



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTSTM

Free and Equal: An Australian Conversation on Human Rights

*Submission to the Australian Human
Rights Commission*

November 2019

Acknowledgements

Australian Lawyers for Human Rights (**ALHR**) is a national organisation and we acknowledge the traditional owners and custodians of the lands on which we work as the first people of this country. We recognise that the land belonging to these peoples was never ceded, given up, bought, or sold. We pay our respect to their Elders past, present and emerging and express our strong support for the Uluru Statement from the Heart.

Introduction

ALHR welcomes the opportunity to make a submission to the Australian Human Rights Commission's *Free and Equal: An Australian Conversation on Human Rights* project.

ALHR co-convenes the Human Rights for NSW Alliance and endorses its submission in full.

With respect to the rights of persons with a disability and mental health conditions in Australia, ALHR endorses the submission by Queensland Advocacy Incorporated.

With respect to the rights of children in Australia, ALHR endorses the submission by Save the Children Australia.

Within this submission we have addressed the consultation questions from the standpoint of the desirability of implementing an Australian-wide human rights framework, as described further below.

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Recommendations

ALHR makes the following recommendations

1. The Federal Parliament should enact comprehensive human rights legislation to give full protection to all human rights in line with Australia's international legal obligations and should explicitly recognise the foundational principle that human rights are universal and inalienable, indivisible, interdependent and interrelated.

2. A Federal Human Rights Act should set out which rights are absolute and non-absolute and which are derogable and non-derogable.

ALHR submits that the right to life, the right to freedom from torture and slavery, freedom from forced work, the right to liberty and security of person, humane treatment when deprived of liberty, the right to a determined period of detention if liberty is deprived, the right to a fair hearing and the rights of children in the criminal process should be absolute or non-derogable (not able to be denied, limited or restricted in any way).

ALHR submits that it is appropriate that other human rights which are not absolute may be subject to reasonable and proportionate limitations. ALHR submits that a Federal Human Rights Act should:

- a. specify that such rights should only be limited after careful consideration and only 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
- b. protect human rights from limitation beyond what is permitted in the legislation.

3. A Federal Human Rights Act should apply to children and specifically recognise children's unique human rights by, at a minimum, protecting the core principles and rights set out within the *UN Convention on the Rights of the Child*.

4. A Federal Human Rights Act should reflect an understanding of the culture of Aboriginal and Torres Strait Islander peoples as essential to the distinctive character of Australia as a nation. Consistent with Australia's obligations under the *International Covenant on Civil and Political Rights* and its support of the *United Nations Declaration on the Rights of Indigenous Peoples*, a Federal Human Rights Act should therefore recognise and protect the distinct cultural rights of Aboriginal and Torres Strait Islander peoples. In particular it should:

- a. specify that Aboriginal and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy, maintain and control their ancestral lands, identity and cultural heritage, kinship ties, traditional languages and knowledge and natural resources;
- b. specify that Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture; and

c. protect the right of Aboriginal and Torres Strait Islander peoples to self determination.

5. ALHR supports a model akin to the 'dialogue model' of human rights protection implemented through Queensland, ACT and Victorian human rights legislation. By this model, human rights are taken into account when developing, interpreting and applying the law and a dialogue between the different arms of government (legislature, executive and judiciary) is facilitated. A Federal Human Rights Act should require government officials and decision-makers to take human rights into account when making policies, decisions and administering the law.

6. A Federal Human Rights Act should include an accessible enforcement mechanism and a full range of remedies for breach. Noting that there is a human right to an effective remedy when human rights are violated, the Federal Government should explore providing affordable access to the full range of remedies for individuals.

Remedies could include:

- a. an independent cause of action for breaches of the human rights protected in the Act. ALHR submits that a Federal Human Rights Act should allow for the commencement of legal action in an accessible tribunal such as a specialist human rights division in the Administrative Appeals Tribunal or a newly constituted tribunal within the Federal Court of Australia;
- b. the ability to make a complaint to the Australian Human Rights Commission and for the complaint to be heard and reconciled by the Commission's internal complaint handling mechanisms within public authorities; and
- c. the full range of judicial remedies for breach, including declarations, injunctions, orders to cease the offending conduct and compensation and reparations, while protecting complainants against adverse costs orders, except in exceptional circumstances.

ALHR additionally adopts Queensland Advocacy Incorporated's recommendation that a Federal Human Rights Act should include provision for class actions to be brought, in recognition that human rights are often of special significance to a particular group, 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).

7. A Federal Human Rights Act should require courts to consider relevant international law and international jurisprudence when interpreting the rights protected in the Act.

8. A Federal Human Rights Act should draw on international jurisprudence in setting out how to best balance competing rights and explicitly acknowledge that the

<p>exercise of one person’s human rights must respect the human rights and dignity of other humans.</p>
<p>9. The Federal Government should consider whether a Federal Human Rights Act should apply to non-government entities exercising public or private functions.</p>
<p>10. A Federal Human Rights Act should provide for statutory review of the legislation at specified intervals, which results in action and monitoring based upon United Nations reports, community and civil society engagement, review of case studies under the Act, analysis and review as to whether adequate resources are being committed to realise the human rights protected by the Act.</p>
<p>11. The Federal Government should establish a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People, all called for by SNAICC - Secretariat of National Aboriginal and Islander Child Care (SNAICC) and the Family Matters Campaign.</p>
<p>12. ALHR calls for strengthening existing laws in Australia pertaining to modern slavery to ensure that the rights of victims of slavery, slavery-like practices and human trafficking are protected.</p>
<p>13. The Federal Government should support a broad program of human rights education, aimed at fostering understanding, awareness and respect for human rights and a human rights dialogue in general society and culture.</p>

Why Australia Needs Human Rights Reform

This submission specifically focuses on Australia’s lack of a Federal framework to protect human rights. We are the only developed Western democracy without a Federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions and has been elected to the UN Human Rights Council but our citizens and residents continue to live without the human rights protections enjoyed by others in comparable countries across the Western world.

In the absence of a federal framework to protect human rights, Australia cannot affect appropriate and proportionate balancing between, for example, “national security” and freedom of expression or between religious rights and other rights.¹

¹ Kerry Weste, ‘We need an Australian Charter of Rights’ *Lawyers Weekly Op-ed*, 17 June 2019 <https://www.lawyersweekly.com.au/politics/25851-we-need-an-australian-charter-of-rights>.

Recent years have seen numerous governments at both the Federal and State levels in Australia introduce laws that limit our basic rights. These governments have pushed through legislation without adequate scrutiny as to whether those laws disproportionately or inappropriately violate fundamental and internationally recognised human rights standards.²

Further, the current piecemeal legislative framework in place at the Federal level which singles out only select characteristics for anti-discrimination protection, while providing certain discriminatory religious activities with particular protection, does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.

Even where Australian laws and policies do not directly infringe human rights, the necessary conditions, supports and decision-making frameworks are often not in place to realise the human rights of the most vulnerable members of our community.

Australian legislation and judicial decisions should adhere to international human rights standards. Human rights laws cannot be selectively applied; they are not divisible nor are they hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights.

The Australian Parliament should properly abide by its obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith, and State Parliaments should likewise abide by Australia's human rights obligations. All legislation, whatever its purpose, should reflect a reasonable, necessary and proportionate response to the harms it is purporting to address, and adherence to international human rights law and standards is an important indicator of proportionality.³

Australians deserve laws that ensure all people can live in safety, in freedom, and with dignity. Every person in Australia is entitled to be treated fairly and equally, with compassion and respect. However, we know from experience that when human rights are not protected in law, they are always in danger of being eroded, and rights are at risk of being rendered meaningless if they cannot be legally enforced. It is only through holding all behaviours up to the standard of international human rights law and creating a culture of respect for human rights in Australia that we can address harmful and discriminatory practices.

In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a *Human Rights Act* similar to legislation in place in Victoria and the Australian Capital Territory. Queensland has since enacted a *Human Rights Act*. Yet eleven years later, Australia continues to lag behind the rest of the world at a federal level. ALHR submits that addressing this deficiency should be a national priority. Australia's international

² Recently, we have been witnessing human rights scandal after scandal whether it be raids on journalists, Don Dale and abuses in youth detention, epidemics of abuse in aged care or in the disability sector.

³ See generally Law Council of Australia, 'Anti-Terrorism Reform Project' (October 2013). Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%200Anti-Terrorism%20Reform%20Project.pdf>.

human rights treaty obligations should be enshrined in Commonwealth legislation via a Federal Human Rights Act.

What human rights matter to you?

