation to engage in participation processes where a decision disproportionately affects the rights of Aboriginal or Torres Strait Islander people, people with disability, or children. The second limb would impose a positive duty on public authorities to realise access to justice principles, for example by providing sufficient access to legal assistance, interpreters and disability support to people navigating the justice system. The AHRC proposed that this duty would apply to public authorities, and to private business, non-government organisations and contractors where they are performing public functions.

Who are public authorities?

7.13 The AHRC model proposes that 'public authorities' should be defined flexibly, to encompass both core public authorities (meaning authorities that are always

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22 ACT Government, *Submission 73*, p. 12. The Australian Human Rights Commission also raised this suggestion. Australian Human Rights Commission, *Supplementary Submission 1*, p. 7.

23 Dr Helen Watchirs, Human Rights Commissioner, ACT Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 3.

24 Law Council of Australia, *Submission 120*, p. 16.

25 Australian Feminists for Women's Rights, *Submission 211*, p. 61.

public authorities), and 'functional' public authorities (meaning bodies that has functions of a public nature when exercising those functions on behalf of the State, including private business, non-government organisations and contractors).[26]

7.14 The AHRC model proposes that a public authority would mean:

- 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; and [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; or
- an entity declared by the regulations to be a public authority.[27]

7.15 Under the AHRC model a public authority would *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; or
- an entity declared by the regulations not to be a public authority.[28]

7.16 In deciding whether a function is of a public nature, the AHRC proposed that the following matters should 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;

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[26] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, p. 147. The full proposed definition of a public authority is proposed at page 149.

[27] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 149.

[28] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 149.

- whether the function is of a regulatory nature;
- whether the entity is publicly funded to perform the function; or
- whether the entity is a government owned corporation.[29]

7.17 The AHRC also sets out a list of functions that should specifically be listed to be of a public nature, including the operation of prisons and other places of detention or correctional facilities under control of the federal government; the provision of federal public health and disability services and education; emergency services; federal public housing; and aged care services.[30]

7.18 Numerous submitters agreed with this approach.[31] The Law Council of Australia agreed, while highlighting comments from the Victorian Bar that the definition of a public authority must be sufficiently clear to enable courts to hold all service providers to account, noting that some lack of clarity under the *Victorian Charter of Human Rights and Responsibilities Act 2006* has produced anomalous results, and arguing that the definition from the *Queensland Human Rights Act 2019* (Queensland HRA) is to be preferred.[32] The Law Council of Australia's own view was that it is logical for a federal HRA to apply to entities with obligations under the *Public Governance, Performance and Accountability Act 2013*, and related Commonwealth integrity and accountability-related legislation, though it may apply to a broader range of entities.[33]

7.19 Australian Lawyers for Human Rights agreed that a HRA should provide a non-exhaustive list of factors and indicia that may indicate if an organisation is performing a function of a public nature, and should be defined to include functions of a regulatory nature. They submitted that the operation of regulatory schemes governing the licensing, accreditation or regulation of non-government service providers 'is a mechanism by which government can secure human rights compliance from non-government service providers undertaking contracted-out services':

> A similar provision in a federal HRA would mean that the regulatory body governing the provision of aged-care services, currently the Australian Aged Care Quality and Safety Commission ('the Commission'), would have obligations to act compatibly, and make decisions that are compatible, with the rights protected in the federal HRA. Accordingly, in fulfilling its own

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29 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 150.

30 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 150.

31 See, for example, Human Rights Law Centre, *Submission 232*, pp. 13–14; Law Council of Australia, *Submission 120*, p. 20; Australian Lawyers for Human Rights, *Submission 83*, p. 26.

32 Law Council of Australia, *Submission 120*, p. 20. See, *Human Rights Act 2019* (QLD) section 9 (meaning of public entity).

33 Law Council of Australia, *Submission 120*, p. 20.

> public authority human rights obligations, the Commission would need to 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. A failure to adhere to required human rights standards would have adverse consequences for the organisations themselves, including possible cancellation of contracted arrangements or punitive responses from the regulator. Similarly, the National Disability Insurance Scheme Quality and Safeguards Commission would have obligations to act compatibly, and make decisions which are compatible, with the rights protected in the federal HRA.[34]

7.20 The AHRC model proposes excluding courts from the definition of 'public authorities'. However, some submitters disagreed with excluding courts as core public authorities. The Hon Pamela Tate AM KC submitted that there are, in principle, good reasons why courts should be captured by the definition, because courts are institutions of the state and their conduct should be compatible with human rights.[35] She noted that under the United Kingdom HRA, courts have the status of public authorities, meaning that the United Kingdom *Human Rights Act 1998* has both a 'vertical' effect (creating legal remedies for individuals against the State), and a 'horizontal' effect (whereby human rights legislation influences legal relations between private parties).[36] This horizontal effect arises because the courts, as public authorities, are required to ensure that the law they apply is compatible with human rights, regardless of whether the parties to the litigation are public or private. Ms Tate posited that a concern arises as to whether the result of courts being public authorities 'is that they may develop the common law in unsettled or unpredictable directions', something which she argued may be addressed by an express exclusion of the development of novel causes of action between private parties in reliance on a federal HRA.[37] Professor Melissa Castan, Director of the Castan Centre for Human Rights Law, agreed that there would be constitutional issues to be addressed, but which could be resolved.[38] Associate Professor Julie Debeljak also submitted that, subject to constitutional considerations, courts and tribunals should be included in the definition, noting that as 'courts and tribunals will have human rights obligations in relation to rights-compatible interpretation of statutory law under a federal human rights instrument, it is odd and incomplete to not impose similar obligations on courts and tribunals in

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34 Australian Lawyers for Human Rights, *Submission 83*, p. 26.

35 The Hon Pamela Tate AM KC, *Submission 61*, p. 4.

36 The Hon Pamela Tate AM KC, *Submission 61*, p. 5.

37 The Hon Pamela Tate AM KC, *Submission 61*, p. 6.

38 Professor Melissa Castan, Director, Castan Centre for Human Rights Law, *Committee Hansard*, Friday 25 August 2023, p. 15.

the development of the common law'.[39] Australian Lawyers for Human Rights submitted that the concern about a unified common law does not arise for a federal HRA and did not agree that defining public authority to include the courts in their own right would offend the Constitution. They emphasised the importance of including the courts in the definition so as to require the courts to develop, interpret and apply the common law in a manner consistent with human rights values.[40]

7.21 The AHRC model also proposes allowing delegated legislation to be made to clarify when entities are not considered to be public authorities. Some submitters raised concerns with this, noting that the use of such power in Victoria has effectively become an exemptions power. Dr Bruce Chen noted that the exemption of the Victorian parole board from the operation of the Charter provides a cautionary tale:

> Initially, this was to allow Victorian parole boards 'an extended time to prepare themselves for Charter compliance'. These exemptions have continued to be extended since the Victorian Charter fully commenced operation over 15 years ago.[41]

7.22 The AHRC proposed that business and organisations should be able to voluntarily opt in to accept responsibility to comply with a HRA.[42] Liberty Victoria submitted that the ACT and Queensland due diligence 'opt-in' schemes had resulted in limited engagement by private entities.[43] However, the ACT Government noted that, in its jurisdiction, seven private entities have elected to opt-in to its public authority obligations.[44] Several submitters argued that there should be legislated, clear and unambiguous obligations that apply to private entities, through a positive duty to undertake and report on human rights due diligence, rather than an 'opt-in' clause for businesses to comply with human rights voluntarily.[45] For example, KPMG submitted that Australia's human rights framework should include a HRA which imposes 'clear and unambiguous human rights due diligence obligations' on Australian businesses

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39 See also, Associate Professor Julie Debeljak, *Submission 15*, pp. 77–78.

40 Australian Lawyers for Human Rights, *Submission 83*, p. 24.

41 Dr Bruce Chen, *Submission 158*, p. 12.

42 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 150.

43 Liberty Victoria, *Submission 155*, pp. 36–37.

44 ACT Government, *Submission 73*, p. 6.

45 KPMG, *Submission 108*, p. 2, Environmental Defenders Office, *Submission 147*, p. 20; Ethical Partners, *Submission 178*, p. 5. See also, Ms Frances Bradshaw, Senior Solicitor with the Environmental Defenders Office (ACT), *Committee Hansard*, Thursday 28 September 2023, p. 36; Community Legal Centres National Human Rights Network, *Submission 331*, p. 32.

to better align with emerging international leading practice.[46] It highlighted, in particular, the *UN Guiding Principles on Business and Human Rights*, which affirm that businesses have a responsibility to respect human rights, which includes preventing or mitigating adverse impacts related to their operations and value chain.[47]

Positive duty

7.23 The AHRC model proposes that a federal HRA should establish a duty on public authorities to act in a way that is compatible with the human rights included in the HRA, and to give proper consideration to those rights when making decisions:[48] There are therefore two elements to this duty that operate cumulatively, that public authorities must:

- give proper consideration to human rights when making decisions (which must be more than a checklist exercise); and
- act compatibly with human rights.[49]

Failure by a public authority to comply with this duty would be enforceable by the courts (see the discussion regarding remedies below).

7.24 The AHRC described the potential effect of an enforceable positive duty:

> The positive duty…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. 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.[50]

7.25 It posited that a positive duty should result in 'a transformative cultural shift within government', making rights protection 'a core part of government

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46 KPMG, *Submission 108*, p. 2.

47 KPMG, *Submission 108*, p. 1.

48 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 139. See also, Australian Human Rights Commission, *Submission 1*, p. 49.

49 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 142–145.

50 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 139.

business, not just an afterthought'.[51] President of the AHRC, Emeritus Professor Rosalind Croucher, described the intended effect as being a duty 'to get it right in the first place by developing policies and framing decisions through the lens of human rights'.[52]

7.26 Several submitters and witnesses expressed support for the inclusion of a positive duty.[53] Ms Lauren Henley, Senior Systemic Advocate at the Australian Federation of Disability Organisations, discussed the potential effect of such a duty in relation to services provided to people with disability, expressing hope that a positive duty would lead workers to undergo human rights training and professional development before entering roles with the National Disability Insurance Scheme (NDIS) to help improve a 'culture of low expectations'.[54]

7.27 Under the AHRC model, consistent with the HRAs in Victoria, ACT and Queensland, the positive duty would not apply if the public authority could not reasonably have acted differently or made a different decision in accordance with the law.[55] This means that if a law, such as an Act of Parliament, requires the decision-maker to take certain actions (for example, mandatory visa cancellation under the *Migration Act 1958*) the duty on the public authority to act compatibly with human rights or consider human rights would not apply. Mr Sean Costello, Principal Lawyer with the Queensland Human Rights Commission, drew attention to the practical limits of a positive duty, noting that if a law requires a public authority to act in a manner that breaches human rights, then a positive duty would not require it to act in a manner compatible with human rights:

> [C]ommon across all three of the state and territory human rights acts, a defence for a public entity contravening that obligation is that—the first test to assess if the entity is acting compatibly is if it's acting lawfully. Human rights can only be limited by a public agency if they're acting in accordance with the law…[A]s a result, there is a defence provided—it's in section 58(2) of our act—which says that if the act legislation you're acting under gives

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51 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 140. The AHRC proposed that the implementation of such a duty should be subject to an initial transition period pre-introduction, followed by a roll-out and permanent ongoing education and support measures. See, p. 154.

52 Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, Friday 12 May 2023, p. 27.

53 For example, Law Council of Australia, *Submission 120*, p. 20; Dr Sarah Moulds, *Committee Hansard*, Friday 20 October 2023, p. 44.

54 Ms Lauren Henley, Senior Systemic Advocate at the Australian Federation of Disability Organisations, *Committee Hansard*, Wednesday 27 September 2023, p. 44.

55 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 143.

> you no discretion, you have no choice but to act compatibly, and that's not a contravention of the act.[56]

Associate Professor Julie Debeljak noted that from a parliamentary sovereignty perspective, this exception is necessary, as if Parliament retains the right to enact rights-incompatible legislation, public authorities should not be considered to be behaving unlawfully for implementing that law. However, from a human rights perspective, if a law is rights-incompatible, such that a public authority may rely on it not to act in accordance with the positive duty, an individual may still seek to rely on a rights-compatible interpretation of the law under the interpretative provision of the HRA[57] (see the discussion of the interpretative provision below).

Participation duty

7.28 The AHRC model proposes that a positive duty should also incorporate a binding procedural obligation to engage in participation processes where a decision disproportionately affects the rights of Aboriginal or Torres Strait Islander people, people with disability, or children.[58] It posited that this participation duty would be part of the 'proper consideration' limb of the positive duty.

7.29 The AHRC proposed that a participation duty would include both a binding and non-bonding component:

> 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

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56 Mr Sean Costello, Principal Lawyer with the Queensland Human Rights Commission, *Committee Hansard*, Tuesday 15 August 2023, p. 8.

57 Associate Professor Julie Debeljak, *Submission 15*, p. 76.

58 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 161–242.

report on participation to Parliament would not affect the validity of the instrument in question.[59]

7.30 The AHRC noted that international law requires specific participation measures to be undertaken regarding decisions affecting the rights of these groups, and stated that a 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'.[60] In this regard, it stated that some groups in society 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 applies particularly to minority groups and those lacking sufficient political power to have their voice heard, or groups who experience barriers to participation related to vulnerabilities experienced by those groups (for example, children, who are unable to vote).[61] It argued that 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.

7.31 The AHRC also argued that 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, resulting in economic costs, and possible infringement of Australia's obligations to protect the rights of vulnerable members of the community. In this regard, it stated that the AHRC 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.[62]

7.32 The AHRC stated that participation should be characterised by several features: being active, free, meaningful and accessible; being a process, not a one-time event; embedded systemically into government decision making; and influencing subsequent decisions.[63] It further stated that participation encompasses consultation with representative organisations, or spokespeople,

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59 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 161.

60 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 161, 165–171.

61 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 161, 165–171.

62 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 162. The Australian Human Rights Commission highlighted recent policies which it argued were implemented without proper consultation, including the Northern Territory Intervention, and policies in response to COVID-19 as they impacted people with disability.

63 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 172.

where a decision will have an impact on the rights of multiple individuals within a specific group, and includes a procedural fairness dimension, ensuring individuals participate in decisions that directly affect their own lives:

> 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…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.[64]

7.33 A significant number of witnesses and submitters supported the inclusion of a participation duty.[65] For example, the Progressive Law Network stated that it 'unreservedly supports the AHRC's recommendation for the inclusion of a procedural 'participation duty', so that those most affected by housing policies can have an active role in their processes'.[66] It posited that a participation duty could have particular value with respect to the realisation of economic, social and cultural rights, highlighting an observation by the UN Committee on Economic, Social and Cultural Rights that 'one of the root causes of violations

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64 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 172–173. For example, the Australian Human Rights Commission argued, a decision involving child protection measures should enable the affected child to be heard throughout the process based on their evolving capacity.

65 See, for example, Queensland Council of Social Service, *Submission 23*, p. 3; Economic Justice Australia, *Submission 34*, p. 16; Dr Laura Grenfell and Dr Sarah Moulds, *Submission 50*, p. 4; Murdoch University Legal Clinic, *Submission 55*, p. 2; National Centre for Action on Child Sexual Abuse, *Submission 85*, p. 14; NSW Aboriginal Women's Advisory Network (AWAN), *Submission 113*, p. 10; National Legal Aid, *Submission 118*, p. 35; Progressive Law Network, *Submission 127*, p. 6; Bonavero Institute of Human Rights, *Submission 128*, p. 7; Queensland Advocacy for Inclusion, *Submission 140*, p. 4; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 10; Federation of Community Legal Centres, *Submission 174*, p. 19; Australian Child Rights Taskforce, *Submission 179*, p. 5; Reconciliation Australia, *Submission 190*, p. 4; ANTAR, *Submission 193*, p. 6; Western Australia for a Human Rights Act, *Submission 205*, p. 12; Amnesty International, *Submission 213*, p. 22; Tasmanian Aboriginal Legal Service, *Submission 217*, p. 9; knowmore, *Submission 222*, p. 4; Australian Lawyers for Human Rights, *Submission 229*, p. 31; Human Rights Law Centre, *Submission 232*, p. 15; Australian Federation of Disability Organisations, *Submission 274*, p. 19; Community Legal Centres National Human Rights Network, *Submission 331*, p. 10; Ms Angela Scarfe, Senior Policy Adviser, Australian Association of Social Workers, *Committee Hansard*, Friday 25 August 2023, p. 55.

66 Progressive Law Network, *Submission 127*, p. 6.

of economic, social and cultural rights [is the] limited involvement of non-governmental organisations in public policymaking'.[67]

7.34 However, several submitters argued that the AHRC's proposed participation duty did not go far enough. National Legal Aid expressed concern that the requirement to consult with these groups only when decisions and policies 'directly or disproportionately affect their rights' would unnecessarily limit the duty to consult with these groups and would not necessarily be consistent with international human rights obligations.[68] It noted that, for example, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) requires consultation with Indigenous peoples in relation to measures 'that may affect them', and the Convention on the Rights of the Child requires that children (both individually and collectively) who are capable of forming their own views be given the right to express them 'in all matters affecting' them, arguing that the right can be presumed to extend to matters that indirectly or proportionately affect their rights.[69] It also suggested that the procedural duties may provide an opportunity to develop an established process of reporting and training from the relevant AHRC Commissioners to the executive and its public authorities.[70]

7.35 Emeritus Professor Chilla Bulbeck argued that consideration should be given to extending the 'participation duty' to other vulnerable groups or groups with a keen interest in particular issues, for example the transgender community's engagement with sex-change surgery, and Australians from different cultural and gender identities and states of health in relation to the structure of, and services in, aged care or nursing homes.[71] The Coalition of Activist Lesbians Australia submitted that lesbians are an under-served group with significant intersecting rights who are not being given adequate consultation rights 'because the dominant position of LGBTQ+ organisations…do not allow for a diversity of views outside their closed 'Trans' umbrella'.[72] Australian Feminists for Women's Right raised similar concerns in relation to consultation with women.[73]

7.36 The Environmental Defenders Office argued that the participation duty should require public authorities to ensure the effective participation of all people who

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67 Progressive Law Network, *Submission 127*, p. 6, in reference to UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Congo* (United Nations Document E/C.12/COG/CO/1, 2013) [11].

68 National Legal Aid, *Submission 118*, p. 36.

69 National Legal Aid, *Submission 118*, p. 37.

70 National Legal Aid, *Submission 118*, p. 37.

71 Emeritus Professor Chilla Bulbeck, *Submission 146*, p. 2.

72 Coalition of Activist Lesbians Australia, *Submission 167*, p. 7.

73 Australian Feminists for Women's Rights, *Submission 211*, p. 64.

are most at risk of experiencing environmental harm in addition to Aboriginal and Torres Strait Islander people, children, and people with disability, such as women, people who are financially disadvantaged, older people, people from a racial, ethnic or other minority, people displaced by natural disasters, culturally and racially marginalised communities, and LGBTIQA+ communities.[74] Environmental Justice Australia argued that a generalised participation right should be coupled, within the right to a healthy environment, with clear articulation of Australia's duties in relation to free, prior and informed consent for Aboriginal and Torres Strait Islander people and the associated UNDRIP participation principles.[75]

7.37 Several submitters highlighted the importance of monitoring carefully the extent to which a participation duty may be successful. The Indigenous Law and Justice Hub stated that the success of this process-based measure for protecting Indigenous rights 'would rely on the robustness of the processes and resources put in place for consultation'.[76] Save the Children and 54 Reasons made a similar observation in relation to the rights of children to participate in decisions relating to them.[77] Deafblind Australia likewise highlighted the importance of the quality and efficacy of consultation being undertaken in purported compliance with a participation duty:

> It's not just about what they do but how they do it. How they conduct their consultation must be shown to be informed by the needs of the group they wish to engage. Assessing people's meaningful inclusion in consultation cannot be left to government as they lack the requisite skills and knowledge to determine this. How can a department that knows nothing about Deafblindness hold a consultation using interpreters whose skills they cannot assess or comment on to transmit information in a language they don't understand, and then make a determination about how meaningfully someone has been included?[78]

7.38 The Law Council of Australia stated that, while a participation duty is a significant human right, it noted that this would be a novel addition to a HRA, and stated that it would need to further consider the implications of such a duty were it introduced.[79] The AHRC also acknowledged that a participation duty would be a novel addition, but noted that this model is directly informed by similar laws and practices existing in the common law and democratic

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74 Environmental Defenders Office, *Submission 147*, p. iii.

75 Environmental Justice Australia, *Submission 150*, p. 15. See also, Humanists Victoria, *Submission 156*, p. 4.

76 Indigenous Law and Justice Hub, *Submission 157*, p. 16.

77 Save the Children and 54 Reasons, *Submission 168*, p. 17.

78 Deafblind Australia, *Submission 87*, pp. 3–4.

79 Law Council of Australia, *Submission 120*, p. 30.

jurisdictions in different contexts, including existing participation models, traditional common law rights, and the treaties ratified by Australia.[80] The ACT Government stated that because the proposal for a participation duty in relation to specific groups of people draws on international human rights law standards, such a duty is already a feature in the ACT's human rights framework, despite not being expressly recognised.[81] It commented that if a participation duty were to be adopted federally, this would present an opportunity to reflect on whether this express statement improves engagement with these cohorts of people. The Queensland Human Rights Commission supported the inclusion of a participation duty, but suggested that public entities 'would benefit from further clarity about when and how the duty arises, and how entities would be held accountable'.[82] It recommended that the AHRC develop guidance material on how public entities would discharge this duty in various circumstances, including where consultation with multiple people and groups is needed, suggesting that it could refer to existing Australian Government frameworks, such as the *APS framework for engagement and participation*.

Equal access to justice duty

7.39 The AHRC model also proposes a complementary 'equal access to justice duty' for public authorities, which would mean that public authorities have a positive duty to realise access to justice principles. 'Access to justice' is an umbrella concept associated with the rule of law, common law principles and several human rights (in particular, the right to a fair hearing, the right to an effective remedy, equality before the law and non-discrimination).[83]

7.40 The AHRC model proposes that such a duty would require that public authorities take active steps '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, overlayed 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

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80 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 161.

81 ACT Government, *Submission 73,* p. 12.

82 Queensland Human Rights Commission, *Submission 142*, p. 46.

83 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 215.

> 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.[84]

7.41 It proposes that the duty should encompass, at a minimum:

- access to legal representation in criminal matters, involving the provision of publicly funded lawyers in criminal trials for people who cannot afford one; and
- non-discrimination regarding access to legal services and courts in both civil and criminal matters (involving the provision of: interpreters where required; supports including accessible court facilities and procedural accommodations to ensure equal participation of persons with disability in legal proceedings; specialist children's advocates/lawyers; and support for culturally safe legal services).[85]

7.42 In this regard, the AHRC notes that access to legal representation is a key element of access to justice and often necessary for the achievement of other rights, but outlined the patchy manner in which such access is currently provided for in criminal matters in practice.[86]

7.43 The AHRC model explains that while these principles may inform the application of procedural rights that already apply in the court room, they would not impose a 'duty' on courts 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'.[87]

7.44 A significant number of witnesses and submitters supported the inclusion of an equal access to justice duty.[88]

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84 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 215.

85 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 217. These matters are discussed in detail from pp. 219–222.

86 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 218–219.

87 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 215.

88 For example, Mr Derek Schild, Head of Civil Justice Legal Practise, National Legal Aid, *Committee Hansard*, Thursday 28 September 2023, p. 38; Ms Mary Ann Baquero Geronimo, CEO, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, Friday 20 October 2023, p. 32; Dr Tania Penovic, Senior Chair, Women and Girls' Rights, Australian Lawyers for Human Rights, *Committee Hansard*, Wednesday 27 September 2023, p. 11; Mr Sean Bowes, Law Reform and Advocacy Officer, knowmore, *Committee Hansard*, Wednesday 27 September 2023, p. 56; Economic Justice Australia, *Submission 34*, p. 21; No To Violence, *Submission 53*, p. 12; Murdoch Law School

7.45 The Australian Child Rights Taskforce stated that it supported such a duty in principle, highlighting the additional barriers to access to justice experienced by children, which it argued 'extend beyond the limitations of the legal and justice systems and require additional training and resources including but beyond that for the legal profession'.[89] Similarly, National Legal Aid noted that the content of the equal access to justice duty, interpreted with reference to the international instruments, may extend to procedural accommodations and to promoting appropriate training for those working in the field of administration of justice.[90]

7.46 Women's Legal Service NSW considered the equal access duty should include the 'right of victim-survivors to be treated with dignity and compassion in the legal process'.[91] It submitted that similar procedural rights that are afforded to the accused should be guaranteed to victim-survivors, including access to interpreters, legal representation and 'gender-based violence and trauma informed, culturally safe support services'. A duty of equal access should also 'include allowing the participation of victim-survivors in the criminal legal process where decisions are being made that directly impact them, for instance bail decisions'.[92] Women's Legal Service NSW argued that a HRA 'which embeds a duty to equal access for victim-survivors in the criminal legal process, in addition to the duty towards defendants, sends a clear message that the voices and experiences of victim-survivors are important'.[93]

7.47 In relation to non-criminal matters, the AHRC notes that legal aid in civil and family matters is not a right guaranteed under international law and as such the AHRC is not including this as a requirement of the proposed access to justice duty. Nonetheless, it noted that legal aid in such matters is often essential for the realisation of a person's human rights. In this respect, it highlighted relevant jurisprudence from the European Court of Human Rights that extended the application of the right to a fair trial to include legal aid in the determination of civil rights and obligations:

Legal Clinic, *Submission 65*, p. 3; Australian Athletes' Alliance, *Submission 92*, p. 1; NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 13; Queensland Advocacy for Inclusion, *Submission 140*, p. 4; Federation of Community Legal Centres VIC, *Submission 174*, p. 19; Western Australia for a Human Rights Act, *Submission 205*, p. 12; Australian Lawyers for Human Rights, *Submission 229*, p. 32; Human Rights Law Centre, *Submission 232*, p. 16; Australian Federation of Disability Organisations, *Submission 274*, p. 10; Community Legal Centres National Human Rights Network, *Submission 331*, p. 31.

89 Australian Child Rights Taskforce, *Submission 179*, p. 6.

90 National Legal Aid, *Submission 118*, p. 39.

91 Women's Legal Service NSW, *Submission 97*, p. 11.

92 Women's Legal Service NSW, *Submission 97*, p. 13.

93 Women's Legal Service NSW, *Submission 97*, p. 14.

> 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. This ruling was grounded in the procedural right to access courts, rather than the procedural rights guaranteed by a criminal trial.[94]

7.48 The AHRC noted that while there may be no right to free legal assistance in civil cases, there should still be a requirement to ensure that where civil and family legal assistance is available, it is equally accessible in accordance with the non-discrimination principle.[95]

7.49 Women's Legal Service NSW acknowledged that the AHRC model does not extend the duty to civil and family law matters, but submitted that a duty should extend in such cases that involve substantial human rights issues:

> An inability to access legal assistance (referring broadly to free legal advice, advocacy and/or representation) in civil and family law matters, or appropriately participate in the court process due to procedural deficiencies, can have serious human rights implications for women and children, impacting the right to be free from gender-based violence, the right to civil redress for gender-based violence, the right to life, the right to family and the right to shelter, among others.…[T]he lack of funding for women who have experienced gender-based violence in family law, immigration law, discrimination and employment law, social security and other areas of civil law, (as well as in state/territory based issues such as protection orders and tenancy) has similar human rights implications…For example, parenting orders which provide for care arrangements that do not recognise the risks posed by a violent father, can have serious and sometimes fatal consequences, directly impinging on a mother and her children's right to life and to live free from violence.[96]

Limitation clause

7.50 The AHRC model proposes the inclusion of a single limitation clause in a HRA, setting out when a right may be permissibly limited, noting that circumstances may require that different rights be balanced against important public interests, and against one another.[97] It proposes that the overarching limitations clause should carve out absolute rights and be based on the proportionality test at

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94 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 219.

95 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 219.

96 Women's Legal Service NSW, *Submission 97*, p. 9.

97 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 254–256.

international human rights law. Absolute rights are those rights under international human rights law that may never be permissibly limited (for example, the prohibition against torture). It stated that such a provision should provide that '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' and set out the test for when a limit may be permissible. It stated that in determining this, a provision could include consideration of:

- 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; and
- whether there are safeguards or controls over the means adopted to achieve the purpose.[98]

7.51 The AHRC noted that the ACT, Queensland and Victoria all adopt similar limitations tests, and stated that in its consultation process the Queensland provision was identified as being preferred.[99] Section 13 of the Queensland HRA states:

> (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).[100]

7.52 This provision establishes an analytical framework which recognises that some rights may not be limited (in particular, by having regard to the nature of the right in question). However, it does not explicitly state that the limitation clause

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98 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

99 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

100 *Human Rights Act 2019* (QLD), section 13.

does not apply to absolute rights or identify those rights. The AHRC suggested adopting this provision with amendment 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'.[101]

7.53 The Law Council of Australia stated that it supported the inclusion of a general limitation clause that provides that many of the rights protected in the HRA 'may be subject to reasonable and proportionate restrictions if these are clearly demonstrated to be necessary for the achievement of a legitimate purpose such as protecting the rights of others'.[102] However, it noted that as no such clause exists in either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights (ICESCR), such a clause would need to be drafted carefully to ensure it does not limit rights more than is permissible at international law, and should make clear that limitations on rights 'are not lightly to be inferred'.[103] Professor Sarah Joseph agreed that most of the rights in a HRA should be subjected to reasonable limitations, but new wording would be required 'to cater for the extended ICESCR obligations, adapting the words of Article 2(1) ICESCR'.[104]

7.54 The Law Council of Australia stated that the limitation clause in the Queensland HRA reflects best practice, as it includes guidance on what 'reasonable and proportionate' restrictions may entail, and makes clear that public authorities subject to the Acts are not to limit or destroy others' human rights (for example based on their own interpretation of permissible limitation).[105] Associate Professor Debeljak agreed with this observation, and that a limitation provision should explicitly exclude *all* absolute rights (a wider suite of rights than those set out by the AHRC).[106]

7.55 However, some witnesses and submitters argued that a single limitation clause was inappropriate, including on the basis that it would dilute protections for some rights and elevate some rights over others.[107] Dr Mark Fowler, an Associate

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101 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

102 Law Council of Australia, *Submission 120*, p. 17.

103 Law Council of Australia, *Submission 120*, pp. 17–18.

104 Professor Sarah Joseph, *Submission 36*, p. 25.

105 Law Council of Australia, *Submission 120*, p. 18 in reference to sections 13–14 of the *Human Rights Act 2019* (QLD).

106 Associate Professor Julie Debeljak, *Submission 15*, p. vi. See also, Castan Centre for Human Rights Law, *Submission 160*, p. 28.

107 See, Church of Scientology Australia, *Submission, 66*, p. 11; Human Rights Law Alliance, *Submission 14*, p. 9; Freedom for Faith, *Submission 119,* p. 10; Australian Christian Lobby, *Submission 143*, p. 13; Rule of Law Institute, *Submission 327*, p. 2.

Professor of Law, argued that a single limitation clause would not reflect the different limitations permitted under international law. [108] He noted that some civil and political rights may be subject to 'necessary' limitation, whereas others may be subject to 'reasonable' limitation, drawing on jurisprudence from the European Court of Human Rights to argue that 'necessary' is a higher standard than 'reasonable', meaning that the AHRC's proposed single limitation clause may lead to contravention of Australia's obligations under international human rights law.[109]

7.56 Dr Paul Taylor, a legal academic, submitted that a single limitation clause would, in relation to civil and political rights, 'seriously undermine the protection that is meant to be secured for rights against interference'.[110] He argued that the convenience of courts and public servants in conducting limitations analysis day-to-day is not enough reason for individuals under Australia's jurisdiction to 'lose key aspects of the fundamental rights to which they are entitled under the ICCPR'. [111] Dr Taylor also submitted that the Siracusa Principles (which sets out the limits on rights restrictions that states may take during emergencies) do not permit this approach.[112]

Absolute rights

7.57 The AHRC proposed that a limitation clause 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; and

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[108] Associate Professor Mark Fowler, *Committee Hansard*, Friday 20 October 2023, p. 20.

[109] Associate Professor Mark Fowler, *Committee Hansard*, Friday 20 October 2023, p. 20. The Australian Christian Lobby and Rule of Law Institute expressed similar concerns. See, Mr Daniel Simon, Solicitor for the Human Rights Law Alliance and Legal Representative for the Australian Christian Lobby, *Committee Hansard,* Friday 20 October 2023, p. 23; Mr Chris Merritt, Vice President of the Rule of Law Institute of Australia, *Committee Hansard*, Friday 20 October 2023, p. 41.

[110] Dr Paul Taylor, *Submission 216*, p. 4.

[111] Dr Paul Taylor, *Submission 216*, p. 4.

[112] Dr Paul Taylor, *Submission 216*, p. 3. Ms Monica Doumit, the Director of Public Affairs and Engagement at the Catholic Archdiocese of Sydney, also posited (in the context of the right to freedom of religion) that language from the International Convention on Civil and Political Rights is 'the linchpin', but that The Siracusa principles and other international instruments could guide interpretation. See, *Committee Hansard*, Thursday 28 September 2023, p. 13. The relevance of The Siracusa Principles was also raised by the Racial and Religious Discrimination Legal Service Inc, *Submission 184*, p. 6.

- right to recognition before the law.[113]

7.58 However, Associate Professor Julie Debeljak stated that this does not capture all absolute rights, arguing that the list should be expanded to include: the prohibition on genocide; the prohibition on slavery and servitude; the prohibition on prolonged arbitrary detention; and the right to freedom from systematic racial discrimination.[114] Further, as observed by several submitters,[115] freedom of thought, conscience and religion (as distinguished from the right to exercise or manifest those beliefs) is also an absolute right which may never be subject to permissible limitations. The Church of Scientology argued that this aspect of the right to freedom of religion should be carved out as an absolute right.[116]

Minimum core of economic, social and cultural rights

7.59 The AHRC also proposed the inclusion of examples in the limitations clause that highlight the minimum core of certain economic, social and cultural rights, to signify that these rights should not be limited to such an extent as to encroach upon the minimum protection required by the right.[117]

7.60 The AHRC stated that minimum core obligations have been described as the 'non-negotiable foundation of a right to which all individuals, in all contexts, and under all circumstances are entitled', or 'a "floor" below which no government can go regardless of the economic situation in a country'.[118] It stated that the limitations clause could state that:

> [R]ights 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. Other examples could also be included in the text to illustrate the nature of minimum core obligations.[119]

7.61 The ICESCR establishes a specific restriction on the reasons for, and the manner in which, economic, social and cultural rights may be limited. Article 4 of this Convention establishes that States Parties may limit economic, social and

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113 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

114 Associate Professor Julie Debeljak, *Submission 15*, p. vi.

115 See, for example, Human Rights Law Alliance, *Submission 14*, p. 4; Church of Scientology, *Submission 66*, pp. 9–10; Australian Christian Lobby, *Submission 143*, p. 10.

116 Church of Scientology, *Submission 66*, p. 10.

117 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 256.

118 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

119 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 255.

cultural rights only insofar as this may be compatible with the nature of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.[120] This means that the only legitimate objective in the context of economic, social and cultural rights is a limitation for the 'promotion of general welfare'. In addition, the UN Committee on Economic, Social and Cultural Rights has advised that:

> [T]he benefits of the limitation in promoting the general welfare must outweigh the impacts on the enjoyment of the right being limited. The more serious the impact on the [individual's] Covenant rights, the greater the scrutiny that must be given to the grounds invoked for such a limitation.[121]

7.62 As to when a limitation will be compatible with the nature of economic, social and cultural rights, the UN Committee on Economic, Social and Cultural Rights appears to indicate that minimum essential levels and corresponding minimum core obligations under each right represent the nature of the rights.[122] That is, even if a limitation were for the promotion of general welfare, if it was regarded as constituting a non-fulfilment of the minimum core obligations associated with economic, social and cultural rights, then it would go against the nature of those rights.[123] The term 'general welfare' is to be interpreted restrictively in this context, and should not be taken to impliedly include reference to public order, public morality and respect for the rights and freedoms of others.[124] Rather, 'general welfare' refers primarily to the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[125]

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120 International Covenant on Economic, Social and Cultural Rights, article 4.

121 *Pardo v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 52/2018, E/C.12/67/D/52/2018, [9.4].

122 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: the nature of states parties' obligations* (14 December 1990) E/1991/23(Supp) [10].

123 For further discussion see, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review*, vol. 9, no. 4, 2009, pp. 580–581.

124 Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review*, vol. 9, no. 4, 2009, p. 573. See also, Phillip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, vol. 9 no. 2, 1987, pp. 201–202.

125 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review*, vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

Interpretive clause

7.63 The AHRC model proposes that a federal HRA should include several directions articulating how a HRA is to be interpreted, both by reference to international human rights law, and in relation to federal domestic laws.[126]

7.64 The AHRC argued that a direction about how to interpret the human rights contained in the Act in relation to international human rights law should be 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.[127]

7.65 The AHRC stated that as human 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. It also argued that this approach would encourage consideration of explanatory General Comments and other relevant international materials, to ensure that a HRA remains a 'living document' that accounts for developments in international law over time.[128]

7.66 The ACT Human Rights Commission also commented on the need for a HRA to be able to evolve:

> Human rights are vibrant and not stagnant. A human rights act must likewise be a living document, ensuring protections keep pace with changes in society.[129]

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126 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 9.

127 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 247.

128 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 247.

129 ACT Human Rights Commission, *Submission 176*, p. 2. See also, comments regarding the need for rights definitions and a human rights framework to evolve. See, Chief Executive Women, *Submission 234*, p. 4; Ms Ally McAlpine, Senior Lawyer, Environmental Justice Australia, *Committee Hansard*, Friday 25 August 2023, p. 41; Ms Kate Eastman AM SC, *Committee Hansard*, Thursday 28 September 2023, p. 52.

7.67 In relation to the interpretation of federal legislation, the AHRC proposed the inclusion of a provision articulating how legislation is to be interpreted having regard to a HRA as follows:

> 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.[130]

7.68 It further stated that a HRA should provide that an act, decision or provision is compatible with human rights in the following circumstances:

> 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].[131]

7.69 The AHRC stated that an interpretive clause and limitation clause would collectively provide guidance to courts about how they should interpret statutes in light of the human rights in a HRA.[132] It stated that achieving the correct approach would be delicate, given Australia's Constitution and rigorous separation of powers between the judiciary and Parliament. It noted that some complexity does arise in considering the extent to which an interpretive provision would differ from the principle of legality (the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities).[133] The Law Council of Australia agreed that an interpretation clause must be 'conceptually distinct' from the principle of legality in order to provide stronger protection that that already provided by common law.[134]

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130 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 253.

131 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 253.

132 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 248.

133 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 249–251.

134 Law Council of Australia, *Submission 120*, p. 18.

7.70 Associate Professor Julie Debeljak indicated that the specific words used to frame a limitation clause required careful consideration. [135] In this regard, she suggested that rather than stating that 'all statutory provisions must be interpreted' (the approach taken in the Victorian Charter), the interpretive provision should require that all legislation 'must be read and given effect in a way which is compatible with' the rights in a HRA (the drafting utilised in the United Kingdom HRA).[136] She noted that two justices of the High Court of Australia had attached significance to this.[137]

7.71 Dr Bruce Chen stated that the AHRC's proposed interpretive clause should be amended to state:

> All primary and subordinate Commonwealth legislation is to be interpreted, so far as is reasonably possible, in a manner that is ~~**consistent**~~ **compatible** 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 **reasonably** possible ~~**that is consistent with its purpose**~~, be interpreted in a way that is most compatible with human rights.[138]

7.72 He argued that these amendments would ensure there is consistency in terminology and consistency in approach within the interpretive clause itself, and the link between the interpretive clause and general limitations clause clear. He stated that it is unnecessary for the provision to include the words 'that is consistent with its purpose', as courts and tribunals would in any event apply the interpretive clause having regard to not only the purpose of the legislation being interpreted, but also its text and context.[139]

7.73 Professor Sarah Joseph noted that all human rights charters in Australia direct courts to interpret statutes in conformity with human rights where possible.[140] She stated that the equivalent interpretative clause in the UK has been read as having 'a remedial effect, which has allowed UK judges to stray quite far from the language of statutes in reading them consistently with human rights'. She noted that the High Court of Australia 'arguably indicated that such an approach would go beyond the constitutional powers of federal judges in Australia', meaning that an interpretation clause in federal legislation 'would

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135 Associate Professor Julie Debeljak, *Submission 15*, p. viii.

136 Associate Professor Julie Debeljak, *Submission 15*, p. viii. In reference to section 3 of the Human Rights Act 1998 (UK) and section 32 of the Victorian Charter.

137 Associate Professor Julie Debeljak, *Submission 15*, p. viii in reference to *Momcilovic v R* [2011] HCA 34.

138 Dr Bruce Chen, *Submission 158*, p. 7.

139 Dr Bruce Chen, *Submission 158*, p. 7.

140 Professor Sarah Joseph, *Submission 36*, p. 19.

almost certainly be read, and if necessary read down, by judges so as to conform with their constitutional powers'. She argued that, as such, it is unlikely that judges would 'over-read' the clause so as to place it beyond constitutional requirements, meaning that 'an interpretative clause need not be drafted tentatively'.[141]

7.74 Ms Kate Eastman AM SC, a barrister and expert in human rights law, highlighted domestic jurisprudence examining approaches to the interpretation of legislation:

> In our domestic law we're very text focused and we look very much to the intention of Parliament when a law was enacted. When we look at human rights, and particularly draw on international law experience, we think about human rights as evolving. They are often described as living instruments…Sometimes there can be tension between 'What did Parliament intend these words to mean at the time it was enacted?' and 'How might you apply that 20 or 30 years down the track?' …There was a very interesting judgement in the High Court—Maloney v The Queen—which really examined the extent to which we can take an ambulatory approach or an evolving approach to our domestic law. I think that's an important case for anybody looking at these issues to think about—when we enact sets of human rights, to what extent do we give those rights the capacity to expand?[142]

7.75 The Hon Pamela Tate AM KC, Adjunct Professor of Law and former justice of the Supreme Court of Victoria, posited that the High Court of Australia has not clearly resolved the methodology to be adopted for fulfilling an interpretive obligation, stating that she supported the recommended linkage between the interpretive obligation and the limitations clause by means of the definition of 'compatible with human rights'.[143]

7.76 The ACT Government noted that in its jurisdiction, the HRA interpretive clause has been interpreted conservatively by courts.[144] It noted that under section 30 of the ACT HRA, all ACT legislation must be interpreted in a way that is compatible with human rights, so far as it is possible with the purpose of the Act. It stated that while initially it had been considered that this interpretive provision could have an expansive effect (allowing the courts to depart from the unambiguous meaning the legislation would otherwise bear), territory and federal case law has indicated a more conservative interpretation of the scope of this provision:

> The majority of the High Court in *Momcilovic* considered an equivalent provision in the Victorian Charter to go no further than the common law

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141 Professor Sarah Joseph, *Submission 36*, p. 19.

142 Ms Kate Eastman AM SC, *Committee Hansard*, Thursday 28 September 2023, p. 52.

143 The Hon Pamela Tate AM KC, *Submission 61*, p. 3.

144 ACT Government, *Submission 73*, pp. 7–8.

> principle of legality, that that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. In the ACT case of *Islam*, it was noted that in working out the meaning of a Territory statute or statutory instrument, the starting point is to identify available meanings consistent with ordinary principles of statutory interpretation and with legislative purpose, and then preferring the interpretation most consistent with human rights, if available.[145]

Override declarations

7.77 The Victorian and Queensland HRAs both have provisions providing for 'override declarations' by Parliament. That is, the Parliament may expressly declare that an Act, or a provision of an Act, has effect despite being incompatible with one or more human rights.[146] In such circumstances, the member introducing a bill that includes an override declaration must outline the exceptional circumstances that justify including the declaration, and that it is the intention of Parliament that an override declaration will only be made in exceptional circumstances. The ACT HRA does not include an override declaration provision.

7.78 The AHRC model does not propose the inclusion of an override declaration provision, instead proposing that courts may interpret legislation as indicating a parliamentary intention to legislate other than in accordance with human rights.[147] In other words, if Parliament clearly intends to pass legislation that is incompatible with rights, this will operate in the same way as an override declaration as a court will not be able to interpret the provision as compatible with rights, and a public authority would therefore not be bound by the obligation to act compatibly as an express statutory provision would instruct them otherwise.

7.79 Numerous witnesses and submitters agreed that an override declaration should not be included in a HRA. The Queensland Human Rights Commission stated that it did not support the inclusion of an override mechanism, and recommended its removal from the Queensland HRA.[148] It stated that laws subject to such a declaration provisions, and any statutory instruments made under those provisions, cannot be declared incompatible with human rights by a court, are not subject to human rights compatible rules of statutory

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145 ACT Government, *Submission 73*, pp. 7–8 referencing *Momcilovic v The Queen* [2011] HCA 34 and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

146 See, *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 31 and *Human Rights Act 2019* (Qld), section 43.

147 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 25.

148 Queensland Human Rights Commission, *Submission 142*, p. 37.

interpretation, and 'signals to public entities that they do not need to act compatibly with human rights when implementing these provisions'.[149]

7.80 Associate Professor Julie Debeljak noted that she has long advocated that an override provision is not required.[150] The Law Institute of Victoria argued that the override provision in the Victorian Charter is not necessary,[151] as did the Castan Centre for Human Rights Law, which cited comments made by Associate Professor Debeljak:

> Whereas human rights instruments are 'designed not only to preserve parliamentary sovereignty, but also to enhance the transparency of an accountability for public decision-making that impacts on rights, and to require justifications for the rights-costs of such decisions', override provisions 'in design and practice … undermine[] such scrutiny and accountability' and allow for 'the substitution of inter-institutional dialogue with a representative monologue'.[152]

7.81 The Victorian Equal Opportunity and Human Rights Commission argued that a federal HRA should not include an override provision on the basis that the equivalent Victorian provision 'suppresses the judiciary's contribution to the dialogue model' by preventing courts from commenting on the scope of protected rights, the justifiability of any limitation on rights, the interpretation of the law compatibly with the rights in the Charter and the need for a declaration of inconsistent interpretation.[153]

7.82 Professor Sarah Joseph agreed that an override clause should not be included, contending that the federal Parliament may lack the constitutional authority to make one:

> An override clause that allows Parliament the latitude to remove laws completely from the ambit of the Act is possibly unconstitutional for lack of a head of power. Section 51(29) does not authorize laws which undermine a treaty obligation. While partial implementation of a treaty obligation is permissible (eg the extension of human rights obligations to federal bodies rather than all bodies), a provision that blatantly facilitates the passage of legislation which breaches human rights undermines those treaty obligations, and may therefore fall outside s 51(29).
>
> In any case, an override clause is unnecessary. Parliament retains the ability to enact laws which are incompatible with human rights. In such instances,

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149 Queensland Human Rights Commission, *Submission 142*, p. 37.

150 Associate Professor Julie Debeljak, *Submission 15*, p. ix.

151 Law Council of Australia, *Submission 120*, p. 10 in reference to input from the Law Institute of Victoria.

152 Castan Centre for Human Rights Law, *Submission 160*, p. 25 citing Julie Debeljak, 'Of Parole and Public Emergencies: Why the Victorian Charter Override Provision Should Be Repealed' *University of New South Wales Law Journal,* 2022, volume 45, no. 2, pp. 570, 616.

153 Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 31.

> Parliament should remain accountable for its decision to do so through the processes of statements of compatibility, legislative scrutiny and judicial interpretation.[154]

7.83 By contrast, the Queensland Youth Policy Collective posited that an override declaration still provides an 'alarm bell mechanism' to alert the community that Parliament is not acting in accordance with human rights, and to invite a higher level of scrutiny of proposed legislation and place greater pressure on the legislature to reconsider whether to support a bill.[155]

Declarations of incompatibility

7.84 ACT, Victoria and Queensland HRAs provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights through applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' or 'declaration of inconsistent interpretation', to notify Parliament that a law is considered incompatible with human rights. This then triggers a process for Parliament to review the legislation. The High Court in *Momcilovic v The Queen* considered this power under the Victorian Charter and while it narrowly upheld the constitutional validity of a court making such a declaration when exercised in state jurisdiction, a majority of judges indicated a federal court could not make such a declaration because of the separation of powers requirement in Chapter III of the Constitution.[156]

7.85 As such, the AHRC model does not recommend that a power for courts to make a declaration of incompatibility be included in a federal HRA.[157] It proposed 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' [declaration of incompatibility] power exists…[W]hen 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

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154 Professor Sarah Joseph, *Submission 36*, p. 27.

155 Queensland Youth Policy Collective, *Submission 141*, p. 25.

156 *Momcilovic v The Queen* (2011) 245 CLR 1 at p. 65 [89] per French CJ (Bell J agreeing at p. 224 [661]); pp. 96–7 [187] per Gummow J; p. 123 [280] per Hayne J; p. 185 [457] per Heydon J.

157 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 25.

> formal [declaration of incompatibility] to be issued by the court to Parliament.[158]

7.86 The Law Council of Australia agreed that a declaration power is 'potentially problematic' for Chapter III Courts under the Australian Constitution, because it involves the court commenting on the validity of a law divorced from the relevant constitutional 'matter'.[159] In its submission to the Law Council of Australia, the Law Society of New South Wales indicated that it preferred that such a process be managed outside the core of the executive, such as by the AHRC. The Law Council of Australia endorsed the idea of judgments automatically triggering an executive review process 'as a pragmatic solution to the constitutionality issue raised in the Momcilovic case', while ensuring that laws incompatible with human rights are reviewed as a matter of course.

7.87 However, The Hon Pamela Tate AM KC expressed concern that the approach proposed by the AHRC may still raise constitutional issues:

> In my view, the absence of a power to make formal declarations of incompatibility may not be sufficient to avoid the risk of constitutional invalidity. Imposing a coercive requirement on a member of the executive by reason of a 'notification' made by a federal court, when it concludes that there are incompatibilities between a statutory provision and human rights, may violate the doctrine of the strict separation of powers regardless of whether the court has a power to issue a formal declaration of incompatibility…The making of comments by judges about defects in legislation is well recognised as permissible. However, there is a risk, although one cannot be certain, that, where the comments are treated as a 'notification' from a federal court that sets in train a process requiring action by the executive, the process will be held invalid by the High Court. It may appear that the process reflects the notion of a declaration of incompatibility in everything but name.[160]

Enforcing duties under a HRA

7.88 The AHRC model proposes that a federal HRA should include the ability for a person to make a complaint to the AHRC for conciliation, and if that fails or is inappropriate, to provide that a person can bring a stand-alone cause of action to the federal courts. It also proposes giving the court discretion over the range of remedies available, which may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.[161] It

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158 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 25–26.

159 Law Council of Australia, *Submission 120*, p. 19. See also, Professor Sarah Joseph, *Submission 36*, p. 27.

160 The Hon Pamela Tate AM KC, *Submission 61*, p. 4.

161 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 11.

proposes that both individuals and representative bodies should have standing to bring claims under a HRA, and that the Act should protect persons from adverse costs orders.

Complaints process

7.89 The AHRC model provides that where a public authority is alleged to have breached its positive duty, a person could: complain to the AHRC first; and if conciliation through the AHRC fails or is inappropriate, or if the matter is urgent, initiate proceedings in the Federal Court or the Federal Circuit and Family Court.[162] The AHRC stated that its existing complaint processes could easily be adapted to conciliate complaints under a HRA to enable complaints and disputes to be resolved in a quick, accessible, cost-efficient and effective manner.[163] It posited that an accessible complaints process (utilising alternative dispute resolution) would reduce the impact of a HRA on the judicial system.[164] A number of submitters agreed with this aspect of the AHRC model and supported this approach.[165] The Centre for Law and Social Justice noted that this is the same model used for federal discrimination complaints, and so having complaints under the HRA operate in the same manner would 'take advantage of the familiarity of this existing process, as well as the extensive expertise of the AHRC in human rights matters'.[166]

7.90 However, many submitters noted the shortcomings of existing human rights complaints processes. The Aboriginal Legal Service of Western Australia stated that it has assisted numerous clients to navigate inaccessible, complex and lengthy complaints processes which often result in unfavourable or insufficient outcomes.[167] Maurice Blackburn considered that the existing federal human rights complaints process (administered by the AHRC) is underfunded, meaning that the AHRC is not able to be 'responsive to the timely administration of justice':

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[162] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 273, 280–282.

[163] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia* December 2022, p. 275.

[164] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 270.

[165] See, for example, The Hon Pamela Tate AM KC, *Submission 61*, p. 8; New South Wales Council for Civil Liberties, *Submission 77*, p. 5; Australian Lawyers Alliance, *Submission 83*, p. 36; Environmental Defenders Office, *Submission 147*, p. 12; Centre for Law and Social Justice, *Submission 185*, p. 12; Australian Lawyers for Human Rights, *Submission 229*, p. 33.

[166] See, Centre for Law and Social Justice, *Submission 185*, p. 13.

[167] Aboriginal Legal Service of Western Australia, *Submission 239*, p. 14.

> In our experience, one of the more common concerns expressed by our clients when accessing justice in matters under the AHRC's jurisdiction is that there are often significant delays in the progress of matters through the Commission. Anecdotal evidence provided by Maurice Blackburn's social justice law team indicates that is common for matters going through the AHRC conciliation process to take more than 12 months to complete.
>
> Maurice Blackburn accepts that the major cause for such delays is probably connected to the underfunding of the Commission…However, we believe there may be benefit in exploring means by which consumers may be able to access justice following a breach of the Human Rights Act, which do not require triaging by the AHRC.[168]

7.91 Professor Tamara Walsh and Associate Professor Dominque Allen, who are conducting a study on human rights dispute resolution, noted that there is a risk that conciliation processes can, more broadly, exacerbate existing power imbalances, and argued that the process is burdensome and may be an inappropriate mechanism in some cases.[169] In this regard Ms Rita Jabri Markwell, Advisor to the Australian Muslim Advocacy Network Ltd, submitted that in the context of discrimination against Muslims, 'having to go through a conciliation process or even bring actions against publishers who claim they're not violent but just hate Muslims is not worth it, because they will use that to gain attention and they will compromise your safety'.[170] The Australian Federation of Disability Organisations raised concerns regarding the accessibility and appropriateness of conciliation in cases of disability discrimination.[171] It stated that, under current disability discrimination mechanisms, discrimination must have occurred, and the onus is placed on the person with disability to lodge a complaint with the AHRC. It argued that this process is not working, given the time it can take for a complaint to be addressed, and because the AHRC cannot compel respondents to participate in conciliation, make legally binding decisions to compel the respondent to take positive steps to remedy the situation or impose sanctions for noncompliance, or commence own motion inquiries in relation to issues of unlawful discrimination that are of a systemic nature.

7.92 However, Associate Professor Allen also noted that conciliation can also lead to systemic outcomes:

> [O]ne of the advantages of conciliation…[is that] people can sit down in a room and come to any outcome that they want to. They're not published

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168 Maurice Blackburn, *Submission 110*, p. 13.

169 Professor Tamara Walsh and Associate Professor Dominique Allen, *Submission 16*, p. 3.

170 Ms Rita Jabri Markwell, Advisor, Australian Muslim Advocacy Network Ltd, *Committee Hansard*, Tuesday 15 August 2023, p. 62.

171 Ms Lauren Henley, Senior Systemic Advocate, Australian Federation of Disability Organisations, *Committee Hansard*, Wednesday 27 September 2023, p. 39.

> outcomes, but I've had access to this kind of information and they do come up with wider systemic outcomes. So it's not just about the person who is discriminated against. They might say: 'Yes, but I don't want this to happen to anyone else. I want you to agree to change your policy. I want you to agree to change your building so people can access it.' And the response is, 'Okay, we'll do that in the confines of conciliation.' If they go to court, they do not, historically, make those wider systemic orders. They're just going to compensate the individual. So, if you want broader systemic change, you can get it through conciliation.[172]

7.93 Maurice Blackburn highlighted the approach taken in Victoria where complainants may determine how they would like a complaint to be handled:

> Under [the Victorian] scheme, the complainant can choose to go through the Victorian Equal Opportunity and Human Rights Commission conciliation process or direct to the Victorian Civil and Administrative Tribunal. In our experience, this offers a potentially more time and cost-effective avenue when it is apparent that a conciliation process alone will not resolve the matter, for example where the parties have already engaged in extensive pre-litigation correspondence and/or informal settlement conference processes…In our experience, the AHRC is not currently funded to be responsive to the timely administration of justice. Unless a parallel process is developed, the additional responsibilities placed on the AHRC through the adoption of a Human Rights Act will only exacerbate the current situation.[173]

7.94 Professor Walsh and Associate Professor Allen cautioned that if the only alternative is litigation, parties might choose not to pursue a complaint, because litigation is expensive and can be traumatising (or re-traumatising) for vulnerable people.[174] Good Shepherd agreed that accessible remedies are essential, but argued that a preventative approach to human rights breaches should be taken because 'government should not be relying on individuals and advocates with limited resources to defend human rights post-breach, against well-resourced public authorities'.[175] The NSW Child, Family and Community Peak Aboriginal Corporation similarly highlighted the importance of funding being provided to community services in order to make remedies accessible.[176]

7.95 Some submitters were also concerned that the AHRC model means that victims would not have direct access to the courts, requiring them to complete the conciliation process before commending a proceeding (other than judicial

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[172] Associate Professor Dominique Allen, *Committee Hansard*, Tuesday 15 August 2023, pp. 67–68.

[173] Maurice Blackburn, *Submission 110*, p. 13.

[174] Professor Tamara Walsh and Associate Professor Dominique Allen, *Submission 16*, p. 4. The importance of alternative dispute resolution was also raised by the Australian Lawyers Alliance, *Submission 83*, p. 35.

[175] Good Shepherd Australia New Zealand, *Submission 42*, p. 11.

[176] NSW Child, Family and Community Peak Aboriginal Corporation, *Submission 37*, p. 2.

review). Ms Kate Eastman AM SC noted that the model used in discrimination claims may not be appropriate for breach under a HRA, and requiring conciliation before accessing the courts may be a barrier to victims accessing immediate relief:

> While I very much support mediation and conciliation, the model presently used for discrimination claims, that often involve individual or corporate respondents, is not necessarily the best model for a human rights claim that is brought against a public authority. There is a significant power imbalance. Public authorities are far more likely to have more resources, experienced personnel and lawyers, a greater familiarity with the AHRC processes and information that will not be known to the complainant. The confidential nature of these processes operates as a shield for some public authorities. The process that requires the AHRC's processes to be completed before commencing a proceeding may be a barrier to accessing immediate relief, and may add to the cost and the trauma experienced by a victim.[177]

Stand-alone cause of action

7.96 The AHRC model proposes that a federal HRA should provide an independent cause of action for victims of a breach of human rights committed by a public authority. The AHRC argued that all unlawful actions under a HRA should give rise to a cause of action, noting that the inclusion of an independent cause of action and associated remedies is an element of the right to an effective remedy, which is provided for under the ICCPR[178] (see Chapter 6 for further consideration).

7.97 The AHRC model provides that a HRA should enable HRA rights to be raised in the context of other legal proceedings, along with a direct stand-alone cause of action. It noted that all Australian jurisdictions with HRAs enable human rights to be raised alongside other claims, but Queensland and Victoria *only* allow human rights to be raised alongside other claims (an approach known as 'piggybacking').[179] Under this approach a person can obtain a remedy for breach of a right only by bringing a proceeding that could have been brought in the same court or tribunal on other grounds—in other words, by 'piggy backing' a HRA argument on another claim. Mr Michael Brett Young, who undertook a review of the Victorian Charter in 2015, recommended an independent cause of action, noting:

> 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

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[177] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023), p. 7.

[178] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 268.

[179] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 269.

> 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. This latter litigation has been largely unproductive, in terms of promoting and protecting human rights. A simpler remedies provision … will enable the parties to a human rights dispute to focus on practical outcomes, rather than abstract legal disputes.
>
> 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.[180]

7.98 Numerous submitters endorsed the notion of an independent cause of action.[181] For example, Associate Professor Julie Debeljak noted that the Victorian Charter's 'piggy-back' model prevents an affected person from raising Victorian Charter unlawfulness unless they can connect it to a pre-existing claim, and stated that a federal model 'must include a freestanding cause of action supported by a free standing remedy'.[182]

Administrative law pathway

7.99 The AHRC model also proposes, as is the case in the ACT, that ordinary judicial review could proceed either as an alternative to, or in addition to, a direct cause of action under the HRA.[183] It notes that judicial review, whereby a court determines whether a decision made by a public authority was made lawfully, is provided for under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), and under the Constitution and its statutory equivalent in the *Judiciary Act 1903* (Judiciary Act). The AHRC noted that if the decision is covered by the ADJR Act, a person may seek review on one of a number of grounds,

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180 Michael Brett Young, *From Commitment to Culture The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 2015, p. 127.

