



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS™

# Submission Inquiry into Australia's Human Rights Framework

Parliamentary Joint Committee on Human Rights  
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## 1. Acknowledgement

Australian Lawyers for Human Rights (ALHR) acknowledges the traditional owners and custodians of the lands, rivers and seas on which we work, live and travel across Australia 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 deep respect to Elders past and present. We recognise that human rights apply to all individuals and have a special significance for Aboriginal and Torres Strait Islander peoples — the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.<sup>1</sup>

## 2. About Australian Lawyers for Human Rights

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.

## 3. Executive Summary

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into Australia's Human Rights Framework (**the Inquiry**).

ALHR commends the Federal Attorney-General, the Hon. Mark Dreyfus KC, on the establishment of a PJCHR Parliamentary Joint Committee on Human Rights Inquiry to investigate Australia's human rights framework, with a focus on whether the Federal Government should introduce a federal human rights Act.

For thirty years ALHR has called on Australia to comprehensively incorporate its international human rights law obligations into domestic legislation via a federal Human Rights Act and state-based Human

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<sup>1</sup> Preamble (7), *Human Rights Act* 2004 (ACT).

Rights Acts. ALHR was a member of the Steering Committee of the Human Rights Act for Queensland Alliance. Together with the New South Wales Council for Civil Liberties (NSWCCL), ALHR co-convenes the Human Rights Act for New South Wales Alliance. Together with the Rights Resource Network of South Australia and the South Australian Council of Social Service (SACOSS), ALHR Co-convenes the Human Rights Act for South Australia Campaign. Together with the Aboriginal Legal Service of Western Australia Inc, ALHR co-convenes the Western Australia for a Human Rights Act Coalition.

ALHR endorses the Western Australia for a Human Rights Act Alliance (**WA4HRA**) submission and recommendations to this Inquiry which reflect the call for a federal Human Rights Act and the introduction of state and territory-based Human Rights Acts in all jurisdictions across Australia. Australia is a federation and human rights are for everyone, everywhere, all of time. Every person in Australia should be a beneficiary of the legal articulation and protection of their human rights, no matter who they are or where they live, and the work of all governments across Australia should be driven and guided by a culture of respect for the legally binding nature and fundamental importance of human rights.

ALHR is a member of the Advisory Committee of the National Charter of Rights Campaign Coalition and we endorse the Charter Campaign submission and recommendation provided to this Inquiry.

With respect to the rights of persons with a disability in Australia, ALHR joins with other key disability organisations such as the Disability Advocacy Network Australia and Children and Young People with Disability Australia in endorsing the submission and recommendations to this Inquiry by People with Disability Australia.

With respect to the rights of children in Australia, ALHR makes its own very brief submissions below and endorses the submissions and recommendations to this Inquiry by:

- Save the Children Australia;
- SNAICC; and
- the Australian Child Rights Taskforce.

With respect to the environment and human rights, ALHR makes its own submissions below and endorses the submission and recommendations of the Environmental Defenders Office to this Inquiry.

With respect to economic, social and cultural rights (**ESCR**), ALHR makes its own very brief submissions below and endorses the submission and recommendations of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand)

## 4. Recommendations

1. The federal Parliament should, as a matter of priority, introduce a comprehensive federal Human Rights Act.
2. A draft exposure Bill should be put to the Australian community in order to ensure that all Australians have the opportunity to provide feedback on the proposed legislation.
3. A federal Human Rights Act should explicitly recognise the foundational principle within the Universal Declaration of Human Rights (**UDHR**)<sup>2</sup> that all human rights are universal and inalienable, indivisible, interdependent and interrelated and should protect all people equally within Australia and its territories. 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.
4. A federal human rights Act should apply to all federal government entities, as well as non-government entities exercising public or private functions.
5. A federal Human Rights Act should give full protection to all human rights in line with Australia's international legal obligations under the seven core United Nations human rights treaties Australia has ratified and held itself out to be bound by.
6. In advancing equality, a federal human rights Act should recognise that discrimination may arise on intersecting grounds rather than being confined to a single attribute.
7. A federal Human Rights Act should give full effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), including by ensuring the obligations of 'progressive realisation' are fully justiciable in Australian courts.
8. A federal Human Rights Act should also comprehensively adopt the United Nations Declaration on Rights of Indigenous Peoples (**UNDRIP**) in order to protect the human rights of First Nations Peoples. It is integral that a federal Human Rights Act reflect an understanding of the culture of Aboriginal and Torres Strait Islander peoples as essential to the distinctive character of Australia as a nation, including but not limited to specifying that:
  - a. 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;
  - a. Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture; and
  - b. Aboriginal and Torres Strait Islander peoples have the right to self determination

<sup>2</sup> Universal Declaration of Human Rights (UNDR), GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<p>7. A federal Human Rights Act should apply to children and specifically include all rights set out within the United Nations Declaration on the Rights of the Child (CRC).</p>
<p>8. A federal Human Rights Act should protect the right to a clean, healthy and sustainable environment and associated procedural rights that are essential to the meaningful realisation of this right.</p>
<p>9. Similar to the proposals by the Australian Human Rights Commission (<b>AHRC</b>), a federal Human Rights Act should recognise and provide for specific participation rights belonging to certain members of Australia’s community, at a minimum reflecting participation rights established under the UN core treaties such as the CRC, CRPD and the UNDRIP.</p>
<p>10. The AHRC has proposed an additional duty, the ‘equal access to justice duty,’ and ALHR supports this recommendation. This duty would impose a positive obligation on public authorities to take active steps to provide sufficient access to legal processes, such as by providing access to necessary support to navigate the justice system.<sup>3</sup> It is intended that this positive duty will bolster the protections already afforded under the common law principle of procedural fairness.<sup>4</sup></p>
<p>11. Human rights within a federal human rights Act should only be subject to lawful, reasonable and demonstrably justifiable limitations</p> <p>(a) 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).</p> <p>(b) ALHR submits that human rights which are not absolute may be subject to reasonable and proportionate limitations and in this regard a federal Human Rights Act should:</p> <p>(i) 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</p> <p>(ii) protect human rights from limitation beyond what is permitted in the legislation.</p>
<p>12. A federal Human Rights Act should be a ‘dialogue model’ of human rights protection. ALHR supports a model akin to the ‘dialogue model’ of human rights protection implemented through Queensland, ACT and Victorian human rights legislation. Pursuant to this model, a federal Human Rights Act could:</p>

<sup>3</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 22.

<sup>4</sup> *Ibid* p. 22.

- (a) Require Parliament to consider human rights when passing and amending legislation. Rather than being dismantled, the present parliamentary scrutiny regime should be incorporated within a federal Human Rights Act;
- (b) Require the executive, including all government officials and decision-makers to take human rights into account when developing and implementing policies, making decisions and administering the law; and
- (c) Enable courts and tribunals to interpret legislation consistently with human rights. In this regard, ALHR recommends that a federal Human Rights Act specifically require courts to consider relevant international law and international jurisprudence when interpreting the rights protected in the Act. Various dialogue models introduced in Australian states empower courts to issue a declaration for Parliament to consider if they find that a law breaches human rights. The AHRC model proposes that when a court has found a parliamentary intention to override human rights protected within a federal Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question. ALHR is supportive of this proposal.

13. A federal Human Rights Act must protect the international legal right to an effective remedy and establish accessible pathways for anyone who has their human rights breached. There are no rights without remedy and a federal Human Rights Act must enable everyone to obtain a timely and appropriate remedy via a complaint mechanism and independent cause of action that is cost-effective and cost-protected. In this regard ALHR recommends that a federal Human Rights Act include an accessible enforcement mechanism and a full range of remedies for breach. Remedies should 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 AHRC and for the complaint to be heard and reconciled by the Commission's internal complaint handling mechanisms for confidential conciliation; and where a conciliation is unsuccessful, the ability for a complaint to be made to 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;
- (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.
- (d) 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).



14. A federal human rights Act should protect complainants against costs (save for frivolous or vexatious complaints).
15. There should be a 24 month time limit for complaints under a federal Human Rights Act to be made to the AHRC. Further, there should be the ability to exercise discretion to accept complaints made outside this timeframe.
16. 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.
17. A federal Human Rights Act should be accompanied by adequate resourcing. Resourcing must include additional funding for the AHRC and delivery of 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, as part of any reforms to Australia's human rights framework.
18. ALHR recommends that in addition to including UNDRIP rights within a federal Human Rights Act, the federal Government, in consultation with First Nations peoples, develop a national program to implement UNDRIP.
19. ALHR recommends that the federal Government schedule the UNDRIP to the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) in order to explicitly include the UNDRIP as an instrument for which the Parliamentary Joint Committee on Human Rights ( <b>PJCHR</b> ) has reporting functions.
20. ALHR recommends that the UNDRIP be declared a 'relevant international instrument' within the definition of 'human rights' in the Australian Human Rights Commission Act 1986 (Cth), in order that the rights declared by the UNDRIP come within the inquiry and complaints function of the AHRC.
21. ALHR recommends that the federal Government establish a stand alone National Commissioner for Aboriginal and Torres Strait Islander Children and Young People.
22. ALHR recommends that the federal Government establish a stand alone National Commissioner for LGBTIQ+ Australians
23. ALHR recommends that the federal government ensure that, if it enacts a federal Human Rights Act, existing state and territory Human Rights Acts are allowed to co-exist. Further, ALHR recommends that the federal government place the enactment of state and territory Human Rights Acts in remaining jurisdictions on the agenda of National Cabinet meetings.