Defining the concept of Human Rights

Human rights are the choices we make and the responsibilities we have to one another.⁴ They have long been collectively recognised by the international community, with the first formal collective articulation of these rights, the UN Declaration on Human Rights (**UDHR**),⁵ articulating a common baseline of decency and fairness.

The UDHR is a milestone document which underpins all international human rights law and inspires us to continue to work to ensure all people can live in freedom, equality and dignity. It provides that “*All human beings are born free and equal in dignity and rights*”,⁶ establishing a common standard for all peoples and all nations.

The UDHR further establishes the following fundamental principles of international human rights law:

- All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**);
- All rights should be protected together (**the principle of interdependence**);
- Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).

It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. For instance, the right to express one’s religious beliefs does not “trump” other rights, such as the right to be free from discrimination, but rather must be considered in context. Thus, secular democratic government should not privilege the right to act on religious views above other human rights.

When defining concepts of human rights, where protection is desired for a particular group, it will therefore be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.

Human rights entail **both rights and obligations**. Hence in so far as any person is entitled to the protection of ‘human rights’, that person must also respect the human rights of others.

Where protection is desired for particular behaviour, it will be relevant to what extent that behaviour reflects respect for the rights of others.

Protection against behaviour that is inconsistent with our society’s norms must only be granted where the protection ensures respect for the rights of others.

The balancing of competing rights through a human-rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems

⁴ Anat Shenker-Osorio. *A Brilliant Way of Living Our Lives: How to Talk About Human Rights*.

⁵ *Universal Declaration of Human Rights (UNDR)*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

⁶ *Universal Declaration of Human Rights (UNDR)*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1.

resulting from so-called competing rights. Using the example of religious freedom to illustrate this point, there can be no truly free religious life without respect for the freedoms and human rights of others.

Human rights are the tools we use to fight for the basic rights and freedoms that should be protected in relation to every person in the world, from birth until death, no matter our race, gender, religion, abilities, political belief, sexuality, age or any other characteristics. Protecting our human rights ensures that we are treated fairly and equally.⁷

Human Rights Treaties

Australia has signed and ratified the seven core United Nations' human rights treaties that collectively establish a strong baseline of fundamental human rights, as agreed upon by the international community. These treaties are:

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

Australia is also a party to the following Optional Protocols:

- the *Optional Protocol to the International Covenant on Civil and Political Rights*;
- the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*;
- the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*;
- the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;
- the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* establishing an individual communication mechanism;
- the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* establishing an individual communication mechanism.

Although when the *UN Declaration of the Rights of Indigenous Peoples (UNDRIP)* was first conceived, Australia was among only four countries to vote against its adoption, since 3 April 2009, Australia has supported the UNDRIP. Although UNDRIP is non-binding, Australia

⁷ Anat Shenker-Osorio Op-cit.

accepted it as a framework for better recognising and protecting the rights of Aboriginal and Torres Strait Islander Australians.⁸

*'International human rights treaties provide an agreed set of standards and develop more comprehensive recognition and observance of the rights available to everyone. While these treaties create obligations for State parties, reliance upon treaties alone is not sufficient to provide meaningful human rights protections. States are required to incorporate their international human rights law obligations into domestic legislation and provide effective remedies.'*⁹

As noted by the Human Rights for NSW Alliance in its submission to this conversation regarding the obligations of state governments, the Federal Government should exercise leadership by ensuring that human rights standards are brought into Australian law and a culture of respect for human rights is fostered in Australia. This requires establishing a Human Rights Act that will promote fundamental values and protect internationally recognised human rights standards. It is consistent with liberal ideology to do so.

What rights are currently protected and how?

Constitution

There is no constitutional bill of rights in Australia. The Australian Constitution does protect limited individual rights - the right to vote,¹⁰ protection against acquisition of property on unjust terms,¹¹ the right to a trial by jury,¹² a very limited right to freedom of religion,¹³ and prohibition of discrimination on the basis of State of residency.¹⁴ Other limited rights have been recognised by the High Court as implied by the language and structure of the constitution - for example, the implied right to freedom of communication on political matters.¹⁵

Current Australian legislation

Specific human rights legislation

⁸ "The United Nations Declaration on the Rights of Indigenous Peoples", Reconciliation Australia, p.2 <https://www.reconciliation.org.au/wp-content/uploads/2017/11/Reconciliation-Australia-United-Nations-Declaration-on-the-Rights-of-Indigenous-Peoples-UNDRIP.pdf>

⁹ Human Rights for NSW Alliance Submission to the Australian Human Rights Commission Free and Equal: An Australian conversation on human rights, page 5.

¹⁰ Section 41.

¹¹ Section 51 (xxxi).

¹² Section 80.

¹³ Section 116.

¹⁴ Section 117.

¹⁵ *Nationwide News Pty Ltd v Wills* [1992] HCA 46, (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45, (1992) 177 CLR 106.

Victoria,¹⁶ the Australian Capital Territory¹⁷ and Queensland¹⁸ have enacted human rights-specific legislation. These three human rights instruments cover broadly similar rights, primarily focusing on civil and political rights, with some socio-economic and cultural rights such as the cultural and other rights of Aboriginal and Torres Strait Islander persons included. In both the Australian Capital Territory and Queensland Acts, the right to education is recognised. The Queensland Act contains a right to health services without discrimination.

All three jurisdictions also provide that the rights listed do not abrogate existing rights under law, and that human rights are subject to reasonable limits that can be justified as proportionate in a free and democratic society.¹⁹

The Victorian and Queensland Acts do not create a new right to begin legal action in court solely for a breach of human rights but do allow a person to raise breaches of the legislation within existing legal proceedings. The Queensland Act also establishes a Human Rights Commission with power to receive and conciliate complaints under the Act. The Australian Capital Territory's Act provides for a standalone cause of action in court against a public authority for breach of human rights.

The Victorian Charter is founded on the following principles set out in its Preamble:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social and cultural and economic relationship with their traditional lands and waters.²⁰

It protects rights in three main ways:

- public authorities in State and local government must act in ways that are compatible with human rights;
- government and Parliament must consider human rights when developing new laws;
- people and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible.²¹

As noted by Michael Brett Young in the '2015 Review of the Charter of Human Rights and Responsibilities Act 2006':²²

¹⁶ *The Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

¹⁷ *Human Rights Act 2004 (ACT)*.

¹⁸ *Human Rights Act 2019 (Qld)*.

¹⁹ *ACT Act* (n 1) s 28(1); *Charter* (n 2) s 7(2); *Queensland Act* (n 3) s 13(1).

²⁰ Preamble *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 p 3.

²¹ 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 p 4.

²² *Ibid* p 4.

These mechanisms ensure Parliament is informed about human rights issues in its work. They also ensure human rights play an important role in government policy, in the preparation of legislation, in the way courts and tribunals interpret laws, and how public officials treat Victorians in their day-to-day work in the community.

In 2004 the ACT was the first jurisdiction in Australia to enact human rights legislation. The Human Rights Act 2004 (ACT) has had important cultural and legal impacts on the small jurisdiction. It protects similar rights, and operates in a similar manner, to the Victorian model, but is the only jurisdiction which allows for a “direct right of action”. A complaint that a public authority has not acted compatibly with human rights (or failed to consider human rights in making a decision) may bring be brought to the ACT Supreme Court. Human Rights may also be raised in “other legal proceedings”. Although the unique standalone complaints mechanism is important, the Supreme Court is not a practical or accessible jurisdiction and the ACT Law Reform Advisory Council recommended in late 2018 that the ACT Human Rights Commission be given a complaints power similar to the discrimination conciliation model.

Queensland is the most recent Australian jurisdiction to have acquired legislative human rights protection, achieved through passage of the *Human Rights Act 2019* (Qld). This legislation, the obligations of which are yet to commence,²³ establishes a dialogue model, with each arm of government (Parliament, courts and tribunals and public entities) required to act consistently with human rights. The Act protects 23 fundamental human rights, which are predominantly civil and political rights, but also include the economic, social and cultural rights to education and health services and the cultural rights of Aboriginal and Torres Strait Islander peoples.

The Act allows for reasonable limits to be placed on human rights, which may be justified in a “free and democratic society based on human dignity, equality and freedom”, with a “proportionality test” used to determine whether a limitation is reasonable and justifiable. The Act extends the models of protection offered in the ACT and Victoria by the inclusion of an accessible complaints mechanism, which permits a person who considers their human rights have been limited to lodge a complaint with the Queensland Human Rights Commission, after making a complaint to the relevant public entity (which has 45 days to respond). This right is additional to the right to include a human rights complaint as part of court action to protect another legal right.