181 See, for example, Kingsford Legal Centre, *Submission 101*, p. 8; Maurice Blackburn, *Submission 110*, p. 5; National Legal Aid, *Submission 118*, p. 5; Law Council of Australia, *Submission 120*, p. 22; SNAICC, *Submission 121*, p. 16; Refugee Legal, *Submission 129*, p. 16; Students for Sensible Drug Policy, *Submission 130*, p. 2; Queensland Advocacy for Inclusion, *Submission 140*, p. 6; Queensland Youth Policy Collective, *Submission 141*, p. 3; Environmental Justice Australia, *Submission 150*, p. 9; Aged and Disability Advocacy Australia, *Submission 152*, p. 3; Liberty Australia, *Submission 155*, p. 34; Community Legal Centres National Human Rights Network, *Submission 331*, p. 3; Indigenous Law and Justice Hub, *Submission 157*, p. 14.

182 Associate Professor Julie Debeljak, *Submission 15*, p. xi.

183 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 274, 282–284.

including that there was a breach of the rules of natural justice or that it involved an improper exercise of power.[184] It stated that compliance with the requirements of a HRA 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. Judicial review under section 75(v) of the Constitution or section 39B of the Judiciary Act, considers whether there has been a jurisdictional error, which arises when a decision maker exceeds the authority or power conferred upon them.[185]

7.100 Both the Hon Pamela Tate AM KC and Ms Kate Eastman AM SC considered the availability of judicial review in breach of a HRA duty. Ms Tate argued that, while this would enable a claim to be brought, for example, that a public authority had failed to take into account a relevant consideration on the basis that it had breached its procedural obligation under the HRA, 'a much more stringent test applies to whether there has been a breach of the procedural obligation by a public authority than the test at common law (applicable in judicial review) for a failure to take into account relevant considerations'.[186] She posited that this would be confusing for a court as to which test was applicable if a breach of the HRA was presented as a ground of judicial review, and for a court hearing a claim for a breach of the HRA alone as to whether they should apply general judicial review principles.[187] Ms Eastman agreed with these concerns, but argued that they are not a reason to exclude judicial review from the remedial options, and could be addressed by clear legislative drafting.[188]

7.101 Ms Tate further stated that it would be unfortunate if the clarity of a distinct standalone statutory cause of action was obscured by an attempt to fit it within an existing framework that was not designed to deal with human rights principles:

> If a breach of the HRA was brought under the ADJR, would the 'victim' criterion for standing apply or the ordinary standing test for judicial review? How would an alleged breach of a public authority's substantive obligation be dealt with as a ground of judicial review where there is a need to consider the proportionality of the public authority's actions? This is not to say that a breach of the HRA could not be relied upon in the same proceeding

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184 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 283.

185 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 284.

186 The Hon Pamela Tate AM KC, *Submission 61*, p. 8.

187 The Hon Pamela Tate AM KC, *Submission 61*, p. 8.

188 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023), p. 6.

> alongside a claim for judicial review (governed by ordinary principles) but it would not be brought under the ADJR Act, as appears to be envisaged by the Commission. There would be two distinct causes of action governed by distinct principles and methodology.[189]

7.102 Ms Eastman argued that the question for the court is how the decision was made, and if the decision is flawed and needs to be reconsidered, the court's guidance on how proportionality should be determined will assist the decision maker when reconsidering the decision.[190] She further stated that she considered it unlikely that an application would, in practice, seek to maintain two distinct causes of action with different remedies:

> I question the utility of seeking judicial and merits review in one proceeding. In those circumstances judicial review may be superfluous and unnecessarily complicate proceedings. In my view, judicial review is appropriate for matters where merits review is not the appropriate remedy. This may be because of the operation of other laws.[191]

Intermediate adjudicative process

7.103 The AHRC also recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation in the AHRC and litigation in the federal courts, in relation to unlawful discrimination matters.[192] The AHRC proposed that either the creation of a new tribunal, or the granting of hearing and determination powers to the AHRC in relation to a HRA be subject to future consideration through subsequent HRA reviews.[193]

7.104 The AHRC noted though that this may pose constitutional challenges. The AHRC previously had the power to make binding determinations about discrimination matters. From 1992 and 1995, the AHRC could, where a discrimination complaint was referred for a hearing and substantiated, register a determination with the Federal Court registry.[194] However, in the 1995 case *Brandy v Human Rights and Equal Opportunity Commission* ('Brandy'), the High

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189 The Hon Pamela Tate AM KC, *Submission 61*, p. 8.

190 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023), p. 6.

191 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023), p. 7.

192 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 30.

193 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 283.

194 See Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth)* (28 February 2017) p. 52.

Court held that the scheme for registration of the Commission's decisions was unconstitutional as its effect was to vest judicial power in the Commission contrary to Chapter III of the Constitution.[195] Significant amendments were subsequently made to the AHRC's powers in response to the Brandy decision, including removing its power to hold hearings.[196]

7.105 Professor Simon Rice OAM argued that actions taken in response to the Brandy decision should be revisited:

> Whether the arrangements that were made after the decision in *Brandy* were necessary is open to doubt. It may be that the new arrangements went further than was necessary to redress the Chapter III difficulty posed by the previous arrangements, with the result that a relatively expert and accessible system for dealing with discrimination complaints was lost when it could have been saved. It is desirable that thought be given to how to redress the Chapter III difficulty of the previous arrangements, so as to re-establish the AHRC's power to make a determination that is enforceable through Federal Court.[197]

7.106 Professor Rice recommended that the government seeks legal advice on how a different response to this decision could re-establish the AHRC's power to make a determination that is enforceable through the federal courts. [198] Equality Australia, similarly, argued that jurisprudence on constitutional judicial power has evolved since the *Brandy* judgment, and stated that there are other ways in which a regulator can take lawful action to address breaches of federal law:

> There are also a number of dispute resolution bodies that we can learn from to design a better complaints pathway, such as arbitration models or allowing complaints against the Commonwealth to be dealt with through the foreshadowed replacement for the Administrative Appeals Tribunal. We need a mechanism that results in more jurisprudence to help guide complainants and respondents alike as to their rights and obligations, or which allows the regulator to provide a view as to the merits of a matter to inform industry practice without the need for individual complaints.[199]

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195 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

196 Australian Human Rights Commission, *Federal Discrimination Law* (2016), pp. 1–2. In 1995, Parliament passed the *Human Rights Legislation Amendment Act 1995*, repealing the relevant provisions which established these powers and provided that complaints could still the subject of a hearing and unenforceable determination. A complainant sought to enforce a determination they had to seek a hearing 'de novo' by the Federal Court after which the Court could make enforceable orders if the complaint was upheld. In 1999, the *Human Rights Legislation Amendment Act (No 1)* (1999) made further significant changes to the Commission's functions.

197 Professor Simon Rice OAM, *Submission 204*, p. 17.

198 Professor Simon Rice OAM, *Submission 204*, p. 17.

199 Equality Australia, *Submission 214*, p. 11 in reference to *Australian Communications and Media Authority v Today FM* (Sydney) Pty Ltd [2015] HCA 7 at [59].

7.107 However, the Hon Pamela Tate AM KC expressed concern about an intermediate process bridging the gap between voluntary conciliation at the AHRC and litigation in the federal courts on the basis that conferring judicial power on Commonwealth administrative tribunals would be invalid, because Commonwealth administrative tribunals cannot exercise judicial power.[200]

7.108 Mr Graeme Edgerton, Deputy General Counsel at the AHRC acknowledged these constitutional considerations stating that an intermediate body would not be able to exercise judicial power, but could permit other determinations such as through voluntary arbitration:

> [A]n intermediate body…wouldn't be able to be a body that is exercising judicial power. But there might be different ways in which you could have an intermediate level that is still making a determination. One way in which you could do that would be voluntary arbitration; that's the model that the Fair Work Commission uses, particularly in dismissal cases. You have an agreement between both of the parties to submit to the jurisdiction of the arbitrator to make a final decision that is binding between them…We're not being prescriptive about the model, the way in which it could happen, but we think there are ways in which you could have a more cost-efficient, less formal process than a court that allows people greater access to justice that also has a finality to it that conciliation doesn't; voluntary arbitration is one.[201]

7.109 Ms Kate Eastman also noted that there are effective tribunals which do not exercise judicial power and can make decisions in relation to human rights matters. She stated that the Administrative Appeals Tribunal often makes decisions about the rights of people with disability in relation to the National Disability Insurance Scheme (NDIS) and noted that the NDIS legislation sets out a range of human rights that should be taken into account in making those decisions.[202]

Remedies

7.110 The AHRC argued that a HRA should provide for a range of remedies, both procedural and monetary:

> [T]he federal Human Rights Act remedies clause [should] 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:

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200 The Hon Pamela Tate AM KC, *Committee Hansard*, Friday 25 August 2023, p. 61.

201 Mr Graeme Edgerton, Deputy General Counsel, *Committee Hansard*, Wednesday 27 September 2023, p. 60.

202 Ms Kate Eastman AM SC, *Committee Hansard*, Thursday 28 September 2023, p. 53.

> 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.[203]

7.111 The AHRC proposed that the available remedies should reflect those available under federal discrimination legislation, namely: injunctions; orders requiring action; declaratory relief (where courts set out the rights of parties in a binding way); monetary damages; and administrative law remedies (such as setting aside a decision and referring the decision back to the decision-maker for reconsideration).[204]

7.112 The Australian Lawyers Alliance supported the AHRC's proposal, highlighting the importance of flexibility in remedies given the range of human rights claims that may be raised.[205] NSW Council for Civil Liberties noted the importance of remedies being enforceable, describing Australia's current framework as inadequate because of the inability to enforce remedies.[206] The Grata Fund highlighted the connection between adequate remedies and access to justice, stating that it is crucial that people have meaningful access to the courts to seek remedies.[207]

7.113 Ms Kate Eastman stated that she generally supported the approach taken by the AHRC in relation to remedies and remedial pathways.[208] She highlighted the procedural and substantive components of remedies, stating that the substantive component of a remedy should restore the victim as far as possible to the position they would have been in if the contravention of their rights had not occurred, while the procedural aspect includes both any procedural requirements required by specific human rights (for example, the right to a fair trial with the range of procedural rights to secure a fair trial), and the pathway to secure substantive remedies (including the right to equal access to justice).[209]

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203 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 272.

204 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 275.

205 Australian Lawyers Alliance, *Submission 83*, p. 34. See also, Economic Justice Australia, *Submission 34*, pp. 21–22; Dr Laura Grenfell and Dr Sarah Moulds, *Submission 50*, p. 5; Relationships Australia *Submission 58*, p. 2; Australian Lawyers for Human Rights, *Submission 229*, p. 33.

206 NSW Council for Civil Liberties, *Submission 77*, p. 3. See also, Canberra Community Law, *Submission 332*, p. 3; Australian Medical Students' Association, *Submission 62*, p. 4; Civil Liberties Australia, *Submission 51*, p. 20.

207 Grata Fund, *Submission 65*, p. 3.

208 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023).

209 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023).

7.114 Ms Eastman highlighted the range of remedies set out pursuant to United Nations basic principles, including:

- compensation for past and future loss, economic and personal hurt or suffering;
- reimbursement of expenses or provision for the cost of future treatment or supports;
- an account of profit;
- injunctions to prevent breaches of human rights continuing;
- mandatory injunctions requiring a public authority to make reasonable adjustments;
- orders to repair or remediate property;
- orders to take a reasonable action to prevent future breaches of human rights, this could include undertaking training or further education;
- apologies and statements of regret;
- habeas corpus to release a person from unlawful detention;
- declarations;
- orders such as mandamus, to require a public authority to perform its statutory duties;
- quashing unlawful decisions;
- imposing civil penalties;
- developing memorials, commemorations and tributes;
- implementing redress schemes; and
- rehabilitation services with counselling supports.[210]

7.115 However, Ms Eastman expressed concern that the approach proposed by the AHRC means victims do not have direct access to the court and relies on victims making a claim, participating in the complaints process and initiating proceedings in a federal court, and so would place a heavy onus on victims.[211] She posited that a system of remedies could examine systemic issues through the use of class actions, and would require consideration of procedural pathways and substantive remedies.

Monetary damages

7.116 In relation to monetary damages, the AHRC model would allow monetary damages to be awarded to place the affected person back in the position they would have been had the conduct not happened, by compensating them

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[210] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023) in reference to *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006) (Van Boven Principles) cl IX (15)–(24).

[211] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023).

financially for loss or harm. The AHRC argued that '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'.[212]

7.117 None of the state or territory HRAs provide for monetary damages. In contrast New Zealand, the UK and Canada allow the courts to order damages where appropriate.[213] Several witnesses criticised this aspect of existing state and territory HRAs.[214] The Queensland Human Rights Commissioner, Mr Scott McDougall, argued that the availability of damages would significantly improve the operation of the Queensland HRA.[215] Mr Derek Schild of National Legal Aid noted experiences in the ACT to highlight the importance of damages where the time taken to bring a claim for breach of human rights may mean that no alternative remedy would be effective.[216]

7.118 A small number of submitters and witnesses expressed concern regarding the proposal to include damages as a potential remedy. Mr Chris Merrit, Vice President of the Rule of Law Institute of Australia stated that if a court had the power to award damages for breaches 'of an uncertain standard…the potential liability for taxpayers doesn't bear thinking about'.[217] He cautioned that the definition of rights in a HRA would need to be certain.

7.119 The Queensland Youth Policy Collective argued that if the discretion to award monetary damages in appropriate circumstances could be left open to the courts, a HRA should not provide for exemplary damages, because public entities are not profit driven, or privately owned, meaning that a financial incentive would not be meaningfully effective to deter conduct.[218]

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212 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 272.

213 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 269.

214 See, for example, Mr Derek Schild, Head of Civil Justice Legal Practise, National Legal Aid, *Committee Hansard*, Thursday 28 September 2023, p. 38.

215 Mr Scott McDougall, Human Rights Commissioner, QLD Human Rights Commission, *Committee Hansard*, Tuesday 15 August 2023, p. 1.

216 Mr Derek Schild, Head of Civil Justice Legal Practise, National Legal Aid, *Committee Hansard*, Thursday 28 September 2023, p. 40.

217 Mr Chris Merritt, Vice President, Rule of Law Institute of Australia, *Committee Hansard*, Friday 20 October 2023, p. 40.

218 Queensland Youth Policy Collective, *Submission 141*, p. 23.

7.120 However, numerous witnesses and submitters advocated for the availability of damages as a remedy.[219] National Legal Aid stated:

> [T]here is no reason to limit the remedies available to complainants under a federal Human Rights Act….We note the likelihood that in many cases by the time a human rights matter reaches conciliation or hearing, any non-monetary relief that may have been suitable at the time of breach will have lost currency. For example, a child improperly detained in a watchhouse for a period may have since been released or moved to a suitable detention facility by the time of conciliation or hearing, meaning an order they be released or moved will no longer be necessary. Nonetheless, a substantial wrong has been committed, and Federal Courts should have the ability to award monetary damages, both to recognise the significant status of human rights and give effect to Australia's international obligation to offer effective remedy for their breach, and to effectively deter future wrongdoing of a similar nature by the public authority. For this reason, we note that it is particularly important that nominal damages be available given there are many instances where a person's human rights may have been breached, but they are unable to evidence any resulting injury, loss or damage. Common examples of where this might occur are in relation to privacy breach matters, as well as matters concerning the unauthorised use of restrictive practices in disability and aged care settings.[220]

7.121 The Centre for Law and Social Justice agreed with the AHRC model:

> There are good reasons to make monetary damages available for breach of human rights. Although monetary damages have been explicitly excluded under state and territory human rights legislation, these jurisdictions are outliers when other national jurisdictions are considered. Damages are available where appropriate in the UK, New Zealand and Canada. As the AHRC note, 'procedural remedies will not always be effective in remedying every kind of breach… 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'. Furthermore, it has been suggested that not making monetary compensation available as a remedy 'may deter genuine litigants… and removes an incentive for private law firms to take on human rights cases… on a pro bono or 'no win, no fee' basis'. While it may not be appropriate to award damages in every case, the federal Human Rights Act should ensure that monetary compensation can be awarded in circumstances where doing so is necessary to grant justice.[221]

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[219] See, for example, Ms Nikita White, Campaigner, Amnesty International, *Committee Hansard*, Wednesday 27 September 2023, p. 4; National Legal Aid, *Submission 118*, p. 5; Environmental Justice Australia, *Submission 150*, p. 10; Western Australia for a Human Rights Act, *Submission 205*, p. 13; Aboriginal Legal Service of Western Australia Limited, *Submission 239*, p. 15.

[220] National Legal Aid, *Submission 118*, p. 43.

[221] Centre for Law and Social Justice, *Submission 185*, p. 14.

7.122 The Hon Pamela Tate AM KC supported the availability of damages as a discretionary remedy, however she submitted that a federal HRA should identify relevant considerations guiding the exercise of the discretion:

> These considerations could include, as they have done in practice under the *New Zealand Bill of Rights Act 1990* ('NZ BORA'), the nature of the relevant right, the seriousness of the breach, whether the breach caused any damage or loss, the defendant's response to the breach, any relief awarded on a related cause of action, and public interest factors such as the impact on the public purse. The relevant considerations identified could also include anything done by the public authority to avoid acting incompatibly. The 'last resort' character of damages in human rights cases could be reinforced by providing that an award of damages can only be made if the award 'is necessary to afford just satisfaction', reflecting the terms of the *Human Rights Act 1998 (UK)* ('UK HRA'). Constraining the circumstances in which a discretionary award of damages can be made would help avoid the perception that a federal HRA will impose significant costs on public authorities or be unsustainable.[222]

Systemic remedies and standing

7.123 A number of submitters also considered the best way to ensure breaches of the HRA lead to systemic change rather than only dealing with individual complaints. Ms Eastman AM SC noted that in general the AHRC's model leans towards personal rather than systemic remedies. She noted that one avenue for systemic remedies is the use of class actions (which relates to the issue of standing, considered below). Ms Eastman noted that in developing an approach to systemic remedies there are a number of matters to consider, including:

> (a) what the AHRC should do if it is aware of multiple complaints arising against the same respondent, or concerning the same or substantially the same contravention. Should or could there be a mechanism for the AHRC to identify the complaints as a systemic complaint and join or consolidate the complaints;
> (b) whether there should be an option for a complainant or representative body to identify the complaint as raising systemic issues and when the complaint is lodged identify if a systemic remedy is sought;
> (c) whether the AHRC should refer a systemic complaint to the court;
> (d) whether settlements that may include remedies that may have a systemic effect, should be open and not subject to blanket confidentiality conditions;
> (e) whether the AHRC should publish a register of conciliated outcomes for matters that have a public interest or systemic impact;
> (f) whether claims that raise systemic human rights issues should be conducted by a Human Rights Ombudsman rather than individual victims;[223]

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222 The Hon Pamela Tate AM KC, *Submission 61*, p. 2.

223 For a further discussion of the role of ombudsmen, see Chapter 8.

(g) how to educate and support legal practitioners to consider more innovative remedies and the ways of presenting evidence that might support more systemic remedies being awarded by a court.[224]

7.124 The South-East Monash Legal Service also noted that the current AHRC resolution approach to discrimination claims has been described as a 'case management technique' with the purpose of negotiating private compensatory remedies without addressing the systemic aspects of the violation.[225]

7.125 Associate Professor Allen and Professor Walsh noted that the people most likely to have a human rights claim are from vulnerable or marginalised groups, and will face many challenges in pursuing a human rights claim. As such they argued that '[g]iving community groups and other entities the ability to bring a claim would be valuable for claims that affect more than one individual and/or claims that require a systemic change such as changing a policy or practice'.[226]

7.126 The AHRC model proposes that individuals 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 should have legal standing to bring a cause of action under a federal HRA.[227] The AHRC argued that there is a strong argument in favour of enabling representative or class actions on behalf of individuals or groups from an access to justice perspective, noting in particular that those affected by human rights breaches are more likely to be vulnerable and disadvantaged. It also suggested that public interest cases could be run to create certainty and improve the overall strength of human rights law in Australia, while penetrating the public consciousness.

7.127 Numerous submitters endorsed the approach.[228] The Aboriginal Legal Service of Western Australia stated that enabling organisations to bring complaints on behalf of individuals would mean individuals would not have to go through the trauma of making their own individual complaints, a factor which would be particularly important for their clients.[229] The NSW Aboriginal Women's

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[224] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023) pp. 8–9.

[225] South-East Monash Legal Service, *Submission 172*.

[226] Associate Professor Dominque Allen and Professor Tamara Walsh, answer to question on notice 15 August 2023 (received 1 September 2023).

[227] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia,* December 2022, pp. 284–286.

[228] See, for example, Economic Justice Australia, *Submission 34*, p. 22; Professor Sarah Joseph, *Submission 36*, p. 25; Church of Scientology, *Submission 66*, p. 7; Human Rights Law Centre, *Submission 232*, p. 19.

[229] Ms Chloe Wood, Managing Lawyer, Civil Law and Human Rights Unit, Aboriginal Legal Service of Western Australia Limited and Co-convenor of Western Australia for a Human Rights Act, *Committee Hansard*, Friday 20 October 2023, p. 54.

Advisory Network (AWAN) posited that if organisations are given representative standing to bring claims for human rights breaches on behalf of Aboriginal and Torres Strait Islander communities: 'Significant investment will need to be made in Aboriginal Community Controlled legal organisations…to ensure that communities are represented by their own Aboriginal-led, culturally safe services'.[230] The Indigenous Law and Justice Hub argued that the AHRC proposal was a positive step, progressing 'the ability for First Nations organisations to challenge collective breaches of cultural rights on behalf of a representative group'.[231]

7.128 The Law Council of Australia stated that, in appropriate cases, public bodies such as the AHRC or public interest groups should be granted standing to initiate proceedings, as well as to intervene or act as amicus in proceedings brought by other persons.[232] The ACT Human Rights Commission agreed, arguing that 'the ACT Human Rights Commissioner ought to have a standing right to intervene that is not contingent on Court consent. We do recognise that it may be appropriate for the Court to set parameters for intervention'.[233] Australian Lawyers for Human Rights argued that a HRA should permit class actions to be brought, with standing given to 'appropriate representative organisations in the position to support or represent individuals and groups of people whose human rights have been breached and who have specialised skills or knowledge that is helpful for a particular group(s)'.[234]

7.129 Ms Kate Eastman argued that while there should be broad standing provisions to enable representative bodies to make complaints or commence proceedings, there should also be clarity and certainty in who will have standing to make a complaint or commence judicial proceedings. In this regard, she noted the need to avoid arguments and disputes about who has standing becoming an additional barrier to seeking an effective remedy, and because federal courts must exercise judicial power consistently with Chapter III of the Constitution.[235]

Costs

7.130 In terms of the cost of initiating litigation, the AHRC model posits that a federal HRA should include a provision reflecting public interest considerations to protect against adverse cost orders:

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230 NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 12.

231 Indigenous Law and Justice Hub, *Submission 157*, p. 13.

232 Law Council of Australia, *Submission 120*, p. 22.

233 ACT Human Rights Commission, *Submission 176*, p. 10.

234 Australian Lawyers for Human Rights, *Submission 229*, p. 7.

235 Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023).

> 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.[236]

7.131 Numerous submitters supported the recommendation that a federal HRA provide costs protection.[237] The Queensland Human Rights Commission submitted that at a minimum, legal assistance providers such as Legal Aid commissions and community legal centres must be adequately funded to advise and act for people subject to human rights limitations by government agencies.[238] Both the Law Council of Australia and National Legal Aid noted that an additional option would be to permit a court to make a costs order in relation to a claim brought under a HRA only in limited circumstances, such as when the application or response is made vexatiously, or without reasonable prospect of success.[239] In this regard, the Attorney-General's Department recently conducted a review into an appropriate cost model for Commonwealth anti-discrimination laws, in response to the AHRC *Respect@Work Report*.[240] After this review, the Attorney-General introduced a bill to establish a modified 'equal access' cost protection provision to apply in unlawful discrimination court proceedings.[241] The explanatory materials state that this would 'alleviate the barrier to justice that the risk of an adverse costs order currently poses for applicants in federal unlawful discrimination court proceedings' and provide greater certainty regarding costs to all parties.[242]

7.132 The Grata Fund, an Australian specialist non-profit strategic litigation funder, also called for protections from adverse costs. It argued that the risk of adverse costs orders acts as a significant deterrent to people seeking to defend their rights in court and prevents the court 'from playing its vital democratic role in

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236 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 286.

237 See, for example, Kingsford Legal Centre, *Submission 101*, p. 9; Environmental Defenders Office, *Submission 147*, p. iii; Victorian Equal Opportunity and Human Rights Commission, *Submission 162*, p. 21; Australian Lawyers for Human Rights, *Submission 229*, p. 7.

238 Queensland Human Rights Commission, *Submission 142*, p. 48.

239 National Legal Aid, *Submission 118*, p. 5; Law Council of Australia, *Submission 120*, p. 24.

240 Attorney-General's Department, *Review into an appropriate cost model for Commonwealth anti-discrimination laws* (accessed 17 January 2024).

241 Australian Human Rights Commission Amendment (Costs Protection) Bill 2023.

242 Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, explanatory memorandum, p. 3.

clarifying the application of human rights legislation'.[243] It stated that the inherent unpredictability of litigation means that applicants bear significant financial risk, even if they have a strong case and pro bono legal representation, arguing that providing for costs orders at the conclusion of litigation creates a power imbalance:

> In state and territory jurisdictions which already have their own human rights…costs are typically awarded according to the general discretion of the relevant court or tribunal. In state or territory Supreme Courts, this typically means that 'costs will follow the event' or that parties will bear their own costs ('costs neutrality'), and that a costs order will only be made at the end of proceedings.
>
> While 'costs neutrality' might be better than the status quo in some public interest matters, this approach effectively benefits perpetrators of human rights violations, as they may be excused from covering the costs of the complainant even where they have committed a breach of legal rights. This imbalance is further compounded where a legal entity, rather than an individual, is the respondent, as corporations are able to claim legal costs as tax deductions - a benefit not afforded to public interest litigants who are people.[244]

7.133 The Grata Fund argued that the risk of adverse costs has a chilling effect on public interest litigation, undermines the effectiveness of the legislative protections and reduces the development of judicial precedent for the benefit of the community. It submitted that a HRA should include a provision that applies a specific costs model such as an Equal Access model, as currently exists in federal whistle blowing laws.[245]

Periodic review

7.134 The AHRC model recommends that a HRA should provide for periodic statutory review incorporating significant public consultation, initially five years after it commences, with a timeline for subsequent reviews to be assessed at that stage.[246] It posited that this could examine the impact and effectiveness of a HRA, ensuring its continued relevance, drawing the government's attention to necessary amendments and helping to prevent a HRA from becoming 'frozen in time'. Reviews could, it suggested, include consideration of whether further rights should be set out in the HRA, whether the content of the existing rights should be expanded or clarified, and whether further human rights education initiatives are required to better implement the Human Rights Act.

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243 Grata Fund, *Submission 65*, p. 3.

244 Grata Fund, *Submission 65*, p. 3.

245 Grata Fund, *Submission 65*, p. 4.

246 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 293.

7.135 Several submitters supported the inclusion of a periodic review mechanism.[247] The Law Council of Australia noted that review of the ACT HRA had led to the inclusion of economic, social and cultural and rights and a direct right of action, and argued that reviews of the Victorian Charter had provided useful insights into the Charter's strengths and weaknesses.[248]

[247] See, for example, Law Council of Australia, *Submission 120*, p. 30; Western Australia for Human Rights, *Submission 205*, p. 13.

[248] Law Council of Australia, *Submission 120*, p. 30.

Chapter 8
Developing a culture of respect for human rights

8.1 Ensuring that human rights are respected in Australia requires more than a change in the law – it requires respect for human rights across all layers of government, non-government organisations and the private sector. Many submitters argued that an enforceable Human Rights Act (HRA) can lay the groundwork for respect for human rights, but this must be backed up by an understanding of what human rights are – when they apply and what appropriate limitations are. As the 2009 National Human Rights Consultation report noted:

> …human rights can be protected and promoted effectively only if an understanding of, and commitment to, those rights are a part of everyday life for all members of the community and for government, the private sector and non-government organisations.[1]

8.2 The framework that a human rights lens gives – that of assessing whether a proposed measure or decision is reasonable, necessary and proportionate – can guide decision-makers and help them when balancing competing rights. But for this to be effective, there needs to be knowledge and understanding across the community, public and private sectors, civil society and media, of what respect for human rights means in practice.

Human rights education

8.3 The 2009 National Human Rights Consultation investigated in detail the need for human rights education. The report found that human rights are not well understood by the Australian community and that any meaningful change to human rights protection 'and a fair go for everyone depends on improving the level of understanding and reducing the levels of fear and ignorance'.[2] It recommended that education be the highest priority for improving and promoting human rights in Australia, concluding:

> The main benefits of greater human rights education and the creation of a human rights culture will be greater understanding and better integration of human rights awareness in the community as a whole. Once a human rights culture has taken hold, fewer human rights violations will occur, and people will come to see human rights as synonymous with 'a fair go' and as incorporating the values of decency and respect, which individually and collectively all people should enjoy.
>
> People will begin to see themselves, and others, as 'rights-holding entities'. In this way they will be more likely to assert their own rights and to refrain

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1 National Human Rights Consultation, *Report*, September 2009, p. 131.

2 National Human Rights Consultation, *Report*, September 2009, p. 149.

> from violating the rights of others. In time, human rights will be integrated within the public sector to the extent that they become an everyday consideration when policy and legislation are being developed, decisions are being made and services are being delivered.
>
> In addition, once a human rights culture has developed, there will be more robust responses when breaches of those rights do occur. In the absence of this, there is every chance that human rights violations will continue to be perpetrated in ways that might not attract media attention or any response at all. The community sent the Committee a forceful message that more needs to be done in this regard.[3]

8.4 Father Frank Brennan, who chaired the National Human Rights Consultation, expressed in the foreword to the report his hope that their detailed report, consultation website (which included thousands of submissions), online forum and commissioned research 'will be useful educational resources for years to come'.[4] However, the website is no longer hosted, the submissions and commissioned research are no longer publicly available, and the report itself is not available on any official website.[5] As set out in Chapter 3, the government committed in Australia's Human Rights Framework (the Framework) in 2010 to fund community education and engagement programs, but this funding was discontinued in 2012–13 and no further like programs have been funded. As such, and based on the evidence to this inquiry, it seems likely that the finding in the 2009 report that 'Australians know little about their human rights – what they are, where they come from and how they are protected',[6] remains as relevant in 2024.

8.5 In this inquiry, the Australian Human Rights Commission (AHRC) submitted that ongoing human rights education is critical to building awareness and understanding of human rights:

> For public servants, it is essential to support them in meeting their obligations to develop Statements of Compatibility for new legislation and legislative instruments, as well as to adopt human rights-based approaches in policy design and implementation.
>
> For the community generally, greater knowledge and awareness of human rights can empower people to stand up for their own rights and to better understand their responsibilities to respect the rights of others.
>
> For school students, at the primary and secondary levels, it contributes to engaged citizenship and the development of respectful behaviours.

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3 National Human Rights Consultation, *Report*, September 2009, p. 151.

4 National Human Rights Consultation, *Report*, September 2009, p. vi.

5 It is only accessible from uploads from non-government organisations, see Australian Lawyers for Human Rights upload.

6 National Human Rights Consultation, *Report*, September 2009, p. v.

> For the business community and workplace settings, it can prevent workplace discrimination and harassment, ensure suitable internal response mechanisms to complaints of discrimination or harassment, and building employees' confidence to stand up for their rights and respect the rights of others.[7]

Community

8.6 A number of submitters argued that Australia has a lack of public understanding of human rights.[8] The majority of submitters stated that having a federal HRA would itself be educative for the general public as to what human rights are. The Commonwealth Ombudsman noted that 'the process of going towards a national human rights act would itself be a great opportunity for education', but that it would be important to 'translate the sometimes highfalutin-sounding language of human rights into practical, meaningful things' via education.[9]

8.7 Numerous submitters noted the importance of reinstating and properly resourcing comprehensive and ongoing community education about human rights.[10] The Castan Centre for Human Rights Law noted that in order for human rights instruments to effectively galvanise systems change and embed rights it requires everyone in the system to respect, protect and fulfil human rights, not merely through recourse to lawyers and the courts:

> Such reliance on 'on-the-ground' actors to embed a human rights-based approach to public service delivery required more widespread human rights understanding, which is generally considered to be lacking in Australia, as a necessary step for ensuring human rights compliance. The need to foster such a human rights culture require that a Federal Human Rights Act be readily comprehensible by the public if it is to be truly useful in securing human rights for all.[11]

8.8 Ms Nikita White, Campaigner at Amnesty International, explained the importance of education programs for the public as well as public authorities:

> For the general public it's really important that they know their rights, they know what is protected in Australian law and what their opportunities are

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7 Australian Human Rights Commission, *Submission 1*, p. 88.

8 See, for example, Voices of Influence, *Submission 133*, p. 16; Indigenous Law and Justice Hub, *Submission 157*, p. 9; Dr Stephen Lake, *Submission 315*, p. 4.

9 Mr Iain Anderson, Commonwealth Ombudsman, *Committee Hansard*, 20 October 2023, p. 25.

10 See, for example, Dr Julie Debeljak, *Submission 15*, p. 11; Indigenous Law and Justice Hub, *Submission 157*, p. 9; Save the Children and 54 Reasons, *Submission 168*; Our Watch, *Submission 169*; Jesuit Social Services, *Submission 173*, p. 10; Federation of Community Legal Centres, *Submission 174*, p. 20; UNICEF, *Submission 210*, p. 7; Australian Feminists for Women's Rights, *Submission 211*, recommendation 24; Amnesty International, *Submission 213*; Australian Lawyers for Human Rights, *Submission 229*, recommendation 17; People with Disability Australia, *Submission 230*, p. 18.

11 Castan Centre for Human Rights Law, *Submission 160*, p. 36.

> if they think their rights are infringed. Again, there's very little funding for that in Australia and it's crucial if we do have an Act that it doesn't just sit there as a piece of paper but that people are able to engage with the Act; that they don't have to go to a lawyer and spend a lot of money to engage with the Act, and they know what their options are and what they can do if their rights are infringed. That's why we think education programs for both the public and public authorities are so crucial.[12]

8.9 Similarly, the Law Council of Australia submitted that without training and educational initiatives Australians cannot fully benefit from a HRA or a parliamentary scrutiny regime: 'Australians need to be aware of such measures and their importance as safeguards against both discrete and systemic rights abuses'.[13]

8.10 Multicultural Australia cautioned that any public education strategy should be mindful of the importance of communicating across cultural difference 'with due regard for the importance of divergent traditions and their points of intersection with the values that underwrite a commitment to human rights'.[14] Further, the Federation of Ethnic Communities' Councils of Australia recommended that lived experience and expertise must be central to a human rights education program:

> The knowledge, perspectives and insights of people and communities with lived experience and expertise of human rights violations should be meaningfully embedded into the design, implementation, and evaluation of human rights education programs to ensure they are targeted, meaningful and effectively address the lived experience of human rights violations.[15]

8.11 Ms Bianca Tini Brunozzi, Policy and Advocacy Officer at the New South Wales Aboriginal Women's Advisory Network, emphasised the importance of ensuring education and resources about human rights are informed by Aboriginal peoples. In particular, she argued that such education campaigns and resources should be developed in consultation with Aboriginal women and the education and awareness role should be a community led effort.[16]

Schools

8.12 Numerous submitters discussed the importance of human rights education in schools and ensuring human rights awareness is fully incorporated into the Australian curriculum. As set out in Chapter 3, the 2010 Framework committed to incorporating human rights into the Australian curriculum for primary and

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12 Ms Nikita White, Campaigner, Amnesty International, *Committee Hansard*, 27 September 2023, p. 7.

13 Law Council of Australia, *Submission 120*, p. 28.

14 Multicultural Australia, *Submission 100*, p. 3.

15 Federation of Ethnic Communities' Councils of Australia, *Submission 25*, p. 5.

16 Ms Bianca Tini Brunozzi, Policy and Advocacy Officer, New South Wales Aboriginal Women's Advisory Network, *Committee Hansard*, 27 September 2023, p. 21.

secondary students. The Attorney-General's Department (AGD) advised that in 2010 the curriculum included a number of measures to support human rights education. AGD advised that it has been revised 24 times since its initial release, but each new version has 'continued to include human rights education through teachings about the legal and justice system, freedoms and responsibilities of Australian citizens and the Australian Government's domestic and international roles and responsibilities'.[17]

8.13 However, the University of New South Wales Law Society Inc critiqued the way human rights is contained in the curriculum:

> …human rights education in the national school curriculum is focused on ensuring students understand what human rights are and their importance rather than how these rights exist in legislation and how they are enforced. The curriculum provides lesson plans embedding examples of human rights in Science, Mathematics, History and English subjects, but minimal information is given on how these rights can be taught practically. This may be due to the lack of a national legal framework, which can then be implemented into a national curriculum.[18]

8.14 It is noted that it appears much of the reference to human rights in the Australian curriculum is covered within the civics and citizenship learning area. In this regard, many submissions to the Senate Legal and Constitutional Affairs References Committee in its inquiry into Nationhood, national identity and democracy[19] argued that Australia is not currently providing enough civics education. For example, Ms Deborah Sulway, Manager of Learning at the Museum of Australian Democracy, argued that 'teachers want to teach civics and citizenship and they see it as very important', but they do not have the knowledge, time or resources.[20]

8.15 The Australian Child Rights Taskforce said that Australia should have a human rights education strategy that:

> …provides children and the wider Australian community with the knowledge and skills to be able to understand and use the existing framework provided by the international human rights treaties that Australia has ratified. This should include human rights awareness incorporated into the curricula of primary and secondary schools and human rights training in all tertiary educational and training institutions.[21]

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17 Attorney-General's Department, *Submission 114*, pp. 11–12.

18 University of New South Wales Law Society Inc, *Submission 215*, p. 8.

19 Senate Legal and Constitutional Affairs References Committee, *Nationhood, national identity and democracy* (February 2021).

20 Ms Deborah Sulway, Manager of Learning, Museum of Australian Democracy, *Senate Legal and Constitutional Affairs References Committee Hansard*, 14 February 2020, p. 19.

21 Australian Child Rights Taskforce, *Submission 179*, p. 3.

8.16 Similarly, Dr Genevieve Wilkinson, Co-convenor of the Economic, Social and Cultural Rights Network, gave evidence that there needs to be greater general public literacy about the existence of economic, social and cultural rights:

> This is something that should be part of primary education. It's something that should be taught in schools so that people have an understanding of their rights from a very early age. Having legislation sends a clear signal to people that these rights exist.[22]

8.17 Save the Children and 54 Reasons also submitted that there is a need to institute and support a national conversation on children's rights:

> It would include establishing and resourcing an extensive program of child rights education that is calibrated to reach children of all ages in meaningful ways and accessible settings (such as schools) as well as adults, including – without being limited to – those who work directly with children, and particular children who face the greatest barriers to accessing their rights. It should include funding for civil society organisations for the development and delivery of community education and engagement programs to promote a greater understanding of children's rights. Additionally, it should involve education and training for the Commonwealth public sector, including guidance to support policy development and the implementation of government programs.[23]

8.18 However, the Australian Christian Lobby raised concerns that the national curriculum for students has become 'steeped in radical ideology' and is inconsistent with the right to respect for the liberty of parents to ensure the religious and moral education of their children in accordance with their convictions, as required under the International Covenant on Civil and Political Rights.[24]

Media

8.19 Some submitters also discussed the importance of the media having a better understanding of human rights. For example, Ms White from Amnesty International noted the importance of improving the way in which the media engages with human rights:

> I'm from Queensland and I've seen this a lot in the media in the last year. The focus of the media on youth crime has been immense and has pushed I think poor policy decisions that infringe on human rights. Again, it's probably a question of culture and that's probably not best dealt with through legislation. That would infringe probably on freedom of the press. But through cultural change and improving within media organisations in this country the understanding of the importance of human rights. And not

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22 Dr Genevieve Wilkinson, Co-convenor, Economic, Social and Cultural Rights Network, Australia and Aotearoa/New Zealand, *Committee Hansard*, 20 October 2023, p. 3.

23 Save the Children and 54 Reasons, *Submission 168*, p. 19.

24 Australian Christian Lobby, *Submission 143*, pp. 30–31.

> just of the press but also of the people they're covering and how they're covering those issues.[25]

8.20 Ms Gavshon from Human Rights Watch gave evidence that having a human rights framework would give the media a reference point:

> At the moment, as we know, there's a patchwork of human rights protections in Australia. Media people who are not necessarily human rights experts are having to pull from different things and try to get a grasp on it. If you have it all in one place as a human rights framework, it gives them much clearer guidance for how they're reporting in a framework for them to be looking at the issues they're covering.[26]

Building a human rights culture in the public service

8.21 Many submitters emphasised the importance of building a culture of human rights within the Australian Public Service (APS), and having human rights considered at the earliest stages of policy and legislative development. As set out in previous chapters, many submitters noted the importance of a HRA to ensure the rights of individuals are respected by officials when making policies and delivering services. Ms Kylie Evans SC, who worked in the Victorian public service at the time the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Charter) was enacted, noted that a HRA provides a useful analytical framework for public servants when making decisions:

> Of course, the business of government is business that interferes with human rights at times. It's about how it does it, though, and how competing interests are balanced. That often is where the real issue lies. In my view, a human rights act can actually assist public servants in working out how to do that balancing exercise.[27]

8.22 The Charter has been described as providing the public sector 'with a framework, or fairness radar, through which it can look at legislation, policies, practices and service delivery, and consider the impact on individuals'.[28] Mx Ro Allen, Victorian Equal Opportunity and Human Rights Commissioner, gave evidence that the Charter has meant that human rights considerations are 'part of our DNA' and provides the authorising environment to:

> …actually stop and think about how human rights will affect Victorians when they're making policies and procedures in the Victorian government. And I think it's actually more than just an authorising environment. The Victorian public sector has to seriously turn their minds to human rights—

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25 Ms Nikita White, Campaigner, Amnesty International, *Committee Hansard*, 27 September 2023, p. 5.

26 Ms Daniela Gavshon, Australia Director, Human Rights Watch, *Committee Hansard*, 27 September 2023, p. 5.

27 Ms Kylie Evans SC, *Committee Hansard*, 25 August 2023, p. 70.

28 Michael Brett Young, *From Commitment to Culture The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 2015, p. 20.

> if you like, to go upstream and think about how the decisions that they're making and the policies they're developing will actually impact on people.[29]

8.23 Similarly, both the Australian Capital Territory (ACT) and Queensland Human Rights Commissioners said that the value of their respective HRAs is in assisting 'administrative decision-makers to centre people's rights in their front of mind when they are developing policies and making discretionary decisions'[30] and in 'encouraging those public servants to embrace human rights considerations from the very start'.[31] Emeritus Professor Rosalind Croucher, President of the AHRC, argued that a federal HRA would likewise provide a greater incentive to think about human rights early when decisions are made and before they become complaints, noting that '[t]he beauty of a human rights act and other measures that front-load what I call "rights mindedness" is that they are expressed in the positive. They are embedded in decision-making and ahead of any dispute'. [32]

8.24 For many submitters and witnesses getting the public service to consider human rights when making decisions and developing policy or legislation requires a HRA that is clear, accessible and enforceable, including through litigation.[33] The Queensland Human Rights Commission submitted that one of the most significant outcomes of human rights legislation is getting cultural changes within the public sector.[34] Further arguments made to the committee regarding the need for enforceable human rights legislation are set out in Chapter 5.

8.25 The committee also received evidence that simply having the law is not enough to achieve human rights protection – it is essential that a human rights culture be developed to make human rights real in everyday interactions with government. The former United Nations (UN) High Commissioner for Human Rights, the late Sergio Vieira de Mello, summarised the importance of a good human rights culture:

> The culture of human rights derives its greatest strength from the informed expectations of each individual. Responsibility for the protection of human

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29 Mx Ro Allen, Commissioner, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, 25 August 2023, p. 2.

30 Ms Helen Watchirs, President and Human Rights Commissioner, ACT Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 2.

31 Mr Scott McDougall, Human Rights Commissioner, Queensland Human Rights Commission, *Committee Hansard*, 15 August 2023, p. 2.

32 Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 27. See also, Associate Professor Laura Grenfell, *Committee Hansard*, 20 October 2023, p. 47; Australian Human Rights Commission, *Submission 1.1*, pp. 4–6.

33 See, Ms Catherine Dixon, *Committee Hansard*, 25 August 2023, p. 71; Professor Tamara Walsh, *Committee Hansard*, 15 August 2023, p. 66.

34 Queensland Human Rights Commission, *Submission 142*, p. 14.

> rights lies with states. But the understanding, respect and expectation of human rights by each individual person is what gives human rights its daily texture, its day-to-day resilience.[35]

8.26 As noted in the AHRC's supplementary submission, the United Kingdom's Joint Committee on Human Rights (UK JCHR) has explained that 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 in fully informed by human rights considerations.[36]

8.27 Ms Catherine Dixon, the manager of the Human Rights Unit within the Victorian Department of Justice when the Charter commenced, reflected on what is meant by 'building a human rights culture':

> …the charter was intended as a framework through which the public sector could look at legislation, policies, practices and service delivery and consider the impact on individuals. The attempt is to try to guarantee greater fairness and respect, particularly for users of public services. It's a culture where people's rights are thoughtfully considered up-front, not a tick-a-box approach, and where human rights become real in everyday decision-making and where human rights become second nature, if you like, or common sense.[37]

8.28 Evidence was received that the current approach at the federal level of statements of compatibility risk restricting human rights considerations to be an afterthought, 'a last-minute tick of approval at the end of the legislative process' whereas a HRA could help embed a culture of human rights by creating an expectation that human rights will be considered throughout the process.[38] Ms Emily Dale, Head of Advocacy at Full Stop Australia, said a HRA would set the culture of human rights in Australia and help ensure 'we are not only dealing with breaches retroactively, but rather averting them before they occur'.[39] Mr David Manne, the Executive Director and Principal Solicitor of Refugee Legal gave evidence:

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35 Sergio Vieira de Mello, Statement to the Opening of the 59th Session of the Commission on Human Rights, Geneva, 17 March 2003.

36 See, Joint Committee for Human Rights, Sixth Report of Session 2002–03, The Case for a Human Rights Commission, HL Paper 67-I/HC 489-I, para 2 as quoted in Australian Human Rights Commission, *Submission 1.1*, p. 4.

37 Ms Catherine Dixon, *Committee Hansard*, 25 August 2023, p. 71.

38 Miss Morgan Lynch, Founding Member, Queensland Youth Policy Collective, *Committee Hansard*, 15 August 2023, p. 45.

39 Ms Emily Dale, Head of Advocacy, Full Stop Australia, *Committee Hansard*, 27 September 2023, p. 52.

> …there is a very powerful educative element that would be brought to bear in policymaking and laws and implementation were [there to be a HRA]. We would hope that it would be a preventive of rights violations and that it would reverse what has happened—that is, a culture of rights violations—to a culture of rights compliance. [40]

8.29 Dr Cassandra Goldie, the Chief Executive Officer of the Australian Council of Social Service, noted the importance of decision-makers understanding what human rights standards are. Dr Goldie also noted the importance of properly resourcing civil society and other organisations 'so there is an enlivened civil society culture of advocacy to make sure these rights are realised'.[41]

8.30 A number of submitters also discussed the importance of a HRA in the delivery of services and how it could help provide a cultural shift to ensure services are delivered in a way that respects human rights.[42] Ms Matilda Alexander, the Chief Executive Officer of Queensland Advocacy for Inclusion gave evidence that the Queensland HRA has made a difference to the culture of government service delivery:

> With every submission that we make, we rely on human rights. Every time we're trying to keep a kid in school, every time we're trying to get somebody out of solitary confinement in a disability detention setting, every time we're trying to give somebody their voice back where their capacity has been challenged, we refer to human rights... In the majority of cases, we think that it has made a huge difference to culture on the ground. So it has made a huge difference to the way that governments have to stop and think about human rights…[The Queensland HRA] allows you to have this very detailed and in-depth discussion about exactly that question. It's not just: 'Can I do this? Can I keep a kid out of school?' Yes, you can, but should you do that? You have the power to do that, but under the Human Rights Act, taking into account all of those factors in that proportionality test, should you be making that decision? That's where good government comes from, where it gives us an opportunity to do some good advocacy as well.[43]

8.31 Other submitters also noted the importance of 'peak and peer organisations' being able to receive training from relevant human rights organisations such as the AHRC or other relevant bodies to better advocate for human rights in the delivery of services.[44]

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40 Mr David Manne, Executive Director and Principal Solicitor, Refugee Legal, *Committee Hansard*, 25 August 2023, p. 28.

41 Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Service, *Committee Hansard*, 27 September 2023, p. 28.

42 See Mrs Lisa Ira, Senior Policy Officer, People with Disability Australia, *Committee Hansard*, 27 September 2023, p. 41. See also Human Rights Law Centre, *Submission 232*, p. 10.

43 Ms Matilda Alexander, Chief Executive Officer, Queensland Advocacy for Inclusion, *Committee Hansard*, 15 August 2023, p. 51.

44 Associate Professor Kate Seear and others, *Submission 30*, p. 12.

Human rights training for public servants

8.32 In order for human rights to be appropriately protected and for a culture of respect to develop within the public service it is necessary for public officials to understand the content of human rights and their obligations. As set out in Chapter 3, there is no current organised human rights training available to the APS. The AHRC has stated:

> For public servants, such training is essential to support them in meeting their obligations to develop Statements of Compatibility for new legislation and legislative instruments, as well as to adopt human rights-based approaches in policy design and implementation.[45]

8.33 There do appear to be some common training opportunities which may be available to all federal public servants, for example via the Australian Public Service Academy 'APS Induction Pathway',[46] or via individual courses it offers,[47] however none specifically address human rights.

8.34 A number of submitters emphasised the importance of human rights training to help public sector employees uphold human rights in their day-to-day work, many of whom said this training should be mandatory.[48] Amnesty International Australia's Australian Capital Territory and Southern New South Wales Activism Leadership Committee stated:

> Human rights training within the public service and service institutions helps government employees and service providers recognize and address human rights violations or discrimination in service delivery. It enables them to identify and mitigate systemic barriers that prevent marginalised groups from accessing their rights, leading to more equitable and inclusive public and private services.[49]

8.35 Ms Daniela Gavshon, Australia Director of Human Rights Watch, gave evidence about the need for human rights education at every level:

> I think that if you have a human rights act in place there is education across-the-board, in government at all levels, such that people understand the importance of human rights and understand that human rights should only be transgressed in the most extreme situations and when you have done that

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45 Australian Human Rights Commission, *Submission 1*, p. 21.

46 APS Academy, *APS Induction Pathway*.

47 For example, the APS Academy current offers a number of courses which could include human rights, such as: APS Frameworks; Working in the APS; Producing a Quality Cabinet Submission; and Crafting Quality New Policy Proposals.

48 See for example, Australian Federation of Disability Organisations, *Submission 274*, p. 19; Students for Sensible Drug Policy, *Submission 130*, p. 3; Community Public Sector Union, *Submission 236*, p. 7; Grandmothers for Refugees (Macnamara), *Submission 76*, p. 4.

49 Amnesty International Australia's Australian Capital Territory and Southern New South Wales Activism Leadership Committee, *Submission 46*, p. 7.

> balancing act of it being strictly necessary, limited in duration, respectful of human dignity, et cetera.[50]

8.36 The Australian College of Nursing submitted there is a need to have specific training for all frontline workers who encounter people whose basic human rights are not being met:

> ACN advocates training on the Human Rights Act for all frontline professionals, including healthcare workers, law enforcement, educators, and social and community workers. ACN urges the Australian government to consider the importance of making information, resources, and training materials readily available.[51]

8.37 In relation to the type of training to be provided, evidence was received that the training should ideally be tailored to fit the work of the relevant department 'so that it's not generalised information about human rights but actually gets really close to the scope of their work—the decisions that need to be made, the actions that they may be faced with taking and working out how the human rights principles fit into that scope of work'.[52] Ms Kylie Evans SC, who has been involved in training public servants in Victoria in relation to the Charter, emphasised the importance of having an ongoing commitment to training:

> My observation from Victoria is that there was an initial rollout of training and excitement about the human rights act, and that was great for awareness raising. But then it kind of fell away, that initial awareness raising, and the principles weren't really embedded into the work that public servants do, which therefore creates a limitation on how they can apply it and also I think doesn't really fully support public servants to do this well.

8.38 Ms Evans SC emphasised that the need for ongoing training is not only important because there is a turnover in staff but:

> …also the human rights instruments that we're talking about are necessarily very broad, open-textured rights that are identified. The meaning of these rights develops. And so having just a seminar at the start to learn what it means really isn't sufficient because a human rights act is often described as a living instrument. [53]

8.39 Mx Ro Allen, the Victorian Equal Opportunity and Human Rights Commissioner, noted that the Commission conducts training for public servants and all public servants receive Charter training. They explained:

> What I've come to learn now as the human rights commissioner is that in fact every department has to find money to fund the commission to deliver

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[50] Ms Daniela Gavshon, Australia Director, Human Rights Watch, *Committee Hansard*, 27 September 2023, p. 4.

[51] Australian College of Nursing, *Submission 208*, p. 7.

[52] Ms Kylie Evans SC, *Committee Hansard*, 25 August 2023, p. 70.

[53] Ms Kylie Evans SC, *Committee Hansard*, 25 August 2023, p. 70. See also, Ms Catherine Dixon, *Committee Hansard*, 25 August 2023, p. 72.

> our charter education program, so they've got skin in the game, if you like. They are champions of the charter, and they send their executive, as well as the public sector, to our program.[54]

8.40 However, some submitters noted the importance of ensuring any such training does not inculcate a politically partisan vision of human rights culture and take Australia away from the fundamental principles set out in the International Covenant on Civil and Political Rights.[55]

Senior leadership

8.41 Cultural change starts at the top: to drive change several submitters argued it is necessary to have a change in law (namely a federal HRA) and set human rights as a part of an organisation's culture and direction. In particular, to achieve a positive human rights-based culture, the leadership of an organisation must be committed, with the government and ministers setting the expectations as senior leaders.[56]

8.42 Ms Catherine Dixon, who previously managed the Human Rights Unit in Victoria, gave evidence that leadership is critical:

> When ministers, department secretaries, heads of public sector agencies, senior executives are actually committed to human rights and they link human rights to values and to other important public sector priorities, there is a positive shift in the culture of the Public Service. That manifests in a way where the expectation starts to grow that rights do genuinely need to be considered upfront, that they matter to service delivery, that the departments want to make sure people are regularly trained, that human rights are talked about as a public-sector value, that communities of practice develop, that human rights days are celebrated. There is this sense of the momentum.[57]

8.43 Ms Dixon explained that in Victoria there has been Charter leadership forums, whereby representatives of each department and key agencies set a vision for the Charter, discussing challenges, driving cultural change and acting as a forum for leaders to upskill their understanding of human rights. Ms Evans SC emphasised the importance of including senior levels of the public service in training, not just junior public servants.[58] Ms Kate Eastman AM SC, who helped train ACT public servants when the ACT HRA was first introduced, also gave evidence about the importance of training public servants in order to build

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54 Mx Ro Allen, Commissioner, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, 25 August 2023, p. 2.

55 Australian Christian Lobby, *Submission 143*, p. 5.

56 Michael Brett Young, *From Commitment to Culture The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 2015, pp. 24, 25.

57 See, Ms Catherine Dixon, *Committee Hansard*, 25 August 2023, p. 71.

58 Ms Kylie Evans SC, *Committee Hansard*, 25 August 2023, p. 70.

human rights capacity, and not just assume that having a HRA will mean it will automatically be able to be implemented.[59]

8.44 Professor George Williams AO, who was involved in the Victorian process that led to the Charter, similarly emphasised the importance of embedding human rights throughout the public service, explaining what occurred initially in Victoria:

> The sorts of things they did included setting up charter champions within departments, particularly for that early stage of implementation. I would also urge that there be a period before it comes into force where people can look across the book and, in fact, follow the UK system—a traffic light system of green—go; orange—we've got a problem; and red—we need to change. You would also have your charter champions who are well trained who can then train others and become a focal point of advocacy and also knowledge within the Public Service.[60]

8.45 At the federal level, leadership and governance within the APS is managed by the Secretaries Board. This board is chaired by the Secretary of the Department of the Prime Minister and Cabinet and includes all secretaries of Australian Government departments, the Secretary for Public Sector reform and the Australian Public Service Commissioner. Other persons as nominated by the Secretary of the Prime Minister's Department can also be on the board.[61] Among other things, the board has the functions of identifying strategic priorities for the APS and considers issues that affect the APS. The board may also establish sub-committees to assist the board in performing its functions, consisting of members determined by the board.[62]

APS Code of Conduct

8.46 As set out in Chapter 3, the Framework committed to revising the APS Value or Code of Conduct to require public servants to respect human rights in policy making. However, the current APS Values includes only a 'respectful' value which states: 'The APS respects all people, including their rights and their heritage',[63] and the Code of Conduct states that an APS employee, when acting in connection with APS employment, 'must treat everyone with respect and courtesy'.[64] It does not specifically refer to human rights. Some submitters

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59 Ms Kate Eastman SC, *Committee Hansard*, 28 September, p. 48.

60 Professor George Williams AO, *Committee Hansard*, 28 September 2023, p. 49.

61 *Public Service Act 1999*, section 64.

62 *Public Service Act 1999*, subsection 64(3).

63 *Public Service Act 1999*, section 10.

64 *Public Service Act 1999*, subsection 13(3).

argued that a federal HRA would prevent those subject to a Code of Conduct from exercising power in a way that was incompatible with human rights.[65]

8.47 In contrast to the federal Code of Conduct, the Victorian public sector values specifically requires, in addition to 'respect', the value of 'human rights', namely that public officials should respect and promote the human rights set out in the Charter by making decisions and providing advice consistent with human rights and actively implementing, promoting and supporting human rights.[66]

Consideration of human rights in development of policy and legislation

8.48 The committee received evidence about the importance of formally building human rights into the processes surrounding the development of policy and legislation.[67] Associate Professor Julie Debeljak noted that if human rights considerations are not part of the process internally within government before legislation is finalised 'the prevailing view is that it is near impossible to achieve an amendment – let alone a rights-based amendment – once the executive's Cabinet has approved it'.[68] Former public servants have also explained the importance of early consideration of human rights in policy development and the preparation of legislation, noting that when human rights are considered at an early stage in policy development the prospects of the resulting legislation being compatible with human rights are enhanced:

> In part, this is because human rights instruments provide a useful framework for policy development, forcing policy makers to focus on the policy objective, identify how human rights may be positively or adversely impacted and explore ways to minimise adverse impacts upon human rights whilst still achieving the policy objectives…This is also, in part, because the legislative development and decision-making processes impact upon the capacity and willingness to make any significant changes to a Bill at the later stages of development. The later human rights are considered, the more likely it is that policy choices will have already been made by the relevant Minister and Cabinet, and considerable work done by the Department to give effect to those decisions. Significant alterations to the proposed legislation risk delays in the legislation, loss of placement in the legislative program and even complete derailment of the Bill.[69]

8.49 This accords with the findings of the National Human Rights Consultation, which received submissions on this point and commissioned a telephone survey

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65 Australian Lawyers Alliance, *Submission 83*, p. 5.

66 See, *Public Administration Act 2004* (Vic), paragraph 7(1)(g).

67 See, for example, Ms Kylie Evans SC and Ms Catherine Dixon, *Committee Hansard*, 25 August 2023.

68 Associate Professor Julie Debeljak, *Submission 15*, p. 12.

69 Joanna Davidson, 'Impact of the Victorian Charter upon Policy and Legislative Development' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomson Reuters, 2020, pp. 351–352.

of 1200 people, 85 per cent of whom supported the option for 'governments to pay more attention to human rights when they are developing new laws and policies'.[70] The National Human Rights Consultation report concluded:

> Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights, or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.[71]

Current processes for developing bills

8.50 The Department of the Prime Minister and Cabinet's *Legislation Handbook* explains the process for the development of federal bills. It states that if legislation is required the relevant minister must seek policy approval for measures in the bill. This can be done in two ways: for significant policy proposals involving legislation it is necessary to seek Cabinet approval, but where the minister believes the proposal does not warrant consideration by Cabinet the minister can write to the Prime Minister seeking policy approval.[72] Once approval is received (or sometimes before) drafting instructions are developed to guide the Office of Parliamentary Counsel (OPC) in drafting the legislation. The detail of the drafting instructions is therefore rarely a matter for Cabinet consideration.[73]

8.51 The *Legislation Handbook* states that consultation on proposed legislation must occur within government in accordance with OPC Drafting Direction No. 4.2. It states that OPC will refer drafts of legislation to agencies who have a right or responsibility to provide policy input in relation to a draft. The drafting direction states that bills or legislative instruments are not routinely distributed to the Human Rights Unit in AGD to consider human rights.[74] Provisions in draft bills that are required to be referred to the Human Rights Unit are those where they might discriminate against an individual; are specifically directed to

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70 Colmar Brunton Social Research, 'National Human Rights Consultation – community research phase (2009)' in National Human Rights Consultation, *Report*, September 2009, pp. 163–164.