## 5. The case for federal human rights law reform

*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.<sup>5</sup>*

This submission specifically focuses on Australia's lack of a federal framework to protect human rights. Australia currently occupies an unenviable place as the only developed Western liberal democracy without a federal Human Rights Act or constitutionally enshrined Bill of Rights. Australia is bound by seven of the core international human rights treaties, has endorsed the UNDRIP 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.<sup>6</sup>

Recent years have seen numerous governments at both the federal and state levels in Australia introduce laws that limit our basic rights. "Robodebt" is a glaring example of government excess that could have been easily avoided had Australia had a federal human rights framework that embedded a requirement for the proper scrutiny of the work of government against universally accepted human rights standards and provided accessible remedies to people whose rights have been breached.

Further, the current 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. 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.

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. A federal Human Rights Act offers the opportunity to address these deficiencies and enhance the work of the federal government in ways that benefit the people who deliver much needed services to Australia and the recipients of these services

**ALHR submits that 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. Human rights are for everyone, everywhere, all of the time.**

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<sup>5</sup> Anat Shenker-Osorio Op-cit.

<sup>6</sup> 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>.

**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 instruments it has signed and ratified, the UNDRIP and its recent commitments at the United Nations General Assembly to uphold a stand alone human right to a healthy environment, according to the principle of good faith. 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 ALHR submits that adherence to international human rights law and standards is an important indicator of proportionality that should be legislatively embedded into the work of the federal government.<sup>7</sup>

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.

This December the world will celebrate the 75th anniversary of the *Universal Declaration of Human Rights (UDHR)*, a document which underpins all international human rights law. Australia was a founding member of the UN 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, then 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.

How can it be then, that Australia remains the only developed Western democracy bereft of a national human rights framework to legally protect the rights and freedoms of all Australians? We should all be alarmed at the failure of our legal system to protect fundamental rights. These rights have evolved as the very foundations of democracy. The UDHR calls upon everybody to stand up for human rights and Australians need governments that are prepared to do so.

In 2008, the National Human Rights Consultation Committee (**Brennan 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, fifteen years later, Australia continues to lag behind the rest of the comparable world at a federal level. ALHR submits that addressing this deficiency should be a national priority. Australia's international human rights treaty obligations should be enshrined in Commonwealth legislation via a federal Human Rights Act.

A Human Rights Act will create an essential framework that enables everyone involved in the work of government to engage in a positive collective effort to realise greater freedom, dignity and equality for all of us. When governments legally articulate and protect everyone's human rights the quality of

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<sup>7</sup> 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-%20Anti-Terrorism%20Reform%20Project.pdf>.

decision-making is improved and people are empowered to understand and stand up for their rights. Australians want to live in a society that, through everyday actions and decisions, upholds our rights and the rights of others, working together for a more sustainable, just, and prosperous society – for this generation and those yet to come.

As Australian Human Rights Commission President Rosalind Croucher said, “*With all the States and Territories with Human Rights Act, and one at the federal level, we will have the solid bedrock for rights protections across Australia and the tools to shift the focus of decision making and policy development through a human rights lens.*”

It is time to reignite the dialogue about a federal Human Rights Act for Australia. A federal Human Rights Act would ensure that, instead of selectively enshrining Australia’s international legal obligations in Commonwealth legislation, the human rights of *all* Australians are protected *equally*. This is about good governance. The people of Australia deserve nothing less.

## **6. Adequacy of existing mechanisms to protect human rights in the federal context**

### **6.1. The Australian Constitution.**

There is no constitutional bill of rights in Australia. The Australian Constitution does protect limited individual rights - the right to vote,<sup>8</sup> protection against acquisition of property on unjust terms,<sup>9</sup> the right to a trial by jury,<sup>10</sup> a very limited right to freedom of religion,<sup>11</sup> and prohibition of discrimination on the basis of State of residency.<sup>12</sup> 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.<sup>13</sup>

### **6.2 The Common Law**

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

- The right against self-incrimination;<sup>14</sup>
- The right to sue for false imprisonment;<sup>15</sup>
- Presumption of innocence in criminal trials;<sup>16</sup>
- Presumption that the standard of proof in criminal cases is that of beyond reasonable doubt;<sup>17</sup>
- Right to a fair trial;<sup>18</sup>
- Client legal privilege;<sup>19</sup>

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<sup>8</sup> Section 41.

<sup>9</sup> Section 51 (xxxii).

<sup>10</sup> Section 80.

<sup>11</sup> Section 116.

<sup>12</sup> Section 117.

<sup>13</sup> *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.

<sup>14</sup> *Reid v Howard* (1995) 184 CLR 1, 11–12; *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

<sup>15</sup> *Ruddock v Taylor* (2005) 222 CLR 612 [140] (Kirby J).

<sup>16</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

<sup>17</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [54] (French CJ).

<sup>18</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

<sup>19</sup> *Baker v Campbell* (1983) 153 CLR 52, 120 (Deane J).

- Right to access legal counsel when accused of a serious crime;<sup>20</sup> and
- Aboriginal and Torres Strait Islander native title rights in Australia.<sup>21</sup>

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'.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> Further, the development of common law rights is limited to cases brought before courts, which are confined by the doctrine of precedent.'

### 6.3 Parliamentary Joint Committee on Human Rights and statements of compatibility

The establishment of the Parliamentary Joint Committee on Human Rights (**PJCHR**) was designed to introduce a human rights lens to deliberations within Parliament on bills and legislative instruments, with a view to improving human rights compliance of federal legislation. Yet the impact of this mechanism in improving human rights literacy and compliance is questionable and has not been adequately scrutinised. As the Human Rights for NSW Alliance has previously noted, the non-binding nature of the requirement to prepare and comply with Statements of Compatibility,<sup>25</sup> 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.<sup>26</sup>

ALHR submits that the current mechanisms for Parliamentary scrutiny are insufficient to ensure human rights are protected when the Government passes (or amends) legislation. As such, a federal Human Rights Act should incorporate significant reforms to the current PJCHR powers and processes if it is to ensure the protection and promotion of the human rights of all people within Australia when Parliament makes law and other associated rules.

In ALHR's experience, even the most egregious proposed legislation which clearly breaches numerous human rights is often stated to conflict with those rights only in an appropriate and proportionate way. Additionally, human rights materials cited in these reports (for example a General Comment from one of the treaty body committees) cherry pick that which it tries to support without accurately reflecting the nature and scope of the right. Examples include the suite of 'foreign influence'

<sup>20</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 317 (Mason CJ and McHugh J).

<sup>21</sup> *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).

<sup>22</sup> *Coco v The Queen* (1994) 179 CLR 427, 435-437 (Mason CJ and Brennan, Gaudron and McHugh JJ).

<sup>23</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>24</sup> 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>>.

<sup>25</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(5) and 9(4).

<sup>26</sup> Human Rights for NSW Alliance submission to the Australian Human Rights Commission's *Free and Equal: An Australian Conversation on Human Rights* Project (2019) p. 19, available: <<https://alhr.org.au/wp/wp-content/uploads/2019/11/HR4SWNCF.pdf>>.

Bills and commentary around the rights of minorities and right to culture.<sup>27</sup> We are not clear if this is a ‘human rights literacy’ issue (as raised in the AHRC Position Paper at page 309), or not. The AHRC itself notes that ‘Parliament routinely passes laws that are not human rights compliant’ (p 11).

Thus, we agree there should be a presumption of compatibility of Commonwealth legislation with human rights, but fear this might not go far enough unless there exists a common understanding of how legislation might be drafted so as to have a minimal impact on human rights. We suggest that this concept might need to be spelt out further.

Further on this point, ALHR endorses the submission by Professor George Williams AO to the Inquiry, dated 25 March 2023, in which Professor Williams AO states that the ‘parliamentary scrutiny regime has failed to remedy the many serious human rights problems identified in the Brennan report’.<sup>28</sup> We commend to the Committee the detailed empirical examination of the effectiveness of the parliamentary scrutiny regime available in “*Australia’s Human Rights Scrutiny Regime*’ (2020) 46 *Monash University Law Review* 256.<sup>29</sup> As noted by Professor Williams AO, the article identifies areas for improvement, while concluding that the regime was flawed from the start and never capable of providing an adequate mechanism for protecting people’s fundamental rights

**ALHR endorses Professor Williams AO recommendation that, rather than being dismantled, the parliamentary scrutiny regime should be incorporated within a federal Human Rights Act**

**Finally, ALHR recommends that the federal Government schedule the UNDRIP to the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) in order to explicitly include the UNDRIP as an instrument for which the PJCHR has reporting functions**

#### **6.4. The role of the Australian Human Rights Commission**

In its report, *Free and Equal*, the AHRC proposed the following functions be conferred upon it in relation to a federal human rights Act:<sup>30</sup>

- complaint handling;
- reporting, reviews and oversight;
- an extension of its existing intervention powers to intervene in proceedings concerning the Act’s interpretation;
- education; and
- public sector training and guidance.