The Human Rights for NSW Alliance prepared the following table giving an overview of the rights protected in each of the abovementioned Act

²³ The *Human Rights Act 2019* (Qld) commences in two phases. The first phase commenced on 1 July 2019, with the rebranding of the Queensland Anti-Discrimination Commission to the Queensland Human Rights Commission and the establishment of its educative functions. The second phase involves the commencement of the obligations under the Act and will begin on 1 January 2020.

Right	ACT Act (section)	Victorian Act (section)	Queensland Act (section)
Recognition and equality before the law	8	8	15
Right to life	9	9	16
Protection from torture and cruel, inhuman or degrading treatment	10	10	17
Freedom from forced work	26	11	18
Freedom of movement	13	12	19
Privacy and Reputation	12	13	25
Freedom of thought, conscience, religion and belief	14	14	20
Freedom of expression	16	15	21
Peaceful assembly and freedom of association	15	16	22
Protection of families and children	11	17	26
Taking part in public life	17	18	23
Cultural rights	-	19	27
Property rights	-	20	24
Right to liberty and security of a person	18	21	29
Humane treatment when deprived of liberty	19	22	30
Children in the criminal process	20	23	33
Fair hearing/trial	21	24	31
Rights in criminal proceedings	22	25	32
Right not to be tried or punished more than once	24	26	34
Retrospective criminal laws	25	27	35
Compensation for wrongful conviction	23	-	-
Cultural and other rights of Aboriginal and Torres Strait Islander Peoples	27	19	28
Right to education	27A	-	36
Right to health services	-	-	37

Other legislation

In addition to the dedicated human rights statutes that exist in the ACT, Victoria and Queensland, there exists other legislation which provides some protection for human rights.

Principally, this is through the anti-discrimination legislation that exists at both a federal level and in different states and territories. There is also other legislation, such as mental health, guardianship and privacy legislation that includes human rights principles.²⁴

Commonwealth Discrimination Laws

Australia is a party to various international human rights treaties that oblige it to take measures to eliminate discrimination including on the basis of age, race, sex, pregnancy, marital status and disability.

At the Commonwealth level, some of these obligations have been incorporated into domestic law within the following legislation:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Racial Discrimination Act 1975*;
- *Sex Discrimination Act 1984*;
- *Australian Human Rights Commission Act 1986*.

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.²⁵ However, there are significant limitations to discrimination laws in Australia at both a state and federal level. ALHR notes the views expressed by the Australian Human Rights Commission that there is an overreliance on discrimination laws to protect human rights and that the discrimination framework established by the legislation is a dispute-focused model that is remedial rather than proactive.²⁶

Additionally, the 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. ALHR submits that this does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights. Further, it can cause difficulties for complainants who experience intersectional discrimination to access and achieve appropriate redress.²⁷

²⁴ For example, the *Guardianship and Administration Act 2000* (Qld) and the *Mental Health Act 2016* (Qld). *Privacy Act 1988* (Cth).

²⁵ Law Council of Australia. "Anti-Discrimination Laws" at <https://www.lawcouncil.asn.au/policy-agenda/human-rights/anti-discrimination-laws>.

²⁶ Australian Human Rights Commission. "Discussion Paper: Priorities for Federal Discrimination Law Reform", *Free and Equal: An Australian Conversation on Human Rights*. October 2019, 7.

²⁷ Human Rights for NSW Alliance Submission to the Australian Human Rights Commission *Free and Equal: An Australian conversation on human rights*, page 8.

“The current Commonwealth regime ... deals with different grounds of discrimination in different ways. Four grounds of discrimination - sex, age, disability and race - are dealt with under the specific Acts listed above while other more limited protections are provided under the Australian Human Rights Commission Act 1986 (Cth). This results in a confused and fragmented scheme, which is difficult to use.”²⁸

Prior to the 2013 federal election there was an attempt to progress consolidation of Commonwealth anti-discrimination laws.

ALHR supports the Law Council of Australia’s calls for reforms to the current Commonwealth anti-discrimination regime “that make it easier to access and understand, improve its capacity to address all forms of discrimination, promote substantive equality, and that implement Australia's international obligations in this area.”²⁹

Despite its many positive attributes, ALHR respectfully submits that the present Commonwealth 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.

Common Law

As noted by the Human Rights for NSW Alliance in its submission to this national conversation:³⁰

‘The common law protects some human rights, including the following:

- *The right against self-incrimination;*³¹
- *The right to sue for false imprisonment;*³²
- *Presumption of innocence in criminal trials;*³³
- *Presumption that the standard of proof in criminal cases is that of beyond reasonable doubt;*³⁴
- *Right to a fair trial;*³⁵
- *Client legal privilege;*³⁶
- *Right to access legal counsel when accused of a serious crime;*³⁷ and

²⁸ Law Council of Australia. “Anti-Discrimination Laws” at <https://www.lawcouncil.asn.au/policy-agenda/human-rights/anti-discrimination-laws>

²⁹ Ibid

³⁰ Human Rights for NSW Alliance Submission to the Australian Human Rights Commission Free and Equal: An Australian conversation on human rights, page 9

³¹ *Reid v Howard* (1995) 184 CLR 1, 11–12; *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

³² *Ruddock v Taylor* (2005) 222 CLR 612 [140] (Kirby J).

³³ *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

³⁴ *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [54] (French CJ).

³⁵ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

³⁶ *Baker v Campbell* (1983) 153 CLR 52, 120 (Deane J).

³⁷ *Dietrich v The Queen* (1992) 177 CLR 292, 317 (Mason CJ and McHugh J).

- *Aboriginal and Torres Strait Islander native title rights in Australia.*³⁸

In addition, the common law protects human rights indirectly through two key principles of statutory interpretation. Firstly, the principle of legality ensures that courts will construe legislation so as not to curtail fundamental rights unless the Parliament's intention to do so is manifested by 'unmistakable and unambiguous language'.³⁹ Secondly, if there is ambiguity, the principle is that the courts should favour a construction of a statute which accords with the obligations of Australia under a relevant international treaty.⁴⁰

Despite the application of these principles, the common law does not provide adequate protection for human rights in Australia as governments can override the common law through demonstrating a clear intention to override common law rights in the passing of new legislation.⁴¹ Further, the development of common law rights is limited to cases brought before courts, which are confined by the doctrine of precedent.'

International Human Rights System

At the federal level, the Australian Government has an obligation under international law to respect, protect and fulfil human rights. This means that the Federal Government is obliged to take action to ensure people can enjoy their human rights. The Government must also refrain from action that would breach people's human rights.⁴²

Australia was a founding member of the United Nations and one of eight nations involved in drafting the UDHR. We have had many of the human rights obligations under the core human rights instruments referred to above in this submission for many decades. However, while Australia's obligations under international law are binding and subject to scrutiny and the Australian Government must publicly report to the UN on the steps it has taken to implement each of the treaties, a legislative Act must be passed by Parliament to incorporate the obligations into Australian law.⁴³

Australian courts have not accepted attempts by complainants to rely on breaches of international treaty provisions for their cause of action. Instead, complainants must find a basis for their claim in Australian law.⁴⁴ Given the piecemeal protections of human rights described above, this can be difficult and leaves Australians exposed to violations of their human rights without access to an effective remedy or accountability mechanism.

³⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J).

³⁹ *Coco v The Queen* (1994) 179 CLR 427, 435–437 (Mason CJ and Brennan, Gaudron and McHugh JJ).

⁴⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

⁴¹ Australian Human Rights Commission, 'Human Rights - What do I Need to Know?' (Web Page, 2008) <<https://www.humanrights.gov.au/our-work/human-rights-what-do-i-need-know-2008>>.

⁴² "Australia's Human Rights Framework", Victorian Equal Opportunity Commission website.

⁴³ *R v Burgess* (1936) 55 CLR 608, 644 (Latham CJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J).

⁴⁴ *Minogue v Williams* (2000) 60 ALD 366, 371.

Other Comparable Legal Systems

We provide the following summaries of comparable legal systems, highlighting relevant strengths and deficiencies, with a view to informing the development of an optimal Australian model.