71 National Human Rights Consultation, *Report*, September 2009, p. 174.

72 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, pp. 15–17. Note that all legislative proposals must be considered by the Parliamentary Business Committee of Cabinet, but it does not give approval for the policy underlying the bill, rather it determines the priority the bill will be given in the legislation programme (e.g. the order in which bills will be drafted by the Office of Parliamentary Counsel and their introduction into Parliament), see *Legislation Handbook* pp. 6–7.

73 See, Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, p. 16 which advises officials not to attach drafting instructions or draft legislation to a Cabinet submission or memorandum unless the Cabinet or a Cabinet committee specifically requires the instructions.

74 Office of Parliamentary Counsel, *Drafting Direction No. 4.2: Referral of drafts to agencies*, 2023, p. 5.

groups of people who may be experiencing disadvantage or may be in vulnerable circumstances; or might infringe civil, political or other human rights relating to privacy or freedom of speech.[75] In addition, provisions that involve an international law issue including a limitation on a right under a core international human rights treaty, for example limitations on the rights to privacy or non-discrimination, are to be referred to the Office of International Law (OIL) within AGD.[76]

8.52 This has the potential to ensure the involvement of the International Law and Human Rights Division[77] in AGD to provide advice to departments regarding the human rights implications of proposed legislation at an early stage. However, as to when in the process a draft bill will be referred, this is described in the direction as 'a matter of judgment'. If the draft is referred too early (i.e. before the policy and approach are reasonably well settled) agencies may waste time considering draft provisions that subsequently change, but if it is referred too late there may not be time to provide useful comments or negotiate on policies. The Human Rights Unit and OIL are not listed in the drafting direction as sections that require consultation at an earlier stage.[78]

8.53 Ms Anne Sheehan, First Assistant Secretary at AGD, advised that OPC sends the bill to AGD 'once the bill is drafted'.[79] In response to a written question regarding at what stage of the drafting process OPC usually refers matters to AGD, AGD advised:

> The Office of Parliamentary Counsel (OPC) sends a Bill to the department for review in accordance with Drafting Direction 4.2 once the policy and the draft Bill is sufficiently developed. When a Bill has been provided to the department for review, officers will review the text and, in many cases, contact the drafting instructors within the relevant department to discuss the policy intent and the human rights implications of the proposed drafting. Following this process, comments are returned to the relevant OPC drafters and drafting instructors. In addition to providing specific comments on the drafting, the Human Rights Branch will often suggest the rights that should be considered in the Statement of Compatibility.[80]

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75 Office of Parliamentary Counsel, *Drafting Direction No. 4.2: Referral of drafts to agencies*, 2023, pp. 10, 13, items 13, 14, 63.

76 Office of Parliamentary Counsel, *Drafting Direction No. 4.2: Referral of drafts to agencies*, 2023, p. 10, item 50.

77 The International Law and Human Rights Division in AGD includes both the Human Rights Branch and the Office of International Law.

78 Office of Parliamentary Counsel, *Drafting Direction No. 4.2: Referral of drafts to agencies*, 2023, p. 2.

79 Ms Anne Sheehan, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 57.

80 Attorney-General's Department, answer to written question on notice, 26 October 2023 (received 9 November 2023).

8.54 The evidence from AGD suggests that the International Law and Human Rights Division is not involved until the bill is drafted and therefore quite well developed and a key role is in providing guidance and assistance on what should be included in the statement of compatibility, rather than necessarily suggesting amendments to the draft legislation to make it less likely to infringe on rights. The AGD submission noted that the Human Rights branch might highlight where 'justification' of potential limitations of rights should be addressed in the statement of compatibility.[81] AGD gave evidence that the Human Rights Unit can give advice on statements of compatibility whereas OIL looks at the legislation itself.[82] Any legal advice regarding the compatibility of legislation with international human rights obligations can be provided by OIL and the Australian Government Solicitor (AGS).[83] However, it remains unclear how often legislation is referred to OIL or the AGS to seek advice as to compatibility with human rights treaty obligations. Drafting Direction 4.2 instructs OPC drafters to ask instructors if the draft raises any potential issues with the relevant human rights treaties but states that the drafter is not expected to know about the range of these agreements[84] and AGD provides no human rights training to OPC drafters.[85] As such it appears unlikely that OPC would necessarily always know when a proposed bill would engage Australia's treaty obligations, and it would appear to be largely a matter for each department as to how much expert human rights advice they seek when developing federal legislation. Even if AGD is consulted, no evidence is available as to how often departments accept any human rights advice.[86]

8.55 In relation to this it is noted that the *Legislation Handbook* states that while AGD is available to departments to provide assistance in relation to statements of compatibility, its legal advice on Australia's international human rights obligations is provided on 'a billable basis'.[87] AGD gave evidence that OIL ceased billing for international legal advice in 2017, while the Australian

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81 Attorney-General's Department, *Submission 114*, p. 15.

82 Ms Victoria Bennett, Acting Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 15.

83 See, Attorney-General's Department, *Submission 114*, p. 14; Ms Anne Sheehan, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 15.

84 Office of Parliamentary Counsel, *Drafting Direction No. 4.2: Referral of drafts to agencies*, 2023, p. 5.

85 Attorney-General's Department, answer to written question on notice, 26 October 2023 (received 9 November 2023).

86 See question from the Chair of the Parliamentary Joint Committee on Human Rights and response from Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 58.

87 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, p. 40.

Government Solicitor continues to bill for its services.[88] The advice in the current *Legislation Handbook* that such legal advice is billable presumably may impact departments willingness to seek such advice, noting that the responsibility for consultation rests mainly with the minister/department sponsoring the legislation.[89]

8.56 Ms Sheehan also gave evidence that AGD does not get involved where this committee has recommended changes to legislation to better improve human rights, noting that at that point it is a parliamentary process.[90]

Current processes for developing delegated legislation

8.57 A significant amount of legislation is made by way of delegated legislation. While the power to enact laws is a primary power of Parliament, Parliament can (and often does) delegate certain law-making functions to the executive branch of government. Delegated legislation, made by the executive, usually the Governor-General, ministers, statutory office holders and senior public servants, may be made without parliamentary enactment but has the same legal effect as primary legislation (that is, Acts of Parliament).[91]

8.58 Regulations and ordinances are drafted by OPC and made by the Governor-General, acting on the advice of the Federal Executive Council (in practice by the minister responsible for administering the relevant legislation).[92] However, the majority of legislative instruments are now drafted internally by various government departments (not by OPC),[93] and made by ministers, secretaries of departments or other officials. The only way human rights are required to be considered in the development of delegated legislation is through the statement of compatibility process. However, this only applies to legislative instruments that are subject to disallowance by the Parliament. For those that are non-disallowable, up to 20 per cent,[94] there is no requirement on those drafting and making them to consider human rights.

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88 Attorney-General's Department, answer to written question on notice, 12 May 2023 (received 16 June 2023).

89 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, p. 1.

90 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 12 May 2023, pp. 18–19.

91 See, Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th edition, Lexis Nexus Butterworths, Australia, 2017, p. 1.

92 See, Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook 2021*, 2021.

93 These can be drafted by the Office of Parliamentary Counsel, but are not required to be, and at a cost to the relevant department, see the *Legal Services Directions 2017*. See also Office of Parliamentary Counsel, *Instruments Handbook*, 2022.

94 See, Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 2021, p. 9.

8.59 Most legislative instruments are subject to sunsetting ten years after they are registered, meaning they are automatically repealed. The purpose of this is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.[95] As such, departments and agencies are required to plan ahead to review their legislative instruments and decide if they can be repealed or should be remade. AGD's *Guide to managing the sunsetting of legislative instruments* suggests such reviews should consider if the instrument remains fit-for-purpose, which includes considering the broader legal and policy context including Australia's obligations under international law.[96] However, no specific guidance is provided on conducting a human rights assessment of the instrument.

Current processes for developing policy

8.60 There is no single handbook or standardised framework outlining the process by which policies not involving legislation are developed, considered and approved at the federal level. However, policy development by federal departments does involve a structured process that typically follows some key steps (when time allows): issue identification; policy analysis; policy formulation (including assessment of feasibility, effectiveness, cost-benefit analysis or potential impacts); consultation; coordination; decision (by Minister and/or Cabinet); implementation (may involve the development of regulation, legislation or guidelines); and evaluation.[97]

8.61 Common processes for developing many new non-legislative policies appear to be guided primarily by budget and expenditure processes. The *Budget Process Operational Rules* (the Budget rules), maintained by the Department of Finance, outline the major administrative and operational arrangements for managing the Australian Government Budget and its related processes.[98] These Budget rules include requirements that all policy proposals involving expenditure must include a constitutional risk rating as assessed by AGS (involving a narrow assessment of constitutional risk and not examining broader questions of lawfulness and legal risk)[99] and a gender impact assessment developed in

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95 *Legislation Act 2003*, section 49.

96 Attorney-General's Department, *Guide to managing the sunsetting of legislative instruments*, July 2020, p. 23.

97 See, Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook*, 6th edition, Taylor and Francis, 2018, p. 48.

98 Department of Finance, *Budget Process Operational Rules*, December 2022.

99 Ms Kathryn Graham, National Leader of the Office of General Counsel with the Australian Government Solicitor, advised the Royal Commission into the Robodebt Scheme that the role of the AGS in the NPP Checklist does 'not extend to considering whether there are any other legal issues raised by a NPP beyond the question of constitutional risk and legislative authority for expenditure. In the event that a very obvious legal issue is apparent on the face of the NPP, we may include a

consultation with the Office for Women. It requires that lead entities developing policy proposals with implications for other entities must consult early with those entities.[100]

8.62 Part 3 of the rules highlight a range of policies and frameworks for entities to consider, including: gender analysis; gender impact assessment; policy impact analysis; and risk management.[101] It states that entities are encouraged to consider issues related to these matters early in the development process to help ensure the policy is developed to the highest quality standards. It also notes that a checklist of all requirements for new policy proposals is included in the New Policy Proposal (NPP) template. The additional policies and frameworks to which the rules refer are developed and managed by different government departments. For example, the Department of the Prime Minister and Cabinet Office of Impact Analysis publishes the *Australian Government Guide to Policy Impact Analysis*, which is intended to assist policy makers to reflect on how a policy may affect people, businesses and community, as well as its broader economic and competition impacts. The Department of the Prime Minister and Cabinet Office for Women provide advice and direction to entities on how to assess the gender impacts of their policy proposal, and may assist entities to conduct and complete a comprehensive 'Gender Impact Assessment' to accompany a policy proposal.[102] Comcover (the Australian Government's self-managed insurance fund) assists entities to manage risks and administers the *Commonwealth Risk Management Policy*.[103] This policy requires entities developing new policies to identify risks associated with the proposal and outline how those risks will be managed. However, none of these additional policies and frameworks require an assessment of the compatibility of the proposed measure with human rights.[104]

8.63 The Budget rules distinguish between minor and major policy proposals (minor being those with financial implications of less than $20 million) in terms of the

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comment to that effect in our assessment, however, this is rare in practice given the volume of NPPs, the tight timeframes, the narrow focus of the assessment and the broader complexity of many of the proposals'. See, Royal Commission into the Robodebt Scheme, *Final Report*, 2023, p. 104.

100 Department of Finance, *Budget Process Operational Rules, Part 2 Rules: Policy Proposal Development*, December 2022, pp. 7–19.

101 Department of Finance, *Budget Process Operational Rules, Part 2 Rules: Decision-Making Process*, December 2022, pp. 20–21.

102 Office for Women, *An APS Guide to Gender Analysis and Gender Impact Assessment*.

103 Comcover, *Commonwealth Risk Management Policy*, November 2022.

104 In this regard, the AHRC recently developed a 'Child Rights Impact Assessment Tool', to help governments and service providers assess how children's rights and wellbeing will be affected by new laws and policies. However, use of this tool is not compulsory, and government documents relating to policy development currently make no reference to it.

approvals process.[105] A minor policy proposal is provided to the Minister for Finance for a decision, and then to the Expenditure Review Committee (ERC) for endorsement of that decision. The ERC is a Committee of Cabinet, consisting of the Prime Minister, Treasurer, Minister for Finance and selected portfolio ministers. A major policy proposal must first be considered by the ERC and then by the Cabinet (unless the Prime Minister agrees otherwise).

8.64 Where a policy is agreed and forms part of the government's budget, money is then sought to be appropriated from the Consolidated Revenue Fund through the passage of annual Appropriation Bills for expenditure. The statements of compatibility accompanying these bills persistently state that the bills do not engage human rights, citing authority from the High Court of Australia to the effect that appropriations bills do not create rights or impose duties.[106] This committee has consistently argued that proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, and has cited extensive international guidance to this effect.[107] It has also highlighted the fact that since 1985, Australia has published a 'Women's Budget Statement', which is a public document outlining the positive impact of the annual budget on gender equality and explicitly linking the provision of money through budget measures with improvements in outcomes for women (though with no analysis of whether any of the measures constitute a reduction in funding, and may therefore be a retrogressive measure requiring justification).[108] It is not clear why a similar approach could not be taken to identifying those measures that impact on human rights.

8.65 In relation to the development of policies with no financial implications, or matters pursuant to the exercise of ministerial discretion, these may be subject to Cabinet consideration if they involve significant policy. However, in this

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105 Department of Finance, *Budget Process Operational Rules, Part 3: Matters to Consider When Developing Policy Proposals*, December 2022, pp. 28–33.

106 See, for example, Appropriation Bill (No. 1) 2023-2024, statement of compatibility, p. 4.

107 See, Parliamentary Joint Committee on Human Rights, *Report 3 of 2013* (13 March 2013) pp. 65–67; *Report 7 of 2013* (5 June 2013) pp. 21–27; *Report 3/44* (4 March 2014) pp. 3–6; *Report 8/44* (24 June 2014) pp. 5–8; *Report 20/44* (18 March 2015) pp. 5–10; *Report 23/44* (18 June 2015) pp. 13–17; *Report 34/44* (23 February 2016) p. 2*; Report 9 of 2016* (22 November 2016) pp. 30 33; *Report 2 of 2017* (21 March 2017) pp. 44–46; *Report 5 of 2017* (14 June 2017) pp. 42–44; *Report 3 of 2018* (27 March 2018) pp. 97–100; *Report 5 of 2018* (19 June 2018) pp. 49–52*; Report 2 of 2019* (2 April 2019) pp. 106–111; *Report 4 of 2019* (10 September 2019) pp. 11–17; *Report 3 of 2020* (2 April 2020) pp. 15–18; *Report 12 of 2020* (15 October 2020) pp. 20–23; *Report 7 of 2021* (16 June 2021) pp. 11–15; *Report 2 of 2022* (25 March 2022) pp. 3–7; *Report 6 of 2022* (24 November 2022) pp. 11–15, *Report 6 of 2023* (14 June 2023) pp. 9–14, *Report 8 of 2023* (2 August 2023), pp. 101–109.

108 Parliamentary Joint Committee on Human Rights, *Report 6 of 2023* (14 June 2023) pp. 9–14.

regard, the Cabinet Handbook states that there are 'no hard and fast rules about the issues that should be considered by the Cabinet'.[109]

Statements of compatibility with human rights

8.66 As noted above, the main way in which human rights are currently considered in the development of legislation is through the requirement for statements of compatibility. Currently, as set out in Chapter 3, all bills and all disallowable legislative instruments are required to include a statement of compatibility with human rights which provides an assessment by the minister/department responsible for the legislation as to whether the legislation is compatible with human rights.[110] This was introduced as part of the 2010 Framework.

8.67 All statements of compatibility for government bills are drafted by the department responsible for the legislation. This is the approach taken in the United Kingdom (UK), Victoria and Queensland, but differs from the approach taken by New Zealand and the ACT where the compatibility statement requirement is centralised in the Attorney-General's departments.[111] At the federal level, statements of compatibility are drafted by officials in various departments, including those such as AGD which should have a high level of understanding of international human rights law, as well as other departments for whom human rights law may not be within their expertise. Ms Sheehan gave evidence:

> I would not say that there are human rights law experts in every department to draft them. But the idea when the statements of compatibility was introduced was that every policy officer, without being a human rights expert, should be able to understand how the policy they are developing engages with human rights and be able to take that into account as they are developing their policy.[112]

8.68 In this context it is noted that the human rights training for the public service took place over a decade ago (see Chapter 3). Ms Sheehan noted that resources on AGD's website are designed to assist departments in working out how their policy interacts with human rights.[113] Ms Sheehan stated that AGD does not play a role in clearing or approving statements of compatibility, and there is no requirement that departments seek advice from AGD when developing such

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109 Department of the Prime Minister and Cabinet, *Cabinet Handbook*, 15th edition, 2022, p. 11.

110 *Human Rights (Parliamentary Scrutiny) Act 2011*, Part 3.

111 See, Attorney-General's Department, *Submission 114*, Attachment A.

112 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 16.

113 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 16.

statements, although she gave evidence that AGD does provide a lot of support to departments.[114]

8.69 Non-government bills are drafted by the parliamentarian (or their staff) introducing the legislation. In this regard, parliamentarians or their staff do not have access to support from AGD, although they can access the publicly available resources (if they know to look for them on AGD's website).

8.70 Although the quality of statements of compatibility has generally improved over time, the quality of individual statements nevertheless can vary dramatically. In 2018, this committee identified that several common issues in the drafting of statements of compatibility made the committee's task of analysing human rights compatibility more difficult, including:

- failure to identify any or all human rights engaged by a measure;
- setting out insufficient information about the operation of the legislation and the objectives supporting it to enable the committee to determine whether measures in the legislation engage and limit or promote human rights;
- identifying that a right is engaged, but not sufficiently explaining how; and
- not assessing whether any limitations on the human rights identified in the statement of compatibility are permissible (by reference to the committee's analytical framework).[115]

8.71 Submitters and witnesses expressed concern that the current statement of compatibility process is ineffective and the statements do not accurately reflect the human rights engaged and limited by legislation.[116] The Kaldor Centre for International Refugee Law submitted:

> …statements of compatibility are routinely perfunctory, misleading or inaccurate in their legal analysis. Described as 'an expression of opinion by the relevant Minister or sponsor of the Bill', the 'opinion' expressed is often wrong as a matter of international law.[117]

8.72 Similarly, Refugee Legal submitted:

> It is our experience that [statements of compatibility (SOCs)] are often limited by a lack of quality objective human rights analysis. This is particularly evident where SOCs acknowledge that a right is limited by the proposed legislation. Often the policy intent of the legislation is given in explanation of why the rights limitation is permissible. While in some circumstances this may establish a legitimate objective, this will not always

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114 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 58.

115 Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019), p. 35.

116 See, Rt Rev Dr Michael Stead, Chair, Freedom for Faith, *Committee Hansard,* 28 September 2023, p. 5; Liberty Victoria, *Submission 155*, p. 20; Castan Centre for Human Rights, *Submission 160*, p. 33; Centre for Law and Social Justice, *Submission 185*, p. 3; Nicholas Bulbeck, *Submission 276*.

117 Kaldor Centre for International Refugee Law, *Submission 13*, p. 2.

be the case; there is also routinely a lack of discussion of the proportionality of the limitation.[118]

8.73 Both Maurice Blackburn and National Legal Aid expressed concern regarding the absence of objective standards in relation to content or the level of analysis that statements of compatibility must contain.[119] Voices of Influence submitted that statements of compatibility 'place a significant onus on the Minister who is preparing an opinion to understand international human rights frameworks and Australia's obligations'.[120]

8.74 A persistent concern is that statements of compatibility with human rights will always state that a proposed law is consistent with human rights, regardless of the international law position. This is most apparent in relation to statements of compatibility accompanying legislation dealing with policies and legislative frameworks which clearly breach human rights, where such breaches are not minor or otherwise inadvertent matters that may be rectified without altering the intended effect of the legislation. In such instances, the statement of compatibility will almost invariably conclude that the legislation is compatible with human rights, largely because any limitation on rights is 'reasonable, necessary and proportionate' having regard to the objective of the law.[121] This approach is taken even where the committee has previously concluded that such a policy or law is incompatible with human rights, and, more concerningly, where UN bodies have concluded that that specific law or policy breaches human rights.[122] In such cases, the opinion in the statement of compatibility that the measure is compatible is not supported by any compelling evidence to justify the conclusion.

8.75 Concerns regarding inaccurate conclusions have existed since the requirement to prepare statements of compatibility was introduced. In 2014, Professor Ben Saul, Challis Chair of International Law and current UN Special Rapporteur on

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118 Refugee Legal, *Submission 129*, p. 18.

119 See, Maurice Blackburn, *Submission 110*, p. 12; National Legal Aid, *Submission 118*, p. 8.

120 Voices of Influence, *Submission 133*, p. 13.

121 See, for example, Kaldor Centre for International Refugee Law, *Submission 13*, p. 4.

122 For example, in late 2023 the committee considered the human rights assessment relating to the introduction of Community Safety Orders in relation to certain non-citizens who have previously been convicted of serious criminal offenders. The statement of compatibility relating to these measures stated that the imposition of a more serious penalty for prior criminal conduct did not breach the absolute prohibition against retrospective criminal penalties, despite the UN Human Rights Committee having concluded, in a prior case against Australia, the opposite. See, Parliamentary Joint Committee on Human Rights, Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument, *Report 14 of 2023* (19 December 2023) p. 40–42. A similar assessment in the statement of compatibility that the measure was consistent with the right to liberty also conflicted directly with an assessment by the UN Committee to the contrary.

Human Rights and Counter-terrorism, described them as 'lame statements of compatibility…which whitewash and legitimise rights violations'.[123] In 2020, the Law Council of Australia connected the lack of substance and quality in many statements of compatibility with the lack of human rights engagement and training across departments, stating that the completion of these statements often occurs at the end of the process, 'rather than being baked in at the beginning'.[124] In 2021, the AHRC expressed concern that statements of compatibility have led to a 'culture of justification', explaining away breaches of human rights as being reasonable and justifiable limitations on rights, rather than using the process to seek to improve the design of policy and legislation to minimise or avoid breaches of human rights.[125] In evidence to this inquiry, Christian Schools Australia submitted that, in practice, statements of compatibility 'reflect merely a justification of its proposals by Government using the language of human rights and inevitably, when rights of non-discrimination conflict with fundamental freedoms, give preference to non-discrimination rights'.[126]

Improving processes

8.76 A significant amount of evidence was received as to the need to improve the processes for the consideration of human rights in the development of policy and legislation. Most submitters focused on the impetus a federal HRA would give to this, and additionally many focused on the need for education and a change in culture (as set out above). A number of submitters also argued specifically for the need for internal processes to change within the federal public service in order for human rights to be better considered in the development of legislation and policies.

Agencies and departments

8.77 Evidence was received as to how other jurisdictions within Australia approach the consideration of human rights in the development of policy and legislation. In jurisdictions such as the ACT, Queensland and Victoria, statements of compatibility are drafted by the relevant departments but it appears that the human rights team in the equivalent Attorney-General's departments have a

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123 Professor Ben Saul, *The Ideological War on Human Rights: Why Are Australian Politicians So Hostile towards Basic Freedoms?*, Speech at the NSW Council for Civil Liberties Annual Dinner Sydney, 26 September 2014.

124 Ms Pauline Wright, President, Law Council of Australia, *Let's talk about a federal Human Rights Act* Speech at the National Press Club, 2020.

125 Australian Human Rights Commission, *Constitutional and legislative framework – Australia's third UPR* (2021), p. 2.

126 Christian Schools Australia, *Submission 64*, p. 4.

greater role in assessing the adequacy of the statements and being involved in assessing the human rights impacts of the proposed legislation.

8.78 In particular, the ACT takes a centralised model of human rights scrutiny, as the Attorney-General is required to prepare a written statement about each bill presented by a minister as to whether, in the Attorney-General's opinion, the bill is consistent with human rights and if not how.[127] The ACT Government submission explained the process:

> Advice on human rights compatibility of proposed legislation is provided to the Attorney-General by the Human Rights Scrutiny team within the Justice and Community Safety Directorate. In the ACT, this centralised model of human rights scrutiny has assisted in a more consistent approach being taken to human rights compatibility and justification of limitations. The Scrutiny team seeks to engage early with cross-directorate action officers preparing bills to identify potential human rights concerns and explore options to achieve legitimate policy objectives while minimising limitations on human rights. Where human rights issues are identified at a later stage they can often be accommodated through amendments to a Bill or more detailed reasonings in the Explanatory Statement. At times, human rights considerations have significantly shaped policy direction taken by the ACT Government.[128]

8.79 Ms Tara Cheyne, the ACT Minister for Human Rights, also explained:

> In addition to considering human rights in our policy development, directorates right across will engage with the team in the directorate about the human rights scrutiny aspect. They will be able to provide some advice. Essentially, they need to be able to justify decisions and actions and policies that are being taken, particularly if they are limiting rights. Of course, that is also if they are promoting and protecting rights. That team plays a very important role in engaging with directorates right across the ACT government. The team also has an important role in assisting the Attorney-General in developing the human rights compatibility statements presented with those bills.[129]

8.80 Associate Professor Cristy Clark of the Economic, Social and Cultural Rights Network, explained the role of the Human Rights Scrutiny Unit (HRSU) 'who liaise with all other areas of the ACT public service and the Premier's office to discuss bills while they are still in development', stating that discussions between the various departments and the HRSU take place frequently in relation to significant bills, as the HRSU is required to provide the Attorney-General with a memorandum of compatibility on each bill for the Attorney to grant the statement of compatibility:

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127 *Human Rights Act 2004* (ACT), section 37.

128 ACT Government, *Submission 73*, p. 4.

129 Ms Tara Cheyne, Minister for Human Rights, *Committee Hansard*, 12 May 2023, p. 39.

> This process means that much of the work of the *Human Rights Act 2004 (ACT)* remains invisible to the public, which does raise some issues of transparency, but it [is] also a very effective method of reducing human rights incompatibility and of educating the public service (and politicians) about their human rights obligations and of the (often) very simple changes that can be made to legislation to ensure that it upholds these obligations.[130]

8.81 In Victoria, while each individual minister is required to prepare a statement of compatibility, Ms Dixon gave evidence, when reflecting on when the Charter was first enacted, of the need to have central expertise in the public service:

> The Human Rights Unit played a critical role in developing guidance for public servants, particularly legislative officers, on how to take the charter into account in their work, and it also provided advice to public servants about the development of policy compatibility with human rights and assisted other departments in the development of cabinet submissions. In fact, it was a check and balance, because the Human Rights Unit would also brief the Attorney-General on the compatibility of legislation going to cabinet. Public servants want their cabinet submissions to have a smooth process, and they don't want to have ministers arguing against one another in cabinet, so generally they will want to ensure, in this case, that the Human Rights Unit has reviewed a submission and agrees that the legislation can be developed compatibly, or that the Human Rights Unit has assisted at the approval-in-principle stage and then, at bill-at-cabinet stage, has been involved during the drafting of the bill and supports the compatibility of the bill. So that process was a check and balance. It's not an independent external perspective, because the Human Rights Unit was still part of government, but it was a different department that could give a perspective on another department's bill, if you like.[131]

8.82 In contrast to a centralised human rights unit, the AHRC recommended the establishment of permanent, dedicated internal departmental teams with human rights expertise and responsibility for consultation and education on HRA matters. They also recommended the development and implementation of human rights action plans by federal departments and agencies and tailored guidelines, checklists and resources; and respect for human rights included within public sector codes of conduct.[132] Professor Croucher, President of the AHRC, discussed the importance of getting an 'uplift in rights mindedness' within each department responsible for developing the legislation, and that it is important to embed:

> …a culture across the entire Public Service and all of the departments, not just the Attorney-General's Department but all of the departments that are

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[130] Associate Professor Cristy Clark, Economic, Social and Cultural Rights Network, answer to question on notice 20 October 2023 (received 10 November 2023).

[131] Ms Catherine Dixon, *Committee Hansard*, 25 August 2023, p. 73.

[132] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 187.

> involved in assisting in the development of statements of compatibility and the like; that's where you get the real impact, I would see.[133]

8.83 However, as Ms Evans SC noted:

> …there's a tension in saying that everyone, effectively, needs to do human rights but also recognising that it is a very specialised area of law. So I think there is a need, particularly early on, to have a centralised space where there is this expertise and it can be developed.[134]

8.84 Associate Professor Laura Grenfell also noted the importance of having a specialist unit when a HRA is first introduced, such as in Victoria, and over time having fewer specialists.[135] Professor Kim Rubenstein noted that having a specialised human rights unit or people with expertise in every department:

> …wouldn't have to be mutually exclusive, in the sense that they don't have to be either/or; you could have your unit, with a specialist in each department, and you could have a worthwhile interchange and discussion between them, because the unit would have its expertise and each of the different departments would have its specific application.[136]

Statements of compatibility

8.85 The AHRC *Free and Equal* report considered the effectiveness of parliamentary scrutiny of laws for compatibility with human rights, and the role and quality of statements of compatibility.[137] In this report, the AHRC made a number of recommendations regarding statements of compatibility, namely that:

- section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to require statements of compatibility for all legislative instruments, including non-disallowable legislative instruments;
- the range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken;
- statements of compatibility should include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
- with the introduction of a HRA, the *Human Rights (Parliamentary Scrutiny) Act 2011* 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 HRA and the remaining

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133 Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 64.

134 Ms Kylie Evans SC, *Committee Hansard*, 25 August 2023, p. 73.

135 Associate Professor Laura Grenfell, *Committee Hansard*, 20 October 2023, p. 46.

136 Professor Kim Rubenstein, *Committee Hansard*, 20 October 2023, p. 46.

137 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, Chapter 5; *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 13.

obligations under international treaties not expressly included in the HRA; and

- consideration be given to having designated human rights advisers in departments.[138]

8.86 Several submitters echoed these recommendations. Associate Professor Debeljak argued that the *Human Rights (Parliamentary Scrutiny) Act 2011* should be amended to require the inclusion of 'an explanation that justifies the assessment of (in)compatibility and the evidence upon which that justification is based':

> Section 8(3) of the Federal Scrutiny Act should be amended to read: 'A statement of compatibility must state – (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible including by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment; and (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment.[139]

8.87 Associate Professor Grenfell and Dr Sarah Moulds, as well as Liberty Victoria, likewise, recommended the introduction of 'minimum standards' for statements of compatibility including a 'proper analysis of the degree to which a bill will impact on, and limit, human rights'.[140] Liberty Victoria argued that there should be 'clear consequences' for failing to meet these standards (but did not particularise what those should include).[141] Amnesty International Australia argued that the range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken.[142]

8.88 The South-East Monash Legal Service, a community legal service in Victoria, submitted that an independent body should be established to scrutinise statements of compatibility to enhance their impartiality and quality, and that such a body should be empowered to determine its own scrutiny agenda, including delegated legislation, to ensure all aspects of law-making are

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138 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 12, recommendation 5.

139 Dr Julie Debeljak, *Submission 15*, p. iii. See also Amnesty International Australia, *Submission 213*, p. 7.

140 See, Liberty Victoria, *Submission 155*, p. 4; and Associate Professor Laura Grenfell and Dr Sarah Moulds, *Submission 50*, p. 4.

141 Liberty Victoria, *Submission 155*, p. 20.

142 Amnesty International Australia, *Submission 213*, p. 7.

assessed.[143] Several submitters agreed that statements of compatibility should require consideration of compliance with the UNDRIP (see Chapter 6 for a discussion on the application of rights under UNDRIP).[144]

Cabinet process

8.89 The Cabinet process is required to endorse the policy objectives of legislation or expenditure relating to significant policy proposals. This includes any proposal which represents a significant or strategically important policy initiative or commitment; involves new or significant expenditure; is sensitive or controversial; or has significant implications for other portfolios or is not agreed to by all interested portfolios.[145] Policy approval for legislation is sought at the initial stage, before OPC drafts the bill. The legislation does not generally return to Cabinet for approval after being drafted – instead, if it becomes apparent during drafting that minor policy approval is required (as the policy has changed from what Cabinet endorsed) the minister may write to the Prime Minister for approval.[146]

8.90 Currently, there is no formal requirement by which cabinet submissions must detail the engagement of human rights. Coordination comments by other departments are included in the Cabinet template, and this could include comments by the International Law and Human Rights Division at AGD,[147] although it is not clear how often such comments detail human rights concerns. Ms Anne Sheehan advised:

> Cabinet documents will be circulated to departments, including the Attorney-General's Department. We will then have the opportunity to comment, and we often do. Sometimes we might request that certain language appear in the cabinet submission so ministers are aware of a particular issue as they are considering the matter. There's also an opportunity to comment on cabinet submissions. If a cabinet submission didn't include an explanation of something that we felt ministers should be aware of then we could put a comment in. Ministers see what the comments are of different agencies. That is one mechanism. Then, of course, we brief the Attorney as a member of cabinet. We might be advising the Attorney of human rights issues or international law issues that we consider important for the Attorney to be aware of as a member of cabinet.[148]

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143 South-East Monash Legal Service Inc, *Submission 172,* p. 8.

144 See, for example, Jumbunna Institute for Indigenous Education and Research, *Submission 227*, p. 6; Australian Lawyers for Human Rights, *Submission 229*, p. 13.

145 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, p. 15.

146 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 2017, p. 17.

147 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 59.

148 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 59.

8.91 The cabinet submission template does not currently include a requirement to include the statement of compatibility.[149]

8.92 In contrast, the cabinet processes in Victoria and the ACT have more formalised consideration of human rights. In Victoria there is a two-stage process for approval of legislation, with the first stage being Approval in Principle and the second stage being the Bill at Cabinet stage. The Approval in Principle stage is where Cabinet endorses the policy objectives of the legislation and drafting instructions are approved. At this stage impacts on Charter rights must be described and there is a dedicated section provided within the Cabinet submission template. After the bill is finalised it is returned to Cabinet for approval at the second stage and Cabinet endorses the bill and the attached statement of compatibility with human rights.[150] The Victorian Equal Opportunity and Human Rights Commissioner noted it is 'a brave minister that doesn't listen' to the statement of compatibility.[151] Professor Williams said this was an incentive for departments to have to consider human rights:

> In Victoria, for example, we put material in the cabinet manual that meant that if you are going to cabinet you have to make sure that your department is on top of this. Again, that focused the mind of secretaries and people and essentially incentivised them to get this right. It drove a lot of change.[152]

8.93 In the ACT, the Cabinet Handbook states that all Cabinet 'submissions seeking first pass approval should indicate any possible impact on human rights'.[153] The Cabinet Handbook also states that advice should be sought from the Justice and Community Safety Directorate (which houses the Human Rights Scrutiny Team) to ensure early identification of potential compatibility issues.[154] Once a bill is drafted it should be presented to Cabinet with a memorandum from the Human Rights Scrutiny Team setting out whether the bill is compatible with the HRA.[155] Further, significant bills must be presented with full human rights

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149 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 12 May 2023, p. 23.

150 Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomson Reuters, 2020, pp. 214–215.

151 Mx Ro Allen, Commissioner, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, 25 August 2023, p. 7.

152 Professor George Williams AO, *Committee Hansard*, 28 September 2023, p. 49.

153 Chief Minister, Treasury and Economic Development Directorate, *ACT Cabinet Handbook*, 2023, p. 38.

154 Chief Minister, Treasury and Economic Development Directorate, *ACT Cabinet Handbook*, 2023, p. 38.

155 Chief Minister, Treasury and Economic Development Directorate, *ACT Cabinet Handbook*, 2023, p. 34.

compatibility statements.[156] The ACT also has a Minister for Human Rights who has policy responsibility for the ACT HRA. Mr Daniel Ng, the Acting Executive Group Manager from the Justice and Community Safety Directorate gave evidence to explain the process for development of legislation in the ACT:

> …at the start, when they have the genesis of a work order or legislative project, agencies are encouraged to engage with my office of the human rights scrutiny team. That is probably just a reflection of the fact that, in the ACT Public Service, not every agency does legislative work on a really regular basis. With that comes capability and structural capability to deal with human rights issues in their respective offices. So it's really useful from both of our perspectives where there is some early engagement. My office supports agencies to identify relevant human rights issues and problem solve a bit around whether there are least restrictive means to achieve the legitimate policy outcomes and the construction of the explanatory statements which seek to justify any limitations on rights. We will play that role on an ongoing basis through the development process. It may follow similar trajectories to the Commonwealth. At the policy approval and the detail stage where cabinet is considering the granular content of a bill, we are with agencies every step of the way. We support the provision at the very end, we hope, of a memo of compatibility for the Attorney. This gives him an assurance that he is capable of signing off, or there is a reasonable basis for him to sign off, on the compatibility of a bill.

8.94 The committee received evidence that there should be changes in the federal process to require consideration of human rights impacts of policy decisions in Cabinet submissions.[157] Proposals were also made, in order to address concerns that successive governments could change internal processes for human rights scrutiny, that a specialist human rights unit within government could be established as part of a HRA itself.[158]

Independent pre-scrutiny of legislation

8.95 In addition to improving the internal government processes for the consideration of human rights within the public service, the committee received evidence regarding whether there is a need for an independent agency to

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[156] Chief Minister, Treasury and Economic Development Directorate, *ACT Cabinet Handbook*, 2023, p. 37.

[157] See, for example, Law Council of Australia, *Submission 120*, p. 26; Ms Emily Yates, Head of Policy, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, Friday 25 August 2023, p. 3; Ms Anna Brown, CEO, Equality Australia, *Committee Hansard*, Thursday 28 September 2023, p. 23; Dr Julie Debeljak, *Submission 15*, p. 15 in reference to Laura Grenfell and Julie Debeljak, 'Future Directions for Engaging with Human Rights in Law-Making: is a Culture of Justification Emerging across Australian Jurisdictions?', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomson Reuters, 2020. See also, ACT Human Rights Commission, *Submission 176*, p. 4; ACT Government, *Submission 73*, p. 5, both of which discuss the value of early human rights scrutiny, including of cabinet submissions.

[158] See, Mr Stephen Keim, Law Council of Australia, *Committee Hansard*, 20 October 2023, p. 10.

provide advice when legislation is being considered and before it reaches Parliament.

8.96 Associate Professor Debeljak submitted that there should be an expansion of the voices that are able to influence the pre-Cabinet-approval phase of legislative development, arguing:

> During the "pre-tabling-in-Parliament" phase of policy and legislative design, although the executive accounts for rights, this is in secret and there is no guarantee of outside influence. This is problematic because once Cabinet gives "in-principle" agreement to legislative proposals, it is difficult to secure amendments. If the window for real rights-influence ends at Cabinet, dialogue is nothing more than an executive monologue.[159]

8.97 In addition, Laura Grenfell and Associate Professor Debeljak have written that:

> The pre-introduction phase of law making is arguably one of the most critical phases of law making, and it is the most opaque component of the "upstream" scrutiny process as it takes place outside of parliament and largely behind closed doors. This lack of transparency impacts on executive accountability, and may hinder the development of a culture of justification – not to mention the substantive human rights outcomes with respect to the policies and laws that are developed and adopted.[160]

8.98 In the ACT, Cabinet submissions are circulated for comment to the ACT Human Rights Commission 'and early engagement with the Commission is encouraged by Government'.[161] The ACT Human Rights Commission submitted that they 'have been successful in developing a system which has ensured that human rights scrutiny is integrated early in the development process and is not an afterthought':

> …there is now a strong and accepted practice which involves the ACT HR Commission in a pre-introduction scrutiny. The ACT Cabinet Handbook has for nineteen years required that cabinet submissions explicitly consider human rights and the availability of less restrictive options. This has been partially responsible for the development of the practice of circulating to the Human Rights Commissioner most draft cabinet submissions for comment while at the same time accepting the full statutory independence of the role. Such a balance requires mutual trust between the executive arm of government that is developing legislation and the Human Rights Commission which accepts the role of receiving early drafts in confidence while giving robust and strong advice when human rights concerns are noted and making public statements once bills are tabled.[162]

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159 Dr Julie Debeljak, *Submission 15*, p. 20.

160 Laura Grenfell and Julie Debeljak, 'Future Directions for Engaging with Human Rights in Law-Making: is a Culture of Justification Emerging across Australian Jurisdictions?', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomson Reuters, 2020, p. 798.

161 ACT Government, *Submission 73*, p. 5

162 ACT Human Rights Commission, *Submission 176*, pp. 3–4.

8.99 Ms Tara Cheyne, the Minister for Human Rights, gave evidence:

> …the Human Rights Commission has also over the years, I think, strengthened, or perhaps the culture has strengthened in terms of our directorates engaging with the Human Rights Commission for some early advice as well, particularly as an independent statutory authority. While our scrutiny team within the directorate is excellent, the Human Rights Commission, as an independent body and involved in the conciliation of different aspects, can provide some useful advice as well. I think we have seen much more engagement with the Human Rights Commission early on in policy development.[163]

8.100 Some submitters noted the importance of an independent scrutiny process,[164] and others recommended that there should be an independent human rights analysis during this pre-introduction phase of policy development at the federal level, by involving the AHRC in a way similar to that in the ACT.[165]

8.101 Staff from the Victorian Equal Opportunity and Human Rights Commission gave evidence that they get consulted on legislation 'where there are significant human rights impacts' and that if they can assist in the development of legislation, it is far better to do it in the early stages before drafting has commenced.[166] They noted this is a convention and not one that should be legislated. The Commissioner, Mx Allen, noted:

> I go back to the chair's question about when the Human Rights Commission gets involved in that statement of compatibility, if you like? I think it's important that it doesn't all land on the human rights commission and that we keep embedding that culture and training the public service not to just throw it to us, saying, 'Oh, it doesn't matter; they'll do it.' If we don't do it, it's really important that they do it themselves and put that advice up to the minister.[167]

8.102 Other witnesses gave evidence that to involve the AHRC in this way could affect their independence. Mr Scott McDougall, the Queensland Human Rights Commissioner, raised concerns as to what impact such consultation would have on the independence of the Commission if consulted on Cabinet-in-confidence drafts:

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163 Ms Tara Cheyne, Minister for Human Rights, *Committee Hansard*, 12 May 2023 p. 39.

164 See for example, Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Service, *Committee Hansard*, 27 September 2023, p. 29.

165 See, for example, Dr Julie Debeljak, *Submission 15*, p. 23; Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Service, *Committee Hansard*, 27 September 2023, p. 29.

166 Ms Emily Yates, Head of Policy, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, 25 August 2023, p. 3.

167 Mx Ro Allen, Commissioner, Victorian Equal Opportunity and Human Rights Commission, *Committee Hansard*, 25 August 2023, p. 7.

> The Commission does hold a function of promoting an understanding and acceptance of human rights in the community. If in the process of a bill-drafting exercise, the commission becomes aware of proposals on the part of government and is unable to publicly comment, it does potentially, depending on all exigent circumstances, put the commission in a position of conflict, where they might otherwise make comment but won't because they are subject to a right to those conditions.
>
> …
>
> I think it is best resolved on a case-by-case basis. One of the objectives of the Human Rights Act is to build a culture within the public sector of human rights. Ideally, that would be right across the board. And, as I said earlier, those who were drafting legislation would have a good understanding of the human rights that are going to be impacted by their particular portfolio and would address those issues in the early drafting stages. And, depending on what it is, they're not always going to be attuned to those issues. So, I think it is something that has to be balanced, and hard and fast rules probably aren't going to work. [168]

8.103 Professor Croucher, President of the AHRC, gave evidence as to the strength of the Commission as an independent agency. She noted the influence the AHRC can have during conversations that inform the development of ideas that can become policy or legislative proposals but sees the AHRC as more at arms-length and removed from the Cabinet process.[169] Professor Croucher also raised concerns that if the AHRC was to have such a direct impact this may cut across the goal of embedding rights mindedness more broadly across the public service.[170] Further, Mr Graeme Edgerton, Deputy General Counsel at the AHRC, noted:

> The concerns that we have are in relation to transparency and independence—transparency in the sense that we're accountable to the Australian people, but if we're involved in a private session with government then there's less scrutiny over how we've engaged in that process, and then, as to independence, if we've managed to negotiate, say, a change to legislation, how forthright can we be later about criticising that legislation once it's come out into the public arena and it's become a bill?[171]

8.104 However, Mr Edgerton stated that the AHRC currently does get consulted on a voluntary basis, usually where it relates to their portfolio (for example, anti-discrimination legislation). In this respect it is noted that the *Australian Human*

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[168] Mr Scott McDougall, Human Rights Commissioner, Queensland Human Rights Commission, *Committee Hansard*, 15 August 2023, pp. 2–3.

[169] Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 63.

[170] Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 64.

[171] Mr Grame Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 64.

Rights Commission Act 1986 currently provides that the functions of the AHRC include examining proposed legislation when requested to do so by the minister, for the purpose of ascertaining whether the proposed legislation may be inconsistent with or contrary to any human right.[172]

8.105 Mr Darren Dick, Senior Policy Executive at the AHRC, suggested a comparison could be made with the processes for privacy impact assessments:

> In that situation, where there is a law proposed that has a significant impact on privacy, there is a requirement for the agency to conduct a privacy impact assessment, or the Information Commissioner can require the proponent of the bill to develop that process as well. I wonder if there is some equivalence in this. Perhaps there could be something in the cabinet document that explicitly asks: Is this bill compatible with human rights? Does it have a significant impact? It doesn't necessarily have to say, 'Did you consult the Human Rights Commission?' But you would think that, if a bill does raise significant human rights issues, that would be one of the first questions that various cabinet ministers would ask and that would then trigger that process as well, whether or not you have a formal mechanism in the cabinet process that requires you to identify a human rights impact and you have an impact assessment process.[173]

8.106 Professor Williams considered that when it comes to sensitive judgement calls on human rights many people should be involved, including the AHRC who have the relevant expertise:

> In many ways, it would be problematic not to involve them—they have expertise and they have something useful to say. Then maybe afterwards you hear what they have to say but it is too late at that point. So I think front-ending them is right, but it has to be done in a way that safeguards the independence. There are ways of doing that. For example, even the Electoral Commission might be consulted before government drafts legislation, because you want to make sure that that stakeholder is involved—and they are fiercely independent. I do not think it is beyond our capacity to do it but building it in in a way that is sensitive to their independence, for me, is the right answer.[174]

Existing legislation

8.107 In 2009, the National Human Rights Consultation committee recommended an audit of existing federal legislation, policies and practices for compliance with human rights.[175] It stated that, while this would constitute a substantial task, it would provide an opportunity to identify and remedy cases of inadvertent non-

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[172] *Australian Human Rights Commission Act 1986*, paragraph 11(1)(e).

[173] Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 64.

[174] Professor George Williams AO, *Committee Hansard*, 28 September 2023, p. 49.

[175] National Human Rights Consultation, *Report*, September 2009, p. 156.

compliance at the time the legislation or policy was implemented or through subsequent amendment:

> The…review and development of legislation are already important government tasks. An audit is also consistent with the requirement that Australia implement its international human rights obligations domestically. In view of the scale of the task, the Committee suggests that two areas be identified for priority review—the anti-discrimination framework and national security legislation.[176]

8.108 Subsequently, in 2012, the National Human Rights Action Plan recognised a need to review Australia's existing legislation, policies and practices for compliance with international human rights law. It stated that the AGD would, over time, conduct this review:

> The review of legislation will incorporate a number of key elements, including:
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> - identification of priority areas within portfolios particularly relevant to human rights for review, and
> - ensuring that human rights obligations are considered as part of legislation reviews proposed in other contexts.
>
> Reviews will be designed to suit the particular circumstances. For example, a review at the time of introducing substantial amendments to an Act may be appropriate. In some cases, the Government may ask the new Joint Committee on Human Rights to review particular legislation, while in others, a review team may be established or existing bodies may undertake a review. Views expressed by UN human rights bodies will be taken into account in identifying areas for review.[177]

8.109 However, AGD advised 'there has not been a coordinated review of all pre-existing legislation, policies and practices'.[178]

8.110 As such, bills and legislative instruments introduced before 2012 have not been comprehensively assessed for their compatibility with human rights. Further, many of the bills introduced from 2012 onwards have amended parts of existing laws which have not, themselves, been subject to a foundational human rights assessment. Consequently, the vast majority of laws on the Commonwealth statute book have not been assessed for compatibility with Australia's international human rights law obligations. In this regard, the Federal Register of Legislation indicates that there are currently more than 4,500 Acts in force. Some of these were made as early as 1901. Further, of the bills and legislative instruments introduced since 2012, this committee has concluded that a number of them risk being incompatible with international human rights law.

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176 National Human Rights Consultation, *Report*, September 2009, p. 157.

177 National Human Rights Action Plan, 2012, action item 28, p. 12.

178 Attorney-General's Department, *Submission 114*, p. 10.

8.111 Several submitters echoed concern regarding the need for an audit of existing laws. Students for Sensible Drug Policy Australia and Harm Reduction Australia argued that Australia should commit to undertake a systematic audit of drug policies and laws in Australia to fully document the extent to which these policies and laws do, or do not, accord with human rights law.[179] Change the Record argued that there is a need to audit legislation, instruments and policy frameworks with respect to compliance with the UNDRIP and other international conventions.[180]

Anti-discrimination law

8.112 The National Human Rights Consultation report recommended that federal anti-discrimination laws be one of the prioritised areas for a human rights audit. As set out in Chapter 3, while the government developed exposure draft legislation seeking to harmonise and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly, this was never introduced into Parliament. In 2021, the AHRC published a position paper on the reform agenda for federal discrimination laws, stating that there is a 'compelling case for immediate reform',[181] including because:

- anti-discrimination protections are less accessible than they should be, meaning that people who experience discrimination are not being fully protected;
- the business sector is not being supported as well as it should be to take steps to prevent discrimination, or to have confidence that they will be supported when they confront discrimination head on; and
- addressing discrimination is heavily reliant on individuals bringing complaints, rather than more systemic approaches to building a culture of prevention.[182]

8.113 The AHRC reiterated this position in its submission to this inquiry, advocating the inclusion of a staged approach to federal discrimination law into a new

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[179] Students for Sensible Drug Policy Australia, *Submission 130*, p. 7; Harm Reduction Australia, *Submission 126*, p. 13.

[180] Change the Record, *Submission 148*, p. 2. Specifically, it highlighted the relevance of: Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; Convention on the Elimination of All Forms of Discrimination Against Women; and compliance with protocols and instruments relevant to criminal legal systems, in particular the Beijing Rules, Mandela Rules, Bangkok Rules, and the Optional Protocol to the Convention Against Torture.

[181] Australian Human Rights Commission, *Free and Equal Position Paper: A reform agenda for federal discrimination laws*, 2021, p. 191.

[182] Australian Human Rights Commission, *Free and Equal Position Paper: A reform agenda for federal discrimination laws*, 2021, p. 10.

human rights framework.[183] It proposed 38 reforms to improve the operation of federal discrimination laws, including: the introduction of a positive duty to take steps to eliminate unlawful discrimination; funding of the AHRC to develop guidance materials related to these amendments; the introduction of new protected attributes relating to thought, conscience and religion; and revision of the definition of 'discrimination'.[184]

8.114 A number of submitters supported the need to modernise anti-discrimination laws as part of a national human rights framework. For example, Equality Australia, a leading national LGBTIQ+ organisation, submitted:

> As a national priority, we need updates to federal anti-discrimination laws to ensure they are coherent, consistent and provide necessary protections for people who experience discrimination, harassment and vilification. In particular, federal anti-discrimination laws and the discrimination framework in the Fair Work Act 2009 (Cth) are inconsistent, complex and lack much needed protections, including for LGBTIQ+ people. They are increasingly out-of-step with state and territory protections.[185]

8.115 Western Australia for a Human Right Act also stated that current federal anti-discrimination laws need to be amended to reflect contemporary understanding of discrimination, to give greater consistency for treatment of different types of discrimination, and to make the area more accessible for individuals to pursue complaints.[186] Amnesty International, similarly, stated that these laws should be amended to shift their focus 'from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place'.[187]

8.116 The Law Council of Australia stated that it supports reforms to the anti-discrimination framework which would make it easier to access and understand; improve its capacity to address all forms of discrimination; promote equality; and implement Australia's international obligations in this area.[188] It also advocated for an intersectional analysis of the challenges posed by the current operation of these laws, stating:

> A limited policy focus which is blind to this issue can lead to the needs of the most disadvantaged members of society being ignored. In Australia, the justice system has traditionally 'identified groups of needs and rights holders such as women and Indigenous people, but fail[ed] to provide for the needs of people who dwell at the intersection of these groups'. With

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183 Australian Human Rights Commission, *Submission 1*, p. 15.

184 Australian Human Rights Commission, *Submission 1*, Appendix, pp. 97–104.

185 Equality Australia, *Submission 214*, p. 1.

186 Western Australia for a Human Rights Act, *Submission 205*, p. 14.

187 Amnesty International, *Submission 213*, p. 6.

188 Law Council of Australia, *Submission 120*, p. 31.

> respect to anti-discrimination laws, the retention of separate legislation dealing with different grounds of discrimination creates real challenges for complainants who experience intersectional discrimination.[189]

8.117 Australian Lawyers for Human Rights noted that the current anti-discrimination framework provides only partial protection against discriminatory activities:

> The current Commonwealth anti-discrimination regime provides important legal protections that promote equality in Australia and contains many positive features that operate to protect against certain forms of discrimination in certain circumstances. However, there are significant limitations to discrimination laws in Australia at both a state and federal level…[T]he piecemeal legislative framework in place at the federal level singles out only select characteristics for anti-discrimination protection, while providing certain discriminatory religious activities with particular protection.[190]

8.118 Australian Lawyers for Human Rights submitted that, despite its many positive attributes, the existing federal anti-discrimination regime is 'a poor substitute for the kind of comprehensive protection of human rights that would be offered if the Australian Government both consolidated the federal anti-discrimination laws and underpinned those laws with the enactment of a Federal Human Rights Act'.[191]

8.119 The Public Interest Advocacy Centre recommended that Commonwealth anti-discrimination laws be consolidation into a single law, and that provisions relating to freedom from religious discrimination be resolved before this occurs.[192] It also argued that the current 'comparator' test for assessing whether a person has been discriminated against on the basis of disability be amended to instead provide for a 'detriment' test.[193] It also advocated other amendments including an equal access model for costs, and reform to religious exceptions from anti-discrimination laws.[194] Equality Australia, similarly submitted that anti-discrimination laws require updating to ensure coherency, consistency, and to provide necessary protections for people who experience discrimination, harassment and vilification.[195] It recommended that short of consolidating

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189 Law Council of Australia, *Submission 120*, p. 31 in reference to *Response to Discussion Paper: Priorities for federal discrimination law reform*, 20 December 2019, p. 13.

190 Australian Lawyers for Human Rights, *Submission 229*, p. 14.

191 Australian Lawyers for Human Rights, *Submission 229*, p. 15.

192 Public Interest Advocacy Centre, *Submission 212*, p. 1.

193 Public Interest Advocacy Centre, *Submission 212,* p. 7.

194 Public Interest Advocacy Centre, *Submission 212,* pp. 7–10.

195 Equality Australia, *Submission 214*, p. 1.

federal anti-discrimination laws in one Act, a number of technical improvements be made.[196]

8.120 Other submitters expressed concern regarding specific aspects of Australia's anti-discrimination framework. Australian Feminists for Women's Rights argued that the existing discrimination framework reflects only a partial implementation of the UN Convention on the Elimination of Discrimination Against Women, expressing concern that this treaty was not one of the international treaties considered foundational by the AHRC in its framing of a proposed federal HRA.[197] Equality Australia also raised concerns about the capacity of the existing framework to address discrimination against transgender people and people who are gender diverse.[198] People with Disability Australia, a national peak disability rights and advocacy organisation, endorsed the recommendation to modernise federal discrimination laws, raising specific concerns that these laws fail to give effect to the specific protections set out in the UN Convention on the Rights of Persons with Disabilities (CRPD).[199]

8.121 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability also made several recommendations regarding reform of the *Disability Discrimination Act 1992*, and in particular to:

- insert a new object of the Act being to give effect to Australia's obligations under the CRPD and to require that the legislation be interpreted consistently in relation to international human rights measures;
- shift the burden of proof regarding alleged direct discrimination to the alleged discriminator and amend the definition of indirect discrimination;
- replace reference to 'reasonable adjustments' to 'adjustments';
- impose a standalone duty to make adjustments, and amend the definition of 'unjustifiable hardship';
- impose a positive duty to eliminate disability discrimination and empower the AHRC to take action in relation to this;
- provide that it is unlawful for a person to engage in offensive behaviour or vilification because of disability; and
- review provisions which impact the ability of persons with disability seeking to enter Australia.[200]

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196 Equality Australia, *Submission 214*, annexure, pp. 3–13.

197 Australian Feminists for Women's Rights, *Submission 211*, p. 8.

198 Equality Australia, *Submission 214*, annexure, p. 5. See also, LGBTIQ+ Health Australia, *Submission 218*.

199 People With Disability Australia, *Submission 230*.

200 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary*, pp. 204–208, recommendations 4.23–4.34. See also Australian Human Rights

Parliamentary Joint Committee on Human Rights

8.122 As set out in Chapter 3, this committee was established with the aim of providing greater human rights scrutiny of legislation once introduced into Parliament. The 2010 Framework stated that such a committee would enhance the consideration of human rights in Commonwealth legislation.[201]

Effectiveness of the committee

8.123 As summarised in a recent paper reflecting on the work of the committee,[202] numerous commentators have previously considered the extent of the committee's impact when measured against certain factors. For example, Professor Williams and Daniel Reynolds have twice, in 2015 and 2020, analysed the impact of the committee, gauging it in terms of its deliberative, legislative and media impacts, and its impact on judicial output.[203] Associate Professor Grenfell and Dr Moulds have analysed the extent of the committee's success by reference to: 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.[204]

8.124 Several studies have considered that there are many challenges associated with assessing the practical 'effectiveness' of parliamentary committees more broadly.[205] As Meg Russell and Megan Benton have observed in the British

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Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p 75.

201 Australia's Human Rights Framework, 2010, p. 8.

202 Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights', *Senate Lecture Series*, August 2022.

203 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review*, vol. 41, no. 2, 2015, pp. 469–507, and Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', pp. 67–98, in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020.

204 Laura Grenfell and Sarah Moulds, 'The role of Committees in Rights Protection in Federal and State Parliament in Australia', *UNSW Law Journal,* vol 41, no. 1, 2018, pp. 40–79 (see p. 44).

205 See, Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review,* vol. 33, no. 1, 2018, pp. 72–107 who cites: Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures', *Human Rights Law Review,* vol. 6, 2006, pp. 545, 551, 545, 570; Meg Russell and Meghan Benton, 'Assessing the Impact of Parliamentary Oversight Committees: the select committees in the British House of Commons', *Parliamentary Affairs*, vol. 66, 2013, pp. 772, 766; Aileen Kavanagh, 'The Joint Committee on Human Rights: a Hybrid Breed of Constitutional Watchdog', in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015, p. 115; Malcolm Aldon, 'Rating the

context, 'much of Parliament's influence is subtle, largely invisible and frequently even immeasurable'.[206] In the Australian context, Dr Moulds has recently considered the capacity for Australian parliamentary committees to have a hidden influence on the development of legislation, not necessarily remedying rights concerns, but in a rights-enhancing manner.[207]

8.125 Concerns regarding the committee's effectiveness (or rather the committee's capacity to be effective) are not new. In 2014, Professor Saul, Challis Chair of International Law and current UN Special Rapporteur on Human Rights and Counter-terrorism, decried the failure to introduce a HRA and described the committee as 'another joint parliamentary committee which wrings its hands at violations but is powerless to stop them'.[208]

8.126 Many submitters made several comments regarding the effectiveness of the committee, both procedurally and substantively, in ensuring better protection of human rights in Commonwealth legislation. Professor Melissa Castan, Director of the Castan Centre of Human Rights Law, described the committee's work as excellent, and an essential part of a human rights framework moving forward, but noted more can be done before getting to the committee stage to better protect rights.[209] Emeritus Professor of International Law and Human Rights Andrew Byrnes (a former legal adviser to the committee), stated that the committee has done 'an excellent job in its analysis and in identifying discrepancies', but stated that its well-informed judgements, after dialogue with the minister, 'have not translated into legislative amendments or pullback on some important issues in a number of cases'.[210] The Kaldor Centre for

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Effectiveness of Parliamentary Committee Reports: the Methodology', *Legislative Studies*, vol. 15, no. 1, 2000, p. 22; and Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – from a Lawyer's Perspective', *About the House*, 2005, p. 55.

206 Meg Russell and Megan Benton 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches'. Paper presented at the PSA Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009, cited in Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015, p. 131.

207 Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia*, Springer Singapore Pty. Limited, 2020.

208 Professor Ben Saul, *The Ideological War on Human Rights: Why Are Australian Politicians So Hostile towards Basic Freedoms?* Speech at the NSW Council for Civil Liberties Annual Dinner Sydney, 26 September 2014.