Given the AHRC’s existing structure and functions under the *Australian Human Rights Commission Act 1986* (Cth), ALHR supports the AHRC’s proposals regarding its role within a federal human rights Act. However, should the AHRC be provided with this additional role as complaint-handler and

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<sup>27</sup> Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, 8 [21]; UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), UN Doc CCPR/C/21/Rev.1/Add.5, (8 April 1994) [7].

<sup>28</sup> Professor George Williams AO submission to the Parliamentary Joint Committee on Human Rights’s *Inquiry into Australia’s Human Rights Framework* (2023) p. 1, available: <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/HumanRightsFramework/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions)>.

<sup>29</sup> At: <http://classic.austlii.edu.au/au/journals/MonashULawRw/2020/8.html>

<sup>30</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 31.

educator under a Human Rights Act, it must be adequately resourced to ensure the Australian community and public sector are informed of their rights and obligations under the Act and that complaints are dealt with in an appropriate and timely manner.

## 6.5. Existing Federal Protections

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 federal 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.<sup>31</sup> However, there are significant limitations to discrimination laws in Australia at both a state and federal level. ALHR notes the views expressed by the AHRC 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.<sup>32</sup>

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.<sup>33</sup>

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'.<sup>34</sup>

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<sup>31</sup> Law Council of Australia. "Anti-Discrimination Laws" at <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/anti-discrimination-laws>>.

<sup>32</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Discussion Paper: Priorities for Federal Discrimination Law Reform, October 2019), p. 7.

<sup>33</sup> Human Rights for NSW Alliance Submission to the Australian Human Rights Commission *Free and Equal: An Australian Conversation on Human Rights*, p. 8.

<sup>34</sup> Law Council of Australia. "Anti-Discrimination Laws" at <https://www.lawcouncil.asn.au/policy-agenda/human-rights/anti-discrimination-laws>.



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. For example, there is a need for a clear policy that seeks to strengthen laws and expand initiatives against discrimination, vilification and harassment on the basis of sexual orientation, gender identity or sex characteristics, as was promised in the 2021 National ALP Platform.

## 6.6 State and Territory Human Rights Acts

Victoria,<sup>35</sup> the Australian Capital Territory<sup>36</sup> and Queensland<sup>37</sup> 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.<sup>38</sup> Queensland's Act is the only one to contain a right to access health services without discrimination.<sup>39</sup> The below table outlines the rights protected within existing state-based Human Rights Acts:

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.<sup>40</sup>

The Victorian and Queensland Acts do not create a new right to commence 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 currently provides for a standalone cause of action in the Supreme Court against a public authority for breach of human rights. However, we note the ACT Government's commitment to immediately commence the process of legislating amendments for an accessible complaints mechanism within the *Human Rights Act 2004*, giving Canberrans, whose human rights are breached, the ability to bring a complaint to the ACT Human Rights Commission for confidential conciliation.

### 6.6.1 Australian Capital Territory

In 2004 the Australian Capital Territory (**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 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 be brought to the Australian Capital Territory Supreme Court. Human rights

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<sup>35</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>36</sup> *Human Rights Act 2004* (ACT).

<sup>37</sup> *Human Rights Act 2019* (Qld).

<sup>38</sup> *ACT Act* s 27A; *Queensland Act*, s 36.

<sup>39</sup> *Queensland Act*, s 37.

<sup>40</sup> *ACT Act*, s 28(1); *Charter*, s 7(2); *Queensland Act*, s 13(1).



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 Australian Capital Territory 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.

As the first Australian jurisdiction to start the human rights journey and enact a human rights Act, the ACT Human Rights Commission has recently released its collection of case studies in *20th Anniversary of the Human Rights Bill: A collection of 20 human rights case studies*. The selection of case studies by the Commission highlight the importance of human rights legislation, as well as provide examples of the Act’s application across the arms of government.<sup>41</sup>

An example of the Australian Capital Territory’s Act in practice is shown in the below case study.

The parents of a man with a disability complained that their son had been deliberately frightened and provoked by his carers. While the ACT Disability & Community Services Commissioner found no reliable evidence to demonstrate that this was the case, the Commissioner made several recommendations in relation to staff training, improved reporting of critical incidents and improved communication and information sharing between the agencies involved in the client’s care. The Commissioner also questioned the nature of the man’s accommodation, as it appeared that he was unable to leave his accommodation of his own volition, and the doors of his residence were locked. The Commissioner recommended that a human rights analysis of the man’s care and treatment be undertaken, including assessment of the authority under which his freedom of movement was restricted. The recommendations were accepted.<sup>42</sup>

In addition to paving the way for human rights legislation within Australia, the ACT Human Rights Act has also been amended throughout its 20 years to progressively expand in line with international human rights standards and evolving community expectations. The ACT government should be commended on these developments.

The below examples briefly evidence the way in which a legislated human rights framework may continuously improve human rights protections in tangible ways when governments are responsive to international and local developments.

In 2020 the Act was amended to protect work and other work-related rights.<sup>43</sup>

As noted above, in October 2022 the ACT Government committed to immediately commence the process of legislating amendments for an accessible complaints mechanism within the *Human Rights Act 2004*, giving Canberrans, whose human rights are breached, the ability to bring a complaint to the ACT Human Rights Commission for confidential conciliation. This commitment followed the “*No Rights Without Remedy*” petition led by a coalition of Canberran and Australian community organisations including ACTCOSS, ALHR, the Human Rights Legal Centre (**HRLC**), Civil Liberties Australia (CLA)

<sup>41</sup> ACT Human Rights Commission, 20th Anniversary of the Human Rights Bill: A collection of 20 human rights case studies (2023) available <[https://hrc.act.gov.au/wp-content/uploads/2023/05/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL\\_A-COLLECTION-O-F-20-HUMAN-RIGHTS-CASE-STUDIES\\_2023.pdf](https://hrc.act.gov.au/wp-content/uploads/2023/05/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL_A-COLLECTION-O-F-20-HUMAN-RIGHTS-CASE-STUDIES_2023.pdf)>.

<sup>42</sup> Human Rights Law Centre, ‘Charter of Rights 101 Cases’, *Case Study 17: Freedom of Movement for People with a Disability*: <<https://charterofrights.org.au/101-cases/2022/10/26/case-17-freedom-of-movement-for-people-with-a-disability>>.

<sup>43</sup> Inclusion of section 27B of the *Human Rights Act 2004* (ACT) by the Human Rights (Worker Rights) Amendment Act 2020 (ACT).

and Canberra Community Law. The petition sought to highlight barriers to access to justice and the right to a remedy created by the ACT Human Rights Act cause of action which requires complaints about human rights breaches be taken to the Supreme Court, a process that is “prohibitively expensive, complex and inaccessible to most Canberrans, especially those experiencing disadvantage”.<sup>44</sup> In response the ACT Government established an ACT Standing Committee on Justice and Community Safety’s inquiry<sup>45</sup> into the enforcement provisions in the *Human Rights Act 2004*. The Committee delivered its report on 23rd June 2023, recommending that the ACT Government support and enact the terms of the petition to create a system that mirrors the current approach with respect to discrimination complaints.<sup>46</sup> Once enacted this amendment will bring the ACT’s Human Rights Act in line with the processes contained in the most recent human rights legislation in Queensland and provide for meaningful solutions to issues impacting everyday life through an accessible process.

The ‘*No Rights Without Remedy*’ petition also called for amendments to enable the transfer of complaints to the ACT Civil and Administrative Tribunal (**ACAT**) for resolution, where conciliation at the Human Rights Commission is unsuccessful. However, the ACT Government has only agreed ‘in principle’ to introducing this aspect of the amendments citing the need to consider the complexities of such a proposal and resourcing implications. Minister Cheyne indicated there will be consideration of this option once the conciliation mechanism has been in place for a period of time.

Further, on 30 June 2022, the ACT Government released a discussion paper<sup>47</sup> to inform consideration of the introduction of a right to a healthy environment in the ACT Human Rights Act with the Justice and Community Safety Directorate conducting a public consultation process. In November 2022 the report<sup>48</sup> arising from that process was tabled reporting that the ACT Government intends to introduce a right to a healthy environment in the ACT Human Rights Act in this term of Parliament, with work commencing in the first half of 2023.<sup>49</sup>

### 6.6.2. Victoria

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects similar rights, and operates in a similar manner, to the Australian Capital Territory Act and is founded on the following principles set out in its Preamble:<sup>50</sup>

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<sup>44</sup> Kerry Weste, President, Australian Lawyers for Human Rights Media Release October 21 2022 at <<https://alhr.org.au/act-accessible-complaints-mechanism/>>.

<sup>45</sup> Inquiry into Petition 32-21 (No Rights Without Remedy)

<sup>46</sup> Report 7 - Report into the Inquiry into Petition 32-21 (No Rights Without Remedy) available at <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/jcs/inquiry-into-petition-32-21#tab1914921-4id>

<sup>47</sup> Right to a Healthy Environment Discussion Paper, Justice and Community Safety Directorate, 30 June 2022 available at: [https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2316/5622/1655/Discussion\\_Paper\\_-\\_Right\\_to\\_a\\_Healthy\\_Environment.pdf](https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2316/5622/1655/Discussion_Paper_-_Right_to_a_Healthy_Environment.pdf)

<sup>48</sup> Your Say Report - Right to a Healthy Environment - Report on what We Heard, Justice and Community Safety Directorate, Presented by Tara Cheyne MLA Minister for Human Rights November 2022, available at: [https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your\\_Say\\_Report\\_-\\_Right\\_To\\_A\\_Healthy\\_Environment\\_-\\_Report\\_On\\_What\\_We\\_Heard.pdf](https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf)

<sup>49</sup> Ibid, p.3

<sup>50</sup> 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.