New Zealand

In New Zealand, there is both a Bill of Rights and a Human Rights Charter. Beyond these two important statutes, some rights are specifically protected in other pieces of legislation – e.g. rights relating to education are guaranteed under the New Zealand *Education Act 1989*.⁴⁵

The *Bill of Rights 1990* (NZ) covers a range of rights: right not to be deprived of life,⁴⁶ right not to be subjected to torture and cruel treatment,⁴⁷ right not to be subjected to medical and scientific experimentation,⁴⁸ right to refuse to undergo medical treatment,⁴⁹ electoral rights,⁵⁰ freedom of thought, conscience, and religion,⁵¹ freedom of expression,⁵² manifestation of religion and belief,⁵³ freedom of peaceful assembly, association, and movement,⁵⁴ freedom from discrimination,⁵⁵ minority rights,⁵⁶ unreasonable search and seizure,⁵⁷ liberty of the person,⁵⁸ rights of persons arrested or detained,⁵⁹ rights of persons charged,⁶⁰ minimum standards of criminal procedure,⁶¹ and the right to justice.⁶² The *Human Rights Act 1993* (NZ) protects New Zealanders from unlawful discrimination, which is also guaranteed in s 19 of the *New Zealand Bill of Rights Act 1990* (NZBORA).⁶³ In contrast to NZBORA that only deals with public sector conduct, the Human Rights Act offers protection in both public and private sectors.⁶⁴

Although these important rights at least have some protection, there are many rights under the ICCPR⁶⁵ which are not protected – e.g. there is no protection for equality before the law

⁴⁵ Geoffrey Palmer & Andrew Butler, 'A Constitution for Aotearoa New Zealand' (Victoria University Press, 1st ed, 2016), 161-162.

⁴⁶ *Bill of Rights Act 1990* (NZ) s 8.

⁴⁷ *Bill of Rights Act 1990* (NZ) s 9.

⁴⁸ *Bill of Rights Act 1990* (NZ) s 10.

⁴⁹ *Bill of Rights Act 1990* (NZ) s 11.

⁵⁰ *Bill of Rights Act 1990* (NZ) s 12.

⁵¹ *Bill of Rights Act 1990* (NZ) s 13.

⁵² *Bill of Rights Act 1990* (NZ) s 14.

⁵³ *Bill of Rights Act 1990* (NZ) s 15.

⁵⁴ *Bill of Rights Act 1990* (NZ) ss 16-18.

⁵⁵ *Bill of Rights Act 1990* (NZ) s 19.

⁵⁶ *Bill of Rights Act 1990* (NZ) s 20.

⁵⁷ *Bill of Rights Act 1990* (NZ) s 21.

⁵⁸ *Bill of Rights Act 1990* (NZ) s 22.

⁵⁹ *Bill of Rights Act 1990* (NZ) s 23.

⁶⁰ *Bill of Rights Act 1990* (NZ) s 24.

⁶¹ *Bill of Rights Act 1990* (NZ) s 25.

⁶² *Bill of Rights Act 1990* (NZ) s 27.

⁶³ Andrew Butler & Petra Butler, 'The New Zealand Bill of Rights Act: A Commentary' (Lexis Nexis, 1st ed, 2005), 3-4.

⁶⁴ Michael Kirby, 'Protecting Human Rights in Australia without a Charter' (2011) 37(2) *Commonwealth Law Bulletin* 255, 260.

⁶⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

(ICCPR, art 26), forced work (ICCPR, art 8.3), wrongful conviction (ICCPR, art 14.6).⁶⁶ This is despite the fact that the Recital (b) to the Long Title of BORA states that the NZBORA seeks to 'to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.'⁶⁷

Additionally, the rights outlined in the International Covenant on Economic, Social and Cultural Rights are not included in the NZBORA either.

New Zealand's constitutional law comes from a range of statutes and common law, rather than a single constitution.⁶⁸ Linking this to a human rights context, the NZBORA which follows the statutory model approach, does not take precedence above other legislation and, in practice, has taken an almost background or inferior status compared to other competing enactments.⁶⁹ Parliament has power to pass laws that are not consistent under NZBORA.⁷⁰ This is interesting given the fact that s 3 makes clear that the BORA is supposed to apply to acts done by the Government of New Zealand or any person or body performing a public duty or function.⁷¹ Section 6 requires that where it is possible for the court to interpret a statute in a way that is consistent with NZBORA, it should do so.⁷²

In New Zealand there is no requirement for a statement of human rights compatibility to be presented to parliament when a Bill is introduced, though the Attorney-General must issue a statement if they think the Bill is inconsistent with the NZBORA⁷³ (which recommendation is not binding).⁷⁴

Canada

In Canada, human rights are constitutionally protected by the Canadian *Charter of Rights and Freedoms* 1982 ('Charter'). These include:

⁶⁶ Andrew Butler & Petra Butler, 'The New Zealand Bill of Rights Act: A Commentary' (Lexis Nexis, 1st ed, 2005), 4.

⁶⁷ *Bill of Rights Act 1990* (NZ) Recital (b).

⁶⁸ Andrew Butler & Petra Butler, 'The New Zealand Bill of Rights Act: A Commentary' (Lexis Nexis, 1st ed, 2005), 8; Geoffrey Palmer & Andrew Butler, 'A Constitution for Aotearoa New Zealand' (Victoria University Press, 1st ed, 2016), 161.

⁶⁹ Andrew Geddis & M B Rodriguez Ferrere, 'Judicial innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?' (2016) 35(2) *University of Queensland Law Journal* 251, 253-254.

⁷⁰ *Bill of Rights Act 1990* (NZ) s 4; Claudia Geiringer, 'What's the story? The instability of the Australasian bills of rights' (2016) 14(1) *International Journal of Constitutional Law* 156, 168-169; Andrew Geddis & M B Rodriguez Ferrere, 'Judicial innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?' (2016) 35(2) *University of Queensland Law Journal* 251, 255; Luke Beck, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 *Public Law Review* 97, 108.

⁷¹ *Bill of Rights Act 1990* (NZ) s 3(a) & s 3(b).

⁷² *Bill of Rights Act 1990* (NZ) s 6; Andrew Geddis & M B Rodriguez Ferrere, 'Judicial innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?' (2016) 35(2) *University of Queensland Law Journal* 251, 254-255.

⁷³ *Bill of Rights Act 1990* (NZ) s 8; Janet McLean, 'The New Zealand Bill of Rights Act 1990 and Constitutional Propriety' (2013) 11 *NZ Journal of Public and International Law* 19, 35; Alison Clegg, 'Implications of the national human rights consultation for the powers and proceedings of parliament' (2011) 26(2) *Australasian Parliamentary Review* 99, 101.

⁷⁴ Janet McLean, 'The New Zealand Bill of Rights Act 1990 and Constitutional Propriety' (2013) 11 *NZ Journal of Public and International Law* 19, 35; Paul Rishworth, Grant Huscroft, Scott Optican, & Richard Mahoney (2003). *The New Zealand Bill of Rights*. Auckland, N.Z: Oxford University Press, 195-197.

- Fundamental freedoms (freedoms of religion, expression (including the press), assembly, and association);⁷⁵
- Democratic rights (citizens' right to vote and qualify for legislative bodies);⁷⁶
- Mobility rights (citizens' right to enter, remain in, and leave Canada; citizens' right to move within Canada, subject to non-discriminatory provincial laws of general application, reasonable residency requirements for public social services, and affirmative action programs);⁷⁷
- Legal rights (rights to life, liberty, and security of the person in accordance with the principles of fundamental justice; rights against unreasonable search and seizure, arbitrary detention, cruel and unusual treatment or punishment, and self-incrimination; rights in relation to arrest, detention, and criminal proceedings);⁷⁸
- Equality rights (right to equality before and under the law and equal protection and benefit of the law without discrimination, including based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability);⁷⁹ and
- Language rights (official and equal status and use of English and French by and with government; citizens' right to children's education in English or French, subject to sufficient numbers).⁸⁰

The right to equality is additionally protected by federal, provincial, and territorial human rights acts. The federal *Canadian Human Rights Act* (1977) protects against discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or pardoned or spent convictions⁸¹ in provision of goods, services, facilities, accommodation, or employment⁸² at the federal level, subject to *bona fide* occupational requirements, employment- or pension-related age requirements, other prescribed or *bona fide* justifications, or affirmative action programs (ss 15-16). Employment-related protections include protection against discrimination in recruitment, employee organisations, policies or practices (including equal pay for equal work by men and women), and public notices (ss 8-12), as well as protection against harassment and retaliation (ss 14-14.1). Canada's ten provinces and three territories have similar legislation.⁸³

Under the Canadian Charter, remedies are available from the court, including declaratory relief, damages, mandamus and injunctions, as well as a declaration that the law (or part thereof) is invalid.⁸⁴ Under the federal, provincial, and territorial human rights acts, remedies

⁷⁵ Section 2.

⁷⁶ Section 3 - 5.

⁷⁷ Section 6.

⁷⁸ Section 7 - 14.

⁷⁹ Section 15.

⁸⁰ Section 16 - 23.

⁸¹ Section 3.

⁸² Section 5 - 7.

⁸³ See Canadian Centre for Diversity and Inclusion, *Overview of Human Rights Codes by Province and Territory in Canada*, January 2018, available at: <https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf>.