209 Professor Melissa Castan, Director, Castan Centre for Human Rights Law, Monash University, *Committee Hansard*, 25 August 2023, p. 16.

210 Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 46.

International Refugee Law was critical, summarising the committee's effect as follows:

> Notwithstanding the expert guidance of the independent Human Rights Legal Advisor – a role that has been held by some of Australia's leading international human rights law scholars – as well as expert input through the public submissions process, Parliamentary scrutiny of bills is often poor and overly deferential to the statements of compatibility. Even assessments by the Parliamentary Joint Committee on Human Rights that have found proposed laws to be incompatible with Australia's international obligations have been overlooked. This suggests that the process is largely performative and serves little substantive function in ensuring that domestic law compiles with international human rights law.
>
> Indeed, some of Australia's most egregious violations of international refugee law and human rights law have been legislated since the establishment of the statement of compatibility process.[211]

8.127 The United Nations High Commissioner for Refugees Representation in Canberra stated that the work of the committee is 'inadequate to prevent the adoption of laws that contravene international refugee and human rights obligations'.[212] Liberty Victoria noted the lack of a formal review of the committee's effectiveness.[213]

8.128 Professor Byrnes argued that human rights need to be considered earlier in the process.[214] Associate Professor Debeljak agreed, observing that the point at which this committee may consider legislation (that is, once it has been introduced into the Parliament) is too late:

> [A]s soon as the legislation is tabled in parliament, there is very little chance that there is going to be any changes to that legislation. So no matter how much the [Australian Human Rights Commission], for example, might make commentary publicly and no matter how much a committee like yours might make commentary publicly, the policy has been signed off and the legislation has been drafted. Usually, even within a regular legislation framework, it's very hard to get amendments on the floor of the parliament. With human rights legislation it's going to be even worse.[215]

8.129 Associate Professor Debeljak also raised concerns about the limited parliamentary engagement with the comments of the committee, including with

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211 Kaldor Centre for International Refugee Law, *Submission 13*, p. 2.

212 United Nations High Commissioner for Refugees Representation in Canberra, *Submission 91*, p. 2. JFA Purple Orange, similarly, argued that 'the committee does not have sufficient power to ensure that human rights are adequately protected and upheld': JFA Purple Orange, *Submission 116*, p. 37.

213 Liberty Victoria, *Submission 155*, p. 18.

214 Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 46.

215 Associate Professor Julie Debeljak, *Committee Hansard*, 25 August 2023, p. 65.

respect to the quality of ministerial responses to the committee.[216] She recommended that the committee be granted the power to require Parliament to give 'proper consideration' to its reports.[217] Refugee Legal similarly expressed concern that the advice of the committee is not always available when bills pass.[218] Associate Professor Grenfell and Dr Moulds submitted that the committee (together with other technical scrutiny committees) play a critical triaging and 'alarm raising' role when it comes to identifying laws that fail to comply with human rights, and the work of the committee can lead to important rights-enhancing impacts, including substantive changes to the law that improve compliance with human rights standards. They also noted:

> The work of these committees can also influence the development of procedures and processes undertaken at the departmental level within the federal public service, for example by contributing to the development of formal and informal guidance materials to assist in legislative and policy design.[219]

8.130 However, Associate Professor Grenfell and Dr Moulds also stated that the capacity of the committee to do so is 'regularly thwarted' by the quality of statements of compatibility; the time and resources allocated; and the absence of any meaningful legal or political consequences for failing to respond to the human rights concerns raised.[220]

8.131 Some witnesses and submitters commented on the construction of the committee (in particular, the requirement that the committee Chair must be a government member), and the extent to which this may impact on the committee's effectiveness. In its 2023 *Free and Equal* report, the AHRC observed that the committee's approach as a 'technical' committee without comment on the policy merits of the legislation 'has been a key way of managing possible political tensions'.[221] However, Professor Byrnes, a former legal adviser to the committee, observed that on the big issues where there is a political imperative, the committee members, who act as parliamentarians, are also members of political parties.[222] In this regard, the Law Council of Australia recommended a return to the committee's early practices of consensus-based reports with firms

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216 Associate Professor Julie Debeljak, *Submission 15*, pp. 17–18.

217 Associate Professor Julie Debeljak, *Committee Hansard*, 25 August 2023, p. 62.

218 See, for example, Refugee Legal (Refugee and Immigration Legal Centre), *Submission 129*, p. 18.

219 Associate Professor Laura Grenfell and Dr Sarah Moulds, *Submission 50*, pp. 2–3.

220 Associate Professor Laura Grenfell and Dr Sarah Moulds, *Submission 50*, p. 3.

221 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 313.

222 Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 46.

conclusions.[223] The ACT Human Rights Commission noted that the ACT Legislative Assembly's Standing Committee on Justice and Community Safety plays a similar role in the ACT to the PJCHR at the federal level and is chaired by a non-government member and assisted by external legal advisers.[224]

Reform proposals

8.132 The AHRC *Free and Equal* report included extensive consideration of the role of the committee, and the effectiveness of parliamentary scrutiny of laws for compatibility with human rights.[225] In addition to recommending an enforceable HRA, it made numerous recommendations about the committee's role, including that:

- a HRA be enacted, and that the committee should scrutinise legislation for compatibility with this domestic legislation *and* all of Australia's international treaty obligations;[226]
- parliamentary standing orders be amended to prevent bills from passing until a final report has been tabled, subject to limited exceptions for urgent matters and provisions for later views in such cases;[227]
- the committee be vested with an 'own motion' inquiry power, enabling it to inquire into any human rights issues (not including individual cases) which it may think fit to bring to the notice of Parliament, and be provided with greater resourcing in order to perform this wider role;[228] and
- the committee be empowered to review the adequacy of the Australian Government's response to individual communications from UN bodies, and/or Concluding Observations from the UN about Australia from time to time.[229]

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223 Law Council of Australia, *Submission 120*, p. 26.

224 ACT Human Rights Commission, *Submission 176*, p. 5. See also, ACT Government, *Submission 73*, p. 5.

225 See, Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 13. Where the position paper deals with a particular issue in greater detail than the final report (*Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023) the position paper is referenced.

226 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 309.

227 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 307.

228 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 313.

229 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, recommendations 6.

8.133 Numerous submitters endorsed or reflected these recommendations by the AHRC.[230] Professor Williams argued that a model for human rights protection in future needs to account for different governments that might have different views on human rights:

> [Y]ou have actually got to build some robustness into the system with a variety of checks and balances and not assume that there won't be resistance—as indeed there has been at prior times in this committee, where you can give some positive examples but, over the life of the committee, where it has just been ineffectual.[231]

8.134 The Law Council of Australia agreed that the legislative scrutiny regime established should be integrated into a federal HRA.[232] Professor Byrnes echoed the recommendation that the committee have the power to monitor human rights decisions of international bodies, stating that there should a procedure for tabling such decisions before the committee, or indeed the Parliament, as a formal process 'might give the committee the opportunity to ask the government how it proposes to respond and explore that in a way that might lead to change'.[233]

8.135 Associate Professor Greg Carne argued that the committee has not been effective in obtaining 'human rights purchase in national security legislation', unlike the Parliamentary Joint Committee on Intelligence and Security (PJCIS) which appears to have emerged as the 'premier Commonwealth Parliament review committee'.[234] He also submitted that the committee should have a rapid response mechanism for its scrutiny of national security legislation, and require the PJCIS and the Independent National Security Legislation Monitor to consult with the committee over national security bills.[235]

Passage of legislation before committee reports

8.136 On average, ten per cent of all bills pass each year before the committee has reported.[236] Several submitters commented on the committee's capacity to table

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230 See, for example, Liberty Victoria, *Submission 155*, p. 19; Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 45.

231 Professor George Williams AO, *Committee Hansard*, 28 September 2023, p. 50.

232 Law Council of Australia, *Submission 120*, p. 27.

233 Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 49.

234 Associate Professor Greg Carne, *Submission 29*, pp. 3, 6.

235 Associate Professor Greg Carne, *Submission 29*, pp. 11–12.

236 See Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights', Senate Lecture Series, August 2022, p. 9.

its human rights compatibility assessment in the Parliament before legislation has passed. In this regard, Professor Sarah Joseph stated that:

> The committee cannot make the parliament pass or not pass legislation, but perhaps it could be the practice, or some way to strengthen at least the way reports from the committee are done in a timely fashion. And it's not because you don't do them in a timely fashion; it's because you're not given enough time to do them. So, a lot of the reports would be issued after the relevant legislation was passed, and that's clearly not so useful. It's useful to academics, and that's pretty much it.[237]

8.137 Professor Croucher, President of the AHRC, stated:

> …it is crucial to that embedding of human rights impact in the legislation itself that this committee can slow down the process, except in cases where it's absolutely necessary and that other mechanisms of review can be the trade-off if the legislation has to get through really fast.[238]

8.138 The Law Council of Australia advocated for 'guaranteed time before a vote' for committee scrutiny of legislation raising significant issues, and adequate resourcing to facilitate expeditious consideration of urgent laws.[239] Refugee Legal agreed that standing orders should be amended to prevent bills from being passed until a final report of the committee has been tabled in Parliament, with limited exceptions for urgent matters.[240] Relatedly, the South-East Monash Legal Service argued that a guaranteed minimum time period for considering new bills would prevent their enactment without scrutiny.[241] The UNSW Law Society recommended that the committee have the power to 'revoke' bills that violate international law obligations.[242]

8.139 Witnesses also observed that the capacity for this committee to undertake more targeted human rights analysis would also depend on greater human rights consideration earlier in the legislative development process. For example, Ms Linda Forbes, Law Reform Officer of Economic Justice Australia, stated:

> If human rights considerations were properly considered at an earlier time, less legislation would get up to the Senate that is dubious in terms of human rights. For example, if the government of the day says to the department, 'Let's do this for cost-cutting', the department is then obliged under the act

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237 Professor Sarah Joseph, *Committee Hansard*, 15 August 2023, p. 56.

238 Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 33.

239 Law Council of Australia, *Submission 120*, p. 26.

240 Refugee Legal (Refugee and Immigration Legal Centre), Submission 129, p. 18. See also, Mr Derek Schild, Head of Practice, Civil Justice Legal Practice, Legal Aid ACT, National Legal Aid, *Committee Hansard*, 28 September 2023, p. 38.

241 South-East Monash Legal Service Inc, *Submission 172*, p. 8.

242 UNSW Law Society, *Submission 215*, p. 9.

> to consider the human rights ramifications. It would allow your committee to be a lot more targeted, and with a higher level of analysis. Arguably, if problematic legislation does get up to the Senate, then you are in a position to look at it in more detail because a lot of the detailed scrutiny and analysis will already have been done. It will be quite a different role, in a way, and a lot more specific.[243]

8.140 Associate Professor Debeljak recommended that the committee may be involved in the scrutiny of legislation before it is introduced into Parliament, including at the Cabinet submission phase, on the basis that this is the time for the greatest opportunity to successfully recommend changes to legislation.[244] However, Ms Eastman AM SC noted that cabinet-in-confidence considerations could raise challenges.[245]

Own motion inquiry power

8.141 The *Human Rights (Parliamentary Scrutiny) Act 2011* provides that the committee's functions are to examine bills, legislative instruments and Acts for compatibility with human rights and to inquire into any matter relating to human rights, but only where this is referred to it by the Attorney-General. The AHRC *Free and Equal* report recommended that the committee be vested with an 'own motion' inquiry power, enabling it to inquire into any human rights issues (not including individual cases) which it may think fit to bring to the notice of Parliament, and be provided with greater resourcing in order to perform this wider role.[246] It stated that these (and further) reforms to the committee's remit would enhance the committee's effectiveness and enhance parliamentary oversight of both decision making in relation to the scope of Australia's international human rights obligations, and actions to be taken to respond to breaches of our international human rights obligations.[247]

8.142 Several submitters supported this recommendation. The Castan Centre for Human Rights Law agreed that the committee should be granted an own motion inquiry power, including a power to inquire into thematic human rights issues, and the power to delay the enactment of laws before their proper consideration, and that the committee be guaranteed proper resourcing to undertake this

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243 Ms Linda Forbes, Law Reform Officer, Economic Justice Australia, *Committee Hansard,* 27 September 2023, p. 29

244 Associate Professor Julie Debeljak, *Submission 15*, p. 23.

245 Ms Kate Eastman AM SC, *Committee Hansard*, 28 September 2023, pp. 49–50.

246 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 313.

247 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report,* 2023, p. 29.

work.[248] The Law Council of Australia echoed this recommendation, stating that further resources and powers should be given to the committee so it may involve the public more in own-motion inquiries.[249]

8.143 Attention was drawn to the role of the UK JCHR, which is broader than that of this committee. The UK JCHR: scrutinises every UK Government bill for compatibility with human rights; scrutinises the UK Government's response to court judgments concerning human rights and the UK's compliance with its human rights obligations contained in a range of international treaties; and can conduct its own thematic inquiries, where the Committee chooses its own subjects of inquiry and seeks evidence from a wide range of groups and individuals with relevant experience and interest.[250]

8.144 The UK JCHR has exercised its power to self-initiate thematic inquiries on numerous occasions in relation to a range of matters. For example, at the date of this report, the UK JCHR's current inquiries include examining: accountability for Daesh crimes; human rights at work; and the human rights of asylum seekers in the UK.[251] Its completed inquiries include broad matters including a Human Rights Ombudsperson and Human Rights Act reform, as well as specific matters such as an inquiry into the right to a family life relating to the adoption of children of unmarried women from 1949-1976.

8.145 Dr Adam Fletcher has stated that the UK JCHR has used its own-motion inquiry effectively:

> The power to initiate its own inquiries has frequently been employed by the UK JCHR to good effect. It has enabled the committee to examine pressing human rights issues, even when they are not the subject of pending legislation. Aileen Kavanagh described the UK JCHR's work as multi-dimensional, incorporating reactive, proactive and interactive dimensions. In contrast, the Australian PJCHR's work is largely one-dimensional, comprising reactive reporting, interspersed with the very occasional thematic inquiry.[252]

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248 Professor Melissa Castan, Director, Castan Centre for Human Rights Law, Monash University, *Committee Hansard*, 25 August 2023, p. 12.

249 Law Council of Australia, *Submission 120*, p. 26. See also NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 9.

250 United Kingdom Parliament, *Role – Joint Committee on Human Rights*.

251 United Kingdom Joint Committee on Human Rights, *Inquiries*.

252 Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', in Julie Debeljak and Laura Grenfell, *Law Making and Human Rights*, Lawbook Co, 2020, p. 55. In reference to A Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog', in M Hunt, H Hooper and P Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart, 2015, pp. 121–124.

Expansion of committee remit

8.146 As noted above, the AHRC recommended that the committee's remit be expanded, including to: assess compatibility with a domestic HRA; conduct 'own motion' thematic inquiries; and review the adequacy of responses to individual communications from UN bodies, and/or Concluding Observations from the UN about Australia.[253]

8.147 In relation to the scrutiny of both rights and freedoms in a HRA, and those set out under international law, the Law Council of Australia argued that the committee should retain its current role of scrutinising according to the treaties, noting the AHRC's HRA model proposes that some economic, social and cultural rights be articulated more narrowly than the treaty obligations.[254]

8.148 Several submitters argued that the committee should examine further international legal instruments. A number stated that the remit should be expanded to include consideration of the UNDRIP.[255] The application of UNDRIP is further examined in Chapter 6.

8.149 A number of submitters also argued that the committee should examine compatibility with the Refugees Convention.[256] The Refugees Convention[257] protects against non-refoulement (expulsion or return to a place of persecution) and affirms the right of asylum without distinction or discrimination on account of a person's race, religion, country of origin, or mode of arrival.

8.150 The National Centre for Action on Child Sexual Abuse argued that a sub-committee on children's human rights should be established as part of the committee, saying that this could play an ongoing role in scrutinising federal legislation and preparing statements of compatibility focused on child rights,

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253 Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 313; and *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, recommendations 6.

254 Law Council of Australia, *Submission 120*, p. 14.

255 See, Law Council of Australia, *Submission 120*, p. 15; NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 9; Dr Tania Penovic, Senior Chair, Women and Girls' Rights, Australian Lawyers for Human Rights, *Committee Hansard,* 27 September 2023, p. 23. The NSW Aboriginal Women's Advisory Network noted that the right to equality and non-discrimination was the second most commonly engaged right in legislation which the committee considered in 2020, stating that 'Aboriginal and Torres Strait Islander peoples must be engaged in the process of determining compatibility for issues that may directly or disproportionately impact their human rights and freedoms'. NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 9.

256 See, for example, United Nations High Commissioner for Refugees Representation in Canberra, *Submission 91*, p. 2; Kaldor Centre for International Refugee Law, *Submission 13*, pp. 2–3; Grandmothers for Refugees (Macnamara), *Submission 76*, p. 7.

257 1951 Convention relating to the Status of Refugees and its 1967 Protocol (together called the Refugee Convention).

ensuring that the parliamentary scrutiny of legislation is appropriately informed by expertise on children's human rights.[258]

8.151 The AHRC made a series of recommendations regarding the current absence of processes for the consideration of findings by UN treaty bodies regarding Australia by the Parliament. These are discussed in greater detail below. Specifically in relation to the committee, the AHRC recommended that the committee be empowered to review the adequacy of the Australian Government's response to individual communications from UN bodies, and/or Concluding Observations from the UN about Australia from time to time. The resourcing implications this role would have on the committee are not immediately apparent, particularly because AGD no longer maintains a public up-to-date database of UN treaty body recommendations relating to Australia, or individual communications relating to Australia.[259] See further below regarding findings by treaty bodies.

Resourcing

8.152 Several submitters commented on the workload pressures on the committee in relation to its current remit, arguing that a greater remit will necessitate greater resourcing. The AHRC, in recommending an expansion to the committee's remit,[260] acknowledged:

> While adding this power would expand the ability of the PJCHR to contribute to wider human rights discussions…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, as demonstrated in relation to the exercise of its existing inquiry powers.[261]

8.153 The Castan Centre for Human Rights Law noted observations by Dr Fletcher and Philip Lynch that 'the PJCHR's workload has been immense, and its resourcing, including staffing of its secretariat, has not always reflected this reality'.[262] The committee is currently supported by a small secretariat to

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[258] National Centre for Action on Child Sexual Abuse, *Submission 85*, p. 15.

[259] This is discussed in greater detail by the Australian Human Rights Commission, which also observes that the public database which was maintained was incomplete in any case, as it did not set out recommendations to Australia arising out the UPR process. See, Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, pp. 109–113.

[260] Australian Human Rights Commission, *Submission 1*, p. 53.

[261] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 105. See also, Law Council of Australia, *Submission 120*, p. 26, and NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 9.

[262] Castan Centre for Human Rights Law, *Submission 160*, p. 31, in reference to Adam Fletcher and Philip Lynch, 'Australia's Human Rights Framework: Has it Improved Accountability?' in Paula

undertake its current functions, consisting of four full time staff (a Secretary, two Principal Research Officers, and a Legislative Research Officer), and a part-time external legal adviser. The two Principal Research Officers are required to have expertise in international human right law,[263] as is the external legal adviser.[264]

Role of the Australian Human Rights Commission

8.154 The AHRC proposed that its role should be expanded alongside the introduction of a federal HRA. However, it cautioned that it has experienced persistent funding shortfalls in relation to its existing set of functions. Numerous submitters also highlighted the underfunding of the ARHC and made a number of proposals regarding an expansion of the AHRC.[265]

Current AHRC functions

8.155 The AHRC's functions, as set out by statute, are broad ranging. It is required to investigate and resolve complaints about alleged breaches of human rights against the Commonwealth and its agencies, and deal with complaints made to the Commission under the *Australian Human Rights Commission Act 1986* (AHRC Act). In addition, its functions include to: promote an understanding and acceptance, and the public discussion, of human rights in Australia; undertake research and educational programs to promote human rights; report to the minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia*, Thomson Reuters Lawbook Co, 2021, p. 20.

263 The importance of secretariat staff with subject matter expertise has been emphasised widely. For example, in 2015, Professor David Feldman, Emeritus Rouse Ball Professor of English Law at the University of Cambridge, stated that the UK Joint Committee on Human Rights required several factors to ensure that specialised advice and information is available to the Parliament as a whole, including 'an enthusiastic and expert secretariat'. See David Feldman, 'Democracy, Law and Human Rights: Politics a Challenge and Opportunity', in M Hunt, H Hooper and P Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart, 2015, pp. 112–113. See also Peter Grundy, 'Parliament Committees – a Secretary's role', *Australasian Parliamentary Review*, 2003, vol. 18, no. 1, pp. 99–100.

264 By comparison, the UK Joint Committee on Human Rights appears to have a secretariat staff of 11 people, including three legal counsels. See, Joint Committee on Human Rights Safety of Rwanda (Asylum and Immigration) Bill, *Second Report of Session 2023–24*, p. 2.

265 See, for example, Australian Human Rights Commission, *Submission 1*, pp. 93–94; New South Wales Council for Civil Liberties, *Submission 77*, pp. 9–13; Maurice Blackburn Lawyers, *Submission 110*, p. 13; Law Council of Australia, *Submission 120*, p. 33; Castan Centre for Human Rights Law, *Submission 160*, pp. 30–31; Save the Children and 54 reasons, *Submission 168*, pp. 23–24; Centre for Law and Social Justice, *Submission 185.1*, p. 4; Professor Simon Rice OAM, *Submission 204*, pp. 15–17; Community and Public Sector Union, *Submission 236*, p. 2; Professor Ben Saul, *Submission 251*, p. 5.

examine enactments, proposed enactments and or international instruments for consistency with human rights and international instruments; publish guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function; and intervene in legal proceedings that involve human rights issues.[266]

8.156 The AHRC previously had the power to make binding determinations about discrimination matters. From 1992 and 1995, the AHRC could, where a discrimination complaint was referred for a hearing and substantiated, register a determination with the Federal Court registry.[267] However, in the 1995 case *Brandy v Human Rights and Equal Opportunity Commission* ('Brandy'), the High Court held that the scheme for registration of the Commission's decisions was unconstitutional.[268] Significant amendments were subsequently made to the AHRC's powers in response to the Brandy decision, including removing its power to hold hearings.[269]

Proposed additional AHRC functions

8.157 The AHRC has proposed a number of expansions to its existing functions linked to the establishment of a revised human rights framework, in particular:

- an extension of its reporting powers to include reporting on the operation of a Human Rights Act and for the Attorney-General to be required to table all these reports and the government's response which should indicate how the government intends to address the AHRC's recommendations;
- the power to conduct own motion inquiries in relation to all areas of unlawful discrimination of a systemic nature, with effective enforcement mechanisms attached, and also be empowered to conduct such inquiries in relation to breaches of human rights in a HRA that are of a systemic nature;
- have a specific self-initiated power to review the policies and practices of public authorities to assess their compatibility with a HRA, with the power to require the production of documents, witnesses or other information necessary to conduct a proper review. The AHRC should also be

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266 *Australian Human Rights Commission Act 1986*, section 11. See further, Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 14.

267 See, Australian Human Rights Commission, *Federal Discrimination Law*, 2016, p. 1.

268 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

269 Australian Human Rights Commission, *Federal Discrimination Law*, 2016, pp. 1–2. In 1995, Parliament passed the *Human Rights Legislation Amendment Act 1995*, repealing the relevant provisions which established these powers and provided that complaints could still the subject of a hearing and unenforceable determination. If a complainant sought to enforce a determination, they had to seek a hearing 'de novo' by the Federal Court after which the Court could make enforceable orders if the complaint was upheld. In 1999, the *Human Rights Legislation Amendment Act (No 1)* (1999) made further significant changes to the Commission's functions.

empowered to make recommendations to relevant public authorities after conducting reviews and public authorities should be required to respond to the Commission's recommendations;
- be required to prepare regular reports on the operation of the HRA across the Commonwealth;
- be empowered, with leave of the court, to intervene in court matters involving the interpretation or application of a HRA, noting its special expertise;
- play a leading role in engaging the Australian community on the content and effect of a HRA (including undertaking research, developing public education programs and campaigns, running community-based workshops, holding public forums, and developing materials for use in schools);
- have a key role in developing initial training programs for the Australian public sector, designed to support the roll-out of a HRA, as well as ongoing education programs to improve human rights compliance; and
- to develop public sector guidelines and protocols in coordination with public sector bodies to enable the implementation and compliance with a HRA in specific public sector contexts.[270]

8.158 Several submitters called for an expanded complaints mechanism for the AHRC.[271] The Law Council of Australia also recommended that the AHRC play an alternative dispute resolution role under a HRA, along the lines of the role it currently performs in relation to anti-discrimination legislation, although it emphasised that this should not preclude the ability of applicants to bypass the AHRC and seek resolution in the courts.[272] The New South Wales Council for Civil Liberties called for the AHRC's current complaints mechanism to be replaced entirely with one drawn from the HRA, broadening the AHRC's jurisdiction to include complaints made under a wider range of international treaties.[273]

8.159 South-East Monash Legal Service envisioned an AHRC divested of its complaints handling functions and consequently able to directly 'advise and assist' litigants:

> This would require the AHRC to be insulated from government reprisal or executive interference. This could be achieved by establishing 'statutory

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[270] Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, Chapter 14, pp. 335–337.

[271] See, for example, The Hon Pamela Tate AM KC, *Submission 61*, p. 8; New South Wales Council for Civil Liberties, *Submission 77*, pp. 10–11; NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 10–11; Law Council of Australia, *Submission 120*, p. 32; Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, p. 17; Professor Ben Saul, *Submission 251*, p. 5.

[272] Law Council of Australia, *Submission 120*, p. 32.

[273] New South Wales Council for Civil Liberties, *Submission 77*, pp. 10–11.

guarantees of independence' and a system of funding independent of direct ministerial control.[274] The ensuing democratic deficit could be assuaged by mandating parliamentary reporting obligations.[275]

8.160 The New South Wales Council for Civil Liberties submitted that the AHRC's statutory functions should be amended such that it 'should have the power to exercise *all* its functions on its own initiative, and not only when *requested* by the Minister, or upon receipt of an individual complaint'. [276] It advocated for full own-motion inquiry powers for the AHRC, together with an extended intervention power in discrimination cases. This was supported by the Victorian Equal Opportunity & Human Rights Commission, which recommended appropriate enforcement mechanisms 'to ensure the AHRC's role as a human rights regulator is effective'.[277]

8.161 Some submitters critiqued aspects of the AHRC's advocacy work. For example, the Affiliation of Australian Women's Action Alliances described the AHRC's 'poorly considered advocacy of gender over sex' and submitted that it failed 'to practise the discipline of the participatory duties it now (rightly) advocates'.[278] Several religious groups expressed concern that the AHRC did not adequately protect freedom of religion.[279] Freedom for Faith described the AHRC as 'consistently fail[ing] to come to the defence of religious freedom, even in cases of egregious breach', citing a number of examples including the AHRC's submissions regarding the Religious Discrimination Bill.[280] It called for 'the appointment of a Religious Freedom Commissioner to help provide a counterbalance to the secular and anti-religious voices within the Commission's professional staff'. The Australian Christian Lobby criticised the AHRC's interpretation of the International Covenant on Civil and Political Rights (ICCPR) and accused it of being 'unashamedly bound…up with political activism in support of the Yogyakarta Principles, in spite of treaties like the ICCPR and CEDAW [the Convention for the Elimination of Discrimination Against Women]'.[281]

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274 House of Lords and House of Commons Joint Committee on Human Rights, *Commission for Equality and Human Rights: The Government's White Paper* (Sixteenth Report of Session 2003–04) p. 19.

275 South-East Monash Legal Service Inc., *Submission 172*, p. 8.

276 New South Wales Council for Civil Liberties, *Submission 77*, p. 11.

277 Victorian Equal Opportunity & Human Rights Commission, *Submission 162*, pp. 25–26. See also, Professor Ben Saul, *Submission 251*, p. 5.

278 Affiliation of Australian Women's Action Alliances, *Submission 138*, p. 10.

279 See, for example, Freedom for Faith, *Submission 119*, pp. 12–15; Australian Christian Lobby, *Submission 143*, pp. 28–30.

280 Freedom for Faith, *Submission 119*, pp. 13–15.

281 Australian Christian Lobby, *Submission 143*, p. 25.

8.162 A number of other submitters called for an expansion of the AHRC's remit. Professor Saul called for a 'comprehensive overhaul' of the AHRC, stating that it is currently an anti-discrimination body by design, and that '[c]ontemporary international human rights law is not limited to anti-discrimination or civil and political rights'. [282] He recommended new commissioners for Economic, Social and Cultural Rights; Work Rights and Social Security; Health Rights; Education Rights; and Decent Living Standards. Both Equality Australia and Just.Equal called for the appointment of an LGBTIQA+ Human Rights Commissioner, with Just.Equal describing 'constant attacks on trans and gender diverse inclusion and equality, as well as moves to ban conversion practices and medical interventions on intersex children at a state and territory level'.[283] This was supported by LGBTIQ+ Health Australia.[284] Equality Australia noted that 'it appears that the new Sex Discrimination Commissioner will now also have responsibility for LGBTIQ+ discrimination', and called for 'funding and policy expertise to support the enlarged mandate'.[285]

8.163 The Environmental Defenders Office called for the AHRC's remit to be expanded to include consideration of environmental rights, setting out five new functions around advocacy, awareness, research, monitoring and complaints resolution.[286] The Australian Federation of Disability Organisations recommended that the AHRC 'be granted the power to enforce compliance with the [*Disability Discrimination Act 1992*] and associated standards'.[287] Dr Stephen Lake considered that the 'defined roles' of the commissioners 'exclude a very substantial range of other human rights areas and implications, all of which ought to have responsible commissioners or be represented in some fashion by the AHRC'.[288]

AHRC funding

8.164 The AHRC argued that it must be adequately resourced in order to undertake any additional functions.[289] Further, numerous submitters, including the AHRC

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282 Professor Ben Saul, *Submission 251*, p. 5.

283 Just.Equal, *Submission 199*, pp. 6–7; Equality Australia, *Submission 214*, p. 13.

284 LGBTIQ+ Health Australia, *Submission 218*, p. 4. See also, Mx Joel MacKay, *Submission 258*, p. 3.

285 Equality Australia, *Submission 214*, p. 13.

286 Environmental Defenders Office, *Submission 147*, pp. 14–15. See also, Australian Human Rights Institute, UNSW Sydney, *Submission 69*, p. 16.

287 Australian Federation of Disability Organisations, *Submission 274*, p. 30.

288 Dr Stephen Lake, *Submission 315*, p. 39.

289 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 335–337.

itself, stated that the AHRC is currently underfunded and requires an increase in resourcing to fulfill its role in protecting Australians' human rights.[290]

8.165 In its submission, the AHRC described funding shortfalls throughout its history and described its current funding level, funding approximately 100 Average Staffing Level (ASL) staff, as insufficient to fully discharge its current legislated functions. It considered 145 ASL staff to be necessary, meaning it experiences a shortfall of $7.4 million per year.[291] In its 2022–2023 Annual Report, the AHRC observed that it had 'started the year facing uncertainty about its sustainability', owing to 'long-term underfunding' and financial management issues, placing it in a precarious financial position.[292] It stated that the Commission was unable to afford to fund the core staffing needed to perform its statutory functions, noting that the October 2022 budget had addressed these issues to some extent, 'by increasing the Commission's core revenue to a level that stabilised its existing staffing profile'. However, it observed that this funding increase was still less than 'what the Commission requires in terms of staff to acquit our functions fully and independently'.[293]

8.166 In evidence before the committee in September 2023, Mr Dick, Senior Policy Executive at the AHRC, elaborated:

> …we don't have the resources now to do everything we're meant to be doing, which means we have a significant backlog in complaints, for example, particularly in the Australian Human Rights Commission Act complaints…but also in the discrimination law complaints, and we have less focus on community education because we simply don't have the resources to do the outreach.[294]

8.167 The Community and Public Sector Union (CPSU) stated that the AHRC has been 'grossly underfunded and understaffed for decades':

> The Commission must be properly funded to conduct its core functions independently, effectively and in a timely manner. This means adequate funding that allows the Commission to maintain its independence, sustain

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[290] See, for example, Australian Human Rights Commission, *Submission 1*, pp. 93–94; New South Wales Council for Civil Liberties, *Submission 77*, pp. 9–13; Maurice Blackburn Lawyers, *Submission 110*, p. 13; Law Council of Australia, *Submission 120*, p. 33; Castan Centre for Human Rights Law, *Submission 160*, pp. 30–31; Save the Children and 54 reasons, *Submission 168*, pp. 23–24; Centre for Law and Social Justice, *Submission 185.1*, p. 4; Professor Simon Rice OAM, *Submission 204*, pp. 15–17; Community and Public Sector Union, *Submission 236*, p. 2; Professor Ben Saul, *Submission 251*, p. 5.

[291] Australian Human Rights Commission, *Submission 1*, p. 93.

[292] Australian Human Rights Commission, *Annual Report 2022-2023*, p. 18.

[293] Australian Human Rights Commission, *Annual Report 2022-2023*, p. 18.

[294] Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 62.

> a permanent workforce and build capacity within the Commission to engage in project work as required.[295]

8.168 Circle Green Community Legal reported that due to 'significant delays' in AHRC processing times, they had begun referring clients to other forums which have more limited power.[296] The CPSU considered the AHRC's estimate of 145 necessary ASL staff to be an underestimate, and further recommended steps in relation to a permanent and secure increased workforce for the AHRC.[297]

8.169 The CPSU also recommended a review of the AHRC's structure, describing it as 'a top-heavy institution governed by individual Commissioner's [*sic*] priorities and preferences', and noting that in some circumstances a matter may not fit squarely within a particular Commissioner's area of responsibility.[298] In this regard, the AHRC noted that 'an absence of publicly advertised, merit based selection processes over time' had resulted in a deferral of the AHRC's re-accreditation by the Global Alliance of National Human Rights Institutions, but acknowledged that these concerns had been partially addressed by the passage of the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022*.[299]

Role of the Ombudsman

8.170 A number of witnesses and submitters also considered the role of an Ombudsman in protecting human rights. Several Ombudsmen exist at the Commonwealth level. In addition to the Commonwealth Ombudsman, legislation also provides for the Fair Work Ombudsman and Telecommunications Industry Ombudsman. Numerous other ombudsmen, agencies and other bodies handle complaints, including in relation to human rights.[300] The Commonwealth Ombudsman highlighted its existing role in human rights protection. It noted that its primary function is to be an independent and impartial body that handles complaints from people about Australian Government administrative actions and decisions, including by handling complaints and disclosures about government action.[301] It stated that

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295 Community and Public Sector Union, *Submission 236*, p. 2.

296 Circle Green Community Legal, *Submission 80*, p. 4. See also, Maurice Blackburn Lawyers, *Submission 110*, p. 13.

297 Community and Public Sector Union, *Submission 236*, pp. 2–4.

298 Community and Public Sector Union, *Submission 236*, pp. 5–6.

299 Australian Human Rights Commission, *Submission 1*, pp. 93–94. See also, Castan Centre for Human Rights Law, *Submission 160*, p. 30; Centre for Law and Social Justice, *Submission 185.1*, p. 4; Professor Simon Rice OAM, *Submission 204*, p. 16.

300 The Commonwealth Ombudsman website includes a useful summary of the numerous agencies that handle complaints.

301 Commonwealth Ombudsman, *Submission 197*, p. 2.

the complaints process has several benefits, including being: accessible and relatively informal; enabling individuals to have their concerns heard; and providing assurance to the broader community and Parliament that government agencies are acting fairly and reasonably.[302] The Ombudsman noted that it does not have the power to direct an action or outcome, nor compel an agency to act on a recommendation, but stated that its administrative investigations and subsequent recommendations 'can stimulate the sensitivity of an agency's organisational culture to the human rights impacts of its decisions and influence systemic change'. It noted that it follows-up with agencies to confirm whether they have implemented the recommendations they accepted and stated that its reporting on this follow-up process demonstrates that agencies generally do implement the recommendations they accepted.[303]

8.171 In this regard, the Commonwealth Ombudsman, Mr Iain Anderson, stated that the Commonwealth Ombudsman aims 'to do most of our business confidentially—that's the philosophical model for ombudsmen—but we have the ability to go public if we think that's appropriate':

> People can come to an ombudsman and complain about the actions of a government agency, and the ombudsman looks at that to say, 'Has the person been treated fairly, reasonably, lawfully?' and that sort of thing. The ombudsman has the power of a royal commission in terms of the ability to require people to give evidence to provide information and documents but can only make recommendations ultimately; it can't compel people to act on the recommendations of the ombudsman. The ombudsman can do this publicly, and that can be quite a powerful tool—transparently shining a light on the actions of government agencies and their willingness or unwillingness to act on matters that have been recommended to improve the way in which they engage with people.[304]

8.172 However, Mr Anderson indicated that, while the Commonwealth Ombudsman makes decisions that relate to human rights, it does not form a strict human rights conclusion in relation to complaints:

> We certainly have regard to human rights case law and to statements of UN bodies and things like that. But ultimately what we are thinking about is: is it fair? Is it reasonable? For example, one of my roles is to give individual assessments to the immigration minister of people who've been in immigration detention for more than two years. When we look at that we look at both the legal context and statements of human rights principles, but we also look at the individual's own situation: their health, both mental and physical; their family relationships; their criminal record—all those sorts of things. What we're trying to do in that particular exercise is say, 'Are the

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302 Commonwealth Ombudsman, *Submission 197*, pp. 2–3.

303 Commonwealth Ombudsman, *Submission 197*, p. 3.

304 Mr Iain Anderson, Commonwealth Ombudsman and National Preventive Mechanism Coordinator, Office of the Commonwealth Ombudsman, *Committee Hansard*, Friday 20 October 2023, p. 28.

> arrangements for their detention at the moment appropriate, or should it be changed?' So it's not strictly a human rights conclusion, but it's informed by human rights principles along the way.[305]

8.173 However, the Refugee Advice and Casework Service noted that while the Ombudsman provides some oversight of immigration detention 'this is considerably limited given that their recommendations and conclusions are not legally binding on the Department'.[306]

8.174 Ms Eastman AM SC argued that a Human Rights Ombudsman could be established, providing for a similar role to that of the Fair Work Ombudsman in the regulation of workplaces and fair work laws.[307] She stated that a Human Rights Ombudsman could be vested with functions including: promoting a human rights dialogue, awareness and understanding of human rights; promoting compliance with a HRA; providing education, assistance and advice to public authorities and producing best practice guides to human rights, jointly or in cooperation with the AHRC; monitoring compliance of public authorities with a HRA; inquiring into, and investigate, any act or practice of a public authority that may be contrary to the HRA; commencing proceedings in a court to enforce the HRA; and referring matters to relevant authorities, if there are more appropriate remedies. She further stated that civil penalty orders for a breach of human rights 'would shine a light on a public authority's actions and be a means of holding a public authority accountable', and that the option of a civil penalty as part of a suite of remedies should deter public authorities from engaging in unlawful conduct.[308]

8.175 This may be comparable to the Victorian Ombudsman whose functions include inquiring into or investigating whether administrative action is incompatible with a human right set out in the Charter, and if the action involves a decision whether there was a failure to give proper consideration to a relevant human right.[309] In light of the Victorian experience, Dr Bruce Chen submitted that 'jurisdiction should be given to the Commonwealth Ombudsman and National

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[305] Mr Iain Anderson, Commonwealth Ombudsman and National Preventive Mechanism Coordinator, Office of the Commonwealth Ombudsman, *Committee Hansard*, Friday 20 October 2023, p. 29.

[306] Refugee Advice and Casework Service, *Submission 231*, p. 10.

[307] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023). See, *Fair Work Act 2009*, section 682.

[308] Ms Kate Eastman AM SC, answer to question on notice 28 September 2023 (received 16 October 2023).

[309] *Charter of Human Rights and Responsibilities Act 2006* (VIC), subsection 13(2)(a).

Anti-Corruption Commission to investigate human rights breaches by public authorities as part of their existing roles'.[310]

Business and human rights

8.176 Under the AHRC model businesses would not be bound by the HRA, as 'public authority' would be defined by reference to whether the authority is performing a public function (see Chapter 7). However, the AHRC model proposes that businesses and organisations should be able to voluntary opt in to accept responsibility to comply with a HRA.[311] A number of submitters indicated their concern that an individual's rights may be breached by businesses and private entities. Several submitters argued that a positive duty in a HRA should engage certain private businesses that may be acting on behalf of government,[312] and agreed with the 'opt-in' clause for businesses to 'voluntarily accept responsibility to comply' with a HRA.[313] However, the Australian Christian Lobby expressed concern that businesses would be incentivised to sign up to 'an ill-conceived, politically partisan vision of human rights culture' with 'little transparency and accountability for how it is implemented'.[314]

8.177 Other submitters felt that an 'opt-in' clause was too weak and that businesses should be required to protect human rights on the same basis as public authorities.[315] The Environmental Defenders Office advocated for a HRA to 'impose a duty on businesses and other private actors to act consistently with human rights, and should include accessible remedies for harmful interference on human rights by private actors'.[316] Liberty Victoria argued that 'opt-in' models had not been successful, observing that no private entities in the ACT or Queensland had yet opted in, and suggested that limiting human rights

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310 Dr Bruce Chen, *Submission 158*, p. 12.

311 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 150.

312 See, for example, Australian Human Rights Commission, *Submission 1*, p. 49, *Submission 1.1*, p. 19; Australian Lawyers Alliance, *Submission 83*, p. 29; National Legal Aid, *Submission 118*, p. 35; Centre for Law and Social Justice, *Submission 185.1*, pp. 5–6; Western Australia for a Human Rights Act, *Submission 205*, p. 10; Amnesty International Australia, *Submission 213*, pp. 21–22; Fiona David and Dr David Tickler, *Submission 223*, p. 2.

313 See, for example, Australian Human Rights Commission, *Submission 1*, p. 49; National Legal Aid, *Submission 118*.

314 Australian Christian Lobby, *Submission 143*, p. 5.

315 See, for example, Environmental Defenders Office, *Submission 147*, p. 11; Liberty Victoria, *Submission 155*, pp. 353–36; Ethical Partners Funds Management, *Submission 178*, pp. 4–5; Human Rights Law Centre, *Submission 232*, pp. 14–15; Community Legal Centres National Human Rights Network, *Submission 331*, p. 32.

316 Environmental Defenders Office, *Submission 147*, p. 11.

obligations to public authorities 'would be a missed opportunity'.[317] However, the ACT Government indicated that seven private entities have opted in to the scheme, but of those listed as having opted in, none appear to be private businesses, but are more in the nature of non-government organisations (such as the Women's Legal Centre and the ACT Disability, Aged and Carer Advocacy Service).[318]

8.178 The Human Rights Law Centre suggested:

> To complement a federal Charter, Australia must consider enacting a broader mandatory human rights due diligence law that applies to all businesses operating within Australia (including their activities overseas). This would involve requiring businesses to undertake due diligence to identify, prevent and mitigate human rights and environmental harms, and to provide access to remedy for affected individuals and communities wherever harm occurs.[319]

8.179 A number of submitters identified ways in which the government can support business to uphold and protect human rights. The Australian Lawyers Alliance suggested that the government 'develop a government tender pre-qualification process in which prospective tenderers for government contracts have to satisfy, among other things, their capacity to adhere to the federal human rights charter', with an exemption for those that have opted in to the positive duty.[320] Civil Liberties Australia noted:

> Arguably the biggest gains in human rights in Australia over the past decade have been through corporate commitments widely adopted by the private sector, based on a clear understanding of the need for a stable, rules based and sustainable international and domestic business environment.[321]

8.180 The Minerals Council of Australia noted the difficulty for many businesses with the complexity and disparate nature of current human rights law, and called for 'an overarching framework that sets out the different objectives and obligations, where requirements overlap, and how legal conflict will be resolved to ensure a business can achieve compliance with each law without breaching another'.[322] Similarly, KPMG Australia called for the government to develop 'a separate National Action Plan on Business and Human Rights', including 'a commitment, context, priorities, current and planned activities, and modalities of monitoring

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317 Liberty Victoria, *Submission 155*, pp. 35–36.

318 ACT Government, *Submission 73*, p. 6.

319 Human Rights Law Centre, *Submission 232*, p. 15.

320 Australian Lawyers Alliance, *Submission 83*, p. 29.

321 Civil Liberties Australia, *Submission 51*, p. 11.

322 Minerals Council of Australia, *Submission 48*, p. 8.

and update' in line with recommendations from the UN Working Group on Business and Human Rights.[323]

8.181 The Law Council of Australia emphasised that the government's role in protecting human rights includes a 'duty to protect individuals from rights abuse by third parties including business', and recommended it employ both legislative and administrative means to accomplish this. It suggested that government policies and procedures 'could have the practical effect of encouraging business compliance' with the UN Guiding Principles on Business and Human Rights.[324] Australian Lawyers for Human Rights observed that a federal HRA would strengthen the government's efforts to require human rights due diligence from businesses.[325]

8.182 In a more specific suggestion, Mr Joshua Bollard recommended reform to the *Modern Slavery Act 2018*, arguing its lack of traditional penalties reduced the incentive for businesses to address instances of modern slavery within their supply chains.[326]

8.183 The AHRC summarised the steps which the Australian Government has previously taken at the UN level in relation to businesses and human rights:

> In 2011, the Australian Government co-sponsored the UN Human Rights Council resolution endorsing the UN Guiding Principles on Business and Human Rights (UNGPs). The Commission welcomes steps the Australian Government has made towards implementation of the UNGPs since the last UPR, including:
>
> • reform of the Australia OECD National Contact Point
>
> • passing the Modern Slavery Act 2018 (Cth)
>
> • other efforts to combat modern slavery such as the regionally-focused Bali Process.
>
> The Human Rights Council and UN Working Group on Business and Human Rights (WGBHR) have called on States to adopt a National Action Plan on Business and Human Rights (NAP) as a means of implementing the UNGPs within their respective territories and jurisdictions.
>
> The WGBHR has stressed that while legislative and other efforts to eliminate modern slavery are laudable they are not a substitute for full implementation of the UNGPs, including through developing a NAP. In

323 KPMG Australia, *Submission 108*, pp. 2–3.

324 Law Council of Australia, *Submission 120*, p. 29.

325 Australian Lawyers for Human Rights, *Submission 229*, p. 43.

326 Mr Joshua Bollard, *Submission 249*, pp. 8–10.

> October 2017, the Australian Government decided not to proceed with the development of a NAP.[327]

8.184 The AHRC recommended the government 'undertake a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights'.[328] It also recommended that the Australian Government develop a National Action Plan on Business and Human Rights:

> A NAP would help clarify the expectations on business in relation to respecting human rights in Australia and overseas, highlight the role of government in supporting business, address policy and legal gaps and ensure there is a plan for implementation of the UNGPs that is targeted, transparent, measurable and informed by relevant stakeholders. [329]

Monitoring progress on human rights

8.185 A number of submitters suggested ways in which domestic progress in the protection of human rights could be tracked and monitored in Australia.

8.186 Ms Sheehan (AGD) noted that a number of separate monitoring mechanisms do exist, and commented:

> I think what might be useful for the committee, and what we would be thinking about and developing policy advice on, would be what's already in place. [There's] a variety of monitoring and evaluation frameworks or ways of doing it. Obviously, there's not one system, such as the model that's proposed…Noting how broad human rights are and how many different policies and programs have human rights implications across government, there will be particular programs or policies that do have monitoring evaluation frameworks built into them. I'm thinking in particular of some of the national action plans that we have that would engage human rights issues.[330]

8.187 Ms Sheehan noted the existence of existing frameworks: the Closing the Gap implementation plan and the National Plan to End Violence against Women and Children. She stated that consideration is required as to how a central system would interact with specific frameworks that are in place for particular policies, and whether measurement would be at a high level or focusing on rights that the government wanted to pay particular attention to or track more closely.[331]

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327 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 167.

328 Australian Human Rights Commission, *Submission 1*, p. 36.

329 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 167.

330 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 60.

331 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 60.

National human rights indicator

8.188 The AHRC called for the introduction of a national human rights indicator index in the form of an 'independent statutory agency'.[332] They described indicators as providing 'concrete and practical ways to measure the realisation of human rights and track progress on implementation', and explained:

> Indicators can be used as part of a broader process of systematic work to implement, monitor and fulfil human rights obligations. Indicator-based measurement frameworks are useful tools for turning complex concepts and standards into tangible and measurable outcomes. They can help law and policy makers more easily to identify where gaps in implementation are occurring and help advocates for human rights to use the language of technical measurement and science to ground their feedback to governments.[333]

8.189 The AHRC suggested that the *Is Britain Fairer?* model in the UK was a useful example.[334] *Is Britain Fairer?* is a triennial report published by the UK Equality and Human Rights Commission reviewing the country's performance on equality and human rights and tabled in the Parliament. It draws on a range of sources dealing with all grounds of discrimination and presents that data in relation to: education, work, living standards, health, justice and security, and participation. It utilises a *Measurement Framework for Equality and Human Rights*,[335] which is itself based on the human rights indicator framework developed by the Office of the UN High Commissioner for Human Rights (OHCHR). The OHCHR framework:

> [A]ims to assist in developing quantitative and qualitative indicators to measure progress in the implementation of international human rights norms and principles. The Guide describes the conceptual and methodological framework for human rights indicators recommended by international and national human rights mechanisms and used by a growing number of governmental and non-governmental actors. It provides concrete examples of human rights indicators, and other practical tools and illustrations, to support the realization of human rights at all levels. The Guide is targeted at human rights advocates as well as policymakers, development practitioners, statisticians and others.[336]

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[332] Australian Human Rights Commission, *Submission 1*, p. 90.

[333] Australian Human Rights Commission, *Submission 1*, p. 57.

[334] Australian Human Rights Commission, *Submission 1*, p. 90.

[335] United Kingdom Equality and Human Rights Commission, *Measurement Framework for Equality and Human Rights*.

[336] United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide for Measurement and Implementation*, 1 January 2012.

8.190 The Measurement Framework for Equality and Human Rights aims to monitor systematically the position of certain groups in relation to equality and human rights, using disaggregated data.

8.191 The UK Equality and Human Rights Commission manages a Human Rights Tracker tool, a searchable online tool to track the UK's implementation of recent recommendations from UN treaty bodies and the Universal Periodic Review process.[337] In addition, the Human Rights Measurement Initiative is an online global human rights measurement initiative, which publishes data about human rights progress in relation to a number of countries.[338] This organisation publishes detailed information regarding its methodology for data collection and analysis.[339]

8.192 The Law Council of Australia considered that a human rights indicator index could replace the 2012 National Action Plan.[340] Both the AHRC and the Law Council noted that similar mechanisms are in place on Closing the Gap initiatives, but also acknowledged that an indicator would be a significant undertaking likely to take several years to establish.[341] The implementation of an indicator index was supported by a number of other submitters.[342]

8.193 Amnesty International Australia noted that 'the importance of the development and application of appropriate indicators of human rights performance is increasingly being recognised internationally and within Australia', but that 'Australia has no mechanism with indicators to measure human rights progress'.[343]

8.194 The Queensland Human Rights Commission stated that it supports the development of a national human rights indicator index consistent with the

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337 United Kingdom Equality and Human Rights Commission, *Human Rights Tracker*.

338 See, Human Rights Measurement Initiative. The non-government organisation Human Rights Watch publishes an annual *World Report*, which provides a very brief overview of the human rights conditions in countries around the world, including Australia.

339 Human Rights Measurement Initiative, *Methodology handbooks*.

340 Law Council of Australia, *Submission 120*, p. 31.

341 Australian Human Rights Commission, *Submission 1*, p. 91; Law Council of Australia, *Submission 120*, p. 32.

342 See, for example, Economic Justice Australia, *Submission 34*, p. 22; Domestic Violence NSW, *Submission 104*, p. 2; Harm Reduction Australia, *Submission 126*, p. 14; Students for Sensible Drug Policy, *Submission 130*, p. 7; Voices of Influence Australia, *Submission 133*, p. 10; Federation of Community Legal Centres Victoria, *Submission 174*, p. 21; Amnesty International Australia, *Submission 213*, p. 6; People with Disability Australia, *Submission 230*, p. 18; Australian Federation of Disability Organisations, *Submission 274*, p. 12; Community Legal Centres National Human Rights Network, *Submission 331*, pp. 31–32.

343 Amnesty International Australia, *Submission 213*, p. 13.

measures it has sought to develop through its annual reports.[344] The Queensland indicators relate to public entities measuring their own human rights outcomes (by reference to activities including education and consultation), and the measurement of human rights-related matters in the Parliament (including the number of bills in which the proponent has indicated that the bill is incompatible with human rights, where statements of compatibility have been critiqued, and where a committee has made recommendations in relation to the human rights compatibility of a measure).[345]

Annual government statement to Parliament

8.195 The AHRC recommended 'a new mechanism by which [the government] announces key human rights priorities on an annual basis through a statement to Parliament'.[346] It contended that this would allow the government to both identify problems and celebrate progress made over the course of a year. The Law Council of Australia felt that this could complement the existing parliamentary scrutiny mechanisms by 'assist[ing] with planning and prioritisation in terms of addressing national areas of human rights need'.[347] This concept received support from a number of other submitters.[348]

Departmental human rights action plans and annual reporting

8.196 The AHRC recommended that federal departments and agencies should develop and implement human rights action plans,[349] and that all public authorities subject to the HRA should be required to report on their HRA compliance as part of their annual reporting duties (including information about efforts to ensure compliance with the HRA, including training and education undertaken; the development of internal guidelines and protocols; and the conduct of any compliance audits). It stated that such reporting should also disclose data about any complaints made with respect to the HRA, both internally to the public authority, and externally to the AHRC or the courts (while respecting relevant privacy considerations).[350] The same

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344 Queensland Human Rights Commission, *Submission 142*, p. 54.

345 Queensland Human Rights Commission, *Submission 142*, appendixes D-E, pp. 87–96.

346 Australian Human Rights Commission, *Submission 1*, p. 20.

347 Law Council of Australia, *Submission 120*, p. 32.

348 See, for example, Economic Justice Australia, *Submission 34*, p. 23; Voices of Influence Australia, *Submission 133*, p. 10; Queensland Human Rights Commission, *Submission 142*, p. 4; Federation of Community Legal Centres Victoria, *Submission 174*, p. 18; Amnesty International Australia, *Submission 213*, p. 13; People with Disability Australia, *Submission 230*, p. 19.

349 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 189.

350 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 336.

recommendation was made in 2009 in the National Human Rights Consultation report.[351]

Findings by treaty bodies

8.197 The AHRC has outlined the absence of an overarching consistent mechanism by which Australia reports, publishes, and regularly updates findings and recommendations made by UN treaty bodies about Australian laws, policies and practices as they relate to international human rights law.[352] The AHRC stated that it is unacceptable that the Australian Government does not routinely inform the Parliament of the outcomes of individual communications and concluding observations made by UN treaty committees.[353]

8.198 The UN Human Rights Council publishes documentation received from the Australian Government in relation to each UPR cycle, submissions from civil society in Australia, together with information relating to the review process and the outcome.[354] However, the UPR process takes place only every four to five years (the most recent cycle was significantly delayed by the Covid-19 pandemic). At Australia's first UPR in 2011, the then federal government undertook to table the Concluding Observations of all human rights treaty body appearances in Parliament, however this practice ceased around 2013. Findings are made by other UN bodies semi-regularly, including by special rapporteurs, treaty committees (for example, the Subcommittee on Prevention of Torture).

8.199 In addition, Australia is a party to the complaints mechanisms for several international treaties, giving individuals the ability to bring an individual complaint about Australia at the international level and seek a decision.[355] Numerous decisions have been made in relation to individuals in Australia that assess the compatibility of Australian laws and policies.[356] However, there is no central database setting out those decisions, or outlining Australia's response in

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351 National Human Rights Consultation, *Report*, September 2009, p. 187, recommendation 10.

352 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, pp. 108–110.

353 Australian Human Rights Commission, *Submission 1*, pp. 17–18.

354 UN Human Rights Council, *Universal Periodic Review – Australia*.

355 Australia has not agreed to either the Optional Protocol to the Convention on the Rights of the Child on communications procedure, or the Optional Protocol to International Covenant on Economic Social and Cultural Rights, 10 December 2008, meaning that persons in Australia cannot access these complaints mechanisms. See, Attorney-General's Department, *Complains mechanisms under human rights treaties: public sector guidance sheet*.

356 For example, *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 (12 April 2010) and *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (12 April 2010), in which state-based post-sentence detention mechanisms were found to be incompatible with the prohibition against arbitrary detention.

relation to them. Indeed there is no process for routinely tabling in Parliament the outcomes of individual communications brought before the UN treaty committees.[357] In this regard, the AHRC stated that Remedy Australia, a small voluntary non-government organisation, has taken on this role:

> Remedy Australia, an NGO that monitors compliance with the recommendations arising from individual communications, notes that Australia's implementation of recommendations from these communications is extremely low at approximately 12%. There is limited transparency and accountability for this.[358]

8.200 The AHRC recommended that the Parliament's role in reviewing Australia's implementation of its treaty obligations be updated, and in particular:

> A. The Attorney-General reinstate the practice of tabling Concluding Observations of human rights treaty committees in both houses of Parliament.
>
> B. The Australian Government should maintain a publicly available and up to date database about the Concluding Observations made by each UN human rights treaty committee and their status.
>
> C. The Government reform the Standing National Mechanism for Treaty Body Reporting to include public reporting on treaty bodies and individual communications.
>
> D. The Attorney-General table information about individual communications in Parliament on an annual basis, along with the Australian Government's response to these.
>
> E. The Parliamentary Joint Committee on Human Rights be empowered to review the adequacy of the Australian Government's response to individual communications and/or Concluding Observations from time to time.
>
> F. The Joint Standing Committee on Treaties conduct a review of all existing reservations and interpretive declarations under UN human rights treaties.[359]

8.201 Amnesty International Australia likewise recommended that there be a requirement for the government to periodically table reports in Parliament 'on how it is meeting its UPR commitments, UPR recommendations, and any voluntary pledges', and further noted that '[t]he absence of a formal response to the [UN treaty body] committees and national mechanism results in reviews

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357 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 108. See, for example, Remedy Australia, *Follow-up Report on violations by Australia of ICCPR in individual communications (1994-2017)*, October 2017.

358 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, p. 109.

359 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights Free & Equal Final Report*, 2023, pp. 12–13.

where concerns raised previously have been left unaddressed for several years'.[360]

8.202 Ms Sheehan stated that one way of monitoring Australia's implementation of human rights would be through the universal periodic review (UPR) process through the UN, noting that there is a tracking process associated with that process.[361]

8.203 Some submitters argued that a formalised parliamentary response from the government to the findings of international treaty bodies, which would then be scrutinised by this committee, would assist in tracking Australia's human rights progress. Professor Byrnes of the Australian Human Rights Institute, and former legal adviser to the committee, observed:

> Many others have pursued a losing campaign thus far to say that, particularly when cases are decided against Australia, or the Commonwealth or the states, it is relevant to how we interpret and implement our human rights obligations. We have lost a few, and we have not lost a few, as a country. It seems to me, as a matter of just good practice and informing, that there should be some procedure for tabling those before the committee, or indeed the parliament, and in the case of state and territory parliaments as well, where their legislation is concerned ... A formal process might give the committee the opportunity to ask the government how it proposes to respond and explore that in a way that might lead to change.[362]

8.204 The Foundation for Aboriginal and Islander Research Action (FAIRA) also recommended that UN reports about Australia be assessed and reported on by this committee, and the committee should engage with civil society in the process of that assessment.[363] Mr Les Malezer, Chairperson of FAIRA, expanded on this in evidence to the committee:

> …we're proposing that parliament should receive reports on Australia's human rights performance which are coming from the treaty bodies. This is part of the international obligations. From my understanding, the Human Rights Commission report goes to the Attorney-General and gets tabled. There's really no debate that happens around that, and that's forgotten until the next year. These reports that come over from the seven treaty bodies—I think there's a report at least every five years. Then there are a number of annual reports about Australia's human rights performance. All go to the Attorney-General's Department. The Attorney General probably is briefed in relation to receiving the report but does not actually peruse or consider

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360 Amnesty International Australia, *Submission 213*, p. 18.

361 Ms Anne Sheehan, Attorney-General's Department, *Committee Hansard*, 20 October 2023, p. 60.

362 Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 49.

363 Foundation for Aboriginal and Islander Research Action, *Submission 124*, recommendation 2.

> the reports, and the Attorney-General's Department will alert any other department that has been brought into the findings, concluding observations and so on. So the whole thing about Australia's human rights performance is basically handled by the bureaucrats, and one could take the cynical view—if you're a blackfella like me—that they bury these reports and they don't deal with the recommendations. I would say that you've probably had a thousand recommendations sitting there over the last two decades, including three UPR reports, for which nothing is done.
>
> …we're saying that if you want to strengthen Australia's human rights system framework then, when reports are received not just about Aboriginal and Torres Strait Islander people but on human rights from these treaty bodies, they go to your parliamentary committee and the committee holds hearings on those reports so civil society gets to react, respond to and even see what is being reported…and then present that treaty body report along with their findings on it to the parliament for the parliament to then receive it.[364]

8.205 The UK-based Bonavero Institute of Human Rights noted that the UK JCHR 'monitors the UK government's response to the Universal Periodic Review (UPR) process' and recommended 'that the PJCHR monitor Australia's progress in implementing changes to which it has committed in the UPR process'.[365] This could then contribute to future UPR processes, providing a closer link between Parliament and the UN treaty bodies.

