Parliamentary Joint Committee on Human Rights
Via email to human.rights@aph.gov.au

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS™

18 October 2023

Dear Committee Secretary,

Re: Response to Question on Notice - Inquiry into Australia's Human Rights Framework

At our appearance before the Committee on September 27 2023, Australian Lawyers for Human Rights was asked the following question by Senator Thorpe:

> *Could you expand on section 6.7 of your submission and the interaction between Federal laws and states and territories in light of the following example:*
> - *If the Federal Government introduced a standalone Federal Act empowered by section 109 of the Constitution, saying for example no children under the age of 14 can be locked up in prison:*
> - *Would this not mean state and territory governments would have to change their laws to comply, and once they changed their laws, state public servants would be complying with state direction not Federal direction? I reference the repeal of laws which criminalised homosexuality in 1994.*

We thank Senator Thorpe for her question and dedication to this Inquiry, together with all members of the Committee.

<u>The answer to the question is as follows:</u>

The outcomes described in the question on notice would be justified from an international legal perspective, given that the Commonwealth is bound in international law to ensure respect for human rights by all governmental entities in Australia[1].

The external affairs power within section 51(xxix) of the Constitution would support a Federal Human Rights Act being drafted so as to bind the executive governments of the states and their agencies, and by force of section 109 of the Constitution, to prevail over any state law to the extent of any inconsistency[2].

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[1] Sarah Joseph and Melissa Castan, Federal Constitutional Law: A Contemporary View (Thompson Reuters, 2019, 5 th ed), 525-527 Chapter 8 and at page 20 of the submission provided to this Inquiry by Professor Sarah Joseph: file:///Users/Angus/Downloads/Sub36.pdf

[2] Justin Gleeson SC A FEDERAL HUMAN RIGHTS ACT – WHAT IMPLICATIONS FOR THE STATES AND TERRITORIES? UNSW Law Journal Volume 33(1) 2010

However, as noted in our Submission at 6.7 and by Professor Sarah Joseph and Professor Melissa Castan:

> "*it would likely be unconstitutional for a federal law to require state public servants to abide by human rights when performing functions under state legislation, or to direct courts to interpret state legislation in a way that is compatible with human rights. Such duties would likely breach the doctrine of intergovernmental immunities in the Commonwealth constitution (ie that the Commonwealth and the states cannot unduly interfere with each other's governmental organs)*[3]

As indicated at 6.7 within our submission ALHR supports the introduction of a federal Human Rights Act that would be applicable only to federal laws and federal public authorities.

ALHR notes that this is also the position proposed by the Australian Human Rights Commission (AHRC) in its model. This position is supported by national legal bodies such as the Australian Lawyers Alliance[4] and was similarly the position taken in 2009 by the National Human Rights Consultation Committee (NHRCC) which recommended that.

> *…any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities – including federal ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.*[5]

As noted by Professor Sarah Joseph in her submission to this Inquiry:

> *Comprehensive human rights legislation which overrides State laws would have a massive impact on the federal balance of power, given that it would impact in many or even most spheres of State law. It is unlikely, politically, that such a Bill would be enacted without extensive discussion with the State governments. Regardless, the Commonwealth should ensure that existing Bills of Rights at State and Territory level are allowed to co-exist, just as State anti-discrimination legislation sits alongside like Commonwealth legislation*[6]

The model proposed by the AHRC has an interpretative provision applicable to existing and future Commonwealth law. That would require statutory provisions to be interpreted in a way that is compatible with protected human rights, to the extent that this is consistent with the

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[3] Sarah Joseph and Melissa Castan, Federal Constitutional Law: A Contemporary View (Thompson Reuters, 2019, 5 th ed), 525-527 Chapter 8 and at page 20 of the submission provided to this Inquiry by Professor Sarah Joseph: file:///Users/Angus/Downloads/Sub36.pdf

[4] See for example Australian Lawyers Alliance Submission, p.29;

[5] Recommendation 20, Commonwealth of Australia, National Human Rights Consultation, (Report, September 2009) 305-307.

[6] Ibid, p.20

provision's purpose. Further, it would require that this does not affect the validity or operation of the legislation.

In the example provided in the question on notice, if a federal Human Rights Act that applies only to federal laws and federal public authorities protected children under the age of 14 from imprisonment, this would only interact with decisions made, and actions done, in accordance with Commonwealth law, by Commonwealth law enforcement.

ALHR takes the opportunity to note that it is our long held position that all rights set out within the United Nations Declaration on the Rights of the Child (CRC) should be included in a Federal Human Rights Act and all existing and future legislated State and Territory human rights frameworks. It is similarly our position that all jurisdictions must raise the minimum age of criminal responsibility to at least 14 years of age with no exceptions.

ALHR submits that existing state and territory Human Rights Acts in the Australian Capital Territory, Queensland and Victoria should be allowed to co-exist with a federal Human Rights Act, just as State anti-discrimination legislation sits alongside Commonwealth legislation. The states and territories that are yet to introduce a Human Rights Act, should do so as a matter of priority. The federal government should place the enactment of state and territory Human Rights Acts in all remaining jurisdictions on the agenda of National Cabinet meetings.

Further to our submission and in line with the answer to a similar question on notice provided to this Committee by the Queensland Council for Civil Liberties[7], ALHR notes that a Federal Human Rights Act could contain a provision similar to Commonwealth anti-discrimination legislation which provides that the Act is not intended to exclude or limit the operation of a law of a state (or territory) that furthers the objects of the Act and is capable of operating concurrently with the Human Rights Act.

> *As the then Solicitor General, soon-to-be the Chief Justice of Australia, submitted to the 2009 committee: Express qualification of the rights protected by the [Act] could easily be combined with a provision making clear that the [Act] does not cover the field and 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.*[8]

[7] Answer to Question on Notice provided by the Queensland Council for Civil Liberties at file:///Users/kangus/Downloads/QON%20responses.QCCL.05.09.23.pdf

[8] Justin Gleeson SC Ibid, Commonwealth of Australia, National Human Rights Consultation, (Report, September 2009) and answer to Question on Notice provided by the Queensland Council for Civil Liberties at file:///Users/kangus/Downloads/QON%20responses.QCCL.05.09.23.pdf