⁸⁴ Sections 24 and 52(1). Charter remedies are generally available under s 52(1) (in the case of an unconstitutional law) or s 24(1) (in the case of unconstitutional government action), not both (Schacter v Canada [1991] 2 SCR 79). Some exceptions are if the government's conduct was "clearly wrong, in bad faith or an abuse of power" (Mackin v New Brunswick [2002] 1 SCR 405) or if the court wishes to exempt the applicant from the application of the infringing law during (Nova Scotia (Workers Compensation Board) v Martin [2003] 2 SCR 96) or after (R v Demers [2004] 2 SCR 489) a temporary suspension of the declaration of invalidity.

are available through the respective Human Rights Commissions and Tribunals. An individual makes a complaint to the respective Human Rights Commission. If the complaint has merit, the Commission refers the complaint to the respective Tribunal, which is independent. If the Tribunal cannot resolve the complaint through mediation, it conducts a hearing and makes a decision.

At the federal level, under s 53 of the Canadian Human Rights Act, the Canadian Human Rights Tribunal may order cessation of, and measures to prevent in future, the discriminatory practice; making available to the victim the denied rights, opportunities or privileges; compensation for lost wages, the additional costs of obtaining alternative goods, services, facilities, or accommodation, and pain and suffering; and interest on compensation. Provincial and territorial Tribunals may make similar orders.

United Kingdom

The *Human Rights Act 1998* (UK) came into force in October 2000 and sets out the fundamental rights and freedoms that everyone in the United Kingdom is entitled to. It incorporates the rights set out in the *European Convention on Human Rights* (ECHR) into domestic British law. The Human Rights Act may be used by every person resident in the United Kingdom regardless of whether or not they are a British citizen or a foreign national, a child or an adult.⁸⁵

The following 'Convention rights' are protected:

- The right to life
- Freedom from torture and inhuman or degrading treatment
- Freedom from slavery and forced labour
- Right to liberty and security
- Rights to a fair trial
- No punishment without law
- Respect for private and family life, home and correspondence
- Freedom of thought, belief and religion
- Freedom of expression
- Freedom of assembly and association
- Right to marry and start a family
- Protection from discrimination in respect of these rights and freedoms
- Right to peaceful enjoyment of property
- Right to education
- Right to participate in free elections
- Abolition of the death penalty

The UK Human Rights Act has three main effects:

1. Ability to seek justice in a British court. If Convention rights are breached, complainants can take their case to a British court rather than having to seek justice from the European Court of Human Rights in Strasbourg, France. Judges must also

⁸⁵ Liberty United Kingdom website at <https://www.libertyhumanrights.org.uk/human-rights/human-rights-act>.

read and give effect to other laws in a way which is compatible with Convention rights.

2. Public bodies must respect Convention rights. The Act requires all public bodies (like courts, police, local authorities, hospitals and publicly funded schools) and other bodies carrying out public functions to respect and protect your human rights.
3. New laws are compatible with Convention rights. In practice it means that Parliament will nearly always make sure that new laws are compatible with the rights set out in the European Convention on Human Rights (although ultimately Parliament is sovereign and can pass laws which are incompatible). The courts will also, where possible, interpret laws in a way which is compatible with Convention rights.

Inter-Americas

The Inter-American system for the protection of Human Rights (**IAHRS**) was born out of the creation of the Organization of American States (**OAS**) and its founding members' adoption of the American *Declaration on the Rights and duties of Man* (the American Declaration) in 1948. The American Declaration was the first international human rights instrument of a general nature. In 1969, the OAS adopted the American Convention on Human Rights (**ACHR**), which came into effect in 1978 and was followed in 1979 by the creation of the Inter-American Court of Human Rights. The IAHRS is therefore achieved by the workings of two key bodies; the Inter-American Commission on Human Rights (**IACHR**) and the Inter-American Court of Human Rights (**IACtHR**). . The IACtHR is a judicial body with a narrower mandate to the IACHR. Through its judicial functions, the IACtHR protects human rights; however, its jurisdiction is limited to OAS Member States that have both ratified the ACHR and agreed to the Court's jurisdiction.

The IAHRS has been criticised for failing to take adequate active measures in protecting human rights; particularly in failing to advance the international law doctrine of the Responsibility to Protect.⁸⁶ However, the IAHRS as a whole has developed since its inception and the 'two-tier system' allows the IAHRS to function as a protective regime, capable of promoting human rights, investigating violations and bringing individuals and members states to account for violations under the American Declaration.

⁸⁶ See, *Ibid*, 459.

Whose rights should be protected?

Every person deserves to be treated fairly and equally, with compassion and respect. It is important to have laws that ensure all people can live in safety, in freedom, and with dignity. The Australian Government has a responsibility to protect the human rights of all people in Australia, regardless of their citizenship, age or any other attribute. We provide the following case studies to highlight the particular importance of human rights protection for specific marginalised groups in Australia.

People with disability

A Victorian man suffering from physical disabilities and limited mobility continued to live in his family home after his mother had been admitted in an elderly care unit and placed under a financial administration order. In order to prevent the home being sold, the man's advocate raised the right to property under the Victorian Charter of Human Rights and Responsibilities Act. In consideration of this right an agreement was reached so that the man could continue living in the house as a tenant paying rent.

Source: Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006; in Charter of Rights in Action www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf (Case Study 63, p 36).

A couple in the UK were living in an assessment centre so the Department of Social Services could examine their parenting skills. The couple both had learning disabilities. CCTV cameras had been installed, including in their bedroom. Social workers explained that the cameras were there to observe them performing their parental duties and for the protection of their baby. With the help of an advocate, the couple used the UK's Human Rights Act to challenge the use of the cameras. They said that the Department had not given proper consideration to their right to family and private life. The couple explained that they did not want their intimacy to be monitored. Besides, the baby slept in a separate nursery so it was not necessary to monitor the couple in their bedroom at night. As a result, the Department agreed to switch off the cameras during the night so that the couple could enjoy their evenings together in privacy.

Source: ATD Fourth World at Our Human Rights Stories; <http://www.ourhumanrightsstories.org.uk/case-study/learning-disabled-coupleusehuman-rights-act-challenge-cctvs-placed-their-bedroom>

Aboriginal and Torres Strait Islander People

A Victorian Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died she went back to her country for a couple of weeks of 'sorry business'. When she returned, she started receiving warnings to engage with services, however she wasn't able to do so because she was overwhelmed with family responsibilities, trauma and grief. A possession order was made and the police came to her door with a warrant. Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with her cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). As a result the community organisation withdrew their possession application and engaged an Aboriginal support service.

Source: Victorian Aboriginal Legal Service Submission to the 8 year review of the Charter, Submission 98 (Case Study 1).

An Aboriginal girl was serving a sentence in a youth justice centre in the ACT for a number of offences. While incarcerated, she was also charged with two assaults and one charge of obstructing a territory official. She was convicted of these offences and sentenced. She appealed the sentences on the basis that the sentences were excessive and that certain required factors had not been taken into account. The judge found that the sentences were inappropriate, reduced them to shorter periods and ordered that they be served concurrently with her current period of incarceration. The judge took the young person's personal circumstances into account and found that the significant delay between the offence and the sentencing was unacceptable and in violation of the ACT's *Human Rights Act 2004*. [Source: *TM v Karapanos and Bakes [2011] ACTSC 74*]

People who are LGBTIQ

Amendments to the law in Victoria allowed same sex couples to access superannuation death benefits from one another. Because the amendments operated prospectively, they discriminated against older people in same sex relationships. An older woman and her advocate wrote to the Human Rights Unit at the Department of Justice advocating for an amendment to the law based on the claim that the amendments should be consistent with the Charter of Human Rights and Responsibilities Act. As a result an amendment to the law was made so that same sex couples could access superannuation death benefits both retrospectively and prospectively. [Source: *Public Interest Law Clearing House: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Case Study 6).*]

A gay man with physical disabilities living in the UK approached a disability service provider to ask if a support worker could accompany him to a gay pub. His request was denied even though the service regularly supported heterosexual people to attend pubs and clubs of their choice. The man and his advocate successfully used his right not to be discriminated against and the right to respect for his private life, rights protected in the UK's Human Rights Act, to challenge the service provider's decision. [Source: *BIHR, The Human Rights Act – Changing Lives, (Case Study 7 p 9).*]

What rights?

ALHR submits that the rights to be included in a Federal Human Rights Act should be drawn from the human rights articulated in the seven core human rights treaties Australia has signed and ratified, referred to above. These rights have been developed in consultation with the international community and are supported by a significant body of jurisprudence.