8.206 Voices of Influence Australia recommended that the government 'invest in a robust National Human Rights Digital Tracking Tool…to monitor recommendations made to Australia by the UN Treaty Bodies and the Universal Periodic Review (UPR)', with a public search function to enable the community to monitor the government's progress.[366] In this regard, the UN has developed a free National Recommendations Tracking Database tool, currently available only to governments, to assist States in planning and tracking the realisation of their human rights obligations and the Sustainable Development Goals (SDGs).[367]

Role of civil society in the UN process

8.207 Civil society plays a central role in engaging with UN treaty processes. As set out by the AGD, civil society groups contribute to Australia's periodic reporting to treaty bodies:

> Periodic reports outline a State party's implementation of the relevant treaty and are due at intervals as specified in the relevant treaty. At this time, civil

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364 Mr Les Malezer, Chairperson, Foundation for Aboriginal and Islander Research Action, *Committee Hansard*, 15 August 2023, p. 38.

365 Bonavero Institute of Human Rights, *Submission 128*, p. 9.

366 Voices of Influence Australia, *Submission 133*, p. 2.

367 Office of the High Commissioner for Human Rights, *National Recommendations Tracking Database*.

> society and non-government organisations have the opportunity to submit shadow reports to the relevant United Nations human rights committee, outlining their views about how Australia is complying with its treaty obligations. A State party is then scheduled to appear before the relevant committee…receiving further questions from the committee about the content of Australia's report and other issues arising under the treaty.[368]

8.208 The 2010 National Human Rights Framework stated that the government would strengthen the relationship between government and NGOs by 'bringing together the NGO Forums on Human Rights hosted by the Attorney-General and the Minister for Foreign Affairs, to ensure the forums provide a comprehensive consultation mechanism for discussion about domestic and international human rights issues'.[369]

8.209 AGD stated that since then 11 such forums have been held since that time.[370] It stated that NGO forums provide an opportunity for government to consult with civil society:

> …in order to better inform Australia's human rights reporting, implementation and monitoring processes. They also provide a platform for the Australian Human Rights Commission and NGOs to identify issues for Australia to address in the lead up to treaty reporting processes and the Universal Periodic Review (UPR). This process does not replace or limit the ability of the Commission and civil society to provide direct, independent reports to the UPR.[371]

8.210 In 2016, the government introduced the Standing National Human Rights Mechanism (an inter-departmental committee) to further improve coordination across federal, state and territory governments, the AHRC and civil society in reporting and engaging with the UN on human rights. AGD stated that the Standing Mechanism's functions include an annual NGO forum on human rights led by AGD.[372]

8.211 In contrast, the AHRC submitted that 'at least one' joint NGO Forum was held (jointly by AGD and the Minister for Foreign Affairs) before the practice was discontinued:

> The Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) had a longstanding practice of convening separate annual human rights forums. While DFAT has regularly maintained this and other engagement ahead of each session of the UN

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368 Attorney-General's Department, *United Nations human rights reporting*.

369 Australia's Human Rights Framework, 2010, p. 7.

370 Attorney-General's Department, *Submission 114*, pp. 16–17.

371 Attorney-General's Department, *Submission 114*, p. 17.

372 Attorney-General's Department, *Submission 114*, p. 17.

> Human Rights Council, the conduct of NGO forums by the AGD has been more sporadic.[373]

8.212 In this regard, Associate Professor Debeljak submitted that NGO human rights forums have taken place in Australia in various forms since the 1990s, and therefore exist outside the Framework.[374]

8.213 Numerous witnesses and submitters argued that NGO forums should continue to take place, arguing that civil society plays a key role in human rights protection. The Law Council of Australia argued that NGO forums, as set out in the 2010 Framework, should be included in a new framework.[375] Australian Lawyers for Human Rights submitted that a federal HRA should facilitate civil society engagement.[376] Ms Elke Nicholson, a lawyer with Environmental Justice Australia, argued that having civil society and individuals involved in lawmaking and decision-making 'is always going to be a good thing for society and for the advancement of human rights'.[377] In this regard, Dr Cassandra Goldie, the CEO of the Australian Council of Social Service, highlighted the importance of properly resourcing NGOs to ensure 'there is an enlivened civil society culture of advocacy'.[378]

8.214 Ms Natalie Lewis, Queensland Child and Family Commissioner, stated that her prior involvement in Australia's UPR process with civil society facilitated an opportunity to provide information to challenge that being put forward by the Australian Government:

> I was able to appear in Geneva as part of the pre sessions around the periodic review of the Convention on the Rights of the Child in a civil society capacity. It allowed an opportunity to put on the record some of the things that we know about, that we observe that amount to significant adverse impacts on the rights of Aboriginal and Torres Strait Islander children. Then to sort of sit back a few months later and watch the hearing of the Australian government presenting evidence, it sounded to me was like this collective chorus of 'there's nothing to see here'. I think that the importance of being able to contribute directly to processes like that and to bring about accountability for the stories, the experiences and the impacts, particularly on Aboriginal and Torres Strait Islander children that get lost in the

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373 Australian Human Rights Commission, *Submission 1*, p. 33.

374 See, Associate Professor Julie Debeljak, *Submission 15*, p. 10 in reference to Adam Fletcher, 'Human Rights Scrutiny' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomson Reuters, 2020, 30, 32.

375 Law Council of Australia, *Submission 120*, p. 6.

376 Australian Lawyers for Human Rights, *Submission 229*, p. 45.

377 Ms Elke Nicholson, Lawyer, Environmental Justice Australia, *Committee Hansard*, Friday 25 August 2023 p. 44.

378 Dr Cassandra Goldie, CEO, ACOSS, *Committee Hansard*, Wednesday 27 September 2023, p. 28.

> aggregate data and the national narrative that is sold overseas about how we're doing for children in this country.[379]

8.215 Ms Emma Golledge, Director of the Kingsford Legal Service, noted that such advocacy and engagement has, for some time, occurred despite insufficient funding:

> The National Human Rights Action Plan and framework have not been effective mechanisms to ensure a culture of human rights and human rights compliance. They have created a disconnected, ineffective human rights monitoring process in Australia and place large burdens on civil society to raise human rights concerns. It's notable to us that, during this time, there has been poor engagement with NGOs around Australia about the attainment of human rights, and key human rights institutions, such as the Human Rights Commission, have been insufficiently empowered to undertake this vital work. Civil society has continued to undertake key human rights monitoring with almost no funding and through regressive advocacy gags, which we welcome the removal of.[380]

Human rights considerations at the state and territory level

8.216 A number of submitters gave detailed evidence as to human rights concerns that mainly arise within the jurisdiction of the states and territories. As set out in Chapter 4, the committee received many submissions setting a range of human rights concerns in Australia: including the over-policing of First Nations communities; prisoners and children in youth detention; state and territory based lockdowns during the COVID-19 pandemic; discrimination against the LGBTIQA+ community in home rental and health care; gender-based violence; lack of support for victim-survivors of crime; access to justice; and homelessness. These are all significant human rights concerns, however, much of the legislative responsibility for these concerns rests with the states and territories. While a federal human rights education program could assist in people better understanding their rights in relation to these areas, the proposed federal HRA model would not cover matters that fall within the responsibility of the states and territories (as set out in Chapter 7).

Leadership role

8.217 Notwithstanding the division of legal powers between Australia's states, territories and the Commonwealth, a number of submitters noted the important leadership role a federal HRA could play in relation to those states and

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379 Ms Natalie Lewis, Commissioner, Queensland Child and Family Commission, *Committee Hansard*, Tuesday 15 August 2023, p. 15.

380 Ms Emma Golledge, Director, Kingsford Legal Service, *Committee Hansard*, Thursday 28 September 2023, p. 26. The significance of funding for civil society was also noted by Domestic Violence NSW, *Submission 104*, p. 2.

territories that do not currently have a state or territory based HRA.[381] The ACT Human Rights Commissioner said that 'having a national framework may force those other jurisdictions to look at it seriously and see the benefits in other jurisdictions having human rights'.[382] Numerous submitters and witnesses argued all states and territories should enact their own HRA legislation. In this regard, Australian Lawyers for Human Rights recommended:

> …that the federal government place the enactment of state and territory Human Rights Acts in all remaining jurisdictions on the agenda of National Cabinet meetings, so as to ensure that all people in Australia enjoy the legal articulation and protection of their internationally recognised human rights, regardless of where they live within our federation.[383]

8.218 Further, other submitters noted the role a federal HRA could play in helping the community better understand human rights and ensure greater advocacy around rights. Associate Professor Grenfell submitted:

> In South Australia we have seen the positive flow-on effects of the human rights culture which is being slowly established in federal parliament. Organisations that advocate for marginalised parts of the South Australian community use the analysis produced by the PJCHR to comprehend the sometimes quite complex interplay of state and federal laws and to assess their alignment with Australia's voluntary obligations under international human rights treaties. This is really palpable when it comes to complex areas such as guardianship and restrictive practices, where you have state and federal laws interlocking. The lack of human rights scrutiny in South Australia means that our interlocking state laws are out of alignment with our international obligations, and we are left looking to the federal level for some leadership. The black hole of rights scrutiny taking place in South Australia, which I think is also evident in New South Wales, WA and Tasmania, makes these federal proposals for strengthening human rights compliance even more critical.[384]

8.219 Similarly, while acknowledging the issues of federalism, Ms Jordan Frith, Deputy Consumer Co-Chair of the National Mental Health Consumer and Carer Forum, stated:

> …one of the really important factors in having an Australian Human Rights Act that explicitly defines and respects the rights of people who are vulnerable, have disabilities, have mental health concerns or are at risk of

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381 See, for example, Mr Wayne Nannup, Chief Executive Officer, Aboriginal Legal Service of Western Australia Limited, *Committee Hansard*, 20 October 2023, p. 53; Ms Chloe Wood, Managing Lawyer, Civil Law and Human Rights Unit, Aboriginal Legal Service of Western Australia Limited; Co-convenor, Western Australia for a Human Rights Act, *Committee Hansard*, 20 October 2023, p. 53.

382 Dr Helen Watchirs, Human Rights Commissioner, ACT Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 8.

383 Australian Lawyers for Human Rights, *Submission 229*, p. 21. See also, Professor Sarah Joseph, *Submission 36*, p. 21.

384 Associate Professor Laura Grenfell, *Committee Hansard*, 20 October 2023, p. 44.

> involuntary detainment is that it gives us as community members more negotiating power when we're actually negotiating with the states and territories about what their specific policies should be. It also clearly standardises what those rights are at a fundamental level.[385]

8.220 In addition, some submitters suggested that the Standing Council of Attorneys-General could be a forum where human rights can be influential, with the federal Attorney-General using their position to put items to progress human rights on the agenda at such meetings.[386] Further, the National Cabinet process could also provide a forum for regular consideration of such issues.

National coordination

8.221 Some submitters also said that by having a federal HRA covering areas where there is shared responsibility this could ensure national coordination to better respect rights. For example, Ms Liz Snell, Law Reform and Policy Coordinator at the Women's Legal Service New South Wales, said, while there are different responsibilities at the federal, state and territory levels, a federal HRA would assist in areas where the federal government has responsibility and would 'send a powerful message about the pervasiveness of gender-based violence and the need to address it' across jurisdictions.[387] In relation to this, Mx Giancarlo de Vera, Senior Manager of Policy of People with Disability Australia, explained:

> I think there's an intangible benefit of having a federal act, in the sense that it provides ownership over inclusion at all levels of government. …[I]f we take the example of housing, that's a shared responsibility across different levels of government. There's a clear right to housing, and that's not debatable; but what is debatable is who is responsible for implementing that right. So, if we had a federal charter of human rights, hopefully we would have national coordination. That is what we would expect to see because there is the expectation that we're obliging by that right and, in doing so, doing it in a coordinated way at the national level; otherwise we're going to be seeing what we see already, and that's a devolvement to 'who's funding what and how are we going to do that', and we're not seeing any progress.[388]

8.222 Associate Professor Jessie Hohmann of the Economic, Social and Cultural Rights Network, in an answer to a question taken on notice, set out how a federal HRA would be important in protecting the right to housing, when it is the states and territories with primary power over housing. Associate Professor Hohmann set

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385 Ms Jordan Frith, Deputy Consumer Co-Chair, National Mental Health Consumer and Carer Forum, *Committee Hansard*, 20 October 2023, p. 33.

386 See Emeritus Professor Andrew Byrnes, Australian Human Rights Institute, *Committee Hansard*, 27 September 2023, p. 47 and 49. See also, Dr Louis Schetzer, Spokesperson, Australian Lawyers Alliance, *Committee Hansard*, 27 September 2023, pp. 14-16.

387 Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Service New South Wales, *Committee Hansard*, 27 September 2023, p. 53.

388 Mx Giancarlo de Vera, Senior Manager of Policy, People with Disability Australia, *Committee Hansard*, 27 September 2023, p. 42.

out how there are many policies within the federal government's responsibility, such as taxation policy, regulation and resource allocation to the states and territories, and concluded:

> That said, it is clear that the most effective way to protect the right to housing in Australia will be through effective coordination and cooperation among all levels of government. For this reason, harmonisation and coordination between States and Territories, and the Federal Government will be important in making any federal human rights legislation successful. Federal human rights legislation might also provide a model for those States and Territories that do not already have human rights legislation, pointing again to the importance of having a strong Federal model.[389]

8.223 In relation to uniform schemes and federal-state co-operative schemes the AHRC's model proposes that in practice a federal HRA's effect on such schemes could be 'dealt with on a case-by-case basis' with 'agreements to adopt the Human Rights Act in application to those specific laws, or exemptions made'. Further, in relation to state authorities that exercise public functions on behalf of the federal government, the AHRC noted these 'may fall under the jurisdiction of both federal and state human rights instruments' and that this could also be dealt with on a case-by-case basis 'including through memorandums of understanding or the clarification of obligations through regulations'.[390] Professor Byrnes also submitted that when proposals are being formulated as part of a joint scheme or harmonised legislation there would be an obligation on jurisdictions with a HRA 'to make sure it is subject to a proper human rights scrutiny, and so far as possible within that framework to comply with human rights'.[391]

8.224 In addition Mr Graham Edgerton from the AHRC noted that if the Commonwealth were going to provide grants to the states and territories and that funding was tied to certain commitments, a federal HRA should mean that the obligations it chooses to impose on states should be compliant with human rights.[392] Professor Byrnes also noted there may be possibilities for the federal

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[389] Associate Professor Jessie Hohmann, Economic, Social and Cultural Rights Network, answer to question on notice 20 October 2023 (received 10 November 2023).

[390] Australian Human Rights Commission, *Free and Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 243–244. See also, National Human Rights Consultation, *Report*, September 2009, pp. 306–307.

[391] Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 49.

[392] Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, 27 September 2023, p. 67.

government to include human rights considerations in funding envelopes when making grants to the states and territories.[393]

[393] Emeritus Professor Andrew Byrnes, Professor of International Law and Human Rights, Australian Human Rights Institute, University of New South Wales, *Committee Hansard*, 27 September 2023, p. 46.

Chapter 9
Committee views and recommendations

Overview

9.1 Australia is a robust multicultural democracy with a strong tradition of believing in a 'fair go' for all. For many, our current system of rights protection, across the common law, Constitution and legislation, is sufficient to protect their interests. We have a system of governance, representative democracy and separation of powers that we can rightly be proud of. Yet, for those whose rights are not protected in practice, the lack of a comprehensive and enforceable federal human rights framework is striking. Submissions not only to this inquiry, but to the many others that have preceded it, are clear. There are significant human rights problems in Australia that must be addressed, ranging from our relationship with Aboriginal and Torres Strait Islander peoples, protection of privacy in the digital age and the treatment of minority groups (see chapter 4 for detailed consideration of the concerns raised by submitters). The committee acknowledges that the founding of this country was based on the abuse of human rights of the First Peoples of this land, who were the first custodians and defenders of human rights, and recognises the special significance of human rights for Aboriginal and Torres Strait Islander peoples. This includes the right to self-determination which includes the rights held in collective possession by the members of the Aboriginal and Torres Strait Islander nations which confers usage, access and custodianship to the lands, waters, minerals and natural resources of Australia.

9.2 The committee has been tasked with reviewing the scope and effectiveness of Australia's Human Rights Framework (Framework), released in 2010, and whether it should be re-established or improved. In undertaking this task, it is important to consider that the Framework was developed in response to the 2009 National Human Rights Consultation. This consultation was established with the aim of determining whether human rights are sufficiently protected and promoted in Australia. During the ten months of consultation in 2009, over 35 000 submissions were received (the largest number for any national consultation in Australia), and about 6 000 people registered to attend 66 community roundtables held in 52 locations around Australia. The consultation committee met with a variety of organisations and experts, commissioned dedicated social and economic research, and focus groups, and facilitated an online forum. After 10 months of listening to the people of Australia, the consultation committee reported that they were 'left in no doubt that the protection and promotion of human rights is a matter of national importance' but that our current system does not always ensure human rights are adequately protected. The consultation committee found a lack of

understanding among Australians of what human rights are and, in addition to recommending a significant investment in human rights education and reforms to parliamentary scrutiny, the consultation committee's main recommendation was that Australia adopt a federal Human Rights Act (HRA). Yet the 2010 Framework failed to commit to a HRA on the basis that, despite significant support for it, a HRA may divide the community.

9.3 The 2010 Framework is now largely non-existent. The only lasting part of the Framework was that established via legislation – namely the creation of this committee and the requirement for statements of compatibility to accompany legislation. All other aspects of the Framework were abandoned shortly after its adoption following a change of government. By failing to legislate an enforceable requirement for government to consider people's rights when making decisions, the Framework's aims, while laudable, were largely ineffective.

9.4 In the 15 years since the National Consultation on Human Rights, it does not appear that an understanding of, and commitment to, human rights have become a part of everyday life in Australia. Given funding for community education and engagement programs was discontinued over a decade ago, and based on the evidence to this inquiry, it seems likely that the findings of the National Consultation that 'Australians know little about their human rights – what they are, where they come from and how they are protected',[1] remains as relevant in 2024 as it did 15 years ago. Since the Framework was launched, there have been multiple examples of the failure of our federal institutions to adequately consider people's human rights, notably exposed by royal commissions into Robodebt; the violence, abuse, neglect and exploitation of people with disability; and aged care quality and safety. The federal government's response to the Covid-19 pandemic also largely failed to reference the importance of respecting human rights.

9.5 Over the past five years, the Australian Human Rights Commission (AHRC) has been working to identify the principles and key elements that would make up an effective system of human rights protection in Australia. It has held conferences, workshops, roundtables and consultations with hundreds of participants, and has put forward a dialogue model for a statutory Human Rights Act, designed to help ensure that laws, policies and decisions are made through a human rights lens. The recent Disability Royal Commission also recommended a national Disability Rights Act, building on the AHRC's model for a HRA.

9.6 The statutory model of a HRA respects parliamentary sovereignty – ensuring our elected representatives can continue to make the laws Parliament deems necessary. But with a HRA in place, Parliament would need to expressly

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1 National Human Rights Consultation, *Report*, September 2009, p. v.

consider human rights when making laws, and importantly, public authorities, including government departments, agencies and the Australian Federal Police, would need to consider rights when making decisions and act compatibly with rights (unless Parliament had directed them to do otherwise). Submitters to this inquiry were overwhelmingly in favour of the introduction of a HRA – of the 335 submissions received, 87 per cent supported the introduction of a HRA and only four per cent either opposed having a HRA or opposed the AHRC's specific model. Over 4 000 campaign letters were also in support. This aligns with submissions to the 2009 National Human Rights Consultation, where, of the more than 32 000 submissions that considered whether Australia should have a HRA, over 85 per cent were in favour.[2]

9.7 The committee considers that there is a clear need for a rights-based legal framework. Our current piecemeal approach to human rights protection is not adequate to ensure rights and freedoms are properly respected, protected or promoted. The committee considers that a HRA would be a framework by which the public sector can look at legislation, policies, practices and service delivery and consider their impact on individuals. The 2010 Framework failed to ensure human rights were made real in everyday decision-making – the current approach appears to restrict human rights considerations as an afterthought, a last-minute tick of approval at the end of the legislative process, and not embedded in the public sector's culture. The committee considers that a HRA could help embed a rights-respecting culture by creating an expectation that human rights will be considered throughout the process, where considering the effect of government action on individuals becomes an upfront consideration, embedded ahead of any dispute.

9.8 Australia is the only liberal democracy not to have a national Act or Charter of human rights protection. Evidence from other jurisdictions, both within Australia and internationally, is that the floodgates have not opened – a HRA has not led to overwhelming litigation or a 'lawyer's picnic'. Under the AHRC model, supported by the committee, a person affected by a public authority's actions could bring a complaint to the AHRC for conciliation, and if that fails, to the federal courts. As with all laws, judges would then, in a small number of cases, need to consider the application of the HRA in those individual circumstances. This is something our courts do every day when interpreting statutes, the Constitution or applying common law principles, and the committee considers it appropriate for the courts to adjudicate disputes regarding a HRA that cannot be solved via conciliation. Of course, if Parliament has authorised the public authority to act in a way that is incompatible with rights, the duties under the HRA would not apply. This is also appropriate within the model that protects parliamentary sovereignty. The committee does

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2 See National Human Rights Consultation, *Report*, September 2009, p. 6.

not agree that rights protection should sit within the Constitution as is the case with bills of rights, such as in the United States of America. The committee considers the preferable model is that which retains parliamentary sovereignty and opens up a dialogue between the branches of government, rather than allowing judges to strike down laws. The committee considers that the AHRC model, on the whole, strikes the right balance between protecting individual rights and freedoms and respecting parliamentary sovereignty and our constitutional system.

9.9 While a HRA is essential to ensure rights protection is enforceable, simply having the law is not enough to achieve human rights protection. There needs to be a more coordinated and consistent framework to build a rights respecting culture. As such, the committee considers that a National Human Rights Framework should be reestablished. Such a framework should encompass a HRA, but should additionally have a focus on education – to educate the community, including school children, as to their rights and protections under Australian law. As already mentioned, the committee considers that a HRA will help to build a culture to make human rights real in everyday interactions with government – but this will require leadership, ongoing training of the public sector and process changes to properly embed rights considerations in decision-making. The committee also sees the role of this committee, and the AHRC, as essential in building that rights culture and considers a human rights framework should include enhancements to both. The committee also considers that there is a need to do what was committed to under the 2010 Framework but never carried out – namely, a review of existing federal legislation for compliance with human rights. Finally, the committee considers there are a number of measures that should be taken to monitor Australia's progress on implementing its human rights obligations, which should also form part of the framework. The committee's specific recommendations regarding these are set out in more detail below.

9.10 In recommending a revised and expanded National Human Rights Framework, it is important to note that not all human rights concerns existing in Australia can be solved by a federal framework of protection. While Australia owes obligations under its international treaties to respect, protect and promote human rights to everyone within its jurisdiction, Australia's model of federation means it is not within the federal government's power to address concerns falling within the remit of the states and territories. For example, concerns regarding over-policing of Aboriginal and Torres Strait Islander communities; prisoners and children in youth detention; state and territory-based lockdowns during the COVID-19 pandemic; discrimination against the LGBTIQA+ community in home rental and health care; gender-based violence; lack of support for victim-survivors of crime; access to justice; and homelessness all do not neatly fall within the federal government's jurisdiction. Residents of Victoria, Queensland and the ACT can rely on their state or territory based

HRAs to seek to enforce human rights breaches arising at the state and territory level. But residents of the other states and territories have no such recourse, and a federal framework will not directly help them in dealing with state and territory public authorities. The committee is concerned that a number of submitters appeared to believe that a federal HRA could solve some of these concerns, and considers it is imperative that community education programs should make clear the different roles of the federal and state and territory governments in this area. The committee also considers that, over time, progress should be made towards all states and territories having their own HRA to ensure all Australians receive the same protection of rights regardless of residence.

Recommendation 1

9.11 The committee recommends that the government re-establish and significantly improve Australia's Human Rights Framework, which should include:

- **comprehensive and effective protection of human rights in legislation, through the establishment of a Human Rights Act;**
- **a significant and ongoing commitment to national human rights education;**
- **requirements for public servants to fully consider human rights in the development of legislation and policies;**
- **enhancements to human rights parliamentary scrutiny;**
- **enhancements to the role of the Australian Human Rights Commission;**
- **review of Australia's legislation, policies and practices for compliance with human rights; and**
- **measures to monitor progress on human rights.**

Human Rights Act

9.12 The committee received a significant amount of evidence regarding what a HRA should look like. The committee's starting point, when seeking submissions, was to ask submitters whether we should enact a federal HRA and if so, what elements it should include – particularly by reference to the AHRC's proposed model. The committee considers the AHRC's model should be the starting point, noting the significant amount of time and work done in developing it. Most submitters supported the AHRC's model, however, there were varying degrees of support for specific elements of the model, including about how particular rights were framed.

9.13 On the whole, the committee considers the AHRC's model provides a balanced approach between ensuring appropriate protection of rights and providing a workable model that respects parliamentary sovereignty. There are aspects of the model the committee considers could be improved, as detailed below. In

order to promote understanding of the proposed HRA model, the committee has provided (in Appendix 5) a draft bill setting out how a HRA could look. In doing so, the committee has taken the wording used in the AHRC model and an amalgamation of provisions from the ACT, Victorian and Queensland HRAs and noted where further work would need to be done. The committee intends its draft bill to be a useful starting point for government to further develop a HRA based on advice contained in submissions to this inquiry and having received advice from the Australian Government Solicitor.

What rights to protect?

9.14 The AHRC's model for a HRA would incorporate human rights derived from the core international human rights treaties to which Australia is party. This would include civil and political rights as well as economic, social and cultural rights. The committee considers that the AHRC's model would effectively protect the vast majority of human rights. In particular, the AHRC's model comprehensively protects most civil and political rights, with a few exceptions. The committee notes that the AHRC has suggested including the right to self-determination within a preamble as an overarching principle of a HRA rather than a stand-alone right due, in part, to the vagueness and complexity of the term. The committee acknowledges the complexity of including this right within a HRA, particularly noting it is a collective right of 'peoples' rather than individuals. However, noting the particular significance of this right to Aboriginal and Torres Strait Islander people, the committee considers further legal advice should be sought as to whether the right to self-determination could be included in a HRA as an enforceable collective right, including advice from relevant Aboriginal and Torres Strait Islander experts.

9.15 Regarding economic, social and cultural rights, the committee considers the AHRC's model to be a sound and balanced starting point. The committee reiterates that human rights are indivisible and interrelated. Many civil and political rights cannot be fully realised without the fulfilment and protection of economic, social and cultural rights. For this reason, the committee considers that it is essential that economic, social and cultural rights be protected in a federal HRA. Indeed, so much of what people experience as human rights breaches in their everyday life relate to economic, social and cultural rights. The recent royal commissions into Robodebt; the violence, abuse, neglect and exploitation of people with disability; and aged care quality and safety, demonstrated that people's rights to social security; health; an adequate standard of living; and the rights of older people and persons with disability, need better protection. Protecting these economic, social and cultural rights in a HRA is necessary to ensure that every Australian can access the basic necessities to live a dignified life and reach their full potential. In doing so, Australia would more fulsomely comply with its obligations under international law to respect, protect and promote human rights.

9.16 As to the specific economic, social and cultural rights that should be protected, the committee agrees with the AHRC's proposal to include the rights to education, health, work, culture, an adequate standard of living, social security and a healthy environment. The committee notes that state and territory HRAs protect a number of these rights but not all. In this regard, the AHRC's model would afford greater protection to economic, social and cultural rights than equivalent state and territory HRAs. The committee considers this more expansive approach to be necessary given the fundamental importance of these rights to the everyday lives of Australians. It also provides the Commonwealth with an opportunity to show leadership on this issue. The committee acknowledges that while the protection of certain rights, such as the rights to housing and education, would more clearly fall within the jurisdiction of state and territory governments the Commonwealth nonetheless has an important role to play in realising these rights through policy, grants and regulation. Importantly, notwithstanding the division of responsibilities between the federal, state and territory governments, the obligation to protect these rights under our international treaty obligations ultimately falls on the Commonwealth.

9.17 Further, the committee supports the AHRC's proposal to include the right to a healthy environment. The committee considers that protecting the right to a healthy environment is indispensable for realising other human rights. Access to safe and uncontaminated water, and clean air and soil, are necessary preconditions to realise the rights to health and an adequate standard of living, for example. Likewise, a failure to protect the environment can lead to the violation of human rights, such as the rights to a private life and culture. The committee also notes that this right is recognised in the domestic legislation of approximately 80 per cent of UN member states and is being considered for inclusion in the ACT *Human Rights Act 2004*.

9.18 In considering how to frame economic, social and cultural rights in a federal HRA, the committee needed to think about potential constitutional issues. A key issue was whether these rights could be framed in a way that is sufficiently definite and judicially manageable so that they are compatible with the Constitution. Based on the evidence received, including from leading legal experts, the committee considers that economic, social and cultural rights are likely to be justiciable and can be framed in a constitutionally sound manner. Nevertheless, the committee agrees with the AHRC's suggestion to seek updated advice from the Solicitor-General on this question in order to avoid potential constitutional challenges.

9.19 In light of these constitutional issues, the AHRC model suggests framing economic, social and cultural rights more narrowly to include the essential and immediately realisable aspects of these rights. The model further proposes to *not* require the courts to consider progressive realisation principles with respect to

economic, social and cultural rights. The committee notes that the progressive realisation of economic, social and cultural rights involves complex decisions about resource allocation and public policy. The committee agrees with the AHRC that these decisions are best left to the government and the Parliament, not the courts. There are various ways outside the courts in which economic, social and cultural rights can be progressively realised, such as through the establishment of effective processes for monitoring the implementation of rights, including by setting human rights indicators and benchmarks. The committee considers such measures to be of vital importance given Australia's general obligation under international human rights law to progressively realise these rights. The committee suggests, however, that this approach to progressive realisation be reviewed within five years to ensure it is working as intended.

9.20 The committee further considers that the immediately realisable aspects of economic, social and cultural rights should be protected. Obligations with immediate effect include requiring the government to ensure that people enjoy economic, social and cultural rights without discrimination; satisfy, at the very least, certain minimum aspects of these rights; and not take backwards steps (known as 'retrogressive measures') with respect to these rights. The committee considers that it is particularly important that a HRA incorporate the presumption against retrogressive measures. This would mean that public authorities would have a duty to not unjustifiably take deliberate steps that would negatively affect the enjoyment of those economic, social and cultural rights protected in a HRA (unless Parliament has directed them to do otherwise). In the committee's experience, economic, social and cultural rights are most frequently limited when backwards steps are taken.

9.21 With respect to the proposed wording of the rights, the committee notes that the AHRC model largely reflects the wording used in equivalent provisions in state and territory HRAs, with some adjustments to clarify or better reflect international law. Some submitters raised concerns that the AHRC model diverges too substantially from the text of the international treaties and in doing so restricts the scope of certain rights or possibly assigns new meaning to certain rights. For example, some submitters were concerned that the AHRC's model extensively redrafted the right to freedom of religion such that there was no differentiation between those elements of the right that are absolute and those that may be subject to permissible limitations, and certain elements of the right were removed and incorporated into other rights. Some submitters were also concerned that the AHRC's proposed rewording of the prohibition of torture or cruel, inhuman or degrading treatment or punishment, protected in article 7 of the ICCPR, may have the effect of broadening the scope of the right and altering its meaning. The committee considers that many of these concerns can be alleviated through careful drafting of civil and political rights, including the right to freedom of religion and the prohibition of torture or cruel, inhuman or

degrading treatment or punishment, to ensure the rights fully align with international human rights law, including with respect to absolute rights.

9.22 The committee notes that similar concerns were also raised with respect to the proposed wording of certain economic, social and cultural rights, including the right to a healthy environment. The committee acknowledges the challenge of drafting these various rights in a way that is consistent with international law and, where appropriate, sufficiently flexible to evolve in line with international human rights law jurisprudence, while ensuring the rights are precise enough to be constitutional as well as being sufficiently clear so that public authorities can interpret and apply the rights. The committee considers that, so far as is constitutionally possible, the economic, social and cultural rights should reflect international human rights law (except with respect to the principle of progressive realisation) and should include the immediately realisable aspects of these rights.

9.23 Finally, the committee notes that the AHRC's model does not include certain rights contained in the treaties. In particular, the right of aliens not to be expelled without due process and the prohibition against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, protected in articles 13 and 20 of the International Covenant on Civil and Political Rights (ICCPR) respectively, are not expressly protected in the AHRC's model. Further, the right of all persons to take part in cultural life and enjoy the benefits of scientific progress and its applications as provided under article 15 of the International Covenant on Economic, Social and Cultural Rights (ISESCR) is missing from the AHRC model. The committee considers that the rights in articles 13 and 20 of the ICCPR and article 15 of the ICESCR should be captured in any HRA, either through embedding the substance of the right in related rights or protecting them as stand-alone rights.

9.24 The committee also received evidence that other rights relating to specific groups, such as Aboriginal and Torres Strait Islander people, children, people with disabilities, older persons and victim-survivors of crime, should be protected in addition to those rights set out in the AHRC's model. The committee acknowledges the importance of protecting the rights of specific vulnerable groups, particularly in light of their experience of systemic discrimination. However, the committee considers that the AHRC's model would adequately protect the rights of these specific groups, noting that many of these specific rights are drawn from the core rights contained in the ICCPR and the International Convention on Economic, Social and Cultural Rights (ICESCR). The committee also notes that those rights proposed for inclusion in a HRA would apply to all persons without discrimination. There are also some rights that would afford protection to specific groups, such as the rights protecting children and the right to culture for Aboriginal and Torres Strait Islander peoples. Additionally, an interpretive clause would require a HRA to

be interpreted in light of international human rights instruments, which would include subject matter specific treaties such as the Convention on the Rights of Persons with Disabilities and the United Nations Declaration on the Rights of Indigenous Peoples. The committee understands that applying this interpretive clause in practice is a complex task, particularly in light of the volume of international human rights law. The committee therefore suggests that a HRA include notes referring to the equivalent rights in subject matter specific treaties. For example, with respect to the right to recognition and equality before the law, a note could refer readers to the equivalent article 12 in the Convention on the Rights of Persons with Disabilities, which reaffirms the right of people with disability to recognition everywhere as persons before the law and the right to enjoy legal capacity on an equal basis with others in all aspects of life. The right to culture, for example, could include a note referring to the relevant provisions in the United Nations Declaration on the Rights of Indigenous Peoples. The committee also considers that a HRA should be accompanied by detailed guidance material, which clearly sets out the nature and content of each right and how the rights are to be interpreted in light of international human rights law, including with specific reference to the various subject matter specific treaties and related jurisprudence.

A Human Rights Act model

9.25 The AHRC's model for a HRA outlines the key features which would govern who the Act would protect, who it would impose obligations on, and how people could make complaints and access remedies if their rights under the Act were to be breached. Broadly speaking, the committee considers the adoption of such a model would be a sensible and appropriate first federal HRA, one which could be reviewed and amended over time as necessary. The committee below summarises the AHRC's model and sets out what the committee considers the HRA should cover.

Jurisdiction and commencement

9.26 A HRA should protect all people within Australia's territory without discrimination, meaning that it should apply to citizens and non-citizens in Australia. It should also apply in relation to people outside Australia's geographical territory, but who are nevertheless subject to Australia's jurisdiction (including when they are located overseas but subject to Australia's effective control). This kind of extended geographical jurisdiction applies to many federal Australian laws, and it would be appropriate for it to apply under a HRA.

9.27 The committee considers that providing for a minimum twelve-month transition period before the HRA comes into force, after Royal Assent, would be prudent. It would provide time for specialised resources to be developed,

training programs to be developed and delivered, and public authorities to familiarise themselves with their new obligations.

Coverage

9.28 A HRA should apply only to federal laws. As noted above, Australia's model of federation means that the federal government does not have the power to regulate matters that fall within the remit of the states and territories. As such, a federal HRA should not (and constitutionally, could not) apply in relation to state laws, such as a Western Australian law relating to state prisons, or a South Australian law regulating state hospitals. Equally, state and territory human rights laws should continue to operate unaffected by the introduction of federal human rights protection.

A positive duty on public authorities

9.29 A federal HRA should apply to public authorities. It should impose obligations on federal departments, agencies and other federal public bodies. It should also apply to organisations such as private businesses, non-government organisations and contractors where they are performing public functions. The AHRC indicated that there were constitutional concerns associated with such a duty applying to federal courts. However, the committee also heard evidence suggesting that this could be resolved and there are benefits in the courts developing the common law in line with human rights. The committee considers that the government should seek advice on whether courts could be included in the definition of public authorities. Businesses and organisations should be able to voluntarily opt in to accept responsibility to comply with a HRA.

9.30 A federal HRA should impose a positive duty on these public authorities, requiring them: to act in a way that is compatible with the human rights included in the HRA; and to give proper consideration to those rights when making decisions. It should also impose two procedural duties: a binding procedural obligation to engage in participation processes where a decision disproportionately affects the rights of Aboriginal or Torres Strait Islander people, people with disability, or children. With time, consideration should be given to whether similar consultation should be required in relation to further groups. The committee considers that a significant amount of work would need to be undertaken to flesh out the specific aspects of this duty (for example, which groups public authorities would need to consult with, how that is to be determined and at what threshold groups or individuals are likely to be 'disproportionately affected' by a decision). Extensive guidance material would also need to be developed by the government to assist public authorities to understand the obligations under this duty.

9.31 It should also include a positive duty on public authorities to realise access to justice principles, including by providing (for example) sufficient access to legal

assistance, interpreters and disability support to people navigating the justice system. This would not affect all public authorities in practice.

9.32 This positive duty would not apply where the public authority could not reasonably have acted differently or made a different decision in accordance with the law. If a law, such as an Act of Parliament, requires the decision-maker to take certain actions, the duty on the public authority to act compatibly with human rights or consider human rights would not apply. This would preserve parliamentary sovereignty.

Limitations on rights

9.33 Most human rights may be subject to permissible limitations, broadly where those limitations are reasonable, necessary and proportionate, but subject to a number of specific considerations in relation to individual rights. While a federal HRA must recognise that most rights may be limited, practically it would be a challenge to replicate the myriad specific limitation criteria in relation to specific rights. A federal HRA should include one general limitation clause based on the tests at international human rights law, and excluding those rights (and aspects of rights) which are absolute and may never be limited under international law. Legislative notes in relation to specific rights that have specific limitations clauses under international law could be added where relevant (for example, the right to freedom of religion can only be limited on the basis of certain specific grounds).

Interpretive clause

9.34 A federal HRA should include a clause directing that it is to be interpreted by reference to international law. This would ensure that it continues to reflect international law as it develops over time. It would also ensure that the rights contained in specific treaties, such as UNDRIP or the Convention on the Rights of Persons with Disabilities, would form part of how the rights are to be interpreted (as set out above). Further, it should include a direction that all Commonwealth legislation is to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.

Incompatible federal laws

9.35 Australia's state and territory HRAs provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights through applying the interpretive clause, it may issue a 'declaration of incompatibility' to notify Parliament that a law is considered incompatible, and trigger a review of the law. The AHRC model does not propose including this as it is likely to be unconstitutional at the federal level. The AHRC proposed an alternative to address this constitutionality issue – namely, that where a court has found a parliamentary intention to override human rights contained in a HRA, the Attorney-General should be required to trigger a process for reviewing the law in question. However, the committee received evidence that this may also raise

constitutional issues. As such, the committee considers that where a court has found that a federal law is incompatible with the federal HRA, there should be no formal trigger in legislation. Instead, the Attorney-General's Department (AGD) should, as a matter of practice, review all cases involving the HRA and this should be considered as part of the process of review of legislation and be considered by the Secretaries Board (see recommendations 16 and 9).

9.36 The Victorian and Queensland HRAs both include provisions providing that Parliament may expressly declare that an Act, or a provision of an Act, has effect despite being incompatible with one or more human rights (an 'override provision'). Based on the evidence to the committee, the committee does not propose that a federal HRA should include such an override provision. This does not mean that the Parliament may not make legislation which cannot be interpreted in a way that is inconsistent with rights included in a HRA, but rather that it may not expressly override its operation.

Enforcement

9.37 A federal HRA should enable a person to make a complaint to the AHRC for conciliation and enable them to bring a stand-alone cause of action to the federal courts. While most complaints should begin with conciliation, there will undoubtedly be circumstances in which conciliation would not be appropriate, and so going to court directly should also be possible. Both individuals and representative bodies should have legal standing to bring claims under a HRA, and the Act should include protection for individuals from adverse costs orders. The committee notes that the AHRC's model provides limited discussion as to the precise nature of such orders, and the committee considers that the recent review into an appropriate cost model for Commonwealth anti-discrimination laws could apply in relation to cases taken under a HRA.

9.38 The AHRC considered that ordinary judicial review could proceed either as an alternative to, or in addition to, a direct cause of action under the HRA. However, the committee heard expert legal evidence raising some concerns as to how judicial review of a decision under the HRA should best be expressed. The committee considers that it would be prudent for the government to obtain legal advice in relation to this question.

9.39 The AHRC also recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation in the AHRC and litigation in the federal courts, in relation to unlawful discrimination matters. The committee noted evidence suggesting that there may be scope for the AHRC (or another body) to be validly granted such a power. Noting, however, the constitutional and other legal issues associated with this, and given the significance of the proposal, the committee

considers that it would also be prudent for the government to obtain legal advice in relation to this.

Remedies

9.40 A court should have the discretion to order a range of remedies under a HRA, including injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions. The committee considers that the availability of damages should be subject to clear guidance. Further, flexibility as to remedies will be crucial to the effective operation of a HRA. In this respect, consideration should be given to the availability to provide for remedies to address systemic human rights issues (such as, inquiries or class actions) (see further recommendation 14 regarding the AHRC's role).

Review of HRA

9.41 Lastly, a HRA should include a provision requiring it to be reviewed after five years operation. There may be aspects of a HRA which do not operate as intended, or in the most effective manner possible, or rights not adequately protected. A review would be a critical to ensure this can be considered, and would provide an opportunity for members of the community and civil society to provide structured feedback regarding its operation, and suggest amendments where necessary. The committee considers, in particular, that the review could consider whether progressive realisation principles should be incorporated and whether additional rights (and/or additional or revised participation or consultation obligations) relating to specific groups, such as Aboriginal and Torres Strait Islander people, people with disability, children, older persons and victim-survivors of crime, should be included.

Recommendation 2

9.42 The committee recommends that the government introduce legislation to establish a Human Rights Act. The committee considers the bill should broadly reflect the model proposed by the Australian Human Rights Commission, with the following modifications and considerations (the committee has prepared an example Human Rights Bill, see Appendix 5, in order to promote understanding of this proposed model):

- **ensure the drafting of all rights and freedoms:**
  - **is consistent with international human rights law (except with respect to the principle of progressive realisation in relation to economic, social and cultural rights). This should include ensuring rights, such as the right to freedom of religion and the prohibition of torture or cruel, inhuman or degrading treatment or punishment, are drafted consistently with the provisions of the International Covenant on Civil and Political Rights;**

  - **includes legislative notes where relevant to indicate if more specific limitation criteria apply under international human rights law to those rights (for example, the right to freedom of religion);**
  - **captures the immediately realisable aspects of economic, social and cultural rights, including obligations to ensure people enjoy rights without discrimination; satisfy certain minimum aspects of these rights; and not take backwards steps (or 'retrogressive measures') with respect to these rights;**
  - **captures the right of aliens not to be expelled without due process; the prohibition against advocacy of national, racial or religious hatred; and the right of all persons to take part in cultural life and to enjoy the benefits of scientific progress and its applications;**
  - **includes, where appropriate, notes referring to the elaboration of these rights in other United Nations (UN) treaties and the United Nations Declaration on the Rights of Indigenous Peoples, and is accompanied by detailed guidance materials to assist public authorities in interpreting and applying the law;**
- **consult with Aboriginal and Torres Strait Islander peoples in relation to the framing of Indigenous peoples' right to culture to ensure it adequately captures all applicable rights under international human rights law;**
- **further consideration be given to the drafting of the right to a healthy environment, including consultation with Aboriginal and Torres Strait Islander peoples on how best to recognise the relationship between the right to a healthy environment and the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander peoples;**
- **allow cases to be brought directly to a federal court, without the need for conciliation, when conciliation is not appropriate;**
- **specific provision should be made to protect individuals from adverse costs orders when bringing action against public authorities under a HRA, in line with the government's proposed equal access cost protection provisions for federal anti-discrimination claims (see Australian Human Rights Commission Amendment (Costs Protection) Bill 2023); and**
- **the first review of the Act should specifically be required to consider whether:**
  - **progressive realisation principles should be incorporated; and**
  - **additional rights relating to specific groups, such as Aboriginal and Torres Strait Islander people, people with disability, children, older persons and victim-survivors of crime, should be included.**

Recommendation 3

9.43 The committee recommends the government seek legal advice as to:

- **whether the collective right to self-determination could be recognised as a stand-alone right in a Human Rights Act (HRA);**
- **whether requiring the Attorney-General to monitor court cases involving a HRA and reporting to Parliament would raise constitutional issues;**
- **the appropriateness of including compliance with duties under a HRA as part of a judicial review claim;**
- **whether including courts in the definition of public authorities would raise constitutional issues; and**
- **whether there is a constitutionally sound way of reintroducing an intermediate adjudicative process that could determine complaints under the proposed HRA (a process sitting between conciliation by the Australian Human Rights Commission and litigation at the federal courts).**

Recommendation 4

9.44 The committee recommends the government consult with Aboriginal and Torres Strait Islander people, people with disability, children's groups, civil society and other experts on how the proposed participation duty and equal access to justice duty should operate, including whether it adequately captures the principle of free, prior and informed consent. Following this, the committee recommends the government develop detailed guidance material to assist public authorities to understand their specific obligations under these duties.

National human rights education

9.45 As set out above, the committee thinks it is imperative that people understand what human rights are and how they are protected. It is concerning that surveys show that half of all Australians think that Australia already has a HRA (with only 15 per cent being aware that we do not).[3] The National Human Rights Consultation recommended that education be the highest priority for improving and protecting human rights in Australia, on the basis that human rights are not well understood by the Australian community and that any meaningful change to human rights protection and a fair go for everyone depends on improving levels of understanding and reducing levels of fear and ignorance. Yet, in the 15 years since that report, human rights education has not been prioritised.

9.46 The committee considers there is an urgent need to fund the AHRC and non-government organisations to make training available to all sectors of the community, including the private sector and media. In doing so, the committee considers that this should be done in consultation with different community groups, including Aboriginal and Torres Strait Islander people, having due

[3] See Amnesty International Australia, *Submission 213*, p. 5, referencing Amnesty International Human Rights Barometer 2022.

regard for the importance of divergent traditions and their points of intersection with the values that underwrite a commitment to human rights. The respective roles of the federal government and the states and territories in protecting rights within our constitutional structure should also form part of such an education program.

9.47 Submitters also discussed the importance of human rights education in schools. The committee considers human rights awareness should be fully incorporated into the Australian curriculum. The committee considers that one of the values of a domestic federal HRA is that it not only sends a clear signal that these rights exist, it also brings those rights together in one readily accessible location.

9.48 The committee notes that pursuant to the 2010 Framework less than $1 million in grants were made available to non-government organisations to develop community education and engagement program, and $6.6 million was provided to the AHRC over four years to expand its community education role (but this was discontinued after four years). The committee does not consider this sufficient funding to deliver on the commitment to promoting awareness and understanding of human rights in the Australian community. A genuine commitment to respecting, protecting and promoting human rights in Australia requires a sustained commitment to significant and ongoing funding for such education.

9.49 The committee also notes with disappointment that the significant work undertaken by the National Human Rights Consultation in 2009 appears largely lost to the public. During that consultation tens of thousands of submissions were received, research and legal advice commissioned, and a 500 page report released – none of which are now available on any government hosted website. The committee considers this important work should form part of the educational resources available to the community.

Recommendation 5

9.50 The committee recommends that the government commit to:

- **significant and ongoing funding of human rights education for the community, including in primary and secondary schools; and**
- **appropriately funding the Australian Human Rights Commission and representative non-government organisations to develop educational programs and resources.**

Recommendation 6

9.51 The committee recommends that the Attorney-General's Department republish on its website the 2009 National Human Rights Consultation report, associated submissions and commissioned research to operate as an

educational resource, reflecting the large body of work done in reviewing the state of human rights in Australia.

Cultural change

9.52 Our late committee member, Ms Peta Murphy MP, put the proposition during the hearings for this inquiry that the benefit of a HRA 'is not necessarily the litigation that one might be able to commence based on it, but the benefit of driving a human rights culture within the Public Service'.[4] The 2010 Framework had the laudable aim of fostering human rights awareness in the Commonwealth public service and bringing human rights to the forefront in the development of policies and legislation. However, without a culture of human rights or a statutory obligation on public officials to comply with human rights, the evidence to this committee is that there is a patchy understanding of human rights within government and the internal processes for developing policies and legislation see human rights considerations tacked on at the end – justifying how legislation is compatible with rights, rather than genuinely considering how rights can best be respected.

9.53 The committee has observed over its 12-year history that while there is some understanding within the public service of certain human rights, this varies greatly across departments and agencies, including portfolios whose legislation regularly engages human rights. In addition, submitters raised concerns that while this committee does an excellent job of advising the Parliament as to the compatibility of legislation with human rights, this often does not translate into legislative amendments. Indeed, the committee's observation is that, with some few exceptions, once legislation is before the Parliament, the responsible department or agency seems largely intent on justifying to their minister why the legislation was developed as it was, and any amendments suggested by the committee to improve human rights, no matter how minor or seemingly uncontroversial, are vigorously opposed. It is clear that there needs to be a seismic cultural shift within the public service to mainstream human rights and ensure they are considered at the very earliest stages of policy and legislative development. The committee considers this can only be achieved in reality with the introduction of binding obligations on public authorities under a HRA; comprehensive and sustained training programs and resources for the Commonwealth public sector; and a commitment by senior leaders within government and Parliament to respect, protect and promote human rights. The committee considers this will require significant and sustained funding across a number of bodies to embed this change and ensure these reforms can be made realisable in practice.

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4 Ms Peta Murphy MP, *Committee Hansard*, 27 September 2023, p. 28.

Recommendation 7

9.54 The committee recommends that the government commit to significant and sustained funding to ensure greater respect for individual rights and freedoms, in particular by ensuring:

- **the Australian Human Rights Commission is effectively and sustainably funded to perform its community educative role, help lead cultural change within public authorities to better respect human rights, and conciliate human rights complaints;**
- **departments and agencies are appropriately resourced to develop internal human rights understanding and the Human Rights Office within the Attorney-General's Department is adequately resourced to establish a centre of expertise to provide whole-of-government human rights advice;**
- **sufficient resources and expertise are provided to support the work of the Parliamentary Joint Committee on Human Rights; and**
- **non-government organisations, including those providing legal services, are sufficiently funded to allow them to advance human rights protection.**

Training

9.55 If public officials do not fully understand their obligations to respect and protect human rights, it is unlikely, as recently highlighted by the Robodebt Royal Commission, they will always do so. A HRA would make it an obligation on public authorities to act compatibly with human rights and give proper consideration to rights when making decisions. This duty would apply to anyone performing public functions, including public servants, the Australian Federal Police, regulatory bodies, and bodies acting on behalf of government, such as those providing federal disability or aged care services. If they are to be bound by these obligations, the committee considers it essential that appropriate training be made available to allow them to understand their specific obligations. Human rights considerations can provide a useful framework for policy development, forcing policy makers to focus on the policy objective, identify how human rights may be positively or adversely impacted and explore ways to minimise adverse impacts on human rights while still achieving policy objectives.

9.56 The committee considers there to be a particular need for all Australian Public Service (APS) employees to have an understanding of their human rights obligations, and considers it should be mandatory for all APS employees to have at least basic human rights training. However, the committee considers the provision of *basic* training is unlikely to be sufficient for public sector staff that are: providing services to the community (including the Australian Federal Police); developing policies in areas likely to engage human rights (for example, social security or data collection); and developing legislation. In such cases the committee considers that tailored training and resources should be developed to assist public sector staff to understand when rights are likely to be engaged

and if rights can be permissibly limited. The committee also considers it is imperative that such training is not simply provided on a one-off basis (such as occurred under the 2010 Framework) but is ongoing and regularly reviewed. The committee also considers there is value in amending the APS Code of Conduct to more specifically state that APS employees should make decisions and provide advice consistent with human rights.

9.57 The committee considers that human rights training should be made available to parliamentarians (and their staff), noting the role they play as legislators. This should also apply to ministers who, under a HRA would be subject to a duty to consider and act compatibly with rights, noting that culture is set from the top down.

9.58 Finally, noting it is proposed that some private entities will have duties under a HRA to respect and protect human rights (when exercising functions of a public nature), the government should develop specific guidance to such entities to help them understand their human rights obligations. For example, aged care and National Disability Insurance Scheme providers may have such obligations and it would be important to ensure that all staff involved in the provision of such services fully understand the importance of protecting human rights – something recent royal commissions have demonstrated have all too often been sadly lacking.

Recommendation 8

9.59 The committee recommends that the government (in consultation with the Australian Human Rights Commission) provide ongoing training and resources for public authorities, including;

- **making basic human rights training mandatory for all Australian Public Service employees (including the Senior Executive Service);**
- **providing specific and tailored ongoing human rights training and guidance material to all public sector staff involved in:**
  - **delivering services to the community;**
  - **developing policy in areas that engage human rights; and**
  - **developing legislation;**
- **making human rights training available to all parliamentarians, including ministers, and their staff; and**
- **providing tailored human rights guidance material to those private entities that perform functions of a public nature (for example, aged care and National Disability Insurance Scheme providers).**

Recommendation 9

9.60 The committee recommends the government update the Australian Public Service (APS) Code of Conduct and Values to require APS employees to

respect and promote human rights by making decisions and providing advice consistent with human rights, and implementing, promoting and supporting human rights.

Senior leadership

9.61 The committee believes that enforceable obligations on public authorities under a HRA is only the first step in developing a culture of respect for human rights in Australia, across all layers of government, non-government and the private sector. Culture is set from the top down. Development of a culture that respects human rights within government will only be truly effective if senior leaders make clear the standards to be expected.

9.62 Within the public service, it is essential that human rights considerations are embedded in the early stages of decision-making and the development of policies and legislation. Ministers, Assistant Ministers and heads of departments and agencies should set the expectations as senior leaders. The committee considers there would be value in having a regular forum for the senior leaders of all government departments and agencies to meet to discuss the implementation of a HRA and the training needs within the public service. The committee considers, just as happened in Victoria when their *Charter of Human Rights and Responsibilities Act 2006* was first introduced, that senior leaders within each department should be designated as Human Rights Act champions, who can be a focal point for advocating the importance of respecting, protecting and promoting human rights. The committee also considers such a forum should receive coordinated updates of any concerns raised by this committee and by relevant UN treaty bodies about Australia. By having such a forum, the aim is for a coordinated approach to be taken to embed a human rights respecting culture within the APS.

Recommendation 10

9.63 The committee recommends that the Secretaries Board establish a standing senior leadership group or sub-committee comprising senior leaders of all departments and a representative of the Australian Human Rights Commission to regularly:

- **consider the human rights training needs of public servants;**
- **consider reports of the Parliamentary Joint Committee on Human Rights and responses to those reports;**
- **establish senior leaders as Human Rights Act champions;**
- **discuss emerging human rights issues and get updates on any complaints or cases taken under a Human Rights Act; and**
- **get updates on comments or decisions involving Australia by United Nations human rights treaty bodies and on Australia's Universal Periodic Review process.**

Consideration of human rights in development of legislation and policies

9.64 The importance of leadership and human rights education for public sector staff cannot be understated. However, the 2010 Framework is a salutary lesson in why cultural change must be embedded in laws and processes. If human rights considerations are not part of the process within government before legislation is finalised, any subsequent amendments to minimise the risk of breaching rights are all too often resisted.

9.65 The committee considers there is a need for human rights advice when important policies and legislation are developed that focuses on improving rights protection. The committee is concerned that if human rights advice comes only from within government at a later stage, such advice may tend towards being defensive, justifying why government policy does not breach rights, rather than focused on how risks of human rights breaches may be avoided. In the committee's experience, all too often the breaches of rights that occur in legislation could often be remedied by relatively minor amendments to build additional safeguards into the legislation, while still achieving the policy intent. The committee wishes to see a change in the mindset within government departments and agencies to this effect.

9.66 The committee considers that reform can best be achieved by ensuring there is strong, honest advice from various quarters. The 'Swiss cheese model', used in risk management systems like airline safety and healthcare, recognises the need for multiple systems to ensure lapses and weaknesses in one area do not allow a risk to materialise. In this model, each slice of cheese represents a safety barrier or precaution, and while they are not all perfect (e.g. they have 'holes'), when layered up together the other defences (e.g. other slices of cheese) will prevent a single point of failure (e.g. the holes in each slice will not align). In this respect, the committee considers that there is a need for human rights advice from multiple sources, so that even if one source fails to adequately consider rights, there are other there to do so.

9.67 On this basis the committee considers that human rights expertise should be developed within departments through training and the establishment of departmental human rights units. Further, the committee considers that there would be significant benefit in establishing a Human Rights Office within AGD to provide advice on legislation and policies at the early stage of development. This should be well resourced and contain significant human rights law expertise. The committee agrees with submitters that there is a tension in saying that everyone needs to understand human rights law, however, it is a specialised area of law and, as such, the committee believes there should be expertise within a centralised space in AGD, while over time human rights expertise can be developed within each department.

9.68 The committee considers it likely that laws that breach human rights are generally developed without the participation of the groups most impacted by

those laws or policies. The committee considers the participation duty in the HRA, as outlined above, would help to remedy this, but considers processes must also change to require such consultation where appropriate and if it does not occur, for departments to explain why (see below regarding statements of compatibility).

9.69 The committee also considers changes to expand the role of the AHRC in reviewing and auditing the practices of departments and agencies to monitor compliance with human rights obligations are an important aspect of achieving cultural change (see further below).

9.70 The committee considers changes to internal government documents could help to ensure greater consultation has occurred on the human rights implications of new policy proposals and draft legislation, including requiring the advice of the Human Rights Office in AGD in relation to all proposed bills and major policies.

9.71 The committee also sees the role of the Office of Parliamentary Counsel (OPC) as important in achieving greater human rights protection in legislation. While it is not the role of parliamentary drafters to develop the policy behind the legislation they draft, they serve an important role in reminding departments of their statutory obligations and can, and already do, act as a central point to direct departmental officers to the concerns of this committee and to the need to consult within government. As such the committee considers tailored human rights training should be made available to all parliamentary counsel, and there would be merit in OPC reviewing their current drafting practices in line with a reformed human rights framework.

Recommendation 11

9.72 The committee recommends, in order to embed requirements for public servants to consider people's rights and freedoms when developing government policy and legislation, that the government:

- **set up specialised human rights units in each government department to provide advice on the applicability of human rights within each portfolio;**
- **establish a Human Rights Office in the Attorney-General's Department (AGD) with staff with human rights law expertise;**
- **update policy development guidelines to require policy makers to consider the potential impact of each decision on human rights and the need to consult with potentially affected groups, particularly those with relevant lived experience;**
- **develop tailored human rights impact assessment tools or checklists to guide decision makers in determining whether human rights are engaged by the proposed policy or legislation;**
- **amend budget documentation to include an assessment of the human rights compatibility of the budget measures in the statements of compatibility for the annual appropriations bills;**

- **update the Legislation Handbook and the Legislative Instrument Handbook to alert public servants to the need to consider human rights when developing legislation, and the need to involve their human rights unit and the Human Rights Office early in the development of legislation;**
- **require the Human Rights Office to provide advice on legislation and policies at the early stage of development, including;**
  - **to be provided with drafting instructions and early drafts of all bills to provide advice to instructing officers and the Office of Parliamentary Counsel (OPC) on how the proposed legislation can better protect human rights;**
  - **to review all statements of compatibility with human rights involving bills;**
- **require OPC to review their drafting practices, drafting guidance materials and drafting directions in line with a reformed human rights framework.**

Parliamentary scrutiny

9.73 The 2010 Framework committed to the introduction of this committee as a way of ensuring greater scrutiny of legislation for compliance with our international human rights obligations. Our committee has now been in operation for 12 years and has created a large body of largely non-partisan analysis as to the compatibility of federal legislation with human rights. Its influence on the development of legislation cannot be quantified – much of it is likely to be a 'hidden influence' on the development of legislation. However, as set out above, once legislation is before the Parliament its concerns have, with some notable exceptions, largely been ignored or justified. The committee hopes that changes to the culture of the public service and senior leadership may lead to a shift in how the committee's comments are viewed – away from something to be justified and towards a genuine commitment to improving the rights compatibility of legislation. The committee considers the Human Rights Office in AGD should play a greater role in supporting and promoting the work of the committee within the public service, including liaising with departments as to how they can best respond to meet the committee's concerns.