- 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 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 relationships with their traditional lands and waters.

The Victorian Charter protects rights in three ways:<sup>51</sup>

- public authorities in State and local governments 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 laws in a way that is compatible with human rights, as far as possible.

While the Victorian Charter has paved the way for the development of human rights case law in Australia, there are at least two glaring omissions from its scheme, which must be considered in a federal human rights Act. The first is the Charter's omission of any economic, social and cultural rights, some of which are contained within both the ACT and Queensland human rights legislation.

The second is the Charter's lack of any accessible conciliatory process to allow for those whose human rights have been breached to attempt to resolve their concerns in an informal, and cost-free, process. The Charter allows for complaints to be made to the Victorian Ombudsman. However, the role the Victorian Ombudsman plays in this process currently only extends to investigate complaints and make recommendations to the public authority on ways to rectify any breaches. While this process mandates some accountability for Victorian public authorities, it does not offer the therapeutic element to those whose rights have been limited by being able to discuss the impacts and opportunities for redress with the particular public authority. This therapeutic element can be achieved through a conciliation process.

An example of the Victorian Charter in practice is shown in the below case study.

Proud Yorta Yorta woman Aunty Tanya Day –a much-loved sister, mother, grandmother and advocate - died in December 2017 after being arrested for being drunk in a public place after she fell asleep on a train. Despite causing no disturbance, a V/Line train conductor set off a series of events that led to the police arresting her in circumstances where the Coroner found that the police should have taken her to hospital or sought urgent medical advice. While locked in a concrete police cell, Aunty Tanya Day fell and hit her head on the wall and subsequently died. The Day family's staunch and ongoing advocacy led to the Victorian government committing to decriminalise the offence of public drunkenness in August 2019 and replacing it with a public health response. The Coroner investigating Aunty Tanya Day's death accepted submissions by the Human Rights Law Centre and the Victorian Equal Opportunity and Human Rights Commission that the Coroner's Court of Victoria is bound to act compatibly with human rights and to consider human rights when

<sup>51</sup> 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 p 4.

making decisions — including the right to life. The Coroner accepted that this meant that their inquiry needed to scrutinise not only the immediate causes of Aunty Tanya Day's death but also the role systemic racism played in her death. This included allowing witnesses to be questioned as to whether racism played a part of their decision making, including Ms Day's treatment, options considered, their motivations and potential unintended effects of their decision-making. The Coroner ultimately found that Aunty Tanya Day's death was preventable had she not been taken into police custody; that the V/Line train conductor's decision making was influenced by her Aboriginality and unconscious bias; that the police officer's checks while Aunty Tanya Day was in the cell were inadequate and that she was "not treated with humanity and respect for the inherent dignity of a human person as required by the Charter". The Coroner found that the totality of the evidence supported a belief that an indictable offence may have been committed, and referred two police officers for criminal investigation. The Director of Public Prosecutions did not, however, prosecute. The Coroner also recommended that V/Line and Victoria Police request the Victorian Equal Opportunity and Human Rights Commission to conduct a review of the compatibility of its training materials with the Charter.<sup>52</sup>

### 6.6.3. Queensland

Queensland is the most recent Australian jurisdiction to have enacted legislative human rights protection, achieved through passage of the *Human Rights Act 2019* (Qld). This legislation 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 Queensland 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 (**QHRC**), 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.

While the Queensland Act is most recent, it contains elements which should be reflected upon in enacting a federal human rights Act. For example, the requirement to allow 45 business days for the public entity to respond to human rights complaints, the scope of access economic, social and cultural rights, and the limitation of any cause of action.

While there is discretion under section 65(2), the requirement to wait 45 business days (or 9 weeks) before making a human rights complaint to the QHRC can be a significant timeframe to wait for those who have been wronged. In addition to this timeframe, complainants can then be waiting several months for their complaints to be assessed and possibly accepted for conciliation. This can be an incredibly drawn-out and timely process for those hoping to rectify their wrongs.

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<sup>52</sup> Human Rights Law Centre, 'Charter of Rights 101 Cases', *Case Study 21: Coroner Investigates the Role of Systemic Racism in the Death in Police Custody of Proud Yorta Yorta Woman Aunty Tanya Day*: <<https://charterofrights.org.au/101-cases/2022/10/26/case-21-coroner-investigates-the-role-of-systemic-racism-in-the-death-in-police-custody-of-proud-yorta-yorta-woman-aunty-tanya-day>>.

Further, the two economic, social and cultural rights contained within the Queensland Human Rights Act have a number of limitations. The first point of concern, which are also reflected in the AHRC's proposal, is that the right only extends to a person's ability to 'access' education and health services, rather than require the State 'provide' those services. Secondly, the education right contained in section 36 limits the child's right to access education that is 'appropriate to the child's needs'. This provides a basis to allow for segregation, rather than facilitating inclusion of all children to access education with their peers on an equal basis.

Finally, what has become known as the 'piggy-back' provisions within the Queensland Human Rights Act, requires that a person who wishes to take their human rights complaint beyond a QHRC conciliation must have a separate cause of action. Instead, a federal Human Rights Act should entitle a person with a human rights complaint alone to attempt to conciliate their complaint and, if unresolved, have the option to commence further proceedings should they seek a determination of their rights,

An example of Queensland's Act in practice is shown in the below case study.

A man made a human rights complaint about the impact of his detention in hotel quarantine on his mental illness. Queensland Health had regard to the protection of human rights, including the right to access health services, in responding to a complaint and arranged for mental health services to be available via telehealth.<sup>53</sup>

### 6.7 Interaction between a federal Human Rights Act and state/ territory Human Rights Acts

Section 109 of the Australian Constitution empowers the federal government to enact a Human Rights Act that would override state and territory laws. However, as noted by Professor Sarah Joseph and Professor Melissa Castan "*it would likely be unconstitutional for a federal law to require state public servants to abide by human rights when performing functions under state legislation, or to direct courts to interpret state legislation in a way that is compatible with human rights. Such duties would likely breach the doctrine of intergovernmental immunities in the Commonwealth constitution (ie that the Commonwealth and the states cannot unduly interfere with each other's governmental organs).*"<sup>54</sup>

ALHR therefore supports the position of the AHRC that a federal Human Rights Act should be restricted to the conduct of federal laws and federal public authorities. This would ensure that the existing human rights mechanisms in the ACT, Victoria and Queensland are not detrimentally affected, while still bringing human rights to the federal level.<sup>55</sup>

However ALHR submits that the states and territories that are yet to introduce a Human Rights Act, should do so as a matter of priority. As noted within the WA4HRA submission, such legislation is important as it will:

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<sup>53</sup> Human Rights Law Centre, 'Charter of Rights 101 Cases', *Case Study 90: Human Rights Considered in Response to Hotel Quarantine Complaint*.  
<<https://charterofrights.org.au/101-cases/2022/10/25/case-90-human-rights-considered-in-response-to-hotel-quarantine-complaint>>.

<sup>54</sup> Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thompson Reuters, 2019, 5 th ed), 525-527 Chapter 8 and at page 20 of the submission provided to this Inquiry by Professor Sarah Joseph: file:///Users/Angus/Downloads/Sub36.pdf

<sup>55</sup> Position Paper, 243.

- 1.1 cover matters which a federal Human Rights Act may not be able to address;
- 1.2 focus on state-based organisations; and
- 1.3 ensure proper training of state-based entities, to facilitate the development of a human rights culture.

**ALHR recommends that the federal government ensure that, if it enacts a federal Human Rights Act, existing state and territory Human Rights Acts are allowed to co-exist, just as State anti-discrimination legislation sits alongside Commonwealth legislation.<sup>56</sup>**

**ALHR recommends that the federal government place the enactment of state and territory Human Rights Acts in all remaining jurisdictions on the agenda of National Cabinet meetings, so as to ensure that all people in Australia enjoy the legal articulation and protection of their internationally recognised human rights, regardless of where they live within our federation.**

## 6.7. Other legislation

In addition to the dedicated human rights statutes that exist in the Australian Capital Territory, 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.<sup>57</sup>

## 7. Comparative Commonwealth Jurisdictions

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.

### 7.1 New Zealand

In New Zealand, there is both a Bill of Rights and a Human Rights Act. 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*.<sup>58</sup>

The *Bill of Rights 1990* (NZ) (**NZ Bill of Rights**) provides that legislation should be interpreted in a way that preferences consistency with the rights it protects.<sup>59</sup> It covers a range of rights such as: the right not to be deprived of life,<sup>60</sup> the right not to be subjected to torture and cruel treatment,<sup>61</sup> the right not to be subjected to medical and scientific experimentation,<sup>62</sup> the right to refuse to undergo medical

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<sup>56</sup> Professor Sarah Joseph Ibid, p. 21

<sup>57</sup> For example, the *Guardianship and Administration Act 2000* (Qld) and the *Mental Health Act 2016* (Qld). *Privacy Act 1988* (Cth).