The content of a federal human rights instrument, and the decision as to what specific rights should be included, should be developed following inquiry and consultation with relevant stakeholders.

At a minimum a Federal Human Rights Act should include the rights protected within the Victorian, Queensland and Australian Capital Territory's human rights legislation (see table listing these rights above)

How should human rights be protected in Australia?

ALHR refers to our Recommendations. In order to protect human rights in Australia, the Federal Parliament should:

1. Enact comprehensive human rights legislation to give full protection to all human rights in line with Australia's international legal obligations and should explicitly recognise the foundational principle that human rights are universal and inalienable; indivisible; interdependent and interrelated.
2. A Federal Human Rights Act should set out which rights are absolute and non-absolute and which are derogable and non-derogable. ALHR submits that the right to life, the right to freedom from torture and slavery, freedom from forced work, the right to liberty and security of person, humane treatment when deprived of liberty, the right to a determined period of detention if liberty is deprived, the right to a fair hearing and the rights of children in the criminal process should be absolute or non-derogable (not able to be denied, limited or restricted in any way). ALHR submits that it is appropriate that other human rights which are not absolute may be subject to reasonable and proportionate limitations. ALHR submits that a Federal Human Rights Act should:
 - (a) specify that such rights should only be limited after careful consideration and only 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
 - (b) protect human rights from limitation beyond what is permitted in the legislation.
3. A Federal Human Rights Act should apply to children and specifically recognise children's unique human rights by, at a minimum, protecting the core principles and rights set out within the UN Convention on the Rights of the Child.
4. A Federal Human Rights Act should reflect an understanding of the culture of Aboriginal and Torres Strait Islander peoples as essential to the distinctive character of Australia as a nation. Consistent with Australia's obligations under the International Covenant on Civil and Political Rights and its support of the United Nations Declaration on the Rights of Indigenous Peoples, a Federal Human Rights Act should therefore recognise and protect the distinct cultural rights of Aboriginal and Torres Strait Islander peoples. In particular it should:

- (a) specify that Aboriginal and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy, maintain and control their ancestral lands, identity and cultural heritage, kinship ties, traditional languages and knowledge and natural resources;
 - (b) specify that Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture; and
 - (c) protect the right of Aboriginal and Torres Strait Islander peoples to self determination.
5. ALHR supports a model akin to the 'dialogue mode' of human rights protection implemented through the Queensland and Victorian human rights legislation, under which human rights are taken into account when developing, interpreting and applying the law and a dialogue between the different arms of government (legislature, executive and judiciary) is facilitated. A Federal Human Rights Act should require government officials and decision-makers to take human rights into account when making policies, decisions and administering the law.
 6. A Federal Human Rights Act should include an accessible enforcement mechanism and a full range of remedies for breach. Noting that there is a human right to an effective remedy when human rights are violated, the Federal Government should explore providing affordable access to the full range of remedies for individuals.

Remedies could include:

- (a) an independent cause of action for breaches of the human rights protected in the Act. ALHR submits that a Federal Human Rights Act should allow for the commencement of legal action in an accessible tribunal such as a specialist human rights division in the Administrative Appeals Tribunal or a newly constituted tribunal within the Federal Court of Australia;
- (b) the ability to make a complaint to the Australian Human Rights Commission and for the complaint to be heard and reconciled by the Commission's internal complaint handling mechanisms within public authorities; and
- (c) the full range of judicial remedies for breach, including declarations, injunctions, orders to cease the offending conduct and compensation and reparations, while protecting complainants against adverse costs orders, except in exceptional circumstances.

ALHR additionally adopts Queensland Advocacy Incorporated's recommendation that a Federal Human Rights Act should include provision for class actions to be brought, in recognition that human rights are often of special significance to a particular group, 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).

7. A Federal Human Rights Act should require courts to consider relevant international law and international jurisprudence when interpreting the rights protected in the Act.
8. A Federal Human Rights Act should draw on international jurisprudence in setting out how to best balance competing rights and explicitly acknowledge that the exercise of one person's human rights must respect the human rights and dignity of other humans.
9. The Federal Government should consider whether a Federal Human Rights Act should apply to non-government entities exercising public or private functions.

10. A Federal Human Rights Act should provide for statutory review of the legislation at specified intervals which results in action and monitoring based upon United Nations reports, community and civil society engagement, review of case studies under the Act, analysis and review as to whether adequate resources are being committed to realise the human rights protected by the Act.
11. The Federal Government should establish a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People, all called for by SNAICC (Secretariat of National Aboriginal and Islander Child Care) and the Family Matters Campaign.
12. ALHR calls for strengthening existing laws in Australia pertaining to modern slavery to ensure that the rights of victims of slavery, slavery-like practices and human trafficking are protected.
13. The Federal Government should support a broad program of human rights education, aimed at fostering understanding, awareness and respect for human rights and a human rights dialogue in general society and culture.

In support of our primary recommendation for enactment of comprehensive human rights legislation, ALHR submits that a Federal Human Rights Act would lay the foundation for a legislative human rights framework in Australia and provide protection of the fundamental rights of individuals. The introduction of a Human Rights Act would demonstrate the Australian Government's commitment to the recognition, promotion and protection of human rights, particularly for the most vulnerable and disempowered members of our society.

Formal review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* has demonstrated that a human rights legislative framework can strongly assist to promote and protect human rights by shaping law and policy, generating greater awareness and respect for human rights in law-making and decision-making, and can encourage the courts to interpret legislation in a manner that will be consistent and compatible with human rights.⁸⁷

The introduction of a Human Rights Act would be consistent with accepted community values and provide a framework for interaction between the government, authorities, businesses and communities in respect of pressing human rights issues. It can provide for dialogue between Parliament, courts, and the executive in order to assist facilitation of a human rights culture and its interplay with the creation, interpretation and application of the law.⁸⁸

Human rights legislation also promotes a culture of respect for fundamental human rights by the legislature, the public service, public entities, and in the broader community. Human rights frameworks assist to promote a society that is inclusive, respectful and committed to equality. Similarly providing individuals with a framework through which they can bring a complaint to an independent commission will have the effect of increasing the confidence of the people of Australia in government and public policy. The lives of marginalised, vulnerable

⁸⁷ Law Institute of Victoria, Submission No 79 to the Independent Reviewer, *Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)* 2–3.

⁸⁸ George Williams and Daniel Reynolds, "A Human Rights Act for Queensland? Lessons from recent Australian experience" (2016) *Alternative Law Journal* 41(2), 42 available at: <https://www.austlii.edu.au/au/journals/UNSWLRS/2016/42.pdf>.

and disadvantaged Australians stand to be improved by the recognition and formal protection of their human rights.⁸⁹

The protection and promotion of human rights under a Human Rights Act is likely to contribute to the growth and development of Australia. This can occur through the improvement of public service delivery with human rights compliant policies and operational practices. A Human Rights Act can result in better education of members of the public about their rights, and will lead to a better understanding and acceptance of human rights principles by the community. As a result, public debate and engagement with democracy will be enhanced.

A Human Rights Act will also improve the quality of legislation passed by the Australian Government, requiring parliamentarians to consider whether proposed legislation is consistent with human rights. Legislative scrutiny is a necessary and essential element in the democratic law-making process. As noted above, the current framework for the scrutiny of Commonwealth legislation is ineffective and inadequate. A Human Rights Act would ensure that there is a framework that requires consideration of the effects of new laws on human rights.

Enacting a legislative framework for the protection of human rights is also consistent with Australia's obligations under international law, which are contained in many important international human rights treaties and conventions that Australia has signed and ratified. Enactment of human rights legislation is of both symbolic and practical importance as it will ensure that public entities act and make decisions in a way that is compatible with human rights. Some of the matters that fall within the jurisdiction of the state are those that can have the most important impact on a person's life, including education, criminal justice and health. The protection of fundamental human rights at a state level is therefore of critical importance.

By moving to introduce a Human Rights Act the Federal Government would join Queensland, Victoria, the ACT and every other comparable common law country in providing legislative protection of human rights. The introduction and passage of such a Bill would demonstrate the Australian Government's commitment to the promotion of dialogue and respect for human rights for all Australians.