9.74 Further, it is not only necessary to achieve a cultural shift within the executive, but also within the Parliament itself. Ideally parliamentarians would reference relevant committee reports when debating legislation, table amendments in response to specific committee recommendations, consistently act as parliamentarians, not politicians, when serving on the committee, and not pass legislation before the Parliament has had the benefit of the committee's advice.

Passage of legislation

9.75 The work of the committee in scrutinising legislation for compatibility with human rights is undermined when the legislation passes before the committee

has completed its scrutiny. The committee works hard to ensure its scrutiny of legislation is available while the bills remain before the Parliament. On average the committee reports on more than 90 per cent of bills while they remain before the Parliament. However, many bills pass the House of Representatives (if not the Senate) before the committee has had time to report and sometimes rights-significant legislation passes before the committee has an opportunity to comment. When the committee was first established it was envisaged that the committee would 'establish a dialogue between the parliament and its citizens whereby the members of the committee can canvass the views of the public, including affected groups, as to how they will be affected by proposed legislation'.[5] The committee has self-initiated inquiries into legislation on six occasions in its history, four times in relation to bills that passed before the committee's report and twice in relation to legislative instruments. But as the committee's scrutiny does not halt the passage of legislation (unlike referrals to standing and select committees) its ability to seek engagement from the community as envisaged is limited.

9.76 A number of submitters, including the AHRC, argued that, except in limited exceptions, bills should be prevented from passing until the committee has tabled its final report on the bill. The committee considers that Parliament would ideally have the benefit of its advice before a bill proceeds beyond its second reading. However, the committee considers a more nuanced approach would be for the committee to indicate which bills it considers requires its detailed consideration. On average the committee makes no comment on around three-quarters of all bills. The committee considers it would be unnecessary and counter-productive to seek to slow the passage of bills raising no human rights concerns. The committee also sees the value in the Parliament having certainty over when the committee seeks to report in relation to those bills it considers requires its detailed consideration, and allow Parliament the option to require the committee's consideration at an earlier date if the bill requires a speedier enactment.

9.77 The committee therefore proposes it could change its work practices to, as soon as bills are introduced, undertake a swift review to determine which bills require its detailed consideration. For those bills that the committee considers require its detailed consideration – including needing a dialogue with the minister or potentially hearing from community members and experts – the committee could issue an interim report listing those bills and the date the committee intends to report. The committee could still comment on any bills that are not included in this process but, as is the case presently, it would not delay the passage of that legislation. A committee member would then be able, without

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[5] The Hon Robert McClelland, second reading speech, *House of Representatives Hansard*,30 September 2010, p. 271.

the need to seek leave, to move such a motion in either house, and the chamber would need to agree to the motion (including which bills are included and the proposed date for reporting). This would ensure that the Parliament retains oversight of its legislative program, as informed by the committee.

9.78 This mechanism would not prevent the passage of legislation that the committee has not had any opportunity to review (such as legislation that passes within a few sitting days of its introduction) and of course nothing would prevent either House of Parliament from suspending its own standing orders if required. This mechanism would allow either House to refuse to allow the committee any time to undertake its detailed consideration of the bill (or a shorter timeframe than that proposed in the motion). There will be bills, such as those relating to national security or the protection of the Australian community, where the Parliament, informed by the government, will appropriately prioritise the bill's passage over the committee's consideration. This proposed mechanism creates the necessary flexibility to ensure that, where either the House or Senate considers it appropriate, the passage of such bills is not constrained by the committee's processes.

9.79 The committee appreciates that such an approach will not satisfy all submitters given some legislation will still pass without the benefit of the committee's human rights analysis. However, the committee considers this to be a workable compromise between ensuring timely passage of legislation and enhancing parliamentary scrutiny of laws for consistency with human rights.

Recommendation 12

9.80 The committee recommends that the House of Representatives and Senate amend their standing orders to provide that:

- **a member of the Parliamentary Joint Committee on Human Rights may move a motion for the adoption of an interim report setting out the bills the committee considers requires its detailed consideration and the day fixed for the committee to report on each bill;**
- **any member of the House or Senate may seek to amend such a motion, including the date by which the committee must report on a bill; and**
- **where the motion is agreed, those bills stated as requiring the committee's detailed consideration may not proceed after the second reading until the day after the committee reports (with no restriction on the passage of bills that the committee indicates it does not seek to consider in detail).**

Functions of the committee

9.81 The committee currently has the function of examining bills, legislative instruments and Acts for compatibility with human rights and inquiring into any matter relating to human rights – but only where such an inquiry is referred to the committee by the Attorney-General. This is in contrast to the United

Kingdom Joint Committee on Human Rights that has the power to self-initiate thematic inquiries in relation to a range of human rights matters. This power has enabled that committee to examine pressing human rights issues even when they are not contained within legislation, allowing them to act proactively to examine matters of concern affecting the community. The committee considers that the ability to self-initiate inquiries into any matter relating to human rights (other than individual cases) would help the committee hear from the community about the human rights affecting them, assist in the committee's educative role and allow the committee to contribute to wider human rights discussions. Of course, doing such inquiries regularly, alongside swiftly reviewing proposed legislation for human rights compatibility, would have resource implications and the committee considers its secretariat should be appropriately resourced to carry out any such functions.

9.82 The committee also considers that if a federal HRA is introduced this should alter what standard the committee scrutinises legislation by. At present the committee considers if legislation is compatible with international human rights law – namely, the seven core human rights treaties Australia is a signatory to. The committee considers that if there were to be a domestic HRA it should scrutinise legislation for compatibility with the HRA. The committee's reports would act as a useful resource for public servants when developing future legislation. However, the committee would not wish to see its remit narrowed – so if a HRA was introduced that did not include all civil and political and economic, social and cultural rights the committee considers its remit should remain.

9.83 Further, should a HRA in line with the model proposed in recommendation 2 not be agreed to, the committee considers there would be value in adding the United Nations Declaration on the Rights of Indigenous Persons (UNDRIP) to the list of international instruments that the committee relies on in interpreting human rights law. UNDRIP is currently considers tangentially by the committee when interpreting rights such as the right to culture and self-determination, but this is not required by the *Human Rights (Parliamentary Scrutiny) Act 2011*. Specifically listing it so that the definition of 'human rights' includes consideration of the standards in UNDRIP – thereby requiring this committee and those preparing statements of compatibility to consider it – would be a minimal, but essential change, consistent with recent recommendations of the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs.[6] The committee also considers the Refugee Convention to be a core international

[6] See Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*, November 2023, recommendation 6.

human rights treaty and considers it should also be added to the definition of 'human rights' should a HRA not be introduced.

9.84 The committee also notes the importance of monitoring Australia's compliance with its international human rights obligations, as discussed further below (and in chapter 8). The committee considers one aspect of this would be for it to review any adverse comments made against Australia by UN bodies and the Australian government's response to them. In doing so, the committee should be able to choose to seek evidence from the community about the adequacy of the response and thereby bring consideration of issues raised against Australia at the international level into the domestic sphere and hear from those in Australia who may be affected.

Recommendation 13

9.85 The committee recommends that the government introduce amendments to the *Human Rights (Parliamentary Scrutiny) Act 2011* to:

- **expand the functions of the committee to allow the committee to inquire into any matter relating to human rights (other than individual cases) on its own initiative (without requiring the Attorney-General's referral);**
- **if a Human Rights Act is introduced in accordance with recommendation 2, amend the definition of 'human rights' to refer to the rights and freedoms recognised in that Act;**
- **if a Human Rights Act is *not* introduced in accordance with recommendation 2, amend the definition of 'human rights' to include the United Nations Declaration on the Rights of Indigenous Peoples and the Refugees Convention; and**
- **empower the committee to review the results of individual communications against Australia from United Nations bodies, and Concluding Observations from the United Nations about Australia, from time to time and report on the adequacy of the Australian Government's response to these.**

Statements of compatibility

9.86 Currently statements of compatibility must be provided in respect of all bills and legislative instruments that are subject to disallowance by the Parliament. However, the committee is required to review all bills and legislative instruments – including those legislative instruments that are exempt from disallowance. Around 20 per cent of legislative instruments are exempt from disallowance, meaning the committee is required to assess the compatibility of hundreds of instruments per year that do not contain a statement of compatibility. There appears to be no reason why legislative instruments exempt from disallowance are not required to include a statement of compatibility. The committee observes that non-disallowable legislative instruments included most of the measures taken by the federal government

during the COVID-19 pandemic and a significant number of migration related instruments. The committee considers there is no reason why responsible departments and ministers should not be required to turn their mind as to the compatibility of such instruments, and thereby assist the committee in its scrutiny of them.

9.87 The committee notes that the quality of statements of compatibility is variable. The committee hopes that if the measures recommended above regarding building human rights considerations into the very beginning of policy and legislative development are adopted, the quality of statements of compatibility will improve. The committee considers there is value in setting out in legislation what is required to be included in statements of compatibility. This would require an amendment so that not only should a statement of compatibility include an assessment of *whether* the legislation is compatible with human rights, it should also include an assessment of *how* it is so compatible and if it is not compatible, the nature and extent of the incompatibility. The committee notes that over its 12-year history it has not observed any statement of compatibility that has admitted the legislation is incompatible with rights – despite clear examples where it is. While the hope would be that legislation would not be incompatible with our human rights obligations, sometimes governments take a policy decision to act in a way that is incompatible. If the government does so, the statement of compatibility should explain this, rather than seeking to justify a measure that is clearly not compatible, and it is up to Parliament to decide if the reasons proffered are sufficiently compelling to justify acting in opposition to those obligations.

9.88 The committee also considers there would be significant value in requiring statements of compatibility to contain a description of the nature of any consultation undertaken on the bill. The committee notes that the explanatory statements accompanying legislative instruments must already set out if consultation was undertaken (and the nature of that consultation), and if not, explain why.[7] The committee considers where legislation affects human rights, where reasonably possible, groups affected by the measure should be consulted before legislation is introduced into Parliament. The committee notes that the HRA model recommended above includes a participation duty on public authorities to consult with Aboriginal and Torres Strait Islander people, people with disability and children before making decisions affecting them. The committee considers that statements of compatibility accompanying bills should explain what, if any consultation, occurred in relation to the proposed law, and if no consultation was undertaken, provide an explanation of why it was not.

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7 *Legislation Act 2003*, paragraphs 15J(2)(d) and (e) and section 17.

Recommendation 14

9.89 The committee recommends that the government introduce amendments to the *Human Rights (Parliamentary Scrutiny) Act 2011* to:

- **require the rule-maker in relation to *all* legislative instruments (not only disallowable legislative instruments) to cause a statement of compatibility to be prepared in respect of that instrument;**
- **require the statement of compatibility to explain *how* the bill or legislative instrument is compatible with human rights and if it is incompatible with rights, the nature and extent of the incompatibility; and**
- **require a statement of compatibility to contain a description of the nature of any consultation undertaken on the bill (including by reference to the participation duty under the proposed Human Rights Act) and if no consultation took place, explain why.**

Role of the Australian Human Rights Commission

9.90 The committee considers the AHRC plays an integral role in ensuring Australia respects, protects and promotes human rights. The committee considers its role would increase if a HRA is introduced, particularly in conciliating complaints under a HRA and providing resources and education to the community and public sector.

9.91 The committee considers the AHRC should also play a strong role in helping to achieve systemic cultural change to achieve human rights. The committee is concerned that the HRA model leans towards individual remedies – requiring a person affected by a breach of human rights to bring a claim against a public authority. The committee considers that the AHRC can play an important role in seeking to address systemic issues. In exercising its functions of conciliating complaints under a HRA, the committee considers the AHRC well placed to identify systemic human rights concerns (e.g. when it receives complaints from multiple people regarding the same department or similar practices by different departments). However, this would still rely on individuals to take complaints to the AHRC, when in many cases those affected may be particularly vulnerable and not able to take on such a role. The committee agrees with the AHRC that it should be given the power to conduct own motion inquires in relation to breaches of human rights that are of a systemic nature, such as considering the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody. In addition, the AHRC should have the power to inquire into, and investigate, the policies and practices of a public authority to assess their compatibility with human rights. In addition, the committee considers that this should also extend to reviewing specific acts by a public authority that may be inconsistent with a HRA – thereby enabling the AHRC to undertake an instigation when alerted to specific concerns. The relevant public authorities should be provided with an opportunity to respond to the AHRC's

findings and, ideally, amend their policies and practices to ensure future compliance with a HRA. The committee considers that the AHRC should report on the results of such investigations (excluding any personal information), noting that those being investigated would be public authorities (such as government departments, regulatory bodies etc) and transparency is important to help drive a culture of respect for human rights. The committee notes similar such powers will be soon granted to the ARHC to monitor and assess compliance by employers regarding sexual harassment[8] and the Fair Work Ombudsman has powers to investigate and monitor breaches of the *Fair Work Act 2009*. The committee considers rather than create a separate Human Rights Ombudsman or significantly expand the role of the Commonwealth Ombudsman, such powers should sit with our national human rights institution.

9.92 The committee also considers, consistent with the AHRC's current function in relation to discrimination cases, the AHRC should be empowered to intervene, with the courts leave, in court proceedings involving the HRA. In addition, the committee considers there would be value in empowering the AHRC, where it has identified systemic human rights concerns that have not been able to be resolved through other means, to commence proceedings to enforce compliance with the HRA.

9.93 The committee notes that the ability of the AHRC to adequately undertake all of these additional functions, including indeed, its current functions, relies heavily on the quality and expertise of its commissioners and staff. The committee is concerned by the evidence to this committee that, due to funding shortfalls, the AHRC has been unable to adequately perform its existing conciliation functions, such that a number of submitters raised concerns about adding conciliation under a HRA to the AHRC's role. The AHRC gave evidence last year that it did not have the resources to do all that they are currently meant to be doing and it would require a significant increase in resources to undertake additional functions. The committee agrees that the AHRC must be sustainably and appropriately resourced to carry out its existing and proposed functions to significantly improve human rights protection across Australia (see recommendation 6 regarding funding).

Recommendation 15

9.94 The committee recommends the government consider expanding the role of the Australian Human Rights Commission to enable, or better enable, the Commission to:

- **conduct own-motion inquiries into systemic human rights concerns;**

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[8] See amendments made by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, Schedule 2, Part 2, Division 2, which commence in December 2024.

- **monitor, and report on, compliance by public authorities with a Human Rights Act (HRA);**
- **inquire into, investigate, and report on, any act or practice of a public authority that may be contrary to a HRA;**
- **intervene, with the court's leave, in court proceedings involving the interpretation or application of a HRA; and**
- **where the AHRC has identified systemic human rights concerns, commence proceedings to enforce compliance with a HRA if other methods have failed.**

Review of legislation

9.95 The model for a HRA proposed by the committee and the AHRC maintains parliamentary sovereignty over the laws that govern us. It is essential, in Australia's system of representative democracy, that Parliament retains the power to legislate within its existing boundaries. In exceptional circumstances, this may include legislating in a way that is incompatible with human rights. It is then a matter for the voters at the ballot box to determine if acting in such a way accords with their view of good governance. However, the committee has observed that all too often legislation risks being incompatible with rights because of a lack of safeguards or controls in place to ensure it is a proportionate limit on rights. The committee's hope is that a HRA and changes to the culture within the public service will lead to legislation being developed that has human rights considerations at the forefront so as to prevent those inadvertent breaches of rights. However, this will only assist in the development of future legislation. There is a vast amount of existing legislation that has not had the benefit of a systematic human rights risk assessment.

9.96 Under the proposed HRA a public authority is not bound by human rights if it could not reasonably have acted differently because of an incompatible law. As such, the committee considers it imperative that existing legislation be reviewed for its compatibility with human rights. The committee considers it important that any such review should be approached in good faith – with a focus on adopting a best practice approach to minimising the risk of a breach of human rights in practice, rather than taking a defensive approach of justifying how the legislation might arguably be found to be compatible. The committee considers that the Human Rights Office in AGD is best placed to coordinate such reviews, with the relevant portfolio department or agency (informed by their internal human rights unit) to conduct each initial review. Once a review identifies any provisions of Acts that fall short of Australia's human rights obligations, the committee considers that the government should introduce amending legislation to allow Parliament to make the final decision on amending the law.

9.97 The committee appreciates the enormity of such a task and understands the likelihood of it taking many years to be complete. The committee considers that the government should consider the best approach to undertaking such a

review, but notes that a convenient starting point may be to review the reports made by this committee regarding legislation made in the previous 12 years which raised human rights concerns and those Acts that require a foundational human rights assessment.

9.98 The committee notes that the 2010 Framework committed to reviewing legislation in this manner, but such a review never occurred. The committee considers that review processes may become a more embedded requirement if the Legislation Handbook is amended to require that when substantive (but not consequential) amendments are being made to existing legislation, the legislation to be amended must be reviewed to determine its compliance with human rights. In addition, the committee considers that when legislative instruments are reviewed as part of managing the sunsetting process, guidance should specifically require that the instrument be reviewed for compatibility with human rights.

Recommendation 16

9.99 The committee recommends that the government review all existing primary and delegated legislation for compatibility with human rights and bring forward any necessary amendments to legislation identified as raised human rights concerns, noting that such reviews:

- **could prioritise reviewing legislation that this committee has reported on as raising human rights concerns or that courts have found to be incompatible with a Human Rights Act;**
- **should be embedded within government processes, so that when existing Acts are being substantively amended, or legislative instruments subject to sunsetting are being remade, a review of their compatibility with human rights must be undertaken (if not already reviewed); and**
- **should be undertaken in good faith with a view to maximising the realisation of human rights in practice (rather than considering whether the legislation is arguably compatible with rights).**

Monitoring progress on human rights

9.100 The committee considers it important to consider ways in which to monitor Australia's progress in protecting human rights over time. In particular, as part of embedding a culture of respect for human rights within government, the committee considers departments and agencies should be required to develop their own human rights action plan to consider any specific changes that may need to be made within their portfolio to ensure greater protection of human rights. For some departments, human rights considerations may not seem relevant, for example, policies within the Treasury may at first glance not seem to engage human rights. However, policies that affect work, housing and the cost of living necessarily engage rights, and measuring progress on respecting

relevant human rights is an important aspect of changing culture. The committee considers it therefore important that each department and agency report annually on compliance with these human rights plans.

9.101 The committee also notes that a significant amount of work has been done by the AHRC, and internationally, in developing concrete and practical ways to track progress on the implementation on human rights. The committee considers the development of a human rights indicator index can be part of a human rights framework, and considers the government should seriously consider the AHRC's proposals in this regard. The committee also considers the AHRC's proposal for the Attorney-General to report annually to the Parliament on areas of progress in human rights and areas for focus will help to involve the Parliament in measuring progress.

9.102 The committee also considers that submitters raised some important concerns about how Australia is currently engaging with our international obligations. It is of some concern that the UN treaty bodies can make recommendations regarding Australia, and decide cases involving complaints against Australia, and there is no centralised publicly available way to locate these or access the government's response and no notification provided to Parliament. The committee considers Parliament should be alerted to how the government is responding to the UN as to how Australia is meeting its treaty obligations and any commitments made as part of the Universal Periodic Review. When decisions are made against Australia by UN treaty bodies this is relevant to the interpretation and implementation of our international human rights obligations, and the committee therefore considers that this committee could play a useful role in reviewing any adverse comments made against Australia and the Australian Government's response to them (see recommendation 12). The committee also considers that civil society plays an important role in helping to protect and promote human rights and inform the Australian government, and the UN treaty bodies, of the experiences of those whose human rights we need to protect. The committee considers that the government should take all reasonable steps to consult with civil society as part of the development of policies and legislation and Australia's engagement with international bodies.

9.103 Finally, in assessing Australia's international human rights obligations it is important to consider whether Australia's existing reservations and interpretive declarations to the UN treaties remain appropriate. These are statements made by the Australian Government, often decades ago, that it does not intend to be bound by certain aspects of the human rights treaties (or interprets them differently). This includes, for example, that substituted decision-making and compulsory medical treatment can continue in limited circumstances, contrary to the Convention on the Rights of Persons with Disability. The committee considers that the government should take a formalised approach to reviewing

all such reservations and declarations to assess if they remain appropriate, and if not, to withdraw them.

Recommendation 17

9.104 The committee recommends that the government commits to monitoring and improving Australia's progress on human rights, particularly by reference to the Australian Human Rights Commission's *Free & Equal* final report, including:

- **developing a national human rights indicator index to measure progress on human rights over time;**
- **requiring each department and agency to develop human rights action plans detailing how they will respect rights within their portfolio, and make annual reports on compliance with their plan;**
- **requiring the Attorney-General to make an annual statement to Parliament identifying areas of progress on human rights and areas of continued focus;**
- **establishing a publicly available database setting out all findings and recommendations of United Nations human rights treaty bodies about Australia, and individual communications involving Australia, and any Australian government responses;**
- **ensuring regular forums for dialogue with the non-governmental (NGO) sector on human rights and supporting the independent participation of NGOs in the UN human rights processes; and**
- **reviewing, with a view to withdrawing, all existing reservations and interpretive declarations under UN human rights treaties.**

Mr Josh Burns MP

Member for Macnamara

Coalition Members Dissenting Report

"If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it."

Sir Harry Gibbs AC GCMG KBE PC QC

8th Chief Justice of the High Court of Australia

Introduction

1.1 The Parliamentary Joint Committee on Human Rights' Inquiry into Australia's Human Rights framework was dominated by evidence relating to the Australian Human Rights Commission's proposed federal Human Rights Act. As the most consequential element of the inquiry, this dissenting report largely focuses on this proposal.

1.2 Coalition members do not support the enactment of a Federal Human Rights Act, as proposed by the Australian Human Rights Commission (AHRC). Proponents of this proposal have failed to demonstrate that our current systems are not providing adequate protection of human rights or that their reform model would achieve preferrable outcomes where current protection is lacking.

1.3 Australia has an enviable human rights record and historically played a pivotal role in the development of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). The AHRC's proposal is a dangerous departure from these international human rights agreements that Australia is treaty-bound to adhere to.

1.4 The AHRC's proposal is a bizarre reimagining of human rights with key rights deleted or distorted, absolute rights not recognised as such, and a deliberate devaluation of internationally recognised protections for the freedoms of thought, conscience, religion and belief. No justification can be found for extinguishing or reducing fundamental ICCPR rights in the way the proposed Human Right Act does.

1.5 The AHRC model applies abstract and vague concepts to define rights. This would require novel judicial interpretation, since the terminology has no counterpart in the ICCPR, which the AHRC model purports to follow. This is compounded by a "limitations clause" allowing rights to be restricted on terms not allowed by the ICCPR, giving further unnecessary, and therefore excessive, discretion to the judiciary when interpreting that clause across most rights.

1.6 Coalition members consider that a Human Rights Act of this nature would weaken our parliamentary democracy and politicise our judiciary.

1.7 Australian democracy is robust, open and vigorous. Parliament remains the best institution to defend human rights and to debate and determine the balance of competing rights through legislation. The Coalition's opposition to the

proposed Act is twofold: to avoid Parliament disrupting the balance of competing rights with an Act which composes rights in a politicised way; and to avoid Parliament surrendering its responsibility to defend human rights, by throwing open the interpretation of an Act which contains excessive uncertainty to final determination by an unelected and unaccountable judiciary.

1.8 The example Bill appended to the inquiry report has not been subject to public consultation or expert review. Coalition members consider this legislative model a concerning departure from international human rights.

1.9 Coalition members agree with former Labor Attorney-General Robert McClelland, who in 2010 wrote in the foreword of 'Australia's Human Rights Framework': "the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community. Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community."

1.10 A Human Rights Act would be unnecessary, divisive and dangerous and should not be adopted by the Government.

Australia's incomparable human rights record

1.11 Australia's human rights record stands as a testament to our commitment to justice and equality. The World Justice Project's Rule of Law Index 2023 revealed that Australia had an overall index rank of 13 out of 142 countries, ahead of France (21) and the United States (26), countries that have a constitutional Bill of Rights.[1]

1.12 Australia's good standing was reaffirmed by Professor Nicholas Aroney, Professor Richard Ekins KC and Dr Benjamin Saunders who in their submission wrote "by international standards, Australia is consistently assessed as maintaining high levels of personal freedom, political rights, civil liberties and the rule of law. This is despite the fact that Australia does not have a constitutional bill of rights or a national charter of rights."[2]

1.13 Coalition members contend that Australia's enviable human rights tradition is secured within the very fabric of Australian society, rather than through legislation or constitutional provisions.

1.14 With the advent of the United Nations, Australia's human rights tradition was exported at a global level. Australians William Roy Hodgson and Dr HV Evatt

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1 World Justice Project, WJP Rule of Law Index | Global Insights (worldjusticeproject.org).

2 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 3.

played vital roles in the formation and enactment of the Universal Declaration of Human Rights.

1.15 A Human Right Act, or Bill or Rights, has been seriously proposed at least ten times before in Australia's history. The concept was considered and rejected by the framers of our Constitution and has been rejected by every Commonwealth Government it has come before since 1901.

1.16 The Committee heard that a Human Rights Act "is the central missing piece of government accountability in Australia."[3] However, evidence was presented during the inquiry that was not in agreement with this assessment. According to the Rule of Law Institute of Australia, "the mere existence of rights or a constitutionalised bill of rights does not result in greater protection of fundamental rights."[4]

1.17 A Human Rights Act, or Bill of Rights, is clearly not a guarantee of achieving protection of human rights. The United States' Bill of Rights (1791) did not prevent the practice of slavery. The French Declaration of the Rights of Man (1789) did not prevent the bloodshed and summary justice of the Reign of Terror. The impressive rights espoused in the Constitution of the Soviet Union (1936) did not prevent the Great Purge or the gulags. Individual freedoms are protected extensively within the Constitution of the Democratic People's Republic of Korea (1972), yet the nation has no contemporary parallel with respect to the extent of human rights abuses.

1.18 Those proposing and supporting the adoption of a Human Rights Act in Australia have the burden of proving both that our current systems are not providing adequate protection of human rights and that their reform model would achieve preferrable outcomes.

1.19 Coalition members of this committee maintain that neither of these aspects have been demonstrated by any of the submissions made during this inquiry. In fact, there is sufficient evidence to suggest it could have a negative impact on human rights.

Loss of legislative autonomy

1.20 A Human Rights Act would fundamentally change the respective roles of the parliament and judiciary.

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3 Sarah Basford Canales, 'Australian Human Rights Commission president Rosalind Croucher proposes Human Rights Act model', *The Canberra Times*, 10 March 2023, Australian Human Rights Commission president Rosalind Croucher proposes Human Rights Act model | The Canberra Times | Canberra, ACT (accessed 27 November 2023).

4 Rule of Law Institute of Australia, answers to question on notice, 20 October 2023 (received 10 November 2023).

1.21 Parliaments are elected to make laws. Members and Senators are elected to make the judgement calls on how competing rights are to be balanced and how they are to be best protected through legislation with certainty and predictability. A Human Rights Act, as proposed by the AHRC, appeals to the integrity of the ICCPR as the gold standard, but fundamentally departs from the rights balance set by the ICCPR, including by giving more scope for judicial interpretation and discretion than the ICCPR would allow. It effectively represents an abdication of this responsibility to the judiciary.

1.22 The specific form of Act proposed aggravates the concerns expressed by Professors' Aroney, Ekins and Dr Saunders in this inquiry, concerning charters generally, that they:

> invite judges to evaluate legislation against standards that are so broad and vague that they amount to an open-ended assessment of whether the law ought to have been enacted. This entangles courts in what are essentially political controversies, undermining public confidence in their political impartiality and impairing their ability to uphold the rule of law.[5]

1.23 They also comment:

> The legislature that enacts a statutory charter of rights is not making a responsible choice about what the law should be – about what respect for human rights requires – but is instead leaving many of the critical questions about what the law should be to be decided, more or less freely, by judges in the course of future adjudication.[6]

1.24 Australia's democracy is incomparably robust. The Parliament is the best environment to defend and debate human rights. Coalition members contend that the adoption of the AHRC's model would be a convenient way for politicians to avoid making difficult decisions. Yet Members and Senators have a duty to the Australian people to front up, discuss difficult issues and settle on decisions, rather than forgoing their responsibilities to unelected bodies.

1.25 Through the Questions on Notice process, Coalition members sought clarification on how a Human Rights Act would affect the legislative's role and responsibility. Evidence was heard from Chris Merritt of the Rule of Law Institute of Australia on these impacts:

> The commission's model, if enacted, would require the judiciary to determine the extent of each of the rights listed in the proposed charter. That function, in essence, requires the application of value judgements in order to weigh conflicting goals. This is a political function that is at best discharged by parliament… Government's, at the moment, are responsible for their actions to parliament and through parliament to the community.

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5 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 2.

6 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 6.

> Under a charter, the judiciary would inevitably become a player in that process by influencing political decisions and limiting or extending rights in ways that are at odds with the views of parliament.[7]

1.26 Coalition members consider that many of the submissions contained misunderstandings of how the parliament deals with Australia's human rights obligations, and the work already undertaken by the Parliamentary Joint Committee on Human Rights. The Australian Government and Parliament are already obliged to consider human rights in their policy-making and decision-making.

1.27 The Parliamentary Joint Committee on Human Rights (PJCHR) is the last remnant of the 2010 Human Rights Framework. It has produced a number of valuable reports, triggered debate within the parliament and government, and ensured accountability on Australia's human rights performance.

1.28 Coalition members reject recommendations made by multiple submitters that the *Human Rights (Parliamentary Scrutiny) Act 2011* should be rolled into a new Human Rights Act. It is critical that the processes of parliamentary scrutiny remain legislatively separate to ensure that the Committee's important function can remain independent. Moves to shift the responsibilities of the committee into new legislation could lead to less parliamentary scrutiny and an undermining of the mission of the PJCHR.

1.29 While many submitters asserted that the courts are best placed to defend human rights through the adoption of the AHRC model, Coalition members note that the experience in the United Kingdom demonstrates that the parliament's Human Rights committee can be a more effective defender of human rights than a judiciary acting under the framework of a Human Rights Act.[8]

1.30 Coalition members of the Committee hold that it is against the public interest for the parliament to surrender their responsibility to defend human rights to the unelected judiciary. It is the legislature that is best placed to make the value judgements required when setting limits on rights and balancing competing rights. As Professors' Aroney, Ekins and Dr Saunders point out:

> Human rights are best protected by carefully drafted legislation which specifically addresses particular issues in a manner that ensures a reasonable level of certainty and predictability for all those affected by the

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7 Rule of Law Institute of Australia, answer to question on notice, 20 October 2023 (received 10 November 2023).

8 Adam Tomkins, 'Parliament, Human Rights, and Counter-Terrorism' in Tom Campbell, K.D. Ewing and Adam Tomkins, *The Legal Protection of Human Rights: Sceptical Essays*, 1st edition, Oxford University Press, 2011, pp. 13–15.

> law. The enactment of abstract 'rights' does the very opposite because it introduces vagueness and uncertainty into the law.[9]

Risk of politicisation of the judiciary

1.31 Coalition members note that the AHRC model would insert abstract and vague concepts into our law that require judicial interpretation. The consequence of this would be an increased politicisation of the judiciary that would be entirely undesirable.

1.32 Coalition members share the views of Associate Adjunct Professor Mark Fowler who, while appearing at the Canberra public hearing, highlighted the potential impact the proposal could have on the judiciary:

> The proposal undermines confidence in the judiciary, as it requires judges to interpret Australian law against principles that are abstract and imprecise, which then requires judges to determine the substantive content of the law in question and thus make law. Being abstract, human rights do not in themselves state what justice requires in any given situation.[10]

1.33 In shifting this burden to the judiciary, the AHRC's model would unfairly burden the courts with decisions that they are not best equipped to assess. Parliamentarians are more capable of weighing community expectations as opposed to judges, who are not free to contribute to the public debate and not equipped with the resources to gauge public opinion.

1.34 Adopting the AHRC's proposed Human Rights Act model would represent a surrender of Parliament's responsibility to defend human rights to an unelected and unaccountable judiciary. It would entangle judges in controversies about contentious moral or political causes and would create American-style conflicts between the judiciary and the executive.

1.35 Coalition members are of the view that the AHRC proposed legislation would invite activists, both from the right and the left of politics, to push for judicial interventions in support of contentious moral or political causes.

1.36 Although not enshrined in the Constitution, a Human Rights Act - as proposed - would be constitutional in nature. All Commonwealth law would need to be read consistently with the charter and it would be extremely difficult for any future parliament to achieve amendments to the law.

1.37 By establishing a quasi-constitutional Act of this nature, Coalition members are deeply concerned that this move would diminish parliamentary sovereignty.

1.38 According to the Rule of Law Institute of Australia, "the commission's model would enable the legislature to avoid taking responsibility for difficult public

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[9] Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p.2.

[10] Associate Professor Mark Fowler, *Committee Hansard*, Friday 20 October 2023, p. 17.

policy issues such as setting the limits on the manifestation of religious freedom."[11]

1.39 Coalition members consider that these value judgements are best made by democratically elected parliamentarians accountable to their constituents. The proposed Act is a convenient way for politicians to avoid making difficult decisions when it comes to the protection of human rights.

1.40 Coalition members are also concerned that a bill and framework of this nature would damage Australia's social fabric by encouraging a culture of complaint.

Specific concerns with the Australian Human Rights Commission's Proposed Commonwealth Human Rights Act model

1.41 Coalition members share the concern articulated in many of the submissions that the AHRC's proposed Act is a dangerous departure from international human rights agreements that Australia is treaty-bound to adhere to.

1.42 The list of rights selected within the proposal presents serious inconsistency with those protected, for example, under Article 18 and Article 7 of the ICCPR. In the view of Coalition members it devalues internationally recognised protections for the freedoms of thought, conscience, religion and belief, and other rights, for reasons given below.

1.43 Coalition members are concerned with the AHRC's invention of a new open-ended 'single limitation clause' on all those rights, particularly their conception as not being absolute. This view differed significantly from the finely calibrated approach of the ICCPR which outlines specifically, and precisely, the scope of each right and the extent to which it may be limited, preserving some rights from ever being restricted.

1.44 Departures from the ICCPR of this nature and magnitude are bound to produce outcomes that violate international human rights law and may result in excessive restrictions on the freedoms of religion and expression.

Article 18

1.45 Article 18 of the ICCPR mandates protection for freedom of thought, conscience and religion. All Article 18 rights are non-derogable; that is, they cannot be suspended even in a state of emergency.

1.46 Article 18 does not appear in the form, nor does it have the substance it should. In the AHRC's proposed Human Rights Act, Article 18 is replaced by the AHRC's own model. Coalition members consider this a significant departure from the robust religious freedom protections contained in Article 18, which is not capable of justification or derogation.

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[11] Rule of Law Institute of Australia, *Submission 327*, p. 5.

1.47 Coalition members concur with the observation of Dr Paul Taylor that "the federal charter would promote some rights over others without any apparent justification."[12]

1.48 Preference has clearly been given by the AHRC to 'non-discrimination' protections over the individual freedoms of religion and belief, thought, and conscience, despite these freedoms being regarded by the ICCPR as absolute.

1.49 Many stakeholders submitted to the inquiry their concerns that the AHRC did not have a sufficient emphasis on the ICCPR's protections when it came to religious freedom.

1.50 Coalition members note that the Australian Christan Lobby (ACL) submitted that the AHRC model is incompatible with Australia's treaty obligations:

> The AHRC model cannot be said to be compatible with Australia's treaty obligations. Australia's treaty obligations concerning freedom of religion and freedom of expression remain unfulfilled. The freedoms do not exist in Australian law so as to enable anyone to resist incursion, with a remedy, the ICCPR requires. The AHRC model does not cure this. Worse still, the ICCPR text for freedom of religion has been rewritten in departure of the clearly defined requirements of the ICCPR for that right.[13]

1.51 According to the ACL, the:

> AHRC model would make matters much worse for the protection of freedom of religion and freedom of expression. Of all the rights in the ICCPR to which Australia is bound to give effect in its domestic law in accordance with article 2 of the ICCPR, these two rights are the least protected in Australia to the ICCPR standard.[14]

1.52 The ACL also state they are 'alarmed' at what is being proposed by the AHRC, saying in their submission to the inquiry:

> The track record of the AHRC in supporting the ICCPR is disappointing. The ICCPR is not its highest priority. This proposal, and the AHRC's historical engagement with human rights issues, demonstrates that this Human Rights Act is likely to produce a subjective, politicised "human rights" culture change which will be socially divisive, less inclusive and harmful, at a time when Australia most needs all rights to be promoted for all Australians according to clearly established treaty principles. The proposed Human Rights Act would give the AHRC official mandate to impose a profound legal and cultural change on Australians, in contravention of their ICCPR and other fundamental treaty rights.[15]

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12 Dr Paul Taylor, *Submission 216*, p. 5.

13 Australian Christian Lobby, answer to questions on notice, 20 October 2023 (received 24 November 2023), p. 3.

14 Australian Christian Lobby, answer to questions on notice, 20 October 2023 (received 24 November 2023).

15 Australian Christian Lobby, *Submission 143*, p. 5.

1.53 In their submission to the inquiry, the Human Rights Law Alliance (HRLA) were critical of the AHRC's lack of prioritisation for religious freedom. In a blunt assessment, the HRLA said the:

> AHRC's model should be scrapped altogether. It cannot be described as upholding human rights when it undermines so significant key rights which are intended for Australians under international law.[16]

1.54 When asked by Coalition members whether the AHRC model was compatible with Australia's treaty obligations, the HRLA said:

> No, the AHRC model is not compatible with Australia's treaty obligations, particularly the ICCPR. It fails to enact in law the protection of religious freedom required to give effect to ICCPR rights, as required by the ICCPR itself. To the extent that it does articulate ICCPR rights it does so in a way that is imbalanced and that devalues the rights to freedom of religion compared to other rights.[17]

1.55 Evidence on this was heard from the Human Rights Law Alliance (HRLA):

> **Senator O'Sullivan:** Mr Simon, in relation to the Human Rights Commission, do you think that the ICCPR is a priority for the Human Rights Commission? What is your view of their track record in relation to religious freedom?
>
> **Mr Simon:** We think that the ICCPR should be more of a priority for the Human Rights Commission and that they have had a tendency not to prioritise the rights in the ICCPR and to prioritise other approaches to human rights. So, we consider that to be a concern that we have with the Human Rights Commission, yes.
>
> **Senator O'Sullivan:** And in relation to religious freedom and the track record?
>
> **Mr Simon:** Religious freedom is the glaring omission in human rights law as legislated in Australia, and we think that should be remediated. As for the Human Rights Commission's track record with that, there's been a tendency to elevate other laws above freedom of religion.[18]
>
> **Senator O'Sullivan:** What impact do you believe a Human Rights Act could have on faith-based schools? And do you believe it would have any safeguards? Could you potentially put that in?
>
> **Mr Simon:** We're concerned about the impacts it could have, precisely because of this imbalance that I've mentioned - the elevation of some rights above others - and the failure to prioritise rights. The lack of protection that we have for freedom of religion in Australian legislation is a problem for

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16 Human Rights Law Alliance, *Submission 14*, p. 3.

17 Human Rights Law Alliance, answer to questions on notice, 20 October 2023 (received 9 November 2023), p. 1.

18 Mr Daniel Simon, Solicitor for the Human Rights Law Alliance and Legal Representative for the Australian Christian Lobby, *Committee Hansard*, Friday 20 October 2023, p. 20.

> Christian schools, and a Human Rights Act as proposed in this model doesn't fix that at all and in fact tends to increase the imbalance.
>
> **Senator O'Sullivan:** And what about safeguards? Could safeguards be put in your view? Or do you think it would make it unworkable?
>
> **Mr Simon:** Our view is that safeguards should be put in prior to considering a Human Rights Act at all. We think safeguards should be put in -
>
> **Senator O'Sullivan:** By way of religious -
>
> **Mr Simon:** By way of Commonwealth legislation - the priorities should be positive protection of freedom religion. Also, the current Commonwealth non-discrimination legislation has no protection against discrimination on the basis of religion, which is another priority we have.[19]

1.56 Specifically on priorities, it was the view of the HRLA that:

> legislative protection for freedom of religion, and all forms of freedom of expression, should first be established in line with the ICCPR before introducing such a Human Rights Act. The highest priority, ahead of any further consideration of a Human Right Act, is a religious discrimination Bill of generous ambit, providing meaningful protection.[20]

1.57 This is a view shared by Coalition members of the committee.

1.58 Concerns with the Article 18 reinterpretation were also raised by the Rule of Law Institute of Australia, who noted in their submission:

> The commission's proposal amounts to a departure from the structure of the ICCPR. Unlike the ICCPR, the commission proposes to have a single "limitation clause". This clause would be used by judges to determine what limits should be imposed on these rights when they come into conflict with other rights or initiatives.[21]

1.59 Christian Schools Australia also noted their concerns with the proposed reimagining of Article 18:

> This is a significant retrograde step for the protection of religious freedom. It replicates and reinforces one of the fundamental weaknesses of existing domestic bill of rights type legislation.
>
> It is also unclear whether under the AHRC's formulation of the right to 'Recognition and equality before the law; and Freedom from discrimination' if they intend that this whole right be treated as an absolute right, which cannot be subjected to any limitation, when they refer to the 'Right to recognition before the law' as an absolute right. Considered in the light of their redefinition of the scope of fundamental human rights, this would

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19 Mr Daniel Simon, Solicitor for the Human Rights Law Alliance and Legal Representative for the Australian Christian Lobby, *Committee Hansard*, Friday 20 October 2023, p. 21.

20 Human Rights Law Alliance, *Submission 14*, p. 3.

21 Rule of Law Institute of Australia, *Submission 327*, p. 3.

> constitute a frightening reshaping of human rights protections with the potential to dramatically undermine religious freedom.[22]

1.60 Coalition members do not support the AHRC's proposal to redefine the absolute right 'not to be coerced in a way that would impair a person's freedom to choose their religion or belief', by turning it into a right 'not to be coerced in a way that would impair their freedom to have or adopt a religion or belief in worship, observance, practice or teaching.' Such a right proposed by the AHRC does not exist anywhere in international law. This would be a significant retrograde step for the protection of religious freedom in Australia and would represent a further departure from Australia's international obligations.

1.61 Given that Australia's protections for the freedom of thought, conscience and religion are already well regarded as insufficient in Australian law, the AHRC's proposed approach would be a significant backwards step in protecting human rights within Australia.

Single limitation clause

1.62 Coalition members note that some stakeholders submitted that the single limitations clause proposed by the AHRC model contravened the ICCPR. This was a view held by the Human Rights Law Alliance (HRLA) who said:

> nothing in the "limitation clause" of the AHRC model requires restrictions to be justified on such grounds, as the ICCPR requires, let alone necessary on such grounds. Subjecting human rights to "reasonable limits" under the AHRC model allows excessive control of Australians in a way that is prohibited under the ICCPR… A broader "limitations clause" than is allowed under the ICCPR would provide the mandate for excessive restrictions to be placed on the freedom of religion and freedom of expression of Australians.[23]

1.63 The Rule of Law Institute of Australia said it believed "the single limitation clause proposed by the Human Rights commission, and its use of proportionally test gave rise to two concerns."[24] These concerns included value judgements that have been included in the AHRC model, and the challenge to the proportionality test "requires judges to explicitly make value judgements" that could pose a risk to the judiciary being impartial arbiters.[25]

1.64 During the Canberra public hearing, Mr Chris Merritt, Rule of Law Institute of Australia, reiterated these concerns with the single limitations clause:

> The entire structure of the Human Rights Commission's proposal is aimed at having a single limitation clause on all the rights that would be outlined

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22 Christian Schools Australia, *Submission 64*, pp. 10–11.

23 Human Rights Law Alliance, *Submission 14*, p. 9.

24 Rule of Law Institute of Australia, *Submission 327*, p. 4.

25 Rule of Law Institute of Australia, *Submission 327*, p. 4.

> in the charter. That's a big departure from the approach taken by the international covenant, where the limitations for each right are included in the right. We have some rights that can't be restricted at all, and there are some where the limitations differ significantly and are designed clearly to take account of the different nature of the right. The limitations on freedom of religion under the covenant, for example, differ quite significantly from the limitations on freedom of expression. I think it's just a little blunt to discard all that international jurisprudence, if you like, and invent a new system that is open-ended and that to my mind seems to be in conflict with the requirement that we not restrict these rights any further than the permissible restrictions outlined in the charter. So, it's a broad concern; it's not restricted to freedom of religion.[26]

1.65 During Associate Professor Mark Fowler's appearance at the Canberra public hearing, Coalition members asked him if the single limitations clause was compatible with common law:

> the limitations clause bundles in the notion of proportionality. The charter proposal requires that all Commonwealth law be read consistently with the charter. If we have a reasonable limitations clause which imposes upon manifestation, when a school acts pursuant to current section 38 in the Sex Discrimination Act in appointing a teacher that shares its ethos and so on, is that exemption provision now to be read consistent with this new standard and hence the exemption provision itself goes from its standalone statutory proposition to something that must be reasonable and proportionate and therefore in a disjunct with the international human rights law? For example, if you take the UK and the Amicus matter, Justice Richards said that the exemption granted there to religious institutions satisfies the proportionality test on its own terms, by sheer dint of its terms. There is no further requirement to balance and consider proportionality. What he was saying was that this acquits the requirements of international law, without a broad reasonableness standard being applied to the exemption. It is not clear in my mind what the outcome is under this proposal.[27]

1.66 The AHRC advocates for a singular limitations clause to encompass all rights, excluding those it deems absolute, which do not correspond with the ICCPR's list of absolute rights. As previously outlined, the AHRC's compilation of absolute rights is perplexing as it overlooks certain freedoms of religion or belief that are recognised as absolute under international law. The AHRC also elevates rights which are not absolute under the ICCPR, and even newly invented rights (related to Article 7) to absolute status.

1.67 Coalition members cannot support a single limitations clause which would allow individuals within Australia's jurisdiction to lose key aspects of their fundamental rights.

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26 Mr Chris Merritt, Rule of Law Institute of Australia, *Committee Hansard*, 20 October 2023, p. 41.

27 Associate Professor Mark Fowler, *Committee Hansard*, Friday 20 October 2023, p. 22.

Article 7

1.68 Submissions were received by the Committee which noted that Article 7 of ICCPR had been significantly extended to an unacceptably low threshold, and given new meaning, in the AHRC charter.

1.69 Article 7 of the ICCPR requires that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This right has been extended by the AHRC proposal to include that "[a] person must not be…treated…in a degrading way". This could be used in a multiplicity of ways to undermine fundamental rights such as freedom of thought, conscience and religion, and freedom of expression.

1.70 Given that Article 7 is an absolute right under the ICCPR, Coalition members are deeply concerned that broadening of the application of this right will lead to significant conflicts in the attestation of competing rights.

1.71 Dr Paul Taylor's submission notes that:

> it is no stretch of the imagination to envisage such a right being asserted in contest with other rights, whether: in the name of child welfare when a public authority's perceptions differ from those of parents; in opposition to the expression of religious or political beliefs which cause offence; or more broadly in a manner analogous to a vilification provision (like *Anti-Discrimination Act 1998* (Tas) s. 17(1)); and possibly also to provide alternative claims against conduct that is characterised as discriminatory.[28]

1.72 Coalition members are particularly alarmed that this reinterpretation of Article 7 rights could be utilised as a Trojan horse for social agendas that cannot be progressed successfully through the political process.

Dialogue between parliament and the judiciary

1.73 Furthermore, Coalition members do not share the confidence of the AHRC, and other Human Rights Act proponents, that the proposed reform model would establish a 'dialogue' between parliament and the judiciary.

1.74 As Professor Nicholas Aroney, Professor Richard Ekins KC and Dr Benjamin Saunders submitted to the inquiry:

> The ability and willingness of parties to engage in genuine deliberation over contested political matters is dependent on factors that have nothing to do with the existence of a charter of rights. The Human Rights Charters enacted in Victoria, Queensland and the Australian Capital Territory have not made genuine dialogue any more likely than it otherwise would have been.[29]

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[28] Dr Paul Taylor, *Submission 216*, p. 7.

[29] Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 2.

1.75 Coalition members contend that 'dialogue' on human rights is best had between parliament and the Australian people, rather than with an unelected and unaccountable judiciary.

Lessons from the State, Territory and international Human Rights Acts

1.76 Humans Rights Acts or Charters have been passed in three Australian jurisdictions; the ACT in 2004, Victoria in 2006 and Queensland in 2019.

1.77 Case studies presented through submissions to the inquiry failed to provide any convincing examples of how these Acts had influenced any positive outcomes.

1.78 Far from supporting the case for a Federal Human Rights Act, Coalition members are of the view that these Acts completely failed to protect abuses of human rights within these jurisdictions during the recent COVID-19 pandemic. This is particularly true of Victoria. These Human Rights Charters did little to protect citizens during the pandemic against draconian government overreach.

1.79 During the Melbourne public hearing, evidence was heard from the Victorian Equal Opportunity and Human Rights Commissioner on how they had no opportunity to assess public health decisions prior to their enactment.

1.80 Coalition members note that, when it was needed most, a Human Rights Charter was found wanting. It failed Victorians abysmally. Therefore, if a Charter could so easily be flouted and overridden during a pandemic by a state government invoking emergency powers, what assurances can be given for religious freedoms under a Human Rights Act during normal times? Either an individual's human rights stand the test for all occasions, including during a crisis, or they are just given lip service when it's convenient.

1.81 In relation to the experiences during the pandemic, Coalition members note that it seemed to matter very little whether a jurisdiction had a Human Rights Act or Charter:

> **Senator O'Sullivan:** … Even though Victoria has a Human Rights Charter and it wasn't suspended, it was still circumvented during the pandemic. The one time that people actually needed to protect their rights, in my view, it failed.
>
> …
>
> **Mr Fowler:** In terms of COVID-19, if we compare the decision of the New South Wales Supreme Court in Kassam v Hazard with that of the Victorian Supreme Court in Loielo v Giles, we can see that, in the Victorian case where there was a Charter and in the New South Wales case where there wasn't, there was no material difference. In both cases the court said that this is a matter of policy; this is a concern for the parliament. From a separation of powers perspective, we might say that's a good outcome. But it does raise the question as to whether or not there was any material difference.[30]

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[30] Associate Professor Mark Fowler, *Committee Hansard*, Friday 20 October 2023, p. 21.

1.82 The failings of the existing state and territory Human Rights Charters during the pandemic underscores the observations of professors' Aroney, Ekins and Dr Saunders that:

> Australian cases evidence significant uniformity in approach and outcome, regardless of whether the relevant jurisdiction had a human rights act or not. The existence of a Human Rights Charter made little difference to either the reasoning or the outcome. In sum, a Human Rights Act did little or nothing to protect Victorian residents against some of the most severe infringement on human rights ever inflicted in Australia.[31]

1.83 Coalition members consider that the AHRC's proposed model would simply entrench the failures of these existing state and territory Human Rights Acts.

1.84 In considering the international experience of the UK Human Rights Act, Coalition members hold significant concerns for how similar legislation in Australia would impact on the Government's ability to respond to foreign individuals who commit crimes within Australia.

1.85 The lived experience of the UK Act has seen numerous examples where the will of the UK Government and the British people have been thwarted by the Act. This includes lengthy and costly delays in the deportation of terrorists Abu Qatada and Abu Hamza. The UK Government was also unable to deport Aso Mohammed Ibrahim, an illegal Iraqi immigrant who struck and killed a 12-year-old girl while driving while disqualified, amongst other criminal offences.

1.86 Other submissions to this committee highlighted the mixed and inconsistent experiences of human rights acts overseas. The Executive Council of Australian Jewry, for instance, made the point that Bills or Charters of Rights overseas have had mixed results at best:

> The ECAJ is ambivalent about the desirability of Australia adopting a legislated Charter or Bill of Rights in the form of a Human Rights Act (HRA), along the lines proposed by the Australian Human Rights Commission (AHRC). In principle, we favour any measures which would enhance individual rights and freedoms. However, in some important cases which are detailed in this submission, experience with bills or charters of rights overseas has resulted in courts applying such instruments in a manner that, in our view, has wrongly prioritised certain rights and freedoms over others.[32]

Specific concerns with Appendix 5 – Example Human Rights Bill 2024

1.87 Coalition members of the committee have opposed the development of the example Bill appended to the committee's inquiry report. This example Bill was

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[31] Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 15.

[32] Executive Council of Australian Jewry, *Submission 26*, p. 1.

not required under the inquiry's terms of reference and has not benefited from direct public consultation or scrutiny from external experts.

1.88 The extension of the inquiry's reporting deadline enabled the opportunity for external consultation on this example Bill, however the majority of the Committee did not see fit to submit this Bill for community and stakeholder feedback.

1.89 Coalition members are not satisfied that the example Bill represent a robust legislative model.

1.90 The preamble of the example Bill contains highly contested statements. It declares that "human rights apply from the time a person is born." This is not compatible with the UN Convention on the Rights of the Child and Declaration of the Rights of the Child which notes that "the child… needs special safeguards and care, including appropriate legal protection, before as well as after birth."

1.91 Contrary to the principle of human rights being universal, the example Bill's preamble outlines that some human rights have "a particular significance for Indigenous peoples", implying a lesser significance for other Australians. Coalition members reject this assertion entirely.

1.92 The draft Example Bill is a concerning departure from internationally recognised human rights. Subclause 12(4) outlines the rights that can never be subject to limitation. This list excludes absolute rights protected under the ICCPR, including Article 6– the right to life (clause 16 of the example Bill), which is only protected within the example Bill if it constitutes genocide.

1.93 Article 18 of the ICCPR – the freedom of thought, conscience and religion, is only protected in part in the example Bill. It excludes subclause 22(3) "A child's parents have the freedom to ensure the religious and moral education of the child in conformity with the parents' own convictions". This is an absolute right under the ICCPR but is not listed as such in subclause 12(4).

1.94 Clause 12(1) of the example Bill outlines that other rights may be subject under law to limits that are "reasonable." Article 18(3) of the ICCPR sets a much higher threshold for the restriction of religious freedom. It provides that the only permissible restrictions on the freedom to manifest religion or belief are those that are "necessary" (not merely "reasonable") to protect public safety, order, health, morals, or the fundamental rights and freedoms of others. This represents significantly less protection for religious freedom than Australia is treaty-bound to provide.

1.95 The example Bill seeks to legislate the economic, social, and cultural rights (ESCR) such as the right to a healthy environment, to education, to health, to social security, and to work. These rights are unsuitable to be incorporated in legislation as they are formulated in such general and subjective terms. Coalition

members consider that these rights do not lend themselves to justiciable processes, and should not be legislated in such an abstract way.

Conclusion

1.96 Australia boasts an exemplary human rights record and has played a significant role in shaping global agreements such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).

1.97 The proposed Human Rights Act deviates dangerously and unjustifiably from these international standards, selectively diluting protections for fundamental freedoms while introducing ambiguous and uncertain provisions allowing unsupportable scope for limiting rights.

1.98 The proposal threatens to undermine the robustness of Australia's parliamentary democracy by empowering the judiciary to be arbiters of contentious political issues, with excessive power to interpret such uncertain provisions. This would result in American-style conflict between branches of government.

1.99 Coalition members note the views of Professors' Aroney, Ekins and Dr Saunders who wrote:

> a federal statutory charter of rights is unnecessary, pointless and dangerous. It is unnecessary because human rights can and should be protected by the Parliament.[33]

1.100 Many stakeholders have demonstrated genuine and legitimate concerns with the AHRC proposal, including that the rights of faith-based schools and institutions could be eroded.

1.101 Promoting and enhancing human rights in Australia requires an approach that fosters unity and trust within the community, rather than one that divides. Given the sufficient concerns raised through this inquiry, Coalition members contend that it would not be in the community interest for the Government to pursue this agenda.

1.102 Coalition members note that many stakeholders who appeared at the Canberra public hearing expressed a view that the higher priorities than a Human Rights Act should be positive legislative protection for freedom of religion, and a Religious Discrimination Bill. Those two priorities are different, as noted by the ACL, because:

> the focus of a proposed Religious Discrimination Bill is protection against discrimination, not positive protection for freedom of thought, conscience

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[33] Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders, *Submission 333*, p. 17.

and religion. Discrimination legislation is needed but it is the wrong vehicle for protecting freedom of religion.[34]

1.103 The Coalition members' rejection of the AHRC's proposal reflects a commitment to uphold Australia's proud tradition of human rights while safeguarding the primacy of the parliament in protecting the rights of Australians.

Recommendation 1

1.104 Coalition members recommend that the Government does not legislate to establish a Human Rights Act.

Mr Henry Pike MP	**Senator Matt O'Sullivan**	**Senator Gerard Rennick**
Member for Bowman	Senator for Western Australia	Senator for Queensland

[34] Australian Christian Lobby, answer to questions on notice, 20 October 2023 (received 24 November 2023), p. 5.

Senator Thorpe Additional Comments

Foreword

1.1 I make these comments as a proud Gunnai Gunditjmara and Djab Wurrung woman, and as a Black witness to the ongoing functions and coercion of the colonial government. As First Peoples, we do not just have inherent rights, we have an inherent responsibility to care for our mother, our Country, as our ancestors did.

1.2 I give my support to the progression of the human rights framework in this country and support the committee recommendation that the government legislates a Federal Human Rights Act. I also note the direct link between the health of our Country, and human rights, including the rights to life, health, food, water and housing. I hope to see all members of parliament take up the fight for a rights based framework, and for our common and collective humanity.

The History and Current Reality of Human Rights in the Settler-Colony of Australia

1.3 So let's talk Truth. Yes, this Bill is about Human Rights – a long overdue conversation on this continent. A discussion that cannot be had without placing ourselves within the historical context, and current reality of colonisation:

> Indigenous peoples who have been colonised around the world; who are marginalised by the dominant society; who have lost access to their lands, territories and resources; and who have a particular affinity to their lands, territories and resources.[1]

1.4 With colonisation came the mass abuse of human rights: massacres, forced displacement, theft of land and resources, slavery, torture, sexual violence, political and social discrimination, child removals and incarceration – violations which continue to be inflicted upon our communities today:

> Aboriginal and Torres Strait Islander children's rights have been in crisis since colonisation, when we were dispossessed of our land and our cultural ways of growing up and nurturing our children, which we have done successfully for more than 65,000 years.[2]

1.5 In fact, the very premise of British colonisation – including the theft of land and resources and the establishment of systems of colonial control such as government and prisons – not only inflicted gross human rights abuses on First

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1 Mr Les Malezer, Chairperson, Foundation for Aboriginal and Islander Research Action, *Committee Hansard,* 15 August 2023, p. 36.

2 Ms Rachel Atkinson, Board Member, SNAICC National Voice for Our Children, *Committee Hansard*, 25 August 2023, p. 33.

Nations Peoples, it actually required them to occur. Terra Nullius was the first of these abuses. A legal fiction coupled with the racist ideology of white supremacy rendered First Nations Peoples as non-human in the eyes of the coloniser, paving the way for the genocide that would lead to the establishment of this government and its legacy of violence:

> There is no other group in Australian society that is a greater litmus test of the place of human rights protection in Australian history than Indigenous Australians.[3]

1.6 Be it through resistance or negotiation, First Nations leaders throughout time have fought for their rights since the first days of the invasion in 1788. Pemulway, Jandamarra, Ellemarra, Bunjileenee, Maulboyheenner, Tunnerminnerwait, Musquito and the Black Banditti, Truganinni, Jupiter, Cold Morning, Walyer, Tongerlongerter, Mannalargenna, Windradyne, Yagan, Dundalli, Multuggerah, the Wiradjuri, the Kalkadoons, the Kalkatunga, the Yolngu, the Bunuba, the Kurnai, the Gunditjmara, the Dharug, the Dja Dja Wurrung as well as countless other fighters and nations have fought invading settler forces. These are just some of the many heroes that resisted the onslaught and raised their voices on behalf of their families and communities.

1.7 Our people were the first human rights defenders on this continent, and this continues today with First Peoples across the world protecting over 80 per cent of the remaining biodiversity on this planet.[4]

> The 2022 decision of the UN Human Rights Committee is relevant in this regard. It found that Australia's failure to provide adaptation and mitigation measures to address climate change impacts violated the rights to culture and a private life of eight Torres Strait Islanders.[5]

1.8 During the drafting of the Genocide Convention in 1948, Australian delegates argued against the inclusion of cultural genocide, a key principle of the original concept of this 'crime of all crimes'. Canada, along with Australia, New Zealand, and the United States (CANZUS) held strong on their objections which were sustained and cultural genocide dismissed from the Convention.