<sup>58</sup> Geoffrey Palmer & Andrew Butler, 'A Constitution for Aotearoa New Zealand' (Victoria University Press, 1<sup>st</sup> ed, 2016), 161-162.

<sup>59</sup> *Bill of Rights Act (1990)* (NZ) s.6

<sup>60</sup> *Bill of Rights Act 1990* (NZ) s 8.

<sup>61</sup> *Bill of Rights Act 1990* (NZ) s 9.

<sup>62</sup> *Bill of Rights Act 1990* (NZ) s 10.



treatment,<sup>63</sup> electoral rights,<sup>64</sup> freedom of thought, conscience, and religion,<sup>65</sup> freedom of expression,<sup>66</sup> manifestation of religion and belief,<sup>67</sup> freedom of peaceful assembly, association, and movement,<sup>68</sup> freedom from discrimination,<sup>69</sup> minority rights,<sup>70</sup> unreasonable search and seizure,<sup>71</sup> liberty of the person,<sup>72</sup> the rights of persons arrested or detained,<sup>73</sup> the rights of persons charged,<sup>74</sup> minimum standards of criminal procedure,<sup>75</sup> and the right to justice.<sup>76</sup>

The *Human Rights Act 1993* (NZ) (**NZ Human Rights Act**) protects New Zealanders from unlawful discrimination, which is also guaranteed in s 19 of the NZ Bill of Rights.<sup>77</sup> In contrast to the NZ Bill of Rights which only deals with public sector conduct, the Human Rights Act offers protection in both public and private sectors.<sup>78</sup>

The New Zealand High Court has consistently found that the NZ Bill of Rights ‘must be interpreted broadly and purposively’.<sup>79</sup> New Zealand courts can issue a ‘declaration of inconsistency’ if they find that a statutory provision is inconsistent with the NZ Bill of Rights.<sup>80</sup> In August 2022 the New Zealand parliament amended the NZ Bill of Rights<sup>81</sup> to provide a process for the NZ Government and House of Representatives to respond to declarations of inconsistency by requiring:

- the Attorney-General to notify the House of Representatives of the court’s declaration of inconsistency within six sitting days after the declaration becomes final; and
- the Minister responsible to present the Government response within six months of the Attorney-General notifying the House.

Although protecting a broad range of important rights, the New Zealand framework has significant gaps. For instance, there are many rights under the ICCPR<sup>82</sup> which are not protected – e.g. there is no protection for equality before the law (ICCPR, art 26), forced work (ICCPR, art 8.3), wrongful conviction (ICCPR, art 14.6).<sup>83</sup> Additionally, the rights outlined in the International Covenant on Economic, Social and Cultural Rights are not included in the NZ Bill of Rights. Notwithstanding these deficiencies, the people of New Zealand currently benefit from a far greater level of legislated human rights protections than those offered to people in Australia; reinforcing Australia’s status as an absolute outlier when contrasted with comparable Commonwealth countries.

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<sup>63</sup> *Bill of Rights Act 1990* (NZ) s 11.

<sup>64</sup> *Bill of Rights Act 1990* (NZ) s 12.

<sup>65</sup> *Bill of Rights Act 1990* (NZ) s 13.

<sup>66</sup> *Bill of Rights Act 1990* (NZ) s 14.

<sup>67</sup> *Bill of Rights Act 1990* (NZ) s 15.

<sup>68</sup> *Bill of Rights Act 1990* (NZ) ss 16-18.

<sup>69</sup> *Bill of Rights Act 1990* (NZ) s 19.

<sup>70</sup> *Bill of Rights Act 1990* (NZ) s 20.

<sup>71</sup> *Bill of Rights Act 1990* (NZ) s 21.

<sup>72</sup> *Bill of Rights Act 1990* (NZ) s 22.

<sup>73</sup> *Bill of Rights Act 1990* (NZ) s 23.

<sup>74</sup> *Bill of Rights Act 1990* (NZ) s 24.

<sup>75</sup> *Bill of Rights Act 1990* (NZ) s 25.

<sup>76</sup> *Bill of Rights Act 1990* (NZ) s 27.

<sup>77</sup> Andrew Butler & Petra Butler, ‘The New Zealand Bill of Rights Act: A Commentary’ (Lexis Nexis, 1st ed, 2005), 3-4.

<sup>78</sup> Michael Kirby, ‘Protecting Human Rights in Australia without a Charter’ (2011) 37(2) *Commonwealth Law Bulletin* 255, 260.

<sup>79</sup> S Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49(4) *The American Journal of Comparative Law* 707 at 730.

<sup>80</sup> *Attorney-General v Taylor* [2017] NZCA 215.

<sup>81</sup> *New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (2022)* (NZ)

<sup>82</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>83</sup> Andrew Butler & Petra Butler, ‘The New Zealand Bill of Rights Act: A Commentary’ (Lexis Nexis, 1st ed, 2005), 4.



## 7.2 Canada

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

- Fundamental freedoms (freedoms of religion, expression (including the press), assembly, and association);<sup>84</sup>
- Democratic rights (citizens' right to vote and qualify for legislative bodies);<sup>85</sup>
- 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);<sup>86</sup>
- 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);<sup>87</sup>
- 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);<sup>88</sup> 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).<sup>89</sup>

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 convictions<sup>90</sup> in provision of goods, services, facilities, accommodation, or employment<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup>

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<sup>84</sup> Section 2.

<sup>85</sup> Section 3 - 5.

<sup>86</sup> Section 6.

<sup>87</sup> Section 7 - 14.

<sup>88</sup> Section 15.

<sup>89</sup> Section 16 - 23.

<sup>90</sup> Section 3.

<sup>91</sup> Section 5 - 7.

<sup>92</sup> 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>.

<sup>93</sup> 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

Under the federal, provincial, and territorial human rights acts, remedies 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.

### 7.3 United Kingdom

The *Human Rights Act 1998* (UK) (**UK Human Rights Act**) came into force in October 2000, incorporating the rights set out within the *European Convention on Human Rights* (ECHR) into domestic British law. The UK 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.<sup>94</sup>

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; and abolition of the death penalty

If ECHR 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. Courts have a duty to interpret statutory provisions consistently with the UK Human Rights Act. While a court cannot change the terms of legislation found not to be consistent with the UK Human Rights Act, it is able to make a declaration of incompatibility. Courts are also required to consider decisions of the European Court of Human Rights in assessing the compatibility of the legislation with the UK Human Rights Act. The Act requires all public bodies (like courts, police, local authorities, hospitals and publicly funded schools) and other bodies carrying out public functions to act compatibly with the rights protected in the UK Human Rights Act. New laws are required to be compatible with the rights protected in the UK Human Rights Act (although ultimately Parliament remains sovereign and can pass laws that are incompatible).

## 8. Brennan Committee Review of Australia's Human Rights Framework

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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.

<sup>94</sup> Liberty United Kingdom website at <https://www.libertyhumanrights.org.uk/human-rights/human-rights-act>.

In 2009, Father Frank Brennan SJ AO chaired the National Human Rights Consultation Committee (the **Brennan Committee**) in its undertaking of a nationwide consultation on human rights within Australia. The Brennan Committee was tasked with inquiring into three primary questions concerning the nature of rights that should be protected, the effectiveness of existing protections, and how Australia could better protect and promote human rights.<sup>95</sup>

As part of its extensive consultation, the Brennan Committee received 35,014 written submissions and held more than 65 community roundtables in over 50 locations throughout Australia.<sup>96</sup> The majority of those who contributed views to the Brennan Committee's inquiry called for greater protection and promotion of human rights. In Australia<sup>97</sup> Further, there was a 'considerable degree of community support for a federal Human Rights Act'.<sup>98</sup> Later that year, the Brennan Committee released its final report, including 31 recommendations on how Australia could fulfil its international human rights obligations. These recommendations included developing a national human rights framework,<sup>99</sup> as well as the adoption of a federal Human Rights Act.<sup>100</sup> In particular, the Brennan Committee's report provided that priority should be given to the right to:<sup>101</sup>

- an adequate standard of living;
- the enjoyment of the highest attainable standard of physical and mental health; and
- education.

In response to the Brennan Committee's final report, the Australian Government implemented the '*Australian Human Rights Framework*' in 2010 (the **2010 Framework**). The 2010 Framework's focus sought to incorporate *some* of the Brennan Committee's recommendations around education and protecting rights through parliamentary processes, such as the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the establishment of the PJCHR and the statement of compatibility process. While these measures were welcomed, it must be noted that:

- The failure to act on the Brennan Committee recommendation to legislate a Federal Human Rights Act represents a 23 year long missed opportunity for Australia to offer people human rights protections that are comparable to those enjoyed in every other Western liberal democracy around the globe.
- The parliamentary scrutiny processes implemented following the Brennan Committee recommendations lacks adequate teeth and needs to be strengthened if it is to meaningfully better protect human rights, as outlined by the AHRC in its 2022 *Free and Equal* position paper.<sup>102</sup>

Recent national events have shown the importance of the Brennan Committee's recommendations and the enactment of a federal Human Rights Act for the betterment of society in Australia. For example, the Online Compliance Intervention (**Robodebt**) scheme that operated between 2015 and

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<sup>95</sup> Frank Brennan et al, *National Human Rights Consultation Committee Report* (Attorney General's Department, September 2009) p. 3.