Inadequacies of existing system

ALHR adopts the submissions made by the Human Rights for NSW Alliance regarding the limitations of the Parliamentary scrutiny process currently operating at a Federal level, a process which has been criticised by the United Nations. The establishment of the Parliamentary Joint Committee on Human Rights was designed to introduce a human rights lens to deliberations within Parliament on bills and legislative instruments, with a view to

⁸⁹ *International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); 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); Convention on the Rights of Persons with Disabilities (CRPD).*

improving human rights compliance of federal legislation. Yet the impact of this mechanism in improving human rights literacy and compliance has been questionable. As the Human Rights for NSW Alliance notes, the non-binding nature of the requirement to prepare and comply with Statements of Compatibility, and the absence of a strike out function where legislation is non-compliant with human rights, has meant that the protection offered by the mechanism is extremely limited. ALHR supports the conclusion reached by the Human Rights for NSW Alliance that current mechanisms for Parliamentary scrutiny are insufficient to ensure human rights are protected when Government passes (or amends) legislation.

What are the barriers to the protection of human rights in Australia?

There is presently a low level of human rights literacy in Australia. This makes us vulnerable to human rights abuses born of ignorance.

Financial 'Burden' perceptions

The 2011 review of the Victorian Charter, which was the first review of a human rights act in Australia that provided this level of information regarding economic costs, published details of the calculation of costs. This review found that, over the first five years of its operation (from 2006-7 to 2010-11 financial years), the total economic cost of the Charter was \$13,488,750.

This was comprised of the following:

- Charter implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services and Victoria Police) (\$2,549,000);
- Establishment of the Human Rights Unit within the Department of Justice (\$3,405,185);
- Funding for VEOHRC's (Victorian Equal Opportunity Human Rights Commission) charter-related work (\$3,326,000);
- Grants provided by the Department of Justice for Charter education and legal advice (\$971,362);
- Other identified human rights staff in the Victorian Public Service (\$754,379);
- Charter-related training and the development of resources (\$160,665);
- Legal advice obtained for the initial audit of legislation in preparation for the introduction of the Charter and drafting of statutory provisions or general legal advice in relation to the Charter (\$272,971);
- Legal advice obtained for the preparation of statements of compatibility (\$470,339);
- Charter -related litigation involving the Department of Justice, Department of Human Services and Victoria Police (\$952,373);
- The cost of conducting the review of the Charter (about \$130,000).

This has amounted to an approximate cost of 50 cents per Victorian per year.

Fear of Litigation

Concerns about an increase in litigation as a result of the introduction of human rights legislation are also frequently raised by opponents of human rights acts. The Victorian and ACT experiences have both shown that the introduction of legislative protection of human rights does not result in a flood of litigation. To the contrary, by making human rights an important dimension of decision-making processes, solutions that are more satisfactory for all parties can often be reached without resort to litigation, thus reducing costs.

How should the government address the situation where there is a conflict between different people's rights?

When can rights be subject to limits?

In Canada, all Charter rights are subject to a general limitation under s 1, which provides that they are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The s 1 limitation, defined in *R v Oakes*⁹⁰ ('Oakes test'), requires 1) a pressing and substantial legislative objective; 2) rational connection between the limitation and the legislative objective; 3) minimal impairment of the right at stake; and 4) proportionality between the legislative objective, and the deleterious effects of the limitation. Sections 2 and 7-15 are also subject to a general limitation under s 33, which provides that federal or provincial governments may expressly derogate from them.

Some sections are further subject to internal limitations, such as s 6 (mobility rights), which are subject to non-discriminatory provincial laws of general application, reasonable residency requirements for public social services, affirmative action programs and s 7 (rights to life, liberty, and security of the person), which are subject to the principles of fundamental justice. The "principles of fundamental justice" include, but are not limited to, procedural fairness and natural justice.⁹¹

As noted above, the right to equality under the federal Human Rights Act is subject to bona fide occupational requirements, employment - or pension-related age requirements, other prescribed or bona fide justifications, and affirmative action programs (ss 15-16). At the federal level, s 15(2) bona fide occupational requirement requires: 1) rational connection between the requirement and performance of the job; 2) an honest, sincere belief of the respondent that the requirement is necessary for performance of the job; and 3) undue hardship to the respondent if they were required to accommodate the complainant, having regard to health, safety, and cost. The provinces and territories have similar legislation applicable at the provincial and territorial level.

A Federal Human Rights Act should set out which rights are absolute, non-absolute and which are derogable and non-derogable.

ALHR submits that the right to life, the right to freedom from torture and slavery, freedom from forced work, the right to liberty and security of person, humane treatment when deprived of liberty, and the right to a determined period if liberty is deprived, the right to a fair hearing and the rights of children in the criminal process should be absolute or non-derogable (not able to be denied, limited or restricted in any way).

⁹⁰ [1986] 1 SCR 103.

⁹¹ Reference re Section 94(3) of the Motor Vehicle Act (BC) [1985] 2 SCR 486.

ALHR submits that it is appropriate that other human rights which are not absolute may be subject to reasonable and proportionate limitations. ALHR submits that a Federal Human Rights Act should specify that such rights should:

- a. only be limited after careful consideration and only 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
- b. protect human rights from limitation beyond what is permitted in the legislation

Balancing rights

Where Rights Compete: What Should Prevail?

The balancing of indivisible and interdependent human rights

International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to religious belief and the right to participate in religious activity as might be protected by the RDB, it is important to differentiate between:

- The internal right hold a belief (the right to freedom, conscious and religion); and
- The external right to manifest that belief.

The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one’s religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms for others and must be balanced against other rights, such as the right to be free from discrimination. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

“Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others”⁹²

⁹² Shaheed, op cit, par 46.

Rights must be balanced where they conflict

In general terms, no human right ‘trumps’ any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).

Some rights are expressed as absolutes, such as the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, arbitrary deprivation of life, and the right to recognition as a person in law.⁹³

Subject to those absolutes, all rights must be balanced where they conflict so as to maximise the practice of other rights to the greatest possible extent, in ‘an atmosphere of mutual consideration’⁹⁴ and so as to ‘ensure that none is inappropriately sacrificed’.⁹⁵ This is sometimes described as a process of providing reasonable accommodation to other rights and other persons: ‘a fair balance needs to be struck between the rights of the individual and the rights of others.’⁹⁶ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values (such as reasonableness or proportionality).

Human rights can validly be restricted if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

The good faith of those seeking protection

Human rights entail both rights and obligations. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Generally, behaviour should not be protected by Australian law, nor advocated by policy, where that behaviour itself infringes other human rights.

In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.

That is, where there is a conflict between human rights and other interests, it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

⁹³ See generally Attorney-General’s Department Public Sector Guidance Sheet: *Absolute rights* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>.

⁹⁴ Grimm, *op cit*, 2382.

⁹⁵ Alice Donald and Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, ILGA-Europe Research Paper, 2015, p i available at: https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf.

⁹⁶ *Ibid*, p i.

Reasonable, necessary, proportionality analysis : Necessity or proportionality of any limitation needs to be assessed on a case by case basis

The rights set out in the NZBORA are not absolute rights; they are subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁹⁷ Limitations on the right to be free from discrimination are also permitted in the Human Rights Act – for instance, there is an exception to discrimination in employment where the work involves national security in s 25.⁹⁸ Having an option to place limitations makes sense where it is done in the public interest.⁹⁹

To determine whether a legislated limit is proportionate, or 'demonstrably justified',¹⁰⁰ requires the judiciary to 'conduct an independent policy analysis of the Parliament's reasons for choosing to limit rights in order to decide whether it is necessary to engage in 'rights friendly' interpretation of a statute.'¹⁰¹ In *Hansen*,¹⁰² the majority of the court took the approach that a law is only inconsistent if it is found to be a breach of a 'protect right in its limited form.'¹⁰³¹⁰⁴ Tipping J established a six-step approach to ss 4-6:

Step 1. Ascertain Parliament's intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted. If Parliament's intended meaning is NZBORA-consistent, or if a provision constitutes a justified limit under s 5, there is no inconsistency and the NZBORA is not engaged.'¹⁰⁵

⁹⁷ *Bill of Rights Act 1990* (NZ) s 5.

⁹⁸ *Human Rights Act 1993* (NZ) s 25.

⁹⁹ Geoffrey Palmer & Andrew Butler, 'A Constitution for Aotearoa New Zealand' (Victoria University Press, 1st ed, 2016), 173.

¹⁰⁰ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), [16]-[17] (Tipping J).

¹⁰¹ Andrew Geddis & M B Rodriguez Ferrere, 'Judicial innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?' (2016) 35(2) *University of Queensland Law Journal* 251, 270.

¹⁰² *Hansen* [2007] 3 NZLR 1.

¹⁰³ Luke Beck, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 *Public Law Review* 97, 104.

¹⁰⁴ *Hansen* [2007] 3 NZLR 1 at [57]-[60] (Blanchard J), [89]-[92] (Tipping J), [191]-[192] (McGrath J).