> Any rights touching on the right to culture, must include rights to cultural heritage, including intangible cultural heritage as per the Convention for the Safeguarding of the Intangible Cultural Heritage and underwater cultural heritage.[6]

1.9 All the while the Stolen Generations were in full effect back in the colony, stripping First Nations children of their right to culture, land, language and

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3 Professor Kim Rubenstein, *Committee Hansard,* 20 October 2023, p. 43.

4 Amnesty International, *Indigenous Peoples*, (accessed 28 May 2024).

5 Human Rights Law Centre, *Submission 232*, p. 52; *Daniel Billy et al. v Australia*, UN Human Rights Committee Communication No. 3624/2019 (2022).

6 UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, (accessed 20 May 2024).

community, and trampling on the basic human right of a mother and father to raise their own child:

> The fifth punishable act of genocide is the forcible transfer of children from one protected group to another…. In relation to child removal in this country, where we have 22,000 Aboriginal and Torres Strait Islander children in out-of-home care, we're obviously over-represented at every point.[7]

1.10 In 2007, Australia – along with the same colonial counterparts – also initially refused to ratify the United Nations Declaration on the Rights of Indigenous Persons (UNDRIP) until provisions like the UNDRIP Article 46 were included to specifically attempt to maintain the territorial integrity of the colony state of Australia. This reluctance has continued to the present day by voting against a UNDRIP Bill last year.

1.11 The ongoing violation of First Nations continued to be raised in both the 1991 Royal Commission into Aboriginal Deaths in Custody Report and the 1997 Bringing Them Home report which called the removal of children as genocidal. Along with a multitude of similar documents, the vast majority of recommendations made by First Peoples in these reports have been largely ignored. Indeed, the need for proper, extensive, genuine decision making power for First Nations Peoples was touched on extensively in the inquiry including the need 'to remedy the historical and ongoing exclusion from government decision making'.[8]

> so, there's a whole range of social problems that are impacting, and we don't have rights or a voice, to know what's best—not having a government coming in and making a decision on what should happen. We know what's best. We did it for 65,000 years. We need that voice to be able to tell the government, this is the best way, how we should be working with our children and our families.[9]

1.12 The same year the Australian government refused to ratify the UNDRIP, they suspended the operation of the *Racial Discrimination Act 1975* in order to implement the Northern Territory Intervention, legislative measures which would largely remain in place until 2022. There we saw hugely harmful legislation rushed through this very committee, without proper human rights scrutiny. There is no legislation pressing enough to not require a consideration of human rights.

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7 Senator Lidia Thorpe, *Committee Hansard*, 12 May 2023, p. 19.

8 Environmental Justice Australia, answers to questions on notice, 25 August 2023 (received 14 September 2023) pp. 4–6; Environmental Justice Australia, *Submission 150*, pp. 8, 23. See also, Asian Research Institute for Environmental Law, *Submission 237;* Australian Lawyers for Human Rights, *Submission 229*, pp. 41–43.

9 Ms Rachel Atkinson, Board Member, SNAICC National Voice for Our Children, *Committee Hansard*, 25 August 2023, p. 35.

1.13 In 2002 Australia finally implemented the Genocide Convention into domestic legislation. After over 50 years of delay since it was ratified in 1949. When it did, it included provisions to shield itself from historical accountability of the most horrendous human rights abuse of genocide, to ensure it was not retrospective for any conduct that occurred prior to 2002, and introduced what is commonly known as the Attorney-General's fiat. The fiat is a tool that has shielded the government from accountability and functioned as an effective veto power to commencing proceedings under the Convention in the past and functioned as a barrier to justice for victims and survivors of these atrocious crimes, which is the subject of the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 introduced in my name.

1.14 In response to a question around what a human rights framework or Act can do to address human rights abuses Ms Jabri Markwell, from the Australian Muslim Advocacy Network Ltd, raised Australia needing to strengthen its approach to its obligations under the Rome Statute to prevent genocide.[10]

1.15 And last September, while the Labor Government was spruiking a powerless Indigenous 'Voice to Parliament', all the while ignoring our People's demands on housing, poverty, imprisonment, while the Labor Queensland party suspended their state's human rights protections to lock First Nations children in adult jails.

> If we look, for example, at Queensland, which has a human rights act, when the Queensland courts pointed out that the treatment of juveniles in detention in Queensland was contrary to the Queensland human rights law, the Queensland government's response was to suspend the operation of the Queensland human rights law with respect to juvenile detention. A court outcome didn't actually change the fact that juveniles in detention in Queensland are, in fact, being treated in ways that are breaching their human rights.[11]

1.16 The 2023 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (JSCATSIA) inquiry into UNDRIP[12] also highlighted Australia's historical and ongoing genocidal impacts, including the assimilation policies that created the Stolen Generations, the forced dispossession of land and the

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10 Ms Rita Jabri Markwell, Advisor, Australian Muslim Advocacy Network Ltd, *Committee Hansard*, 15 August 2023, p. 62.

11 Mr Iain Anderson, Commonwealth Ombudsman and National Preventive Mechanism Coordinator, Office of the Commonwealth Ombudsman, *Committee Hansard*, 20 October 2023, p. 26.

12 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (November 2023).

ongoing ramifications seen in intergenerational trauma, and multi-generational experiences and impacts of poverty and incarceration.[13]

> Our children still remain over 10 times more likely to be in out-of-home care than non-Indigenous children, and, far from getting better, this trend has been increasing in every jurisdiction over the last decade. We suspect it's another four per cent in Queensland. Our children are significantly more likely to have contact with the youth justice system and to be held in detention. This is to say nothing of the horrifying breaches of human rights that our children and young people experience while in out-of-home care and youth detention.[14]

1.17 As the occupation of our land, seas, skies and waters, so does the abuse of our basic human rights continues. These issues have not been addressed, nor has any government been held accountable. Meanwhile current laws, policies and practices continue to exact colonial legacies of violent abuse of human rights and criminalisation of our ways of being. One stark example is child removals, and the consequent child imprisonment, which are currently facilitating the removal of a new stolen generation of children, a system which the Australian Human Rights Commission (AHRC) described as committing egregious human rights violations.[15]

The Role of the State as the Abuser

1.18 We cannot begin to address the systemic, institutional human rights abuses taking place, without properly identifying the role of the state as the abuser, and the fact that this colony and its governments have been, and continue to be, the greatest abuser of human rights. Leaving state violence unspoken serves to hide and legitimise the intergenerational human rights violations of the state, including the failures of state services that have left vulnerable people trapped in poverty, in powerlessness, and in abuse. It must be acknowledged that appropriate funding for housing, community support, and social services means the most to those most vulnerable.

1.19 The Australian College of Nursing submitted that inadequate government income payments and housing stress result in denying basic rights and poverty.[16]

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13 Mr Yingiya Guyula MLA, *Submission 51*, pp. 2–3 to the Legal and Constitutional Affairs References Committee, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, 2022.

14 Ms Rachel Atkinson, Board Member, SNAICC National Voice for Our Children, *Committee Hansard,* 25 August 2023, p. 35.

15 Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 35.

16 Australian College of Nursing, *Submission 208*, p. 4.

> Our current legal frameworks and 'business as usual' approaches to public administration are insufficient to prevent systemic human rights abuses – particularly where they impact upon a vulnerable population" where decisions were based on "budgetary factors that did not take into consideration the broader range of relevant concerns through a human rights lens.[17]

1.20 Evidence throughout the inquiry pointed to this fact: that nationally, human rights abuses are the direct result of the actions and inactions of the state and its agencies who across all jurisdictions – including in extra-territorial jurisdictions – are the primary abusers of vulnerable, criminalised and racialised communities, and especially of First Peoples in the context of ongoing colonialism and genocide.

1.21 The Victorian Aboriginal Child Care Agency submitted that Aboriginal people are significantly more likely to experience homelessness.[18]

1.22 Compulsory income management and cashless welfare policies, which limits individual's ability to spend their social security entitlements, were also raised as impinging on rights to non-discrimination, social security and private life, particularly for First Nations People.[19]

1.23 The state is often framed as the protector of human rights, the solution to violence, the saviour of vulnerable persons, when there is overwhelming evidence of the state being a violent actor in its own right. As such, it is the irony of international and domestic human rights law that it is the government who is both the regular violator of rights, and then casts itself as the protector of those same rights and faces little if any accountability for its actions.

1.24 The National Justice Project noted that people experiencing homelessness are one vulnerable group that frequently face harassment, arbitrary detention and abusive treatment at the hands of police, often due to discrimination.[20]

1.25 Australia is continuously criticised internationally for its human rights record, for its actions both at home and abroad, without accountability for its egregious actions. Only as recently as the 2021 Universal Periodic Review, United Nations (UN) member delegates raised a range of human rights concerns including treatment of asylum seekers, child incarceration, and the discrimination of First Nations Peoples. The UN Subcommittee on Prevention of Torture terminated its visit to Australia in October 2022 after being blocked from accessing prisons and

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17 Economic Justice Australia, *Submission 34*, pp. 7–8.

18 Victorian Aboriginal Child Care Agency, *Submission 175*, p. 4.

19 Economic Justice Australia, *Submission 34*, pp. 8–9; Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission 86*, p. 21; Indigenous Law and Justice Hub, *Submission 157*, p. 5; Human Rights Law Centre, *Submission 232*, p. 50.

20 National Justice Project, *Submission 225*, p. 18.

mental health facilities in New South Wales and Queensland. In 2023, the Commonwealth Ombudsman released a damning report on Australia's immigration detention regime.

> Secondly, the point is regarding children being held in immigration detention. No child should be held in detention, regardless of what their protection claims are. The fact is that they were held in closed detention and that both the children suffered serious medical issues—including one child's teeth rotting when they were at the age of two, and another developing a blood infection.[21]

1.26 As such, the proposed Human Rights Act should serve simply as a starting point.

1.27 Greater protection and accountability for human rights should be underscored by a national truth telling process, and the implementation of recommendations made concerning First Nations human rights in the aforementioned report.

1.28 Inclusive of this should also be protections and support for those who are marginalised and criminalised by the colonial system, as well as the many communities that suffer a range of rights violations in quality of life, safety from the state and empowerment, and are vulnerable to arbitrary or political arrest, such as asylum seekers, refugees, non-citizens, protesters, and participants in union protests and strikes, particularly those protesting climate change, journalists subjected to police harassment, especially if they criticise the government, whistleblowers and other communities and individuals who are marginalised, dehumanised, and othered including those who are trans, non-gender-conforming, disabled or elderly.

1.29 It is with this context in mind that the following commentary regarding the proposed Human Rights Act is made.

> human rights are acknowledged in official Australian government policy to be universal, inherent, indivisible, interdependent, interrelated and inalienable—all those 'in' words. In short, your own policies acknowledge that we're all entitled to all human rights from birth, and they can't be given up by us or taken away by any government, let alone by one purporting to be democratic; and yet here we are, in 2023, with a committee posing questions, the basic assumptions of which are at odds with this official policy. The terms of reference pose questions which contemplate the idea that we're not entitled to human rights, unless it suits the government of the day. This implies that the best Australians might hope for from this inquiry is that maybe some human rights will at last come our way, if it suits the committee today. I'm here to call on this committee to aspire to achieve more

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[21] Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard*, 25 August 2023, p. 29.

> than that kind of meagre offering to Australians because they're entitled to more; they should not be denied their right.[22]

Premise of the Recommendations

All human rights are indivisible and interdependent

1.30 Throughout the committee inquiry, and drafting stages of the report and proposed Act, I have been advocating for the strongest, most comprehensive articulation of and protection of human rights as consistent with international law, and made extensive comments and submissions to this goal, some of which have been accepted and are in the substance of the report, for which I thank the committee.

1.31 Throughout the inquiry some submitters regarded the AHRC model as conservative for excluding certain rights, and drafting certain provisions and specific rights too narrowly, thereby undermining them and potentially rendering them powerless, for example, the right to a healthy environment. It is of utmost importance that any human rights framework progressed is ambitious, future forward and reflects the language, wording and intention of all the rights contained in international law.

> Once bills of rights are enshrined, they can be legally or politically difficult to update or change. This is why it is vital for Australia to embrace the potential of future-facing human rights.[23]

> To stay true to our international human rights obligations and their intent, we need to ensure that a Human Rights Act is forward looking, complies with the obligations set out at international law, and reflects the language, wording and intention of all the rights contained therein, and should fully and comprehensively protect and promote civil, political, economic, social and cultural rights, as per its international legal obligations', including under the ICCPR and ICESCR.[24]

1.32 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, and I support the full implementation of all rights.

> this should include as stated by VALS a standalone right to self-determination, non-discrimination rights, comprehensive cultural rights

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[22] Dr Bronwyn Kelly, Australian Community Futures Planning, *Committee Hansard,* 28 September 2023, p. 25.

[23] Economic, Social and Cultural Rights (ESCR) Network (Australia/Aotearoa/New Zealand), *Submission 86*, p. 6.

[24] Associate Professor Julie Debeljak, *Submission 15*, p. iv.

> and strong protection for economic and social rights, including rights to housing and health.[25]
>
> Any right protected by the principal UN human rights treaties to which Australia is party should be considered for inclusion', subject to a number of factors, including constitutional support, drafting which facilitates justiciability, and the responsibilities of Commonwealth public authorities/entities.[26]

Substance of Recommendations

1.33 These comments make a number of pinpoint legislative recommendations that in principle seek to strengthen the rights of self-determination of Sovereign First Nations and protect vulnerable people from human rights violations committed by the State.

1.34 However, Australia has not observed the right to self-determination as defined in international legal terms within the draft Act, but instead characterised self-determination in terms acceptable to the colonial government, all the time ensuring that the colonial government would maintain its superiority in power. The recommendations made in this paper seek to address this, by noting that these comments are made within the context of a colonial system of governance and the curtailing of human rights this proposed Act actually oversees.

1.35 The right to self-determination is a right of 'peoples' rather than of individuals, and is a core principle of human rights - collective rights/group rights are core human rights principles. The conferring of group rights is significant with respect to the devastating impacts that colonisation had on Indigenous Peoples as collectives. This paper also seeks to address this core deficit in the proposed Act by way of proposed legislative amendments.

1.36 The AHRC acknowledges that without self-determination it is not possible for Indigenous Australians to fully overcome the legacy of colonisation and dispossession.[27]

1.37 I also note that treaty, self-determination and the implementation of UNDRIP are complementary. They are not mutually exclusive, nor are they an either/or option, but together make up a rights-based approach that would achieve greater protection of our rights to First Peoples, and begin to redress the ongoing impacts of colonisation. Our people have long fought for a nationwide Treaty process between the government and First Peoples as a matter or urgency

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[25] Ms Chloe Wood, Managing Lawyer, Civil Law and Human Rights Unit, Aboriginal Legal Service of Western Australia Limited; Co-convenor, Western Australia for a Human Rights Act, *Committee Hansard,* 20 October 2023, p. 51.

[26] Law Council of Australia, *Submission 120*, p 12.

[27] Australian Human Rights Commission, *Right to Self-Determination*, https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination*Right to Self-Determination*, (accessed May 13, 2024).

priority and the only real pathway for society to move forward. A comprehensive Treaty would complement the legislative implementation of the human rights principles, the UNDRIP and further enshrine the principles contained therein within Treaty negotiations and agreements.

Legislative Recommendations

Self-determination

Recommendation 1

1.38 The right to self-determination should be included specifically as an inherent and justiciable right for Sovereign First Nations Peoples that align with international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

1.39 The backdrop to the emergence of the legal right to self-determination was the movement for decolonisation during the 1960s where the core meaning of the legal right to self-determination centres on the idea of freedom from subjugation.[28]

1.40 The right of self-determination has been identified by the International Court of Justice (ICJ or 'the Court') as 'one of the essential principles of contemporary international law'.[29] '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.'[30]

1.41 Many submitters supported the inclusion of the right to self determination in a federal HRA, including advocating for the inclusion of the right to self-determination as a stand-alone right.[31] With the vote against the proposed UNDRIP Bill, and no domestic oversight mechanisms to ensure compliance with the Declaration, a Human Rights Act could serve as the ideal starting point to recognise and uphold these rights.

> The Aboriginal Legal Service strongly supports the enactment of a federal human rights act and is advocating in particular for the act to include the

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[28] Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', *Human Rights Law Review*, 11:4, 2011, pp. 609–644.

[29] *Case Concerning East Timor (Portugal v Australia)* (Merits) [1995] ICJ Reports 95/19, [102].

[30] International Covenant on Economic, Social and Cultural Rights, article 1.

[31] Foundation for Aboriginal and Islander Research Action, *Submission 124*, pp. 3–4; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 3; NSW Aboriginal Women's Advisory Network, *Submission 113*, pp. 6, 13; National Justice Project, *Submission 225*, p. 4.

> important rights set out in the United Nations Declaration on the Rights of Indigenous Peoples, including a standalone right to self-determination, non-discrimination rights, comprehensive cultural rights and strong protection for economic and social rights, including rights to housing and health.[32]

1.42 The right and need for genuine power and decision-making, and how that right is continually violated, and co-opted and denied to First Peoples was touched on extensively in the inquiry,[33] and it is clear that decisions on the adequacy of the proposed framework and legislation must be self-determined by First Peoples and their communities including community controlled organisations, grassroots organisations. This was a flaw of the committee process itself, and the AHRC model themselves noted that their recommendations require further extensive consultation with First People and is not exhaustive.

1.43 Environmental Justice Australia further submitted that additional specific procedural and participation rights for, and developed by, Aboriginal and Torres Strait Islander people should be included to 'remedy historical and ongoing exclusion from government decision making'.[34]

1.44 As stated by the AHRC 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. The inquiry heard of a shocking record of decision-making for and often to the detriment of First Peoples, completely ignoring the principle of free, prior and informed consent even though it should be in the government's own best interest as international and national examples have shown that self-determined solutions are more informed, effective and easier to implement.

1.45 The UNDRIP provides:

> Article 3:
>
> Indigenous 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.
>
> Article 4:

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[32] Ms Chloe Wood, Managing Lawyer, Civil Law and Human Rights Unit, Aboriginal Legal Service of Western Australia Limited; Co-convenor, Western Australia for a Human Rights Act, *Committee Hansard,* 20 October 2023, p. 51.

[33] Law Council of Australia, *Submission 120*, p. 14; NSW Aboriginal Women's Advisory Network, *Submission 113*, p. 4; Victorian Aboriginal Child Care Agency, *Submission 175*, p. 7; Indigenous Law and Justice Hub, *Submission 157*, p. 12; Human Rights Law Centre, *Submission 232*, p. 47; Australian Lawyers Alliance, *Submission 83*, p. 11.

[34] Environmental Justice Australia, answers to questions on notice, 25 August 2023 (received 14 September 2023) pp. 4–6; Environmental Justice Australia, *Submission 150*, pp. 8, 23. See also, Asian Research Institute for Environmental Law, *Submission 237*; Australian Lawyers for Human Rights, *Submission 229*, pp. 41–43.

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> Article 5:
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[35]

Positive Participation Duty

Recommendation 2

1.46 That the proposed Human Rights Act be amended to contain an explicit and enforceable positive participation duty for all people most at risk of human rights breaches, including but not limited to Sovereign First Nations.

1.47 Firstly, it must be noted that participation duty is not an alternative, nor is it a replacement for self-determination.

> We must be upfront about what self-determination is and halt the watering down of this important principle; participation duties must not be equated with self-determination.[36]

1.48 The AHRC acknowledges that without self-determination it is not possible for Indigenous Australians to fully overcome the legacy of colonisation and dispossession.[37]

1.49 Noting that subclause 47(4) ('Obligations on Public Authorities'), of the draft bill,[38] provides for the participation of First Nations Peoples in the 'consideration' of human rights, this provision should be statutorily expressed as per the recommendations of the Australian Human Rights Commission.[39]

1.50 That participation duty must also include a specific obligation to engage with those with lived experience, and grassroots groups that are not at the forefront

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35 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. A/RES/61/295 (2007).

36 Indigenous Law and Justice Hub, *Submission 157*, p. 17.

37 Australian Human Rights Commission, *Right to Self-Determination*, https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination*Right to Self-Determination*, (accessed May 13, 2024).

38 Proposed subclause 47(4) states 'giving proper consideration to a human right in making a decision includes': (c) ensuring the participation of: (i) Indigenous peoples in decisions that directly or disproportionately affect Indigenous peoples.

39 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, pp. 161.

of political access. Consideration must be given in particular to minority groups and those lacking sufficient political power to have their voice heard, or who experience barriers to participation related to vulnerabilities experienced by those groups (for example, children, who are unable to vote). Much scrutiny also needs to be given to the quality and efficacy of consultation being undertaken in purported compliance with a participation duty:

> The success of this process-based measure for protecting Indigenous rights 'would rely on the robustness of the processes and resources put in place for consultation.[40]
>
> It's not just about what they do but how they do it. How they conduct their consultation must be shown to be informed by the needs of the group they wish to engage. Assessing people's meaningful inclusion in consultation cannot be left to government as they lack the requisite skills and knowledge to determine this.[41]

1.51 For example, within government decision making, particularly with the right to a healthy environment, the meaning of this should be read within the context of requiring public authorities to ensure the effective participation of all people who are most at risk of experiencing environmental harm in addition to First Nations Peoples, children, and people with disability, such as women, people who are financially disadvantaged, older people, people from a racial, ethnic or other minority, people displaced by natural disasters, culturally and racially marginalised communities, and LGBTIQA+ communities.

1.52 The Australian Human Rights Commission supports a binding obligation ("a participation duty") on Public Authorities in the consideration of human rights, stating:

> 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.[42]

1.53 Consultative mechanisms should be inclusive of the express right to self-determination, and be actualised by including First Nations leadership and expertise in parliamentary processes that will operate to implement the functions of the Act.

1.54 For example, the Parliamentary Joint Committee on Human Rights should seek to ensure legislation complies with duties expressed in clause 47, including First Nations consultation in matters that concern First Nations communities.

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40 Indigenous Law and Justice Hub, *Submission 157*, p. 16.

41 Deafblind Australia, *Submission 87*, pp. 3–4.

42 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 16.

1.55 This participation duty should also be inclusive in the event of any possible limitations and suspensions of human rights (see below).

Limitations

Recommendation 3

1.56 That the proposed Human Rights Act (HRA) be amended to provide for provisions for Sovereign First Nations consultation, oversight and access for review regarding any limitation placed on the function of the HRA in circumstances in which they are impacted.

1.57 Clause 12 makes provisions for the limitation of rights in a number of circumstances, and also notes that consideration of the vulnerability of any affected group is subject to a limitation.

1.58 This limitation of rights is an ongoing concern for First Nations Peoples and communities given the colony's track record of suspending human rights protections in instances such as Northern Territory Emergency Response in 2007 and at a state level, the incarceration of First Nations children in Queensland in 2023.

1.59 Noting that limitations may be made in particular circumstances under the proposed Act, it is recommended that additional protections be enshrined where First Nations Peoples and Communities are concerned.

1.60 This should include a positive statutory obligation to consult with First Nations Communities who may be impacted by a limitation, as per subclause 47(4) ('Obligations on Public Authorities'), of the draft bill.

1.61 This positive duty should be expressly articulated in clause 12 to avoid further breaches of First Nations' human rights via limitations, suspensions and 'special measures' as has occurred in the past.

1.62 Further, noting that this clause includes the necessity for "oversight" and "access to review" of any imposed limitation, this should include accessible consultative pathways for any First Nations Community subjected to a limitation.

1.63 Limitations to First Nations' human rights have previously been enacted without First Nations' consultation or by deliberately ignoring advice; as such, it is imperative that any limitations deemed necessary are undertaken in direct consultation with the impacted community.

1.64 This is a principle enshrined in the United Nations Declaration of Indigenous Peoples, in particular Articles 2, 4 and 5.

Cultural Rights should be extended

Recommendation 4

1.65 That the proposed Human Rights Act be amended to extend the meaning and interpretation of cultural rights to 'to enjoy, maintain, control, protect and develop' across all conferred cultural rights, and include both tangible and intangible cultural heritage.

1.66 These comments note the manner in which true sovereign powers for First Nations peoples have been disguised – self-determination, for example, that it was proposed to be simply mentioned in a preamble and not as a specific and inherent right that would cause statements of compatibility to address this.

1.67 This continues in clause 36 'Rights to Culture', which contains the provision that 'Indigenous peoples hold distinct cultural rights.'

1.68 However, it is noted that these rights do not reflect the rights to self-determination as defined by the United National Declaration on the Rights of Indigenous Peoples (Articles 3, 4 and 5) and in fact, are increasingly diminished. One example of this is shown in how the AHRC articulates that cultural rights could operate in practice and '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."[43]

1.69 This misconstrues self-determination: no children should be removed by this government in the first place.

1.70 It is noted that the progressive diminishment of such powers is relational to the threat and imposition of power First Nations may have on the economic development in their Sovereign territories.

1.71 For example, paragraphs 36(4)(a) to (c) confers the power for First Nations Peoples 'to enjoy, maintain, control, protect and develop' identity and cultural heritage, languages, and kinship ties.

1.72 However, with respect to the 'material and economic relationship' to the land, territories, waters, coastal seas and resources (paragraph 36(3)(d)), lesser powers are conferred: 'to maintain and strengthen.'

1.73 In paragraph 36(3)(e) - the environment and *productive capacity*'[44] – this power is further diminished to 'conserve and protect.'

1.74 Paragraphs 36(3)(d) and 3(e) should be reworded to confer the same powers as paragraphs(3)(a) to (c), being 'to enjoy, maintain, control, protect and develop'

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[43] Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 130.

[44] Emphasis added.

along with the already stated 'maintain and strengthen' and 'conserve and protect.'

1.75 This right should also be reworded to ensure that the right to culture includes both tangible and intangible culture.

1.76 Any rights touching on the right to culture, must include rights to cultural heritage, including intangible cultural heritage as per the Convention for the Safeguarding of the Intangible Cultural Heritage and underwater cultural heritage.[45]

1.77 This re-wording would confer the capacity for sovereign self-determination for First Nations Peoples, in particular with respect to any economic development.

Free, Prior and Informed Consent (FPIC)

Recommendation 5

1.78 The right to Free, Prior and Informed Consent (FPIC) should be included as a stand alone right in the proposed Human Rights Act.

1.79 The right to Free, Prior and Informed Consent (FPIC) should be included as a stand alone right.

1.80 Article 19 of the UNDRIP requires States to 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.[46]

1.81 This proposed amendment also directly reflects the United Nations Declaration on the Rights of Indigenous Peoples Article 32(1):

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> Indigenous peoples hold the right to free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.[47]

1.82 This wording reflects that contained in the United Nations Declaration on the Rights of Indigenous Peoples Article 32(2). As per the UNDRIP, this also places

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[45] UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, https://ich.unesco.org/en/convention (accessed 20 May 2024).

[46] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. A/RES/61/295 (2007).

[47] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. A/RES/61/295 (2007).

a positive obligation on states to 'provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.' UNDRIP Article 32(3).

1.83 Proposed wording for what a stand alone right to free prior and informed consent could look like is included below, drawing on elements of a common understanding of free, prior and informed consent as per the extract from the United Nations Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples.[48]

Proposed Section on the Right to Free Prior and Informed consent

1.84 Section X: Right to Free Prior and Informed Consent

(a) Free should imply no coercion, intimidation or manipulation.
(b) Prior should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
(c) Informed should imply that information is provided that covers at minimum the following aspects:
    (i) the nature, size, pace, reversibility and scope of any proposed project or Activity
    (ii) the reason(s) for or purpose(s) of the project and / or activity
        (1) the duration of the above
        (2) the locality of areas that will be affected
        (3) a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle
        (4) personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
        (5) procedures that the project may entail.
(d) Consent requires ongoing mutual communication and decision-making
    (i) Consent to any agreement should be interpreted as First Peoples have reasonably understood it.
    (ii) Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith.
    (iii) The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires

[48] Human Rights Commission, *Appendix 4: Elements of a Common Understanding of Free, Prior, and Informed Consent in the Social Context*, (accessed 5 April 2024).

time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate.

(iv) This process may include the option of withholding consent and can be withdrawn.

(2) When should free prior and informed consent be sought:

(a) FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

(3) Who should free prior and informed consent be sought from

(a) First Peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

(b) In free, prior and informed consent processes, First Peoples, United Nations organisations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.

(4) How to seek free prior and informed consent

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their Languages.

(5) Procedures / mechanisms

(a) Mechanisms and procedures should be established to verify free, prior and informed consent as described above, inter alia, mechanisms of oversight and redress, including the creation of national ones.

(b) As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project.

(c) 'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.

(d) Free, prior and informed consent could be strengthened by establishing procedures to challenge and to independently review these processes.

(e) Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.

(f) It is recommended that all actors concerned, including private enterprise, pay due attention to these elements.

Right to take part in public life – should not be limited to 'citizens'

Recommendation 6

1.85 The right to take part in public life is not limited to 'citizens' as per clause 25.

1.86 In the draft bill under clause 25 'Right to Part in Public Life' that "further consideration should be given to whether this right needs to be redrafted to apply only to 'citizens' as this is the wording used in article 25 of the ICCPR."

1.87 This submission strongly recommends that the wording be left as per the current draft, being 'every person in Australia, and to ensure that all the rights in the Act apply to both citizens and non-citizens.

1.88 Conferring the right to participate in public life simply to citizens is exclusionary of other people residing in Australia who may have a stake and/ or be impacted by public decisions and discourses that impact them.

1.89 First Nations Peoples have historically been excluded from participating in public life through a number of discriminatory policies and legislation, not least the exclusion of voting rights and the right to be counted in the census.

1.90 While this may not have been a direct consequence of being counted a 'non-citizen' under colonial law, such exclusionary practices occurred under other auspices of direct and systemic, structural racism.

1.91 Australia has both within its geographical borders 'non-citizens' who have an acute stake in public life, decisions and discourse including students, migrant workers and people on temporary visas.

1.92 Further, there are vulnerable 'non-citizens' in extra-territorial facilities such as off-shore processing under the control of Australian public authorities.

1.93 Often, it is such people who are subject to the abuse of their human rights; as such, the use of exclusionary language such as 'citizen' within the meaning of clause 25 may have consequences on those people who may most require the protection of a Human Rights Act.

1.94 This is even more pertinent given such rights are often upheld by advocates of such groups who require access to and opportunity to participate in the conduct of public affairs via freely chosen representatives.

1.95 This submission recommends the wording remain as is in the draft bill for the purposes as outlined above.

Geographical Influence – Extraterritorial Application

Recommendation 7

1.96 That clarity be articulated in the proposed Human Rights Act as to the geographic and judicial boundaries of the function and application of the Act

1.97 Noting that clause 4 of the draft Human Rights Act contains a necessity to further consider the 'geographical extent' of the Act, clarification is required as to the geographical and jurisdictional reach of the Act with respect to public authorities operating in non-Australian jurisdictions.

1.98 Clause 8 of the draft Act defines the public authorities to whom the proposed Act will apply. Noting that such authorities can and do operate in locations outside of Australia, clarification is required within the Act as to the extra-territorial jurisdictional reach of the Act.

1.99 This submission also notes that the United Kingdom has seen contention over the extra-territorial reach of their Human Rights Act, further cementing the need for clarification.[49]

1.100 This paper strongly recommends that the proposed Human Rights Act should include provisions for the application and protection of human rights as per the Act in instances such as:

- the treatment of asylum seekers in Australian-auspiced off-shore processing centres;
- the conduct of Australian military service people overseas, both within their own ranks and towards civilians and combatants of other nations;
- the export of Australian military and dual-use hardware where used in human rights violations in overseas contexts.

1.101 As noted in clause 8, public authorities also include 'a private entity … performing functions of a public nature (whether under contract or otherwise).'

1.102 A reasonable interpretation of this provision would be inclusive of (for example) security contractors – whether Australian or locally employed – in jurisdictions such as Manus Island, responsible for undertaking public duties on behalf of the Australian Government.

1.103 As such, people – including non-citizens – under the control and jurisdictional influence of the Australian Government (by locally employed contractors, for example) should be protected by, and have access to, the rights contained within the proposed Human Rights Act, and clarification should be made on this.

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[49] UK Parliament, *The Government's Independent Review of the Human Rights Act*, 8 July 2021, (accessed 19 May 2024).

Cultural Genocide

Recommendation 8

1.104 Include in right to life which includes the right to be free from genocide to also include the right to be free from cultural genocide

1.105 Amend paragraph 12(4)(b) to include the right to be free from cultural genocide.

1.106 During the drafting of the Genocide Convention in 1948, Australian delegates argued against the inclusion of cultural genocide, a key principle of the original concept of this "crime of all crimes". It is time to move beyond these limitations and fully align with international law obligations.

Further Recommendations

Businesses

Recommendation 9

1.107 That the proposed Human Rights Act have application to private businesses and not limited to public agencies.

1.108 Noting that the Australian Human Rights Commission recommends the inclusion of a private business 'opt in clause'.[50]

1.109 However, noting the minimal take-up of businesses opting in to the Queensland Human Rights Act, this paper strongly recommends that the proposed Human Rights Act be compulsorily extended to private businesses.

1.110 The Law Council of Australia also emphasised that the government's role in protecting human rights includes a 'duty to protect individuals from rights abuse by third parties including business', and recommended it employ both legislative and administrative means to accomplish this.[51]

1.111 This was supported by submitters including the Environmental Defenders Office, who stated any Act should 'impose a duty on businesses and other private actors to act consistently with human rights, and should include accessible remedies for harmful interference on human rights by private actors.'[52]

1.112 Arguably the biggest gains in human rights in Australia over the past decade have been through corporate commitments widely adopted by the private

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50 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 150.

51 Law Council of Australia, *Submission 120*, p. 29.

52 Environmental Defenders Office, *Submission 147,* p. iii.

sector, based on a clear understanding of the need for a stable, rules based and sustainable international and domestic business environment.[53]

1.113 To complement a federal Charter, Australia must consider enacting a broader mandatory human rights due diligence law that applies to all businesses operating within Australia (including their activities overseas). This would involve requiring businesses to undertake due diligence to identify, prevent and mitigate human rights and environmental harms, and to provide access to remedy for affected individuals and communities wherever harm occurs.[54]

Accessibility and Mechanisms to Access Justice

Recommendation 10

1.114 That provisions for funding should be made for accessibility to pathways to justice for people and groups whose whole human rights have been impacted as per the Human Rights Act.

1.115 That provisions for funding should be made for accessibility to pathways to justice for people and groups whose whole human rights have been impacted as per the Human Rights Act and require and / or are seeking a remedy. Funding for access to justice should fall outside of the scope of simply the Human Rights Commission and be inclusive of meeting full funding requirements for legal services, domestic violence services, community legal services, First Peoples community controlled organisations, and grassroots human rights defenders to further enhance the promotion and protection of human rights. This must extend to civil and family law matters.

1.116 The Queensland Human Rights Commission submitted that at a minimum, legal assistance providers such as Legal Aid commissions and community legal centres must be adequately funded to advise and act for people subject to human rights limitations by government agencies.[55]

> The lack of funding for women who have experienced gender-based violence in family law, immigration law, discrimination and employment law, social security and other areas of civil law, (as well as in state/territory based issues such as protection orders and tenancy) has similar human rights implications…For example, parenting orders which provide for care arrangements that do not recognise the risks posed by a violent father, can have serious and sometimes fatal consequences, directly impinging on a mother and her children's right to life and to live free from violence.[56]

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53 Civil Liberties Australia, *Submission 51*, p. 11.

54 Human Rights Law Centre, *Submission 232*, p. 15.

55 Queensland Human Rights Commission, *Submission 142*, p. 48.

56 Women's Legal Service NSW, *Submission 97*, p. 9.

Group Rights

Recommendation 11

1.117 That group rights - in particular for Sovereign First Nations - be included in the proposed Human Rights Act.

1.118 Group rights, also called collective rights, are the rights held by a group as a whole rather than by each of its individual members.

1.119 This submission strongly recommends that the rights contained within the proposed Human Rights Act – in particular self-determination – should be unequivocally extended to be inclusive of 'group rights.' This should be clarified in the preamble, that where relevant, the group rights of peoples – especially Sovereign First Nations – should be protected under the Act.

1.120 The issue of group rights is clearly a live and important issue, which the AHRC and this committee were unable to grapple with. With regards to participation duty the AHRC offered:

> an alternative to 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.[57]

1.121 However, group rights are central to redressing human rights abuses and as such, must be and cannot be underestimated. The ongoing challenges neo-colonialism poses to First Peoples in so-called Australia continues to undermine and attempt to decimate First Peoples as groups.

1.122 Group rights are critical, not just for First Peoples, but for all Peoples who are collectively harmed, especially with respect to environmental destruction.

Right to a Healthy Environment

Recommendation 12

1.123 That the right to a healthy environment should be amended to the right to a clean, healthy, and sustainable environment, in line with international law.

> Human rights cannot be enjoyed without a safe, clean, healthy and sustainable environment, and sustainable environmental governance cannot exist without an enabling environment for exercising environmental rights.[58]

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57 Australian Human Rights Commission, *Free & Equal Position Paper: A Human Rights Act for Australia*, December 2022, p. 192. See also, pp. 192–195.

58 Asian Research Institute for Environmental Law, *Submission 237*, p. 3.

1.124 This submission strongly recommends that the proposed Human Rights Act contains protections upholding the right to a clean, healthy, sustainable environment as articulated in line with international human rights law.

1.125 This right must not be unduly narrowed as proposed by the committee, which makes it inconsistent with international law. Having the right only relates to 'unlawful pollution' – where this country's pollution standards are woeful and damaging to the environment, and therefore renders the whole provision useless.

1.126 The term 'unlawful' should not be adopted as it implies that lawful pollution is acceptable even where it produces adverse health consequences, an implication which contradicts the very definition of the right to a healthy environment.[59]

1.127 The right to not be subjected to harmful pollution should not be confined to legal interpretation of what is 'lawful' and 'unlawful' or potential 'carve outs' in legislation that could make harmful pollution lawful…Such framing has the potential to seriously reduce the circumstances in which the right would be relied upon and implies that lawfulness eliminates the need for protection of the right.[60]

1.128 As such, clause 40 should be amended to read "the right to a clean, healthy and sustainable environment" in line with international law. The right to a healthy environment should include a fully justiciable right for individuals and groups to the human right to a healthy environment the wording to the right should include 'specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to lands and waterways and the related right to free, prior and informed consent in relation to any proposed projects that might impact their territories',[61] that explicitly recognise how the right to a clean, healthy and sustainable environment is inseparable from the rights to culture, health and self-determination for First Peoples.

1.129 The right to a clean, healthy and sustainable environment is inseparable from the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander people. All of them must be protected to fully realise Aboriginal and Torres Strait Islander people's rights. The drafting of the right in a federal Human Rights Act, should explicitly recognise this relationship for Aboriginal and Torres Strait Islander people.[62]

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59 Australian Human Rights Institute, *Submission 69*, p. 17.

60 Environmental Justice Australia, *Submission 150*, p. 8.

61 Dr Genevieve Wilkinson, Co-convenor, Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand, *Committee Hansard,* 20 October 2023, p. 1.

62 Human Rights Law Centre, *Submission 232*, p. 52.

1.130 Submitters considered the AHRC's proposed framing of the right to be to narrow and argued that the right should not be limited to an exhaustive list of substantive elements:[63]

> interpretation of the right will evolve as our understanding of State obligations under international human rights law in relation to the environment evolves, noting that human rights treaties are considered living instruments that must evolve over time and be interpreted in light of present conditions.[64]

1.131 The right to a healthy environment should be defined broadly to allow it to adapt and evolve as Sovereign cultural knowledge becomes accepted as best practice, and to evolve with international law and in a changing environment and with changing scientific knowledge in line with submissions from the Environmental Defenders Office.

Right to Social Security

Recommendation 13

1.132 That clause 42, the right to social security should be amended to read the right to access safe, secure, and adequate social security.

1.133 Jesuit Social Services submitted that the most disadvantaged people in society experience multiple and long-term disadvantages based on the location where they live, including greater impacts of climate change and pollution, higher rates of poverty, and less access to public transport or healthcare, and face systemic barriers to get out of poverty.[65]

The right to an adequate standard of living

Recommendation 14

1.134 That clause 39, the right to an adequate standard of living, be amended to read that every person has the right to an adequate standard of living, and have access to safe, secure and ongoing food, water, clothing and housing.

1.135 The right to adequate housing is one of the most basic human rights and its importance was brought up by many submitters, who raised the issue of how insecure housing exposes people to violations of a wide range of other human rights. The right to housing is enshrined in international law. It is set in the International Covenant on Economic, Social and Cultural Rights (ICESCR). A big problem in this country is the use of housing in government policy as a

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63 See paragraph 6.91 of the committee's report, and see for example, Environmental Justice Australia, *Submission 150*, p. 6; Environmental Defenders Office, *Submission 147*, p. 5.

64 Environmental Defenders Office, *Submission 147*, p. 5.

65 Jesuit Social Services, *Submission 173*, p. 8.

means to create profits instead of protecting it as a basic need and a human right for all.

1.136 The Progressive Law Network submitted that those in most need of human rights protections are also most vulnerable to homelessness.[66]

Legal Personhood

Recommendation 15

1.137 That the government seek legal advice, and consider approaches of other jurisdictions to the issue of granting legal personhood to the environment for inclusion in any Human Rights Act at the five year review post commencement.

1.138 Environmental personhood is about giving the environment or parts of the environment like our rivers, lakes, forests, and oceans the rights, protections, privileges, and responsibilities that actual people have. For our people we are no different to the environment, we don't see ourselves as different from the lakes, the rivers, the animals, the sky. We are them and they are us. This is why giving the environment personhood is a solution that we must adopt urgently and across the globe, it is Indigenous people and local communities who have overwhelmingly acted as advocates for, as seen with the Whanganui River in in Aotearoa which granted legal personhood in 2017 after hundreds of years of resistance by the Māori People to aggressive colonisation.

1.139 The design of rights-of-nature frameworks varies widely in geography, legal status, guardianship and who holds liability. This includes environmental personhood which grants natural entities a similar legal status to that of corporations, with three primary rights: legal standing, to enter contracts and to take legal action to protect themselves. This has been advanced in other jurisdictions, and gives recognition to the indivisibility of rights to life, culture, and Country of First Peoples. Ecuador was the first country to enshrine rights of nature in its 2008 constitution, followed by a number of other jurisdictions. A key feature of well designed rights-of-nature frameworks ensure accountability, i.e., who is ultimately liable, and what for.

- In 2014, Te Urewera a beautiful forested area in the North Island of Aotearoa was granted legal personhood and owns land in its own right.
- The Whanganui River in Aotearoa was declared a legal person in 2017
- Again, in Aotearoa, Mount Taranaki also has legal personhood. Mount Taranaki is critically important to our Maori Family and their lore.
- In India, the Ganges and Yamuna Rivers are now considered legal people in order to combat pollution.

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66 Progressive Law Network, *Submission 127,* p. 3.

- Our Canadian Aboriginal family through the Innu Council also obtained legal personhood to the Magpie river.
- The Yarra was recognised as a living, integrated entity as its traditional owners, the Wurundjeri people, had always known it, in a state act of parliament in 2017. Unlike Lake Erie and other locations in North America, the Yarra has not been made a legal person.

Constitutional Inclusions

Recommendation 16

1.140 That the Parliamentary Joint Committee on Human Rights (PJCHR) conduct an inquiry into the possibility of a constitutional clause that upholds human rights, including the responsibility of parliament and courts.

1.141 Australia's political and legal system creates barriers to protecting international human rights. Australia is the only liberal democracy without a federal bill or charter of human rights.[67]

1.142 Instead, it relies on parliamentary sovereignty and a responsible government to uphold rights. This has resulted in a system of executive dominance that has tied the hands of courts, and eroded the very principle of the checks and balances that are supposed to accompany the separation of powers, making it difficult to uphold international human rights obligations. Australian governments have utilised parliamentary sovereignty to change laws or settle class actions to short-circuit legal cases and implemented prohibited practices.

> I have recorded no less than five major High Court rulings where it has become apparent that the judicature has found itself unable to protect Australians and others from human rights abuses by Australian executive governments. Instead, federal governments have been able to force through legislation which defeats human rights – such as: legislation which now permits indefinite detention of legitimate asylum seekers including children, or legislation which extinguishes the cultural rights and heritage of First Nations people7 – and the High Court has found itself in the invidious position of being able to do nothing about it.[68]

1.143 Careful consideration needs to be given as to how human rights could be included within the constitution so as not to have unintended consequences. The PJCHR would be well placed to conduct an inquiry into this question.

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[67] Jamal Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres', Journal of Refugee Studies, vol. 35, no. 4, 2022, pp. 1508–1529.

[68] Australian Community Futures Planning, *Submission 17*, p 8.

1.144 I think constitutional enshrinement would be the ideal position, but the political reality is probably more about legal protections.[69]

1.145 Professor Ben Saul, Challis Chair of International Law and current United Nations special rapporteur on human rights and counter-terrorism, considered statutory protection a 'poor cousin' of constitutional entrenchment.[70]

Periodic Reviews

1.146 I support that any Act be reviewed after five years of operation and the substance of these reviews should be led by the communities most impacted. I note that in Victoria community groups are able to provide submissions to the review of the operation of the Act, during four-year periodic reviews conducted by community legal centres, and those with lived experience are able to comment on the operation of the Act, which would then go towards potential amendments.

In Complement to National Human Rights Act

Recommendation 17

1.147 That Truth and Treaty be progressed with immediacy. That the federal government must commence Treaty negotiations with First Peoples as a matter of urgency.

1.148 Treaty, self-determination and the implementation of UNDRIP are complementary. They are not mutually exclusive, nor are they an either/or option, but together make up a rights-based approach that would ensure greater protection of our rights to First Peoples, and begin to redress the ongoing impacts of colonisation. Our people have long fought for a nationwide Treaty process between the government and First Peoples as a matter of urgency priority and the only real pathway for society to move forward. A comprehensive Treaty would complement the legislative implementation of the UNDRIP and further enshrine the principles contained therein within Treaty negotiations and agreements.

1.149 The inquiry into the UNDRIP touched on this.

> We support the establishment of a human rights charter, but we don't think that will address the human rights needs of Aboriginal and Torres Strait Islander people. It's very difficult, I think, for governments that have governed Aboriginal and Torres Strait Islander people or Indigenous peoples around the world for over a century to get into their head that, in fact, as peoples, Indigenous peoples have the right to self-determination….I don't know if you have a strong understanding of the historic dealings with

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[69] Ms Anna Brown OAM, Chief Executive Officer, Equality Australia, *Committee Hansard*, 28 September 2023, p. 23.

[70] Professor Ben Saul, *Submission 251*, p. 5.

> Aboriginal and Torres Strait Islander people, but at no stage have Aboriginal and Torres Strait Islander people been given the right to choose their political status. Perhaps a treaty might do that.[71]
>
> The commission has been on the public record supporting a treaty for many years through social justice reports of the commission. In the reconciliation process, for example, that was a key recommendation in 2000. It was part of the social justice package in 1995 et cetera. So it has been a generational recommendation by the commission as well as the current developments.[72]

1.150 This could include the establishment of a Truth and Justice Commissioner

1.151 A Truth and Justice Commission is an independent body that investigates and reveals past wrongdoing to resolve ongoing and historical conflict, and to enable healing. The Commission would have the powers of a Royal Commission and would investigate and reveal wrongdoing and human rights abuses perpetrated against First Nations people since colonisation to the present day.

1.152 Our journey to Treaty involves truth-telling and healing first. This means exploring, understanding, and reckoning with our painful past and the impact it continues to have on First Nations people and their cultures.

Recommendation 18

1.153 That the government take urgent action on identified recommendations addressing human rights abuses, inequalities and oppression of Sovereign First People

1.154 This can be achieved by:

Implementing key reports that have been ignored by successive governments including:

(a) The Royal Commission into Aboriginal Deaths in Custody (1991, 339 recommendations)
(b) Bringing Them Home: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997, 54 recommendations)
(c) Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017, 227 recommendations)
(d) Australian Law Reform Commission - Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples - Report 133 (2018, 35 recommendations)

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71 Mr Les Malezer, Chairperson, Foundation for Aboriginal and Islander Research Action, *Committee Hansard,* 15 August 2023, p. 34.

72 Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, *Committee Hansard*, 12 May 2023, p. 36.

(e) A Way Forward. Final report into the destruction of Indigenous heritage sites at Juukan Gorge (2021, 8 recommendations)

Reviewing historical and current policies, legislation and practices against the conduct outlined in the Genocide Convention.

Progressing an audit of existing laws, policies, and practice for compliance with the core human rights instruments, including the UNDRIP, the Optional Protocol to the Convention Against Torture and other Curel, Inhuman or Degrading Treatment or Punishment (OPCAT), and the Convention on the Rights of the Child and the Genocide Convention immediately, starting with those most directly concerning First Peoples and breaching their rights.

This should include at the commonwealth level:

(a) Northern Territory Intervention
(b) Cashless Welfare Card
(c) Native Title Act 1993 (Cth)
(d) Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
(e) Environment and Biodiversity Conservation Act 1999 (Cth)

and that the Commonwealth government should work with state and territory legislation on:

(a) Child protection legislation
(b) Age of incarceration
(c) Bail, sentencing and detention, especially juvenile detention
(d) Legislation concerning Aboriginal and Torres Strait Islander land titles (in whatever form)
(e) State heritage legislation

1.155 Throughout the inquiry, the committee heard about the ongoing inequality and oppression experienced by First Peoples, as evidenced by the soaring incarceration of our people, ongoing intergenerational trauma, multigenerational carceral experiences, poor health and low life expectancy and endemic poverty and discrimination. The above measures have been repeatedly identified as measures that would address human rights abuses currently occurring, and it would be remiss of the committee not to draw attention to them.

1.156 These are also consistent with the issues raised in the JSCATSIA inquiry into the UNDRIP. The JSCATSIA inquiry into UNDRIP also highlighted Australia's historical and ongoing genocidal impacts, including the assimilation policies that created the Stolen Generations, the forced dispossession of land and the

ongoing ramifications seen in intergenerational trauma, and multi-generational experiences and impacts of poverty and incarceration.[73]

That the following recommendation be advanced:

Recommendation 19

1.157 That the Australian Government comply with international recommendations as per the 2021 Universal Periodic Review.

1.158 Though the committee report dedicated a chapter on cultural heritage and traditional knowledge protection, it failed to put forward recommendations to address the government's shortcomings on providing protections for these as based on the evidence received during the inquiry.

1.159 Every day, more of our cultural heritage and sacred sites are being destroyed, and with it our traditional knowledge and ability to practise rituals and pass these on to future generations. Following the destruction of the Juukan gorge caves, the Australian parliament undertook an extensive inquiry into heritage protection in Australia, resulting in the Juukan report handed down in October 2021. Besides the urgency to protect our cultural heritage, sacred sites and Country, the government has to date failed to implement even a single of the recommendations of the report and has not even provided a timeline for its implementation.

1.160 I therefore propose the following recommendations to specifically progress Australia's adherence on Articles 11, 12 and 31 of the UNDRIP.

Recommendation 20

1.161 That the government urgently progress the full implementation of the recommendations of the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia and immediately present a timeline for the implementation.

1.162 That the government implement the following recommendations from the 2021 report Dhawura Ngilan:

- **amend its policy on Indigenous repatriation of cultural materials to align with current governmental practices, working with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and communities to coordinate repatriation approaches;**
- **work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way;**

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[73] Mr Yingiya Guyula MLA, *Submission 51*, pp. 2–3 to the Legal and Constitutional Affairs References Committee, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, 2022.

- **recognise and prioritise the rights of Aboriginal and Torres Strait Islander peoples to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors**

Senator Lidia Thorpe

Senator for Victoria

Appendix 1
List of submissions

1 Australian Human Rights Commission
- 1.1 Supplementary to submission 1

2 Justice and Peace Office Catholic Archdiocese
3 Rural Australians for Refugees Queanbeyan Inc
4 Professor George Williams AO
5 Amnesty International Eastern Suburbs and Redfern
6 Amnesty International Bendigo Group
7 Brisbane North Community Legal Service
8 NSW Activism Leadership Committee of Amnesty International
9 St Vincent de Paul Society
10 Blue Mountains Refugee Support Group
11 Older Persons Advocacy Network
12 Valerio Daniel De Simoni Association Inc.
13 Kaldor Centre for International Refugee Law
14 Human Rights Law Alliance
15 Dr Julie Debeljak
16 Professor Tamara Walsh and Associate Professor Dominique Allen
17 Australian Community Futures Planning
18 African Australian Advocacy Centre
19 Australian Association of Christian Schools
20 Grandmothers For Refugees
21 Rural Australians for Refugees
22 Dr Nita Farahany
23 Queensland Council of Social Service
24 Mums 4 Refugees
25 Federation of Ethnic Communities' Councils of Australia (FECCA)
26 Executive Council of Australian Jewry
27 QUT - School of Public Health and Social Work
28 Professor Philomena Murray
29 Associate Professor Greg Carne
30 Associate Professor Kate Seear
31 Australian Catholic Bishops Conference
32 Amnesty International Sunshine Coast Action Group
33 Elder Abuse Action Australia
34 Economic Justice Australia
35 Amnesty Southern Group
36 Professor Sarah Joseph
37 AbSec

38 Refugee Advocacy Network
39 Christians for Peace Newcastle
40 Brigidine Asylum Seekers Project
41 Quaker Peace and Justice Committee (Tasmania)
42 Good Shepherd Australia New Zealand
43 Suicide Prevention Australia
44 Digital Rights Watch and Electronic Frontiers Australia
45 Victorian Women's Guild
46 Amnesty International Australia - Amnesty ACT/SNSW Activism Leadership Committee
47 Cultural Infusion
48 Minerals Council of Australia
49 Zonta International - South Australia (District 23, Area 2)
50 Associate Professor Laura Grenfell and Dr Sarah Moulds
51 Civil Liberties Australia
52 Queensland Council for Civil Liberties
53 No to Violence
54 Thorne Harbour Health
55 Murdoch University Legal Clinic
56 Council on the Ageing (COTA) NSW
57 Peter McMullin Centre on Statelessness
58 Relationships Australia
59 Legal Services Commission of South Australia
60 Edmund Rice Centre for Justice
61 The Hon Pamela Tate AM KC
62 Australian Medical Students' Association
63 St Francis Social Services
64 Christian Schools Australia
65 Grata Fund
66 Church of Scientology Australia
67 ACT Council of Social Service
68 Climate Change Balmain Rozelle
69 Australian Human Rights Institute, UNSW Sydney
70 Dementia Australia
71 Ethnic Communities Council of Queensland
72 Women Speak Tasmania
73 ACT Government
74 Association of Heads of Independent Schools of Australia
75 National Mental Health Consumer & Carer Forum
76 Grandmothers for Refugees Macnamara Electorate
77 New South Wales Council for Civil Liberties
78 Queensland Family and Child Commission
79 The Welcome Project, South Brisbane

80 Circle Green Community Legal
81 Alcohol Tobacco and Other Drug Association ACT (ATODA)
82 Australian Fair Trade and Investment Network
83 Australian Lawyers Alliance
84 Queensland Nurses and Midwives' Union
85 National Centre for Action on Child Sexual Abuse
86 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand)
87 Deafblind Australia
88 Cancer Council Australia and McCabe Centre for Law and Cancer
89 Youth Affairs Council of South Australia
90 Consumers of Mental Health Western Australia
91 Office of the United Nations High Commissioner for Refugees
92 Australian Athletes' Alliance
93 Dr Pushkar Sebastian Cordoba
94 Professor Helen Ware
95 Equal Opportunity Commission
96 Dr Natalie Galea, Dr Aurélie Pankowiak, Dr Victoria Roberts and Dr Mary Woessner
97 Women's Legal Service NSW
98 National Catholic Education Commission
99 Wilderness Society
100 Multicultural Australia
101 Kingsford Legal Centre
102 Inner City Legal Centre
103 National Council of Women Australia
104 Domestic Violence NSW
105 The Oaktree Foundation
106 NSW Young Lawyers - Human Rights Sub-Committee
107 Amnesty International, Margaret River Group
108 KPMG Australia
109 Hume Riverina Community Legal Service
110 Maurice Blackburn Lawyers
111 Asylum Seeker Resource Centre
112 Minding Rights Network
113 NSW Aboriginal Women's Advisory Network
114 Attorney-General's Department
115 Full Stop Australia
116 JFA Purple Orange
117 Carers NSW
118 National Legal Aid
119 Freedom for Faith
120 Law Council of Australia

121 SNAICC - National Voice for our Children
122 Office of the Children's Commissioner of the Northern Territory
123 ChildFund Australia
124 Foundation for Aboriginal and Islander Research Action
125 WA Feminist Lobby Network
126 Harm Reduction Australia
127 Progressive Law Network
128 Bonavero Institute of Human Rights, University of Oxford
129 Refugee Legal (Refugee and Immigration Legal Centre)
130 Students for Sensible Drug Policy Australia
131 Darwin Amnesty Action Group
132 Multicultural Council of the NT
133 Voices of Influence Australia
134 Townsville Community Law
135 Great Lakes Rural Australians for Refugees
136 Rights of Older Persons Australia
137 Lived Experience Australia Ltd
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139 Associate Professor Mark Fowler
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140 Queensland Advocacy for Inclusion
141 Queensland Youth Policy Collective
142 Queensland Human Rights Commission
143 Australian Christian Lobby
144 People Just Like Us
145 Ballarat Rural Australians for Refugees
146 Emeritus Professor Chilla Bulbeck
147 Environmental Defenders Office
148 Change the Record
149 Women's International League for Peace and Freedom (WILPF) Australian Section
150 Environmental Justice Australia
151 Australian Muslim Advocacy Network
152 Aged and Disability Advocacy Australia
153 Forum of Australian Services for Survivors of Torture and Trauma (FASSTT)
154 Single Sex Prisons Australia
155 Liberty Victoria
156 Humanists Victoria
157 Indigenous Law and Justice Hub
158 Dr Bruce Chen
159 Australian Conservation Foundation
160 Castan Centre for Human Rights Law
161 Australian Association of Social Workers

162 Victorian Equal Opportunity & Human Rights Commission
163 Australian Council of Human Rights Authorities
164 Loddon Campaspe Multicultural Services
165 Charter of Rights campaign coalition
166 Australian Nursing and Midwifery Foundation
167 Coalition of Activist Lesbians
168 Save the Children and 54 reasons
169 Our Watch
170 Disaster Legal Help Victoria
171 Dr Jane Tiller and Associate Professor Paul Lacaze
172 South-East Monash Legal Service Inc.
173 Jesuit Social Services
174 Federation of Community Legal Centres (Victoria) Inc.
175 Victorian Aboriginal Child Care Agency
176 ACT Human Rights Commission
177 Women's Rights Network Australia
178 Ethical Partners Funds Management
179 Australian Child Rights Taskforce
180 National Council of Women SA
181 LGB Alliance Australia
182 Women's Justice Network
183 Feminist Legal Clinic Inc.
184 Racial and Religious Discrimination Legal Service Inc
185 Centre for Law and Social Justice
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186 All Means All
187 Josephite Justice Office
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189 Amnesty International Australia National Rainbow Network
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191 Christian Faith and Freedom Inc.
192 Mudgee Amnesty Action Group
193 ANTAR
194 Commissioner for Children and Young People (SA)
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197 Commonwealth Ombudsman
198 Australia's National Preventive Mechanism
199 Just.Equal Australia Inc
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200 Commissioner for Children and Young People (WA)
201 South Australian Council of Social Service
202 New South Wales Aboriginal Land Council

203 Australian Centre for Disability Law
204 Professor Simon Rice OAM
205 Western Australia for a Human Rights Act
206 Uniting
207 Carers Australia
208 Australian College of Nursing
209 Human Rights Watch
210 UNICEF Australia
211 Australian Feminists for Women's Rights
212 Public Interest Advocacy Centre
213 Amnesty International Australia
214 Equality Australia
215 UNSW Law Society
216 Dr Paul Taylor
217 Tasmanian Aboriginal Legal Service
218 LGBTIQ+ Health Australia
219 Freedom from Institutional Abuse
220 Australian Council of Social Service
221 Professor Kim Rubenstein
222 knowmore
223 Fiona David and Dr David Tickler
224 Adoptee Rights Australia Inc.
225 National Justice Project
226 Wotton + Kearney
227 Jumbunna Institute for Indigenous Education & Research
228 Run For It
229 Australian Lawyers for Human Rights
230 People with Disability Australia
231 Refugee Advice & Casework Service
232 Human Rights Law Centre
233 ANU College of Law South Asian Research and Advocacy Hub
234 Chief Executive Women
235 Family Advocacy
236 Community & Public Sector Union
237 Asia Research Institute for Environmental Law
238 Queensland Mental Health Commission
239 Aboriginal Legal Service of Western Australia Ltd
240 Ms Kathryn Kelly
241 Ms Rebecca Bishop
242 Dr Niko Leka
243 Mr Lance Reilly
244 Mr Sam Coten
245 Dr Val Kitchener