<sup>96</sup> *Ibid* p. xiii.

<sup>97</sup> *Ibid* p. 15.

<sup>98</sup> *Ibid* p. 263.

<sup>99</sup> *Ibid* Recommendation 2, p. xxix.

<sup>100</sup> *Ibid* Recommendation 18, p. xxxiv.

<sup>101</sup> *Ibid* Recommendation 22, p. xxxiv.

<sup>102</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 33.

2018 impacted almost 400,000 vulnerable members of Australian society.<sup>103</sup> If A federal Human Rights Act was in force at the time of the Robodebt scheme, it would have required relevant decision-makers to give proper consideration to the scheme's human rights impacts and implement necessary safe-guards to limit any impacts on those rights, prior to implementing the scheme. It would have also provided avenues for remedy and a language in which to contextualise the harm suffered.

Another example of the importance of a federal Human Rights Act in recent government decision-making are the numerous draft exposure bills of the Morrison government's proposed Religious Discrimination laws, which would have privileged the rights of some over the rights of many vulnerable groups and thereby abjectly failed to reflect Australia's obligations under the core human rights treaties.<sup>104</sup> A Federal Human Rights Act would provide a framework for new or amended anti-discrimination laws that considers the inter-relationship between, for example, freedom of religion and free speech. Human rights should be conceptualised against a background of comprehensive legislated protection for interrelated, indivisible, interdependent human rights that are treated contextually and according to international law.<sup>105</sup>

A final, and more recent, example of the benefit of a federal human rights act is the government's emergency response to the COVID-19 pandemic. In its *Free and Equal* position paper, the AHRC provides extensive discussion and case studies of the benefit of human rights protections during times of emergency, and in particular the role the Victorian and Queensland Acts played in ensuring rights were properly considered in the governments' conduct.<sup>106</sup>

## 9. The enactment of a Federal Human Rights Act

**ALHR recommends that the federal Parliament should, as a matter of priority, introduce a comprehensive federal Human Rights Act.**

**ALHR recommends that a draft exposure Bill should be put to the Australian community in order to ensure that all Australians have the opportunity to provide feedback on the proposed legislation.**

Australia is the only Western liberal democracy without legislative or constitutional protection of human rights at a federal level. The introduction of a federal Human Rights Act will demonstrate Australia's commitment to the recognition, promotion and protection of universally accepted human rights standards within the post World War II rules-based international legal order. ALHR applauds the government's initiative in reigniting the conversation which began and lapsed following the Brennan Committee.

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<sup>103</sup> Opinion piece by the Hon. Bill Shorten MP, Minister for the Department of Social Services, *Illegal Robodebt scheme has caused real pain and anxiety to almost 400,000 Australians* (15 February 2023) available <<https://ministers.dss.gov.au/editorial/10296>>.

<sup>104</sup> See the full suite of submissions made by Australian Lawyers for Human Rights in relation to the exposure drafts of Religious Discrimination Bills available here: <https://alhr.org.au/religious-discrimination-bill-fundamentally-flawed-must-rejected/>

<sup>105</sup> Further examples of how a federal human rights Act would have assisted can be found on Amnesty International's *Explainer: Why We Need a Human Rights Act for Australia*, available <<https://www.amnesty.org.au/explainer-why-we-need-a-human-rights-act/>>.

<sup>106</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) pp. 36 - 41.

Australia has ratified, and is therefore bound by seven of the nine core international human rights conventions and has been elected to the UN Human Rights Council, yet over half of the Australian population continue to live without the human rights protections enjoyed by people in Victoria, Queensland and the ACT, and many others in the world. Further, since 2009 Australia has endorsed the UNDRIP, which ALHR submits should be given the same status within Australia as the core UN human rights treaties.

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 as a matter of consistency. 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 and fundamental indicator of proportionality.<sup>107</sup>

Everyone within Australia deserves laws that ensure they 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 in great danger of being eroded, and rights are at risk of being rendered meaningless if they cannot be articulated by those who would seek to rely on them, or be legally enforced. It is only through the implementation of a federal human rights regime that we can properly create a culture of respect for human rights in Australia. Only when we foster a culture of respect for human rights in the work of government will we be able to meaningfully address harmful and discriminatory practices.

As noted by ALHR in its 2019 submission to the AHRC Free and Equal Consultation and indeed in the AHRC's subsequent *Free and Equal* position paper, the current human rights landscape within Australia 'is incomplete and piecemeal'.<sup>108</sup> Currently, rights are protected in a highly selective, patchwork fashion via State and Territory human rights legislation, the Australian Constitution, the common law and subject specific anti-discrimination laws. There is no comprehensive piece of legislation that protects the rights of all people within Australia, making a majority of the country vulnerable to limitations of their human rights.

A federal Human Rights Act will create an essential framework that enables everyone involved in the work of government to engage in a positive collective effort to realise greater freedom, dignity and equality for all. When governments legally articulate and protect everyone's human rights, the quality of decision-making is improved and people are empowered to understand and stand up for their rights.

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 all people in Australia in

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<sup>107</sup> 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-%20Anti-Terrorism%20Reform%20Project.pdf>>.

<sup>108</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 11.

government and public policy. The lives of marginalised, vulnerable and disadvantaged people within this country stand to be improved by the recognition and formal protection of their human rights.

The protection and promotion of human rights under a federal 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 federal Human Rights Act can result in better education of the public about their rights, leading to improved understanding and acceptance of human rights principles by the community. As a result, public debate and engagement with democracy will be enhanced.

Significantly, a federal Human Rights Act will improve the quality of legislation passed by the Australian Parliament, the policies developed by the Government and decisions taken by the Executive., Requiring parliamentarians to consider whether the work of government through legislation, policies and decision-making is consistent with human rights will benefit our democracy and every member of the Australian community.

Legislative scrutiny is a necessary and essential element in the democratic law-making process. Nevertheless, the current framework for the scrutiny of Commonwealth legislation under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is ineffective and inadequate to truly promote and protect human rights, particularly because of the non-binding nature of the Statements of Compatibility and its lack of engagement and cherry-picking of materials produced by thematic committees under the covenants listed below in **5.2**. A federal human rights Act would create a substantive, comprehensive and legally binding, framework that requires consideration of the effects of new laws on everyone's human rights.

Further, It is a basic principle of international law that a State party to an international treaty must ensure that its own domestic law and practice are consistent with what is required by the treaty.<sup>109</sup> Through the act of ratification of human rights treaties Australia has accepted obligations to ensure that its domestic legislation complies with the treaties' provisions, yet as a nation we have consistently failed to establish a national framework that reflects this obligation. Parliament has a critical role in ensuring that the legislative measures required by the commitments that Australia has made to the Australian people and the international community are adopted domestically.

## **10. The essential elements to include in a Federal Human Rights Act**

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<sup>109</sup> See for example, United Nations Department of Economic and Social Affairs Disability at <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html#:~:text=It%20is%20a%20basic%20principle,the%20measures%20to%20be%20taken> and Human Rights Explained, Fact Sheet 6: How Nation States Commit to Human Rights, Australian Human Rights Commission at <https://humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-6how-states-commit-human-rights-treaties>

Generally, ALHR supports the adoption of the AHRC's recommendations in its *Free and Equal* position paper. However, ALHR wishes to provide its own submissions on the structure and content of a proposed federal Human Rights Act, as set out below.

### **10.1 Human rights are universal and inalienable, indivisible, interdependent and interrelated.**

**ALHR recommends that a federal Human Rights Act should explicitly recognise the foundational principle within the Universal Declaration of Human Rights (UDHR)<sup>110</sup> that all human rights are universal and inalienable, indivisible, interdependent and interrelated and should protect all people equally within Australia and its territories.**

Human rights are the choices we make and the responsibilities we have to one another.<sup>111</sup> They have long been collectively recognised by the international community, with the first formal collective articulation of these rights, the UDHR,<sup>112</sup> 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*',<sup>113</sup> establishing a common standard for all peoples and all nations.

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

- All rights are universal, meaning everyone is entitled to human rights (*the principle of universality*);
- 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, a 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 insofar as any person is entitled to the protection of 'human rights', that person must also respect the human rights of others.

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<sup>110</sup> Universal Declaration of Human Rights (UNDR), GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<sup>111</sup> Anat Shenker-Osorio. A Brilliant Way of Living Our Lives: How to Talk About Human Rights, available <<https://commonslibrary.org/wp-content/uploads/A-Brilliant-Way-of-Living-Our-Lives-How-to-Talk-About-Human-Rights.pdf>>.

<sup>112</sup> Universal Declaration of Human Rights (UNDR), GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<sup>113</sup> Ibid art 1.



## 10.2 Interpretation and limitation of rights

ALHR generally supports the AHRC proposals contained in Chapter 9 of the AHRC Position Paper on a Human Rights Act for Australia as to interpretation and limitation of human rights, including the proposed wording of the proposed Interpretative Provisions.