¹⁰⁵ *Hansen v The Queen* [2007] 3 NZLR 1, 37 (Tipping J); Philip A Joseph & Thomas Joseph, 'Human rights in the New Zealand courts' (2011) 18 *Australian Journal of Administrative Law* 80, 94.

To balance competing rights, the NZ judiciary has taken what has been described as a 'definitional balancing' approach. For instance, in the context of religious freedom, in the case of *Re J (An Infant): Director-General of Social Welfare v B and B*,¹⁰⁶ the court had to interpret the breadth of the right to religious freedom and the right to refuse medical treatment. The matter involved Jehovah's Witness parents seeking to refuse blood transfusion treatment to their 3-year-old child who urgently needed such treatment in view of the medical professionals.¹⁰⁷ Ultimately, the court decided that such rights can be limited by the state where it is in the interest of the child's health.¹⁰⁸

In Canada, the question of balancing of rights has been addressed by both the Supreme Court of Canada (**SCC**) in the context of constitutional human rights protection, and the Ontario Human Rights Commission (**OHRC**) in the context of statutory human rights protection.

In *R v NS*,¹⁰⁹ a case involving the conflict between a witness' right to freedom of religion and to testify in a criminal trial wearing the niqab, an accused's right to a fair trial and to make full answer and defence, the SCC set out a 4-part test: 1) would requiring the witness to remove the niqab interfere with her freedom of religion; 2) would allowing the witness to testify wearing the niqab create a serious risk to the accused's right to a fair trial; 3) is there a way to accommodate both rights and avoid the conflict; and 4) if not, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects? Like the Oakes test, the test in *R v NS* is ultimately a proportionality test.

In its *Policy on Competing Human Rights*, the OHRC set out eight principles and a three-stage, five-step process. The eight principles are:

1. No rights are absolute;
2. There is no hierarchy of rights;
3. Rights may not extend as far as claimed;
4. The full context, facts and constitutional values at stake must be considered;
5. Must look at extent of interference (only actual burdens on rights trigger conflicts);
6. The core of a right is more protected than its periphery;
7. Aim to respect the importance of both sets of rights;
8. Statutory defences may restrict rights of one group and give rights to another.

¹⁰⁶ *Re J (An Infant): Director-General of Social Welfare v B and B* [1996] 2 NZLR 134 (CA).

¹⁰⁷ Rex Tauati Ahdar, 'How well is religious freedom protected under a Bill of Rights? Reflections from New Zealand' (2010) 29(2) *University of Queensland Law Journal* 279, 290-291.

¹⁰⁸ Rex Tauati Ahdar, 'How well is religious freedom protected under a Bill of Rights? Reflections from New Zealand' (2010) 29(2) *University of Queensland Law Journal* 279, 290-291.

¹⁰⁹ 2012 SCC 72.

The process is:

Stage One: Recognizing competing rights claims

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

- a. Do claims involve individuals or groups rather than operational interests?
- b. Do claims connect to human rights, other legal entitlements or bona fide reasonable interests?
- c. Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

Stage Two: Reconciling competing rights claims

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a “next best” solution?

Stage Three: Making decisions

Decisions must be consistent with human rights and other laws, court decisions, human rights principles and have regard for OHRC policy. At least one claim must fall under the Ontario Human Rights Code to be actionable at the Human Rights Tribunal of Ontario. Like the constitutional process, the statutory process is purposive, contextual, and proportionate.

What should happen if someone’s human rights are not respected?

When someone’s human rights are breached they should have access to a meaningful remedy.

The right to a remedy in international law

The right to a remedy for victims of violations of international human rights law is a fundamental principle found in numerous international instruments, in particular article 8 of the UDHR, article 2 of the ICCPR, article 6 of the CERD, article 14 of the CAT, and article 39 of the CRC.

The ‘*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*’¹¹⁰ establish that the scope of States’ obligations to respect, ensure respect for and implement international human rights law, includes, inter alia, the duty to:

¹¹⁰ 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’ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

- Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- Provide effective remedies to victims.¹¹¹

Both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination¹¹² have stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to victims. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

The need for the right to a remedy in a Federal Human Rights Act

ALHR submits that a Federal Human Rights Act should include an accessible enforcement mechanism and a full range of remedies for breach. Noting that there is a human right to an effective remedy when human rights are violated, the Federal Government should explore providing affordable access to the full range of remedies for individuals.

Remedies could include:

- a. An independent cause of action for breaches of the human rights protected in the Act. ALHR submits that a Federal Human Rights Act should allow for the commencement of legal action in an accessible tribunal such as a specialist human rights division in the Administrative Appeals Tribunal or a newly constituted tribunal within the Federal Court of Australia;
- b. The ability to make a complaint to the Australian Human Rights Commission and for the complaint to be heard and reconciled by the Commission's internal complaint handling mechanisms within public authorities;
- c. The full range of judicial remedies for breach, including declarations, injunctions, orders to cease the offending conduct and compensation and reparations, while protecting complainants against adverse costs orders, except in exceptional circumstances.

ALHR additionally adopts Queensland Advocacy Incorporated's recommendation that a Federal Human Rights Act should include provision for class actions to be brought, in recognition that human rights are often of special significance to a particular group, 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).

¹¹¹ Ibid II 3 (b), (c) and (d).

¹¹² See UN Human Rights Committee General Comment No 31 (paragraphs 15 – 20), UN Committee on the Elimination of Racial Discrimination General Recommendation No 26, UN Human Rights Committee General Comment No 29 (paragraph 15, on derogations).

How should we measure progress in respecting, protecting and fulfilling human rights?

Regular statutory reviews are an important mechanism for measuring and reporting on progress in respect, protection and fulfilling human rights. Periodic reviews by relevant United Nations Committees is an important international marker for measuring and reporting on Australia's progress.

ALHR submits that a Federal Human Rights Act should provide for statutory review of the legislation at specified intervals which results in action and monitoring based upon United Nations reports, community and civil society engagement, review of case studies under the Act, analysis and review as to whether adequate resources are being committed to realise the human rights protected by the Act

Are there other issues on which you wish to comment?

ALHR notes the importance of ensuring that there is adequate resourcing for implementation of human rights law reform. The commitment of adequate resourcing is an expression of commitment for transformative law reform and vital to enable the meaningful translation of laws into policy and practice.

It is recognised that the meaningful protection of economic, social and cultural rights is often more resource-intensive than the protection of civil and political rights. Yet as the basic enjoyment and expression of a person's economic, social and cultural rights - particularly the rights to adequate housing, education and health - are vital to an adequate and ordinary standard of living, resourcing constraints do not justify a lack of protection of these human rights in Australia.

Conclusion

Australia was a founding member of the United Nations and one of eight nations involved in drafting the UDHR. We should be very proud of the part we played as a nation and of our human rights heroes like Dr Herbert Vere Evatt, President of the UN General Assembly who oversaw the adoption of the UDHR, and Colonel William Roy Hodgson who, as a member of the committee chaired by Eleanor Roosevelt, was influential in the UDHR's drafting and inception. Yet Australia is the only Western democracy bereft of a national Human Rights Act to legally protect the basic rights and freedoms of all Australians. As former President of the Australian Human Rights Commission Professor Gillian Triggs said last year, we should all be alarmed at the failure of our legal system to protect fundamental rights. These rights have evolved over millennia as the very foundations of democracy. In recent years increasingly disproportionate government measures and excessive executive powers have become all too routine.

It is time to reignite the dialogue about a Federal Human Rights Act for Australia. Every Australian deserves to be treated fairly and equally. We now have Human Rights Acts in the ACT, Victoria and Queensland. A Federal Human Rights Act would ensure that, instead of

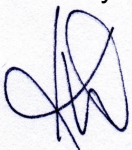
selectively enshrining Australia's international legal obligations in Commonwealth legislation on a piecemeal basis, the human rights of all Australians are protected from unreasonable, unfair and unwarranted incursions by the Executive. This is about good governance. The people of Australia deserve nothing less. After all, this protection is something which is enjoyed by the citizens of every other comparable democratic nation. These nations have not descended into chaos as a result of entrenching protection for basic human rights in law.

The introduction of a Federal Human Rights Act would have many important and positive impacts on the lives of everyday Australians, as had been seen by the experiences in Victoria and the ACT. In both cases, the evidence is clear; a Human Rights Act improves how government operates, it improves efficiency in bureaucratic decision-making, it injects humanity into the governance process and it will provide the people of Australia, especially those most vulnerable, with recourse when their rights are violated.

A Human Rights Act would not only ensure that the fundamental human rights of all Australians are protected and values, but it would also assist in building a human rights culture and increasing dialogue on human rights issues and their intersection with the law, policy, and pressing social, cultural and economic issues.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully



Kerry Weste
President

Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.