246 Ms Pamela M Curr
247 Ms Lauren Jessup-Little
248 Miss Emily Mursa
249 Mr Joshua Bollard
250 Mr Damien Linnane
251 Professor Ben Saul
252 Ms Elizabeth Maddox
253 Ms Leigh Dumpleton
254 Dr Peggy Goldsmith
255 Mr Robert Heron
256 Mr Brian Wooller
257 Ms Carol Bristow
258 MX Joel MacKay
259 Mr Scott Lambert
260 Ms Susan Kopittke
261 Ms Ruth Gould
262 Miss Hannah Nebart
263 Miss Kiana Coe
264 Ms Rowena Skinner
265 Soroptimist International Western Australia
266 Mr Benjamin Racz
267 Ms Caroline Davis
268 Dr Penny Zagarelou-Mackieson
269 Mr Eugene White
270 Disability Discrimination Legal Service
271 Australian Centre for International Justice
272 Dr Michael Dudley and Dr Fran Gale
273 Ms Lauren Honcope
274 Australian Federation of Disability Organisations
275 Mr Simon Akkerman
276 Mr Nicholas Bulbeck
277 Mr Andrew Muller
278 Dr David Thorp
279 Ms Yabbo Thompson
280 Mr Frederick Hoekstra
281 Dr Ed Wensing and Mr Paul Girrawah House
282 Mr Bernard Warnick
283 Ms Jeanene Williams
284 Name Withheld
285 Miss Jayanna Gibson
286 Name Withheld
287 Name Withheld
288 Mr Stephen Rowe

289 Name Withheld
290 Name Withheld
291 Professor Patrick Keyzer
292 Ms Sarah Jackson
293 Mrs Donna McWilliam
294 Mr Geoffrey Robin
295 Mr R.V. Barbero
296 Ms Evelyn Williams
297 Mrs Dale Dumpleton
298 Ms Sue Wasterval
299 Ms Betty McGeever
300 Ms Delia Crabbe
301 Ms Marion Davie
302 Ms Margaret Stewart
303 Ms Lynn West
304 Ms Lyn Wallace
305 Ms Coral Clarke
306 Ms Elizabeth Dangerfield
307 Ms Elizabeth O'Hara
308 Mr Gerd Hollander
309 Name Withheld
310 Ms Judith Reynolds
311 Name Withheld
312 Name Withheld
313 Ms Nancy Oosterhoff
314 Name Withheld
315 Dr Stephen Lake
316 Ms Erika Fish
317 Neurorights Foundation
318 Confidential
319 Confidential
320 Confidential
321 Name Withheld
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325 Mr Peter Capomolla Moore
326 Confidential
327 Rule of Law Institute of Australia
328 Refugee Action Collective (Victoria)
329 Ashley, Francina, Leonard & Associates
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330 Mrs Alison Quigley

331 Community Legal Centres National Human Rights Network

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333 Professor Nicholas Aroney, Professor Richard Ekins KC (Hon) and Dr Benjamin Saunders

334 GeneEthics

- 334.1 Supplementary to submission 334

335 Ms Larissa Kaput

- Christian Congregation of Jehovah's Witnesses (Australasia) response to Submission 335

Additional Information

1 Civil Liberties Australia, additional information following public hearing, Canberra, 20 October 2023 (received 13 November 2023)

2 Commonwealth Ombudsman, correction to evidence following public hearing, Canberra, 20 October 2023 (received 3 November 2023)

Answer to Question on Notice

1 Justice and Community Safety Directorate ACT, answer to question taken on notice, public hearing, Canberra, 12 May 2023 (received 2 June 2023)

2 ACT Human Rights Commission, answer to question taken on notice, public hearing, Canberra, 12 May 2023 (received 2 June 2023)

3 Attorney-General's Department, answers to questions taken on notice, public hearing, Canberra, 12 May 2023 (received 16 June 2023)

4 Queensland Nurses and Midwives' Union, answer to question taken on notice (to provide submission to previous inquiry), public hearing, Brisbane, 15 August 2023 (received 18 August 2023)

5 Queensland Advocacy for Inclusion, answer to question taken on notice, public hearing, Brisbane, 15 August 2023 (received 31 August 2023)

6 Victorian Aboriginal Legal Service, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 31 August 2023)

7 Professor Tamara Walsh and Associate Professor Dominique Allen, answer to question taken on notice, public hearing, Brisbane, 15 August 2023 (received 1 September 2023)

8 Queensland Family & Child Commission, answers to questions taken on notice, public hearing, Brisbane, 15 August 2023 (received 1 September 2023)

9 Queensland Council for Civil Liberties, answer to question taken on notice, public hearing, Brisbane, 15 August 2023 (received 5 September 2023)

10 Deafblind Australia, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 5 September 2023)

11 Multicultural Australia, answer to question taken on notice, public hearing, Brisbane, 15 August 2023 (received 5 September 2023)

12 Aged and Disability Advocacy Australia, answers to questions taken on notice, public hearing, Brisbane, 15 August 2023 (received 5 September 2023)

13 The Hon Pamela Tate AM KC, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 6 September 2023)
14 Save the Children, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 14 September 2023)
15 Victorian Equal Opportunity & Human Rights Commission, answers to questions taken on notice, public hearing, Melbourne, 25 August 2023 (received 14 September 2023)
16 Dr Julie Debeljak, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 14 September 2023)
17 Environmental Justice Australia, answers to questions taken on notice, public hearing, Melbourne, 25 August 2023 (received 14 September 2023)
18 Good Shepherd Australia New Zealand, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 14 September 2023)
19 Ms Kylie Evans, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
20 Australian Association of Social Workers, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
21 Castan Centre for Human Rights Law, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
22 Human Rights Law Centre, answers to questions taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
23 Refugee Legal & Asylum Seeker Resource Centre, joint answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
24 Refugee Legal, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
25 Asylum Seeker Resource Centre, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
26 Dr Bruce Chen, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
27 SNAICC - National Voice for Our Children, answer to question taken on notice, public hearing, Melbourne, 25 August 2023 (received 15 September 2023)
28 Professor George Williams AO, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 6 October 2023)
29 Economic Justice Australia, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 5 October 2023)
30 Just.Equal Australia, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 13 October 2023)
31 ANTAR, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 16 October 2023
32 Australian Human Rights Institute, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 16 October 2023)

33 Ms Kate Eastman AM SC, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 16 October 2023)
34 knowmore, answer to question taken on notice, public hearing, Sydney, 27 September 2023 (received 17 October 2023
35 National Legal Aid, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 17 October 2023)
36 Women's Legal Service NSW, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 17 October 2023)
37 Australian Community Futures Planning, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 18 October 2023)
38 Amnesty International Australia, answer to question taken on notice, public hearing, Sydney, 27 September 2023 (received 18 October 2023
39 Australian Lawyers Alliance, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 18 October 2023)
40 National Catholic Education Commission, answer to question taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
41 Environmental Defenders Office, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
42 Grata Fund, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
43 Australian Lawyers for Human Rights, answer to question taken on notice, public hearing, Sydney, 27 September 2023 (received 19 October 2023)
44 Full Stop Australia, answer to question taken on notice, public hearing, Sydney, 27 September 2023 (received 19 October 2023)
45 Australian Association of Christian Schools, answer to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
46 LGBTIQ+ Health Australia, answer to question taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
47 Equality Australia, answer to question taken on notice, public hearing, Sydney, 28 September 2023 (received 19 October 2023)
48 People with Disability Australia, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 18 October 2023)
49 Kingsford Legal Centre, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 20 October 2023)
50 Australian Human Rights Commission, answers to questions taken on notice, public hearing, Sydney, 27 September 2023 (received 24 October 2023)
51 Australian Catholic Bishops Conference, answer to question taken on notice, public hearing, Sydney, 28 September 2023 (received 24 October 2023)
52 Wilderness Society, answers to questions taken on notice, public hearing, Sydney, 28 September 2023 (received 2 November 2023)
53 NSW Aboriginal Women's Advisory Network, answer to question taken on notice, public hearing, Sydney, 27 September 2023 (received 3 November 2023)

54 Attorney-General's Department, answer to question taken on notice, public hearing, Canberra, 20 October 2023 (received 9 November 2023)

55 Attorney-General's Department, answers to questions taken on notice, public hearing, Canberra, 20 October 2023 (received 9 November 2023)

56 Human Rights Law Alliance, answers to questions taken on notice, public hearing, Canberra, 20 October 2023 (received 9 November 2023)

57 Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), answers to questions taken on notice, Canberra, 20 October 2023 (received 10 November 2023)

58 Rule of Law Institute of Australia, answers to questions taken on notice, public hearing, Canberra, 20 October 2023 (received 10 November 2023)

59 Western Australia for a Human Rights Act, answer to question taken on notice, public hearing, Canberra, 20 October 2023 (received 10 November 2023)

60 Australian Christian Lobby, answers to questions taken on notice, public hearing, Canberra, 20 October 2023 (received 24 November 2023)

61 Associate Professor Mark Fowler, answers to questions taken on notice, public hearing, Canberra, 20 October 2023 (received 27 November 2023)

Media Releases

1 Media Release

Tabled Documents

1 ACOSS and UNSW Sydney - Inequality in Australia 2023: Overview

Appendix 2
List of witnesses

Friday, 12 May 2023
Senate Committee Room 2S1
Parliament House
Canberra

ACT Human Rights Commission

- Dr Helen Watchirs, President and Human Rights Commissioner
- Ms Naomi Reiner Gould, Senior Director, Human Rights Law & Policy

Attorney-General's Department

- Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division
- Ms Victoria Bennett, A/g Assistant Secretary

Attorney-General's Department (cont'd)

Australian Human Rights Commission

- Emeritus Professor Rosalind Croucher, President
- Mr Graeme Edgerton, Deputy General Counsel
- Mr Darren Dick, Senior Policy Executive

ACT Minister for Human Rights

- Ms Tara Cheyne MLA, Minister for Human Rights
- Mr Daniel Ng, A/g Executive Group Manager, Legislation, Policy and Programs Division, Justice and Community Safety Directorate ACT

Tuesday, 15 August 2023
Hyatt Regency Brisbane
33 Burnett Ln
Brisbane

Queensland Human Rights Commission

- Mr Scott McDougall, Commissioner
- Mr Sean Costello, Principal Lawyer

Queensland Family and Child Commission

- Ms Natalie Lewis, Commissioner

Queensland Nurses and Midwives' Union

- Ms Kate Veach, Secretary
- Dr Belinda Barnett, Research and Policy Officer

- Mr Sye Hodgman, First Nations Strategy, Policy and Research Officer

Queensland Council for Civil Liberties
- Mr Michael Cope, Special Counsel
- Ms Lucy Johnston, Intern

Multicultural Australia
- Ms Rose Dash, Chief Client Officer
- Ms Kalpalata Iyer, Research and Advocacy Manager

Ethnic Communities Council of Queensland
- Mr Elijah Buol OAM, Chairperson
- Ms Anna Rolandsen, Manager, Community Development, Policy and Advocacy

Foundation for Aboriginal and Islander Research Action
- Mr Les Malezer, Chairperson

Queensland Youth Policy Collective
- Ms Catherine Bugler, Founder
- Ms Morgan Lynch, Founding Member
- Ms Sienna McInnes-Smith, Member

Queensland Advocacy for Inclusion
- Matilda Alexander, Chief Executive Officer

Aged and Disability Advocacy Australia
- Mr Geoff Rowe, Chief Executive Officer (via teleconference)
- Ms Karen Williams, Principal Solicitor

Professor Sarah Joseph (via teleconference), Private capacity

Australian Muslim Advocacy Network
- Ms Rita Jabri Markwell, Advisor

Professor Tamara Walsh and Associate Professor Dominique Allen

Friday, 25 August 2023
Hotel Grand Chancellor
131 Lonsdale St
Melbourne

Victorian Equal Opportunity & Human Rights Commission
- Commissioner Ro Allen, Commissioner
- Ms Lauren Matthews, Director Programs
- Ms Emily Yates, Head of Policy

- Ms Aimee Cooper, Head of Legal

Castan Centre for Human Rights Law

- Professor Melissa Castan, Director
- Associate Professor Ronli Sifris, Deputy Director (Education)
- Mr Scott Walker, Research Fellow

Human Rights Law Centre

- Ms Caitlin Reiger, CEO
- Ms Alice Drury, Senior Lawyer
- Mr Daney Faddoul, Campaign Manager

Liberty Victoria

- Mr Michael Stanton, President
- Professor Spencer Zifcak, Past President

Asylum Seeker Resource Centre

- Ms Rachel Saravanamuthu, Legal Policy Lead

Refugee Legal (Refugee and Immigration Legal Centre)

- Mr David Manne, Executive Director and Principal Solicitor
- Dr Adrienne Anderson, Senior Policy Lawyer

Save the Children and 54 reasons

- Mr Simon Henderson, Head of Policy (via teleconference)
- Mr Aram Hosie, Group Executive Director, Strategy & Public Affairs
- Mx Dante Casanova, Youth Advisor

SNAICC - National Voice for our Children

- Mr John Burton, Director of Policy and Research
- Ms Rachel Atkinson, Board Member

Victorian Aboriginal Legal Service

- Mr Alex Walters, Principal Managing Lawyer, Civil Law and Human Rights Practice

Australian Conservation Foundation

- Mr Adam Beeson, General Counsel

Environmental Justice Australia

- Ms Ally McAlpine, Senior Lawyer
- Ms Elke Nicholson, Lawyer

Disability Discrimination Legal Service

- Ms Julie Phillips, Manager

Deafblind Australia

- Mr Ben McAtamney, National Policy and Advocacy Officer

Australian Association of Social Workers

- Ms Angela Scarfe, Senior Policy Adviser

Good Shepherd Australia New Zealand

- Ms Phoebe Nagorcka-Smith, Head of Social Policy
- Ms Pip Coulthurst, Family Services Team Leader
- Ms Livia La Rocca, General Manager, Safety & Resilience

The Hon Pamela Tate AM KC, Private capacity

Dr Julie Debeljak, Private capacity

Dr Bruce Chen, Private capacity

Ms Kylie Evans, Private capacity

Ms Catherine Dixon, Private capacity

Wednesday, 27 September 2023

Sydney Masonic Centre
66 Goulburn St
Sydney

Amnesty International Australia

- Ms Nikita White, Campaigner

Human Rights Watch

- Ms Daniela Gavshon, Australia Director

Australian Lawyers for Human Rights

- Dr Tania Penovic, Senior Chair, Women and Girls' Rights

Australian Lawyers Alliance

- Mr Shaun Marcus, National President
- Dr Louis Schetzer, Spokesperson

ANTAR

- Mr Paul Wright, National Director

NSW Aboriginal Women's Advisory Network

- Ms Dixie Link-Gordon, Program Co-ordinator
- Ms Bianca Tini Brunozzi, Policy and Advocacy Officer

Economic Justice Australia

- Ms Linda Forbes, Law Reform Officer

Australian Council of Social Service

- Dr Cassandra Goldie, Chief Executive Officer
- Ms Paula-Rose Bassett, Policy Intern

Older Persons Advocacy Network

- Mr Craig Gear, Chief Executive Officer

Rights of Older Persons Australia

- Professor Catherine Renshaw, Member, Organising Committee
- Dr Susan Cochrane, Member, Organising Committee

People with Disability Australia

- Giancarlo de Vera, Senior Manager of Policy
- Mrs Lisa Ira, Senior Policy Officer

Australian Federation of Disability Organisations

- Mr Ross Joyce, Chief Executive Officer
- Ms Lauren Henley, Senior Systemic Advocate

Australian Human Rights Institute, UNSW Sydney

- Emeritus Professor Andrew Byrnes, Emeritus Professor of International Law and Human Rights and Research Associate
- Ms Gillian Moon, Senior Visiting Fellow and Research Associate (via teleconference)

Women's Legal Service NSW

- Ms Liz Snell, Law Reform and Policy Co-ordinator
- Ms Anna Blacket, Solicitor

Full Stop Australia

- Ms Emily Dale, Head of Advocacy

knowmore

- Mr Simon Bruck, Principal Lawyer
- Sean Bowes, Law Reform and Advocacy Officer

Australian Human Rights Commission

- Emeritus Professor Rosalind Croucher AM, President
- Mr Graeme Edgerton, Deputy General Counsel
- Mr Darren Dick, Senior Policy Executive

Thursday, 28 September 2023

Sydney Masonic Centre

66 Goulburn St
Sydney

Australian Association of Christian Schools

- Mrs Vanessa Cheng, Executive Officer

Freedom for Faith

- The Rt Rev Dr Michael Stead, Chair
- Mr Mike Southon, Executive Director

National Catholic Education Commission

- Mr Robert Tonkli, Director of Missions & Operations
- Mr Dallas McInerney, Chief Executive Officer

Australian Catholic Bishops Conference

- Bishop Daniel Meagher, Member
- Ms Monica Doumit, Director of Public Affairs and Engagement, Catholic Archdiocese of Sydney

Just.Equal Australia Inc

- Mr Rodney Croome AM, Spokesperson (via teleconference)

LGBTIQ+ Health Australia

- Mr James Zanotto, Director Policy, Research and Communications

Equality Australia

- Anna Brown OAM, Chief Executive Officer
- Danielle Yung, Legal Policy Adviser

Kingsford Legal Centre

- Ms Emma Golledge, Director

Australian Community Futures Planning

- Dr Bronwyn Kelly, Founder and Director

Environmental Defenders Office

- Ms Rachel Walmsley, Head of Policy & Law Reform
- Mr Joshua Paveley, Senior Solicitor, Healthy Environment and Justice Program, ACT
- Ms Frances Bradshaw, Senior Solicitor (via teleconference)

Wilderness Society

- Mr Sam Szoke-Burke, Biodiversity Policy and Campaign Manager

National Legal Aid

- Mr Derek Schild, Head of Practice, Civil Justice Legal Practice, Legal Aid ACT
- Mr Anthony Levin, Manager & Senior Solicitor, Human Rights Team, Legal Aid NSW

Grata Fund

- Ms Courtney Law, Senior Solicitor (Strategic Litigation)
- Mr Mohammad Zaki Omar, Acting General Counsel

Professor George Williams AO, Private capacity

Ms Kate Eastman AM SC, Private capacity

Friday, 20 October 2023

Senate Committee Room 2S3
Parliament House
Canberra

Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand)

- Professor Beth Goldblatt, Co-Convenor (via videoconference)
- Dr Genevieve Wilkinson, Co-Convenor (via videoconference)

Law Council of Australia

- Dr Adam Fletcher, Senior Policy Lawyer (via videoconference)
- Ms Jacinta Lewin, Member, Law Council's National Human Rights Committee (via videoconference)
- Mr Stephen Keim, Member, Law Council's National Human Rights Committee (via videoconference)

Civil Liberties Australia

- Dr Kristine Klugman OAM, President
- Mr Bill Rowlings OAM, Chief Executive Officer
- Mr Chris Stamford, National HR Act Campaign Manager

Australian Christian Lobby

Human Rights Law Alliance

- Mr Daniel Simon, Solicitor, Human Rights Law Alliance; Legal Representative, Australian Christian Lobby

Associate Professor Mark Fowler (via videoconference), Private capacity

Australia's National Preventive Mechanism

Commonwealth Ombudsman

- Mr Iain Anderson, Commonwealth Ombudsman, National Preventive Mechanism Coordinator
- Ms Julia Galluccio, Senior Assistant Ombudsman, Policy and Assurance Branch

Federation of Ethnic Communities' Councils of Australia (FECCA)

- Ms Mary Ann Baquero Geronimo, Chief Executive Officer (via videoconference)

National Mental Health Consumer & Carer Forum

- Ms Rosalyn Havard, Deputy Carer Co-Chair
- Jordan Frith, Deputy Consumer Co-Chair
- Mr Ebenezer Swan, Senior Policy and Project Officer, Psychosocial Disability

Rule of Law Institute of Australia

- Mr Chris Merritt, Vice-President (via videoconference)

Professor Kim Rubenstein, Private capacity

Associate Professor Laura Grenfell and Dr Sarah Moulds (via videoconference)

Aboriginal Legal Service of Western Australia Ltd

- Ms Chloe Wood, Managing Lawyer, Civil Law and Human Rights Unit; Co-Convenor, Western Australia for a Human Rights Act (via videoconference)
- Mr Wayne Nannup, Chief Executive Officer (via videoconference)

Western Australia for a Human Rights Act

- Mr Zubayr Abrahams, Co-Convenor (via videoconference)

Attorney-General's Department

- Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division
- Ms Petra Gartmann, Assistant Secretary, Human Rights Branch
- Mr Colin Minihan, Director, Human Rights Branch

Appendix 3
Example of form or campaign letters

Form Letter 1

Dear Committee Secretariat,

I welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework.

I support the legislation of a federal Human Rights Act, also known as a Human Rights Charter.

A Human Rights Act will help prevent human rights abuses because it will place human rights at the heart of decision making by requiring governments to consider human rights when drafting laws, developing policies, delivering services, and making decisions.

Importantly, an Act will give people the power to take action if their rights are violated, and seek reparations for violations.

Finally, a Human Rights Act will foster respect for human rights in Australia, so we can work toward a future where everyone, everywhere understands their rights, and the rights of others.

I support a legislated Human Rights Act, like those in Victoria, Queensland, and the Australian Capital Territory, and support the position paper released by the Australian Human Rights Commission in March 2023.

An Act should include the human rights Australia has already promised to uphold under international law, including civil, political, economic, social and cultural rights under the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the rights of children and people with disabilities.

For these reasons I believe the inquiry should recommend the Federal government legislate a Human Rights Act.

Yours sincerely,

Form Letter 2

In line with the International Covenant of Economic, Social and cultural rights, our group, calls on all levels of Government; Federal, State and Local to uphold their duty of care to protect the safety and wellbeing of those who are experiencing homelessness.

Governments have a duty of care to individuals as outlined in Article 11 of the International Covenant of Economic, Social and Cultural rights, there are intersectional factors that contribute to this, such as women over 55 who are now the fastest growing group of those who are experiencing homelessness and is therefore a breach of women's rights as well.

Those with a disability also experience homelessness at a higher rate, in line with our obligations under the CRPD. Aboriginal and Torres Strait Islander people also experience homelessness at higher rates.

We believe that the failure of governments to create housing policy is a fundamental breach of human rights which could be escalated to the UN Council of Human Rights for which our Nation has a seat.

We call on the Federal Minister for Housing, the Hon Julie Collins and the State Government Minister for Housing: DFFH to build social housing now as there is an immediate need. We want the immediate building of 50,000 social housing dwellings. Prioritising the needs of women, people with disabilities and Aboriginal and Torres Strait Islander peoples who are experiencing homelessness at a higher rate.

We believe that currently negative gearing policy is concentrating ownership of houses in the hands of fewer and fewer people, resulting in less supply and higher rents.

We recommend that there should be a federal charter of human rights regarding housing.

All Australians should have an enshrined right to safe and secure housing.

Appendix 4
AHRC Model Human Rights Act

1.1 The Australian Human Rights Commission has summarised their model for a Human Rights Act for Australia as follows.[1]

1. The HRA should be a 'dialogue' model

- A positive duty on the Executive ('public authorities') to consider human rights and act compatibly with human rights
- Parliament required to consider human rights in the HRA when making and debating laws, through existing parliamentary scrutiny measures
- The judiciary 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.
- When a court, in the course of making a judgment, has found a parliamentary intention to override human rights contained in the HRA, the Attorney-General should be required to trigger a process for reviewing the law in question.

2. The HRA should 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).

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

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[1] Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (December 2023), Appendix 2.

- 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.

3. The HRA should reflect key rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP should 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. These should be included with a standalone cause of action, and representative standing.
- 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
- A clause enabling human rights in the Human Rights Act to be interpreted in light of UNDRIP in cases where the right 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.

4. There should be a positive duty on public authorities

- 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
- Public authorities would also be required to engage in participation processes where the 'participation duty' is relevant, as part of the 'proper consideration' limb (see below)
- Compliance with the positive duty would be reviewable by courts.

5. The scope of public authorities should include core executive bodies and contractors/entities providing public services

- The scope of public authorities with obligations to comply with the positive duty should include core executive bodies, such as government departments, agencies and offices, and the police.
- It should also include '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. This would include, for example, Medicare funded healthcare services.
- 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.

6. The positive duty should be implemented alongside a comprehensive education and training program for public authorities

- There should be a transition period pre-introduction (1 year) to develop proficiency within the public service
- HRA implementation should include an initial whole-of-government education program, followed by permanent routine educational requirements at all levels of government.
  There should 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; 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 to public authorities, and would require dedicated ongoing resourcing to do so.

7. The HRA should include key procedural duties – a 'participation duty' and an 'access to justice' duty. It should also account for technological decision-making

Participation duty

- There should be 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. It would also apply to proponents of legislation in a non-binding respect, reflected in Statements of Compatibility and assessed by PJCHR.
- 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 require public authorities to ensure the participation on these 3 groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights in the HRA.
- The Commission has developed a set of guidelines that encompass key considerations for determining the quality of a general participation process. 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).
- As with substantive rights in the Human Rights Act, the participation duty could be justifiably limited through the application of the limitations clause.

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 – that is, to meet minimum requirements associated with the right to a fair hearing, overlayed by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law.
- 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.
- 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, when making decisions, including decisions that directly affect people's rights.
- The same procedural fairness principles and rights consideration apply to all decisions made by public authorities, regardless of how the decision is made.

8. The HRA should apply to all within Australia's federal jurisdiction

- The HRA should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination.
- This includes individuals under Australia's 'effective control' overseas
- A federal Human Rights Act should be restricted in scope to federal laws and federal public authorities
- States that do not have an HRA could be encouraged to adopt a HRA that mirrors the federal HRA

9. The HRA should provide guidance about how rights in the HRA should be interpreted

- 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.

10. The HRA should provide guidance to courts about how they should interpret legislation in light of the human rights contained within the HRA.

- The interpretive clause should provide that courts are to prefer an interpretation that is compatible with human rights, provided that this I consistent with the intention of Parliament, as expressed through the statute under analysis.
- 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 following wording is recommended: ' All primary and subordinate Commonwealth legislation to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.'
- The clause should also clarify 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.

11. The HRA should include a limitations clause describing the circumstances in which human rights may be permissibly limited

- The limitations clause should be based on the 'proportionality' test that is strongly established in international law and applicable to human rights instruments.
- 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.
- 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 reasonable available means to achieve the purpose
  - whether there are safeguards or controls over the means adopted to achieve the purpose
- 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 limitations clause should include examples that highlight the minimum core of certain ICESCR rights

12. The HRA should include a mechanism to provide notification to Parliament regarding incompatible laws

- State and territory HRAs provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights through applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI). In light of Constitutional concerns, the Commission 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 HRA, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the HRA or whether the statute demonstrates a parliamentary intent 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 HRA, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.
- When a court has found a parliamentary intention to override human rights contained in the HRA, 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.

13. The HRA should include a standalone cause of action for all rights and flexible remedies

- Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action.
- The HRA should also allow for HRA rights to be raised in the context of another legal proceeding
- 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.

14. The HRA should allow a person to make a human rights complaint to the Commission

- The Human Rights Act complaint system should mirror 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 complainant 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).
- 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.

15. An HRA should apply in the context of 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.
- 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.
- 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. Principles of administrative law, and administrative remedies should apply as usual to decisions that require adherence to the HRA.

16. There should be representative standing under the HRA

- Standing under the HRA should 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).
- An additional means of enhancing access to justice is to include protections against adverse cost orders

17. The HRA should be subject to 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 t the 5-year mark, with the timeline for subsequent reviews assessed at that stage.

18. Existing Parliamentary scrutiny mechanisms should be improved alongside the introduction of an HRA

The operation and effectiveness of parliamentary scrutiny of laws for compatibility with human rights should be improved through the following measures:

- Amendments to House and Senate Standing Orders similar to that in the ACT would assist the PJCHR process to ensure that legislation would not be passed prior to the Committee's final report.
- If a Bill proceeded to be enacted 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 the 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.
- 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 resources to public servants to understand and analyse human rights.
- Consideration should be given to having designated human rights advisers in Departments.

19. The Commission should be granted additional powers to enable education measures and compliance with the HRA

In addition to complaints powers, it should have the following specific functions in relation to a HRA:

- Reporting, reviews and oversight. This would include powers to conduct own-motion systemic inquiries; and to review the policies and practices of public authorities.
- 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 HRA.
- Education and public awareness.
- Public sector training and guidance.
- The Commission must also be equipped with the necessary tools and resources to protect and promote human rights in line with the Paris Principles.

Appendix 5
Example Human Rights Bill 2024

1.1 Attached is an example of a draft Human Rights bill. It sets out the main provisions recommended by the Australia Human Rights Commission,[1] but also has regard to the submissions made to this committee, the modifications proposed in recommendation 2 and drafting practices.

1.2 The committee does not intend that this draft bill represents the entirety of what a Human Rights Act (HRA) would ultimately look like, but provides this in order to promote understanding of the proposed HRA model (see Chapter 9).

1.3 As set out in the proposed bill, the HRA would operate by binding public authorities – being those with powers or functions under Commonwealth law or other entities exercising Commonwealth functions. It is not intended to apply generally to the states and territories – instead it is intended to operate concurrently with relevant state and territory Human Rights Acts.

[1] Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (December 2022).

The Parliament of the
Commonwealth of Australia

Presented and read a first time

Illustrative Human Rights Bill 2024

No. , 2024

A Bill for an Act to respect, protect and promote human rights, and for related purposes

PJCHR: Illustrative purposes only

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PJCHR: Illustrative purposes only

A Bill for an Act to respect, protect and promote human rights, and for related purposes

Preamble

In enacting this Act, the Parliament of Australia recognises:

(a) human rights apply from the time a person is born, and are universal, indivisible and interdependent, and interrelated; and

(b) human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom; and

(c) human rights belong to all people without discrimination, and the diversity of the people of Australia enhances our community; and

(d) human rights should be limited only after careful consideration, and any limitation must only be done in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law; and

(e) the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and pursue their economic, social and cultural development. The right to self-determination has a particular significance for Indigenous peoples, as Australia's first peoples, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, water, coastal seas and other resources with which they have a connection.

The Parliament of Australia therefore enacts:

Note: This preamble is an amalgamation of the preambles in the Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld) and Human Rights Act 2004 (ACT)*, with the inclusion of specific wording as recommended by the Australian Human Rights Commission (AHRC) (see* Free and Equal: A Human Rights Act for Australia (referred to as 'AHRC report') *pp. 107, 133, 192–193) in relation to paragraph (a), and the reference to the right to self-determination in paragraph (e).*

PJCHR: Illustrative purposes only

PJCHR: Illustrative purposes only

Part 1—Preliminary

Division 1—Introduction

1 Short title

This Act is the *Human Rights Act 2024*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after the end of the period of 12 months beginning on the day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Objects of Act

The objects of this Act are to:

(a) respect, protect and promote human rights; and

(b) help build a culture whereby public authorities respect, protect and promote human rights; and

(c) help promote a dialogue about the nature, meaning and scope of human rights; and

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(d) ensure that a statutory provision, whenever enacted, is interpreted so far as is reasonably possible, in a manner that is compatible with human rights; and

(e) in conjunction with other laws, give effect to Australia's obligations under international human rights law.

4 Application

Note: consideration would need to be given to the geographical extent of the Act and who the Act applies to (note section 10 below clarifies that only humans have human rights, but consideration needs to be given to how exactly the Act would bind public authorities; courts; and the Parliament (to a limited extent), within our constitutional structure (for example, see s 6 of the Victorian Charter; s 5 of the Queensland HRA).

5 Concurrent operation of State and Territory laws

This Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of human rights and is capable of operating concurrently with this Act.

Note: This is based on s 6A of the Racial Discrimination Act 1975 *(without reference to complaints or offences), see AHRC report p. 243. Further consideration would need to be given to whether this is sufficient.*

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Division 2—Interpretation

6 Definitions

child means a person aged under 18 years.

Commission means the Australian Human Rights Commission.

compatible with human rights has the meaning set out in section 7.

guardian has the same meaning as in the *Family Law Act 1975*.

human rights means the rights and freedoms stated in Division 2 of Part 2.

Indigenous peoples means a group of people who are:

(a) members of the Aboriginal race of Australia; or

(b) descendants of Indigenous inhabitants of the Torres Strait Islands.

international human rights law includes the obligations and principles expressed in:

(a) the Convention on the Prevention and Punishment of the Crime of Genocide done at Paris on 9 December 1948 ([1951] ATS 2), as amended and in force for Australia from time to time; and

(b) the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ([1954] ATS 5), as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ([1973] ATS 37), and as otherwise amended and in force for Australia from time to time; and

(c) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40), as amended and in force for Australia from time to time; and

(d) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5), as amended and in force for Australia from time to time; and

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(e) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23), as amended and in force for Australia from time to time; and

(f) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9), as amended and in force for Australia from time to time; and

(g) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21), as amended and in force for Australia from time to time; and

(h) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4), as amended and in force for Australia from time to time; and

(i) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12), as amended and in force for Australia from time to time; and

(j) the Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on 13 September 2007.

Note: The text of a Convention or Covenant could in 2024 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au). The text of United Nations General Assembly resolutions could in 2024 be accessed through the United Nations' website (https://www.un.org).

parents includes a guardian of a child.

person means an individual.

public authority has the meaning set out in section 8.

slavery includes modern slavery within the meaning of section 4 of the *Modern Slavery Act 2018.*

statutory provision means:

(a) an Act of the Commonwealth; or

(b) a provision of an Act of the Commonwealth; or

(c) a legislative instrument; or

(d) a provision of a legislative instrument.

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7 Meaning of compatible with human rights

An act, decision or statutory provision is compatible with human rights if the act, decision or statutory provision:

(a) does not limit a human right; or

(b) limits a human right only in accordance with section 12.

8 Meaning of public authority

Note: The AHRC has suggested the following entities should be listed as a public authority. Consideration would need to be given to how best to draft this provision to capture this intention (see AHRC report *pp. 149–150):*

(1) Each of the following is 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.*
- *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.*

(2) Each of the following is not a public authority:

- *the Parliament of Australia, except when acting in an administrative capacity;*

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- *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.*

Note: Further consideration should be given to whether courts could be included as public authorities, see the committee's recommendation 3.

9 When function is of a public nature

*Note: The AHRC has suggested the following definition as to when a function is of a public nature (*see AHRC report, p.150). *Consideration would need to be given to how best to draft this provision to capture this intention.*

(1) In deciding whether a function of an entity is of a public nature for the purposes of this Act, any of the following 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.*

(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 subsections (1) or (2), 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 definitions under the Optional Protocol to the Convention against Torture];*
- *the provision of federal:*
  - *public health services [for example, Medicare funded services];*

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- *public disability services [for example, National Disability Insurance Scheme 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];*
- *public housing services [for example, remote Aboriginal and Torres Strait Islander housing programs];*
- *aged care services [for example, Aged Care Quality and Safety Commission accredited services].*

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Part 2—Human rights

Division 1—Preliminary

10 Who has human rights

Only individuals have human rights.

Note: Bodies corporate and bodies politic do not have human rights.

11 Human rights are in addition to other rights and freedoms

A right or freedom not included, or only partly included, in this Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included.

12 Limitations on rights

(1) A human right may be subject under law only to such limits that are reasonable and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

(2) In deciding whether a limit on human rights is reasonable and justified, the following considerations are relevant:

- (a) the nature of the right;
- (b) whether the limitation is aimed at achieving a legitimate objective;
- (c) the relationship between the limitation and its objective, including whether the limitation will be effective to achieve the objective;
- (d) whether the limitation is proportionate to the objective sought to be achieved, including consideration of the following:
  - (i) the extent of the interference with the human right;
  - (ii) whether there are effective safeguards or controls over the means adopted to achieve the objective;
  - (iii) whether the means adopted are sufficiently circumscribed;
  - (iv) whether there is oversight of the means adopted and access to review;

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(v) whether there are any less rights restrictive and reasonably available means to achieve the objective;

(vi) whether the means adopted provide sufficient flexibility to treat different cases differently;

(vii) whether any affected groups are particularly vulnerable.

Note: A legitimate objective is one that is necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting the right.

(3) In considering the nature of the rights in subsection 36(2) and sections 37 to 42, a type of limitation includes:

(a) the taking of backwards steps, known under international human rights law as retrogressive measures; and

(b) not satisfying certain minimum aspects of the rights, known under international human rights law as minimum core obligations; and

(c) not ensuring the rights are enjoyed without discrimination.

(4) Despite subsection (1), the following rights must not be subject to limitation:

(a) the right to recognition before the law (subsection 15(1));

(b) the right to life (section 16) if the deprivation of life constitutes the crime of genocide;

(c) the prohibition of torture and cruel, inhuman or degrading treatment or punishment (section 17);

(d) the freedom to have or adopt a religion or belief (paragraph 22(1)(a));

(e) the right to hold opinions without interference (subsection 24(1));

(f) the right not to be imprisoned only because of the inability to fulfil a contractual obligation (subsection 26(9));

(g) the prohibition of retrospective criminal laws (section 34);

(h) the right not to be held in slavery or servitude (subsection 35(1)).

Note: Subsection (2) seeks to give effect to the AHRC's model, see AHRC report*, pp. 254–256) and is an amalgam of section 13 of the Queensland HRA and, as recommended by the AHRC, the PJCHR's Guidance Note 1.*

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Further consideration should be given as to whether subsection (4) accurately captures all the absolute rights at international human rights law (for example, consideration should be given as to whether this should also include the right to a competent, independent and impartial court or tribunal (an element of subsection 29(2)).

13 Human rights are protected

Nothing in this Act gives any person or other entity a right to limit to a greater extent than is provided for under this Act a human right of any person.

14 No obligation of progressive realisation

In relation to subsection 36(2) and sections 37 to 42, the obligation of progressive realisation as recognised under international human rights law does not apply.

Note: Further consideration should be given as to how to implement the AHRC's model regarding economic, social and cultural rights – namely that only the immediately realisable aspects of these rights apply and not the obligation of progressive realisation (see AHRC report p. 128). See also subsection 12(3) regarding limitations on economic, social and cultural rights).

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Division 2—Human rights

Note: The rights set out in this Division are drafted largely in accordance with the AHRC's model (see AHRC report *pp. 341–377), except where indicated to align the wording of the respective right more closely with the text of the relevant international treaty (see recommendation 2) or with drafting practices. Further consideration should be given to whether the drafting of all of these rights fully implements obligations under the relevant international human rights law.*

As per recommendation 2, in relation to some rights, legislative notes have been included:

- *setting out the limitation criteria that applies under the international treaties in relation to that right (to help interpret what constitutes a legitimate objective for the purposes of the limitation clause in section 12); and*

- *referring to the elaboration of these rights in other UN treaties and declarations. These notes are not intended to be exhaustive and there are other provisions in international treaties that are also relevant. The notes generally reflect those issues that were of particular importance to witnesses and submitters. As per recommendation 2, detailed guidance notes should be provided to assist public authorities in interpreting and applying the law.*

15 Right to recognition and equality before the law and freedom from discrimination

(1) Every person has the right to recognition as a person before the law.

Note: The right to recognition as a person before the law must not be subject to limitation, see subsection 12(4).

(2) Every person has the right to enjoy human rights without discrimination.

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(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) In this section, ***discrimination*** means discrimination against a person on a ground set out in:

(a) Part II of the *Racial Discrimination Act 1975*; or

(b) Part II of the *Sex Discrimination Act 1984*; or

(c) Part 2 of the *Disability Discrimination Act 1992*; or

(d) Part 4 of the *Age Discrimination Act 2004*; or

(e) section 351 of the *Fair Work Act 2009*; or

(f) any other law of the Commonwealth prescribed by the regulations.

Note: For the application of this right in relation to people with disability, see articles 5 and 12 of the Convention on the Rights of Persons with Disabilities.

Note: As per the AHRC report p. 341, this right implements articles 2, 3, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Consideration should be given as to whether the right to equal recognition before the law (subsection (1)) should be separated from the right to equality and non-discrimination (subsections (2) to (5)), noting that these rights are separately protected in the ICCPR.

Further consideration should also be given to the definition of 'discrimination' to ensure it adequately captures all relevant aspects of discrimination (including under international human rights law) and whether this definition should apply to the whole Act (noting however that the use of the term in other clauses, such as paragraph 24(3)(b) or subclause 31(2) may require a broader meaning).

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16 Right to life

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

Note: If the deprivation of life constitutes the crime of genocide, this right must not be subject to limitation, see subsection 12(4).

17 Prohibition of torture and cruel, inhuman or degrading treatment or punishment

A person must not be:

(a) subjected to torture or to cruel, inhuman or degrading treatment or punishment;

(b) subjected to medical or scientific experimentation without the person's free consent.

Note: This right must not be subject to limitation, see subsection 12(4).

Note: This right has been re-drafted from the AHRC drafting (see AHRC report p. 343) to better align it with article 7 of the ICCPR, see Chapter 6 and the committee's recommendation 2.

18 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) In all actions concerning children, the best interests of the child must be a primary consideration.

(3) Every child must be registered immediately after birth and must have a name.

(4) Every child has the right to acquire a nationality.

Note 1: A child also has the other human rights set out in this Act.

Note 2: See article 10(3) of International Covenant on Economic, Social and Cultural Rights.

Note: Note 2 above has been included as this was recommended in the AHRC model (see AHRC report p. 343). Further consideration should be given to whether the rights in article 10(3) of the International

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Covenant on Economic, Social and Cultural Rights (ICESCR) need to be protected as substantive rights or if it is sufficient to include them in a legislative note as set out above.

Subsection (2) reflects article 3 of the Convention on the Rights of the Child (CRC) – it has been redrafted from the AHRC model to more closely align it to article 3 of the CRC and to remove reference to public authorities as the obligation on public authorities is set out in section 47 below.

19 Protection of families

(1) The family is the fundamental group unit of society and is entitled to protection.

(2) Every person of marriageable age has the right to marry and to found a family.

(3) Marriage must not be entered into without the free and full consent of the intending spouses.

Note: See article 10 of International Covenant on Economic, Social and Cultural Rights.

Note: This legislative drafting note has been included as this was recommended in the AHRC model (see AHRC report p. 345). Further consideration should be given to whether the rights in article 10 of the ICESCR need to be protected as substantive rights or if it is sufficient to include them in a legislative note as set out above.

Subsections (2) and (3) have been split out (as compared to the AHRC's model, p. 345) to better align it with article 23(2) and (3) of the ICCPR.

20 Right to 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.

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

21 Freedom of movement

(1) A 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) A person must not be arbitrarily deprived of the right to enter the person's own country.

Note: In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the following limits are recognised under international human rights law as legitimate: those that are necessary to protect national security; public order; public health or morals; or the rights and freedoms of others.

22 Freedom of thought, conscience and religion

(1) Every person has the right to freedom of thought, conscience and religion, which includes:

(a) the freedom to have or to adopt a religion or belief of the person's choice; and

(b) the freedom, either individually or in community with others and in public or private, to manifest the religion or belief in worship, observance, practice and teaching.

Note 1: The freedom to *have or adopt* a religious or other belief or opinion must not be subject to limitation, see subsection 12(4).

Note 2: In determining whether a limit on the freedom to *manifest* one's religion or belief is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the following limits are recognised under international human rights law as legitimate: those that are necessary to protect public safety; public order; public health or morals; or the fundamental rights and freedoms of others.

(2) A person must not be subject to coercion which would impair the person's freedom to have or to adopt a religion or belief of the person's choice.

(3) A child's parents have the freedom to ensure the religious and moral education of the child in conformity with the parents' own convictions.

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Note: See also sections 18 and 37 of this Act and article 14 of the Convention on the Rights of the Child.

Note: This right has been re-drafted from the AHRC model (p. 349) to better align it with article 18 of the ICCPR, see Chapter 6 and recommendation 2.

23 Right to 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.

Note 1: In determining whether a limit on these rights are aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the following limits are recognised under international human rights law as legitimate: those that are necessary in a democratic society in the interests of national security or public safety; public order; the protection of public health or morals; or the protection of the rights and freedoms of others.

Note 2: See also ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise done at San Francisco on 9 July 1948 ([1974] ATS 3), the text of which could in 2024 be viewed in the Australian Treaty Library on the AustLII website (http://www.austlii.edu.au).

Note: Consideration should be given whether the right to form trade unions should be recognised in this right; in the right to work (section 41); or as a stand-alone right, noting that the right to form trade unions has a slightly different limitation criteria than that applicable to freedom of association (compare articles 22 of the ICCPR and article 8 of ICESCR).

24 Freedom of opinion and expression

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

Note: The freedom to *hold* opinions without interference must not be subject to limitation, see subsection 12(4).

(2) Every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing

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or in print, by way of art, or in another form or medium of the person's choice.

Note: The exercise of the right in subsection (2) carries with it special duties and responsibilities. In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the following limits are recognised under international human rights law as legitimate: those that are necessary for respecting the rights or reputations of others; or necessary for the protection of national security, public order, public health or morals.

(3) Despite subsection (2), the following is prohibited:

(a) any propaganda for war;

(b) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Note: Subsection (3) has been included as per the committee's recommendation 2, to incorporate article 20 of the ICCPR.

25 Right to take 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.

Note: This wording is taken from the AHRC report p. 353. Further consideration should be given to whether this right needs to be redrafted to apply only to 'citizens' as this is the wording used in article 25 of the ICCPR. Note that the wording proposed by the AHRC as set out above also does not include the requirement for 'universal and equal suffrage' and voting held by secret ballot as required by article 25 of the ICCPR.

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26 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 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) A person who is awaiting trial must not be detained in custody as a general rule, but the person's 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) A person 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:

(a) make a decision without delay; and

(b) if the detention is unlawful, order the person's release.

(8) A person 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 fulfil a contractual obligation.

Note: The right not to be imprisoned only because of the inability to fulfil a contractual obligation must not be subject to limitation, see subsection 12(4).

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27 Right to humane treatment when deprived of liberty

(1) Every person 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:

(a) be segregated from convicted persons except in exceptional circumstances; and

(b) be treated in a way that is appropriate for a person who has not been convicted.

28 Rights of 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:

(a) must be treated in a way that is appropriate for a person of the child's age who has not been convicted; and

(b) must be brought to trial as quickly as possible; and

(c) has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.

(3) 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.

(4) A child should only be imprisoned as a last resort and for the shortest necessary period of time.

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

Note: With respect to subsection (1), it is noted that Australia has entered a reservation to article 37(c) of the CRC, which provides, among other things, that every child deprived of liberty shall be separated from adults unless it is in the child's best interest not to do so. Australia has also entered a reservation with respect to article 10(2)(b) and (3) of the ICCPR regarding the separation of juvenile

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and adult detainees. Further consideration should be given to how these reservations impact the content of this right.

29 Right to a fair hearing

(1) Every person is equal before the courts and tribunals.

(2) 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.

(3) Despite subsection (2), a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing if it considers it is in the public interest or the interests of justice to do so.

(4) Each judgment in a criminal or civil proceeding must be made public unless the interests of a child requires that the judgment not be made public.

Note: Subsection (1) is suggested for inclusion as this is in article 14 of the ICCPR (and is a broader right than just equality before the law, encompassing equality of arms and access to justice), although it is not included in the AHRC report, p. 357.

The remainder of the provision is drafted in line with the AHRC report, p. 357. In relation to subsection (2), consideration should be given to whether the term 'a party to a civil proceeding' adequately captures the provision in article 14 of the ICCPR which refers to the determination of a person's 'rights and obligations in a suit at law' (for example, does 'a party to a civil proceeding' include parties who are not already a party to the proceedings?), cf ACT HRA s 21(1) which refers to 'rights and obligations recognised by law'.

In relation to subsections (3) and (4), consideration should be given to whether this needs to more closely reflect the wording in article 14 of the ICCPR which provides further grounds for the exclusion of the press and public from trials and for when judgments must be made public.

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30 Right not to be expelled without due process

(1) A non-citizen lawfully in Australia may only be expelled from Australia pursuant to a decision reached in accordance with law.

(2) Subject to subsection (3), a non-citizen subject to expulsion has the right:

(a) to submit reasons against the expulsion; and

(b) to have the case reviewed by a competent authority; and

(c) in any such review, to be represented for the purpose of the review.

(3) Subsection (2) does not apply if compelling reasons of national security require otherwise.

Note: Except in relation to section 25, non-citizens within Australia also have the other human rights set out in this Act.

Note: this is intended to reflect article 13 of the ICCPR and is in addition to the rights recommended by the AHRC model, see recommendation 2.

31 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, in full equality:

(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 adviser 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;

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(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 themself 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.

32 Right to compensation for wrongful conviction

(1) Subject to subsection (2), a person has the right to be compensated according to law if:

(a) a person 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) Subsection (1) 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.

Note: Australia has entered a reservation with respect to article 14(6) of the ICCPR, which relates to compensation for miscarriage of justice. Consideration should be given to how this reservation impacts this right.

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33 Right not to be tried or punished more than once

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.

34 Prohibition of 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 the offence 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.

Note: This right must not be subject to limitation, see subsection 12(4).

35 Prohibition of slavery and freedom from forced work

(1) A person must not be held in slavery or servitude.

Note: The right not to be held in slavery or servitude must not be subject to limitation, see subsection 12(4).

(2) Subject to subsection (3), 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

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(c) work or service that forms part of normal civil obligations.

36 Rights to culture

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.

(2) All persons have the right:

(a) to take part in cultural life; and

(b) to enjoy the benefits of scientific progress and its applications; and

(c) if a person is the author of any scientific, literary or artistic production, to benefit from the protection of any moral and material interests resulting from that production.

Note: In determining whether a limit on the right in subsection (2) is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

Cultural rights—Indigenous peoples

(3) Indigenous peoples hold distinct cultural rights.

(4) Indigenous 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 traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

(b) to enjoy, maintain, control, protect, develop and use their languages, including traditional cultural expressions; and

(c) to enjoy, maintain, control, protect and develop their kinship ties; and

(d) to maintain and strengthen distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which Indigenous

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peoples have a connection under their tradition or custom; and

(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

(5) Indigenous peoples have the right not to be subjected to forced assimilation or destruction of culture.

Note: In relation to the cultural rights of Indigenous peoples, see the United Nations Declaration of the Rights of Indigenous Peoples, particularly articles 8, 11, 12, 13, 25, 29, 31 and 34.

Note: This reflects the AHRC report, p.364, other than subsection (2) which has been added to capture the rights in article 15 of the ICESCR, see Chapter 6 and recommendation 2.

The legislative note under subsection (2) (reflecting article 15 of ICESCR) has been included as most economic, social and cultural rights are subject to a specific limitation clause (see article 4 of ICESCR). Note that the term 'general welfare' primarily refers to the economic and social well-being of the people and the community. Guidance material would need to be developed to explain the application of this limitation criteria. This legislative note is mirrored below for sections 37, 38, 39, 41(1) and (2) and 42.

Further consideration should be given to the framing of Indigenous peoples' right to culture, in consultation with Indigenous peoples, to ensure it adequately captures all applicable rights under international human rights law, see Chapter 6 and recommendation 2.

37 Right to education

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

Note: For the application of this right in relation to people with disability, see article 24 of the Convention on the Rights of Persons with Disabilities.

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(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.

Note: In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

Note: The AHRC report (p.365) suggested including another subsection with respect to parents choosing religious education for their children. This subsection has been included in the right to freedom of religion (section 22), to more closely reflect article 18 of the ICCPR. Consideration should be given as to whether a subsection reflecting article 13(3) of the ICESCR should be included within this right.

38 Right to health

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

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

Note: In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

Note: This largely reflects the AHRC's wording in its report (p. 370), with the addition of the words 'goods and facilities'. Further consideration should be given to whether this adequately covers the right in article 12 of the ICESCR. See Chapter 6 and recommendation 2.

39 Right to adequate standard of living

Every person has the right to an adequate standard of living, including adequate food, water, clothing and housing.

Note: In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

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Note: This has been drafted differently to the AHRC proposal (see AHRC report, p. 371) to more closely align it to article 11 of the ICESCR, see Chapter 6 and recommendation 2.

40 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; and

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

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

(3) No person should be subject to discrimination regarding the realisation of this right.

Note: The primary sources of this right are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations General Assembly resolution, *The human right to a clean, healthy and sustainable environment*, A/RES/76/300 adopted 28 July 2022. The text of a Convention or Covenant could in 2024 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au). The text of United Nations General Assembly resolutions could in 2024 be accessed through the United Nations' website (https://www.un.org).

Note: See the committee's recommendation 2 that further consideration be given to the drafting of the right to a healthy environment, including consultation with Aboriginal and Torres Strait Islander peoples on how best to recognise the relationship between the right to a healthy environment and the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander peoples. This right is articulated in broader terms in international human rights law, namely the 'right to a clean, healthy and sustainable environment'. Consideration should be given as to whether this right should be drafted in broader terms to align more closely with international human rights law and whether the substantive and procedural elements of the right should be expressly incorporated.

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The elements of the right are detailed in the UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/43/53 (2019). See Chapter 6.

The AHRC report (at p. 373) includes subsections (2) and (3), however it is unclear if these are necessary to specify in light of the limitation clause (at subsection 12(3)), noting that these principles would apply to all economic, social and cultural rights.

41 Right to work and other work-related rights

(1) Every person has the right to work, including the right to choose a trade, occupation or profession freely.

(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 1: See also the *Fair Work Act 2009, Work Health and Safety Act 2011*, *Age Discrimination Act 2004, Disability Discrimination Act 1992, Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*, as well as articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights.

Note 2: In determining whether a limit on the rights in subsections (1) and (2) is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

Note: Further consideration should be given to whether this adequately covers the rights in articles 6, 7 and 8 of the ICESCR, which is articulated in broader terms in the treaty.

42 Right to social security

Every person has the right to have access to social security.

Note: In determining whether a limit on this right is aimed at achieving a legitimate objective (see paragraph 12(2)(b)), the objective of promoting general welfare in a democratic society is recognised under international human rights law as legitimate.

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Part 3—Application of human rights

Division 1—Interpretation of laws

43 Interpretation

(1) A statutory provision must be interpreted, so far as is reasonably possible, in a manner that is compatible with human rights.

(2) If a 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.

(3) International human rights 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.

Note: International human rights law is defined in section 6.

(4) This section does not affect the validity of:

(a) an Act or provision of an Act that is not compatible with human rights; or

(b) a legislative instrument or a provision of a legislative instrument that is not compatible with human rights and is expressly empowered by the Act under which it is made to not be compatible with human rights.

44 Intervention by Attorney-General

(1) The Attorney-General may intervene in, and may be joined as a party to, any proceeding before a court in which:

(a) a question of law arises that relates to the application of this Act; or

(b) a question arises in relation to the interpretation of a statutory provision in accordance with this Act.

(2) If the Attorney-General intervenes in a proceeding under this section, the Attorney-General may be taken to be a party to the proceeding for the purpose of any appeal from an order made in that proceeding.

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45 Intervention by Commission

(1) The Commission may intervene in, and may be joined as a party to, any proceeding before a court in which:

(a) a question of law arises that relates to the application of this Act; or

(b) a question arises in relation to the interpretation of a statutory provision in accordance with this Act.

(2) If the Commission intervenes in a proceeding under this section, the Commission may be taken to be a party to the proceeding for the purpose of any appeal from an order made in that proceeding.

46 Notice to Attorney-General and Commission

(1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Commission if a question of law arises that relates to the application of this Act or a question arises in relation to the interpretation of a statutory provision in accordance with this Act.

(2) For the purpose of subsection (1), a notice is not required to be given to:

(a) the Attorney-General if the Commonwealth is a party to the relevant proceeding; or

(b) the Commission if the Commission is a party to the relevant proceeding.

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Division 2—Public authorities

47 Obligations on public authorities

(1) It is unlawful for a public authority:

(a) to act or make a decision in a way that is not compatible with human rights; or

(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

(2) Subsection (1) does not apply to a public authority if the authority could not reasonably have acted differently or made a different decision because of a statutory provision, a law of a State or Territory or otherwise under law.

Example: Where a public authority is acting to give effect to an Act or legislative instrument that is not compatible with human rights.

(3) This section does not apply to an act or decision of a private nature.

(4) For subsection (1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to:

(a) identifying the human rights that may be affected by the decision; and

(b) considering whether the decision would be compatible with human rights; and

(c) ensuring the participation of:

(i) Indigenous peoples in decisions that directly or disproportionately affect Indigenous peoples;

(ii) children in decisions that directly or disproportionately affect children;

(iii) people with disability in decisions that directly or disproportionately affect people with disability; and

(d) where relevant, realising access to justice principles.

(5) To avoid doubt:

(a) an act or decision of a public authority is not invalid merely because, by doing the act or making the decision, the authority contravenes subsection (1); and

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(b) a person does not commit an offence against this Act or another Act merely because the person acts or makes a decision in contravention of subsection (1).

Note: Further consideration would need to be given to give effect to the AHRC's model (see AHRC report Chapter 7) regarding a participation duty, to impose a binding obligation on public authorities to ensure the participation of Indigenous peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights (drafted above as paragraph (4)(c)). Further consideration would also need to be given to how best to incorporate the AHRC's proposed equal access to justice duty (drafted above as paragraph (4)(d) (see AHRC report Chapter 7), and whether it adequately captures the principle of free, prior and informed consent, see the committee's recommendation 4.

48 Legal proceedings

Note: Further consideration needs to be given to the operation of a provision setting out when a claim could be made under the HRA, particularly around representative applicants and when a matter could be brought to the courts (e.g. allowing cases to go directly to the courts in circumstances where conciliation is not appropriate).

A potential option could look something like an amalgamation of the AHRC's model set out in Chapter 11 of the AHRC report, section 40C of the ACT Human Rights Act 2004*, and Schedule 4 to the* Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*:*

(1) This section applies if:

(a) a person claims, or 2 or more persons claim, that:

(i) a public authority has acted (or proposes to act) in a way that contravenes section 47; and

(ii) the person is, or one or more of the persons are, or would be, a victim of the contravention; or

(b) a representative applicant claims that:

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(i) a public authority has acted (or proposes to act) in a way that contravenes section 47; and

(ii) one or more persons on whose behalf the application is made is, or would be, a victim of the contravention.

(2) The person or representative applicant may:

(a) lodge a written complaint with the Australian Human Rights Commission against the public authority; and

(b) bring proceedings against the public authority under this Act in the Federal Court or the Federal Circuit and Family Court of Australia (Division 2); and

(c) rely on the human rights under this Act in other legal proceedings, but only if the person has standing in those other proceedings.

Note: The Australian Human Rights Commission may inquire into and attempt to conciliate a complaint made under this section, see Australian Human Rights Commission Act 1986.

(3) The Federal Court or the Federal Circuit and Family Court of Australia may, in a proceeding under paragraph (2)(b), grant the relief it considers appropriate.

(4) 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.

49 Costs

Scope

(1) This section applies to proceedings (including an appeal) in a court that relate to an application made by a person or representative applicant (the ***applicant***) to bring proceedings against a public authority under this Act in the Federal Court or the Federal Circuit and Family Court of Australia (Division 2).

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When respondent liable for costs

(2) Subject to subsection (4), if the applicant is successful in proceedings on one or more grounds, the court must order each respondent against whom the applicant is successful to pay the applicant's costs.

(3) The court may order that the costs to be paid by the respondent be assessed on an indemnity basis or otherwise.

(4) If the court is satisfied that the applicant's unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay the costs incurred as a result of that act or omission.

When applicant liable for costs

(5) Subject to subsection (6), the applicant must not be ordered by the court to pay costs incurred by another party to the proceedings.

(6) The applicant may be ordered to pay the costs if:

(a) the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs; or

(c) all of the following apply:

(i) the other party is a respondent who was successful in the proceedings;

(ii) the respondent does not have a significant power advantage over the applicant;

(iii) the respondent does not have significant financial or other resources relative to the applicant.

Representative applications

(7) In the case of a representative application, subsection (6) does not authorise the court concerned to award costs against a person on whose behalf the application is made other than the person who made the application.

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Note: this is based on the costs protection provision in the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, as per the committee's recommendation 2.

50 Entity may choose to be subject to obligations

(1) An entity may make a request in writing to the Minister to be subject to the obligations of a public authority under this Division.

(2) If an entity makes a request under subsection (1), the Minister must, by notifiable instrument, declare that the entity is subject to the obligations of a public authority under this Division.

(3) If an entity requests to no longer be subject to these obligations, the Minister must, as soon as reasonably practicable, repeal the declaration.

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Part 4—Australian Human Rights Commission

Note: Provisions would need to be drafted setting out the Australian Human Rights Commission's functions under the Act, including its role of conciliation of complaints under this Act and the committee's recommendation 15 regarding the AHRC.

Part 5—General

Note: Provisions would need to be drafted setting out general matters, such as prescribing reporting requirements, reviews of the Act, making of regulations etc. See recommendation 2 that the first review of the Act should specifically be required to consider whether:

- *progressive realisation principles should be incorporated; and*
- *additional rights relating to specific groups, such as Aboriginal and Torres Strait Islander people, people with disability, children, older persons and victim-survivors of crime, should be included.*

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