**ALHR recommends that Human rights within a federal human rights Act should only be subject to lawful, reasonable and demonstrably justifiable limitations:**

1. 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 following rights should be absolute:
  - the right to life;
  - the right to freedom from torture and inhumane or degrading treatment;
  - freedom from slavery and forced labour;
  - 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.
2. ALHR submits that it is appropriate that human rights which are not absolute may be subject to reasonable and proportionate limitations and in this regard a federal Human Rights Act should:
  - i. 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
  - ii. protect human rights from limitation beyond what is permitted in the legislation.

## 10.3 Reasonable, necessary, proportionality analysis

**ALHR recommends that 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.**

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 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.

There are various points at which balancing and potential interpretative limitations can arise - in considering potential conflicts:

- between legislation and human rights;
  - between competing human rights; and
- between human rights and other rights (such as property rights) or interests (public interests).

In 1986, the Canadian Supreme Court considered the scope of the limitation provision within the country's *Charter of Rights and Freedoms* in a case called *R v Oakes*, which provides that rights may only be limited 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.<sup>114</sup> The Court held that this test required:<sup>115</sup>

- consideration to the objective of the limitation, which must be of 'sufficient importance' to override the protected right or freedom;
- once the sufficiently significant objective is recognised, the party seeking to limit the right must show that the means in doing so are reasonable and demonstrably justified (a 'proportionality test'),
  - the measures adopted must be carefully designed to achieve the objective;
  - the means must be rationally connected to the objective and seek to impair the right as little as possible; and
  - there must be proportionality between the measure's effects and the identified objective.

The scope of this limitation provision is also reflected in the *Human Rights Act 2004 (ACT)*,<sup>116</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*,<sup>117</sup> and the *Human Rights Act 2019 (Qld)*.<sup>118</sup>

#### 10.4 Who should be bound by a federal Human Rights Act

**ALHR recommends that a federal Human Rights Act should apply to all federal government entities, as well as non-government entities exercising public or private functions.**

#### 10.5 Participation rights

**ALHR recommends that, similar to the proposals by the Australian Human Rights Commission (AHRC), a federal Human Rights Act should recognise and provide for specific participation rights belonging to certain members of Australia's community, at a minimum reflecting participation rights established under the UN core treaties and the UNDRIP.**

ALHR strongly supports the implementation of a 'participation duty' as recommended by the AHRC and as required by international law.<sup>119</sup> The AHRC describes this duty as requiring 'public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights'.<sup>120</sup> The participation duty would require the participation

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<sup>114</sup> *R v Oakes* [1986] 1 SCR 103 at 136 - 140.

<sup>115</sup> *R v Oakes* [1986] 1 SCR 103 at 136 - 140.

<sup>116</sup> Section 28(1).

<sup>117</sup> Section 7(2).

<sup>118</sup> Section 13(1).

<sup>119</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 21.

<sup>120</sup> *Ibid* p. 21.

of First Nations people, children, and people with disability in decisions that will affect their rights.<sup>121</sup> ALHR notes that this proposal is consistent with the rights to participate articulated in the CRC, CRPD and the UNDRIP.

## 10.6 Equal access to justice

**The AHRC has proposed an additional duty, the ‘equal access to justice duty’ and ALHR supports this recommendation.**

This duty would impose a positive obligation on public authorities to take active steps to provide sufficient access to legal processes, such as by providing access to necessary support to navigate the justice system.<sup>122</sup> It is intended that this positive duty will bolster the protections already afforded under the common law principle of procedural fairness.<sup>123</sup>

## 10.7 Dialogue model

**ALHR recommends that a federal Human Rights Act should be a ‘dialogue model’ of human rights protection. ALHR supports a model akin to the ‘dialogue model’ of human rights protection implemented through Queensland, ACT and Victorian human rights legislation. Pursuant to this model, a federal Human Rights Act should:**

- a. Require Parliament to consider human rights when passing and amending legislation, including by requiring the federal Parliament to scrutinise and report on the compatibility of all federal Bills, which are to be accompanied by a Statement of Compatibility;
- b. Require the executive, including all government officials and decision-makers to take human rights into account when developing and implementing policies, making decisions and administering the law, including by imposing a positive obligation on public authorities to give proper consideration to human rights in decision-making and to act in a compatible way with human rights.
- c. Require federal courts and tribunals to interpret legislation consistently with human rights.
  - i. In this regard, ALHR recommends that a federal Human Rights Act specifically require courts to consider relevant international law and international jurisprudence when interpreting the rights protected in the Act.
  - ii. ALHR further recommends that a federal Human Rights Act provide that, when acting in an administrative capacity, federal courts and tribunals will also be considered a public authority bound by the Act.
  - iii. ALHR notes that the various dialogue models introduced in Australian states empower courts to issue a declaration for Parliament to consider if they find that a law breaches human rights. The AHRC model proposes that when a court has found a parliamentary intention to override human rights protected within a federal Human Rights Act, the

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<sup>121</sup> Ibid p. 21.

<sup>122</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 22.

<sup>123</sup> Ibid p. 22.

Attorney-General should be required to trigger a process for reviewing the law in question. ALHR is supportive of the AHRC's proposal.

### **10.8 Enforcement Mechanisms: No Rights Without Accessible Remedies**

**ALHR recommends that a federal Human Rights Act must protect the international legal right to an effective remedy and establish accessible pathways for anyone who has their human rights breached.**

There are no rights without remedy and a federal Human Rights Act must enable everyone to obtain a timely and appropriate remedy via a complaint mechanism and independent cause of action that is cost-effective and cost-protected.

**In this regard ALHR recommends that a federal Human Rights Act include accessible enforcement mechanisms and a full range of remedies for breach.**

**Remedies should 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 AHRC** and for the complaint to be heard and reconciled by the Commission's internal complaint handling mechanisms for confidential conciliation; and where a conciliation is unsuccessful, the ability for a complaint to be made to 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;
- 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;
- d. **ALHR further submits that a federal Human Rights Act should include a 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).

Where a complaint is made under a federal human rights Act, most cases should proceed to a confidential conciliation with the AHRC. Unresolved complaints should then have the ability to be referred to a specialist division of a court or tribunal for determination. However, a federal human rights Act should allow for the exercise of some discretion that would permit certain complaints to proceed directly to a determination without conciliation (for example, where there may be time sensitivities).

ALHR supports the AHRC's proposal that failing to give proper consideration to a relevant right protected by a federal human rights Act should give rise to a right to review for jurisdictional error as another means of enforcing human rights.<sup>124</sup> However, to avoid any confusion, the federal human rights Act must expressly state that the breach of a provision would be *invalid* to avoid any uncertainty as arose from the Victorian decision *Bare v Independent Broad-based Anti-corruption Commission*.<sup>125</sup>

In *Bare*, the Court of Appeal found that, due to the Victorian *Charter's* drafting, a decision-maker's breach of the 'proper consideration' requirements did not amount to jurisdictional error.<sup>126</sup> As such, the failure to give proper consideration to the relevant human rights did not of itself give rise to a right to review under administrative law. Similarly, in drafting a federal human rights Act, regard must be had to the intended interaction between administrative law review processes as proposed by the AHRC, proper consideration requirements under a federal human rights Act, and the application of any 'piggy-back' claims. These interactions were recently considered by the Supreme Court of Queensland in *Austin BMI Pty Ltd v Deputy Premier*.<sup>127</sup>

### 10.9 Costs and limitation periods

A federal human rights Act should protect complainants against costs (save for frivolous or vexatious complaints).

A federal Human Rights Act should also adopt an asymmetrical costs model, whereby each party to the proceeding would bear their own costs, however, should a complainant be successful, the respondent would be liable for their costs. This would allow for greater access to achieve justice for those who may ordinarily not proceed with matters due to affordability and costs risks.

There should be a 24 month time limit for complaints under a federal Human Rights Act to be made to the AHRC. Further, there should be the ability to exercise discretion to accept complaints made outside this timeframe.

### 10.10 Whose rights and Which rights?

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<sup>124</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 30.

<sup>125</sup> *Bare v Independent Broad-based Anti-corruption Commission & Ors* (2015) 48 VR 129 [139].

<sup>126</sup> *Bare v Independent Broad-based Anti-corruption Commission & Ors* (2015) 48 VR 129 [139]. The use of the word 'unlawful' in the *Charter* does not mean 'invalid' in administrative law, see paragraph [146].

<sup>127</sup> [2023] QSC 95 [267] - [268].

**ALHR recommends that a federal Human Rights Act should give full protection to all human rights in line with Australia's international legal obligations under the seven core United Nations human rights treaties Australia has ratified and the UNDRIP.**

*'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.'*<sup>128</sup>

ALHR submits that the rights to be included in a federal Human Rights Act should be specifically drawn from the human rights articulated in the seven core human rights treaties Australia has signed and ratified, as well as from the UNDRIP which Australia has endorsed. The rights articulated within these instruments have been developed in consultation with the international community and subsequently ratified by a majority of States, based on accepted international norms, and are supported by a significant body of jurisprudence.

These treaties are the:

- *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); and*
- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

In addition to the above treaties, Australia is also party to the following Optional Protocols, being the:

- *Optional Protocol to the International Covenant on Civil and Political Rights;*
- *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty;*
- *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;*
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;*
- *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and*
- *Optional Protocol to the Convention on the Rights of Persons with Disabilities.*

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<sup>128</sup> Human Rights for NSW Alliance Submission to the Australian Human Rights Commission Free and Equal: An Australian conversation on human rights, page 5.

Importantly, there are additional principles in international human rights law that apply specifically to First Nations peoples due to their special connection with place and space. These rights include the right to consultation and to free prior and informed consent, which stem predominantly from a combined reading of the ICCPR, the ICESCR, CERD, UNDRIP and ILO Convention 169. ALHR refers to our recommendations in relation to the UNDRIP.

**Despite its international commitments, Australia’s lack of federal legislation locally enshrining these obligations has drawn international criticism.**

For example, in 2017 the Special Rapporteur on the human rights of migrants provided his report about his mission to Australia and the regional processing centres in Nauru. In this report, the Special Rapporteur concluded and recommended that Australia should, at a bare, the government should enact a human rights Act that prevails over all other legislation and protects the rights of all citizens and foreigners. Doing so, the Special Rapporteur concluded, would ensure the better protection of the rights of all within Australia, despite their status.<sup>129</sup>

Further, in 2019, the Committee on the Rights of Persons with Disabilities expressed concern about Australia’s inconsistent anti-discrimination laws, along with its lack of ‘comprehensive human rights legislation’, meant that there are ‘no effective solutions to intersectional and multiple forms of discrimination’.<sup>130</sup>

The preamble to the UDHR recognises that human rights are for everyone, everywhere, all of the time, by speaking to the ‘equal and inalienable rights of all members of the human family’. Every person within Australia and its territories 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 equally protect the human rights of all people in Australia, regardless of their citizenship, age or any other attribute and in a manner that is consistent with the principles of universality, indivisibility and interdependence recognised by the UDHR.

**A federal Human Rights Act provides a much needed and long overdue opportunity to address the current gaps and deficiencies in whose rights are currently protected in Australian law and expand the equal legal protection of human rights to all people consistently with the intent and substantive content and scope of the rights articulated in the UDHR, the core UN human rights treaties and the UNDRIP.**

Examples of groups experiencing significant gaps in the protection of their internationally recognised human rights in Australia include: children; First Nations peoples; LGBTIQ+ people; people from culturally and linguistically diverse backgrounds; asylum seekers and refugees; people experiencing socioeconomic disadvantage; and people with disabilities, especially women and girls with disability. We discuss some elements of the gaps in protection in some of these areas below.

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<sup>129</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 24 April 2017, A/HRC/35/25/Add.3, 18.

<sup>130</sup> Committee on the Rights of Persons with Disabilities, *Committee Experts Express Concerns about Slow Progress in the Implementation of the Convention* 13 September 2019 <<https://www.ohchr.org/en/press-releases/2019/09/committee-rights-persons-disabilities-reviews-report-australia>>.



**ALHR notes and welcomes that the AHRC’s proposed rights extend to rights, such as the right to a healthy environment (which Australia voted to recognise as a universal human right in the UN General Assembly on 28 July 2022)<sup>131</sup>, work-related rights, and social security rights.<sup>132</sup> We discuss this in more detail below.**

**ALHR recommends that, in advancing equality, a federal human rights Act should recognise that discrimination may arise on intersecting grounds rather than being confined to a single attribute.**

A federal Human Rights Act must create a framework that is capable for instance, legally articulating the full suite of rights set out in the *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* in a manner that takes account of the differential impact of human rights abuses on persons of different genders, and extent to which gender-based stereotypes and misconceptions have undermined gender equality and the enjoyment of human rights.

### **10.10.1 First Nations Peoples Rights**

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 endorsement of the UNDRIP, a federal human rights Act should:

**ALHR recommends that a federal Human Rights Act comprehensively adopt the UNDRIP in order to protect the human rights of First Nations Peoples, including but not limited to specifying 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;
- Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture; and
- Aboriginal and Torres Strait Islander peoples to self-determination.

**ALHR recommends that the federal Government, in consultation with First Nations peoples, develop a national program to implement UNDRIP original and Torres Strait Islander peoples to self-determination.**

Elsewhere in this submission ALHR has made specific recommendations in relation to Australia’s implementation and adoption of the UNDRIP and the desperate need to protect First Nations children’s rights.

### **10.10.2 Children’s Rights**

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<sup>131</sup> United Nations News, *UN General Assembly declares access to clean and healthy environment a universal human right* <<https://news.un.org/en/story/2022/07/1123482>>.

<sup>132</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022) p. 18.

As noted above, with respect to the rights of children in Australia, ALHR endorses the submissions and recommendations to this Inquiry by Save the Children Australia, SNAICC and the Australian Child Rights Taskforce.

Having ratified the CRC in 1990 Australia has accepted international legal obligations to ensure that all children in Australia enjoy the rights set out in the treaty. The CRC recognises that children have the same human rights as adults, while also needing special protection due to their vulnerability to exploitation and abuse and their developmental needs. However, more than thirty years since ratification, Australia continues to fall short in realising the legal protection of children's CRC rights. This failure adversely impacts all children in Australia, but most especially those from vulnerable groups.

The CRC should be fully incorporated into federal legislation in Australia such that the rights it articulates may serve as guardrails to ensure all Australian laws, policies and government decision-making up children's rights.

In its most recent Concluding Observations to Australia<sup>133</sup> the United Nations Committee on the Rights of the Child (**UNCRC**) drew attention to Australia's failures to uphold CRC rights and called for urgent measures to be taken in relation to:

- (a) violence, including sexual violence, abuse and neglect;
- (b) children deprived of a family environment;
- (c) mental health;
- (d) the impact of climate change on the rights of the child;
- (e) asylum-seeking, refugee and migrant children; and
- (f) administration of child justice

The UNCRC also called on Australia to:

- (a) Enact comprehensive national child rights legislation fully incorporating the Convention and providing clear guidelines for its consistent and direct application throughout the states and territories of the State party;
- (b) Ensure that the resources of the Parliamentary Joint Committee on Human Rights are adequate and sufficient to effectively examine, including in consultation with the National Children's Commissioner and other interested parties, all proposed legislation and its impact on children's rights;
- (c) Guarantee that all proposed legislation is fully compatible with the Convention;
- (d) Develop a national plan of action for implementing the CRC and adopt a national comprehensive policy and strategy on children that encompasses all areas of the Convention, with sufficient human, technical and financial resources for its implementation; and
- (e) Provide For children's right to participation

**ALHR recommends that a federal Human Rights Act apply to all children and specifically include all rights set out in the United Nations Convention on the Rights of the Child.**

**Given the special vulnerability of First Nations children to human rights violations and Australia's shocking record with respect to the protection of First Nations Children's rights,**

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<sup>133</sup> CRC/C/AUS/CO/5-6 1 November 2019

**ALHR recommends that the federal Government establish a stand alone National Commissioner for Aboriginal and Torres Strait Islander Children and Young People.**

### **10.10.3 Protection of Reproductive Rights and Families**

**ALHR recommends that a federal Human Rights Act contain at least a broad protection on the rights of an individual to reproductive autonomy and access to sexual and reproductive healthcare free from discrimination.**

The right to reproductive autonomy is an integral part of the right to health and falls within a number of human rights standards within the core human rights treaties, including the right to privacy and autonomy, the right to security of the person, the right to equality and non-discrimination, the right to equality of access to health care services and the right to protection from cruel, inhuman and degrading treatment.

The protection of this right would uphold Australia's obligations under the core UN human rights treaties by, for example:

- (a) Ensuring that federal domestic laws reflect the human rights law obligations that Australia has agreed to uphold under the core UN human rights treaties and the significant body of international human rights law jurisprudence that has been developed in relation to the substantive content of reproductive human rights;
- (b) Abating current concern amongst the public that an attack on reproductive freedom may naturally lead to an attack on the right to access abortion - which we have since seen in the US Supreme Court;
- (c) Protecting the reproductive rights of people with disabilities in Australia, including in particular protection from forced contraception, sterilisation and abortion;
- (d) Protecting the reproductive rights of children born with innate variations in sex characteristics (intersex children), including in particular protection from non-consensual or forced sterilisation resulting from treatment to "affirm gender" before children are of a sufficient age to provide informed consent to treatment<sup>134</sup>;
- (e) Ensure that financial assistance in relation to reproductive healthcare services, including fertility services, can be accessed equally between heterosexual and LGBTIQ+ people (which is currently not the case by virtue of the Pharmaceutical Benefit Scheme);
- (f) Ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;<sup>135</sup>
- (g) Minimise barriers to LGBTIQ+ couples or singles accessing legal surrogacy options on an equal basis to heterosexual people;
- (h) Prevent barriers to LGBTIQ+ couples or singles accessing legal adoption on an equal basis to heterosexual people; and
- (i) Prevent LGBTIQ+ couples or singles from facing discrimination in obtaining parental or guardianship status or recognition of their children to whom they do not have a genetic link.

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<sup>134</sup> In addition to the core UN human rights treaties and associated jurisprudence see also Principle 24 of the Yogyakarta Principles, relating to the right to found a family, International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <https://www.refworld.org/docid/48244e602.html>

<sup>135</sup> Principle 24 of the Yogyakarta Principles, relating to the right to found a family Ibid.

**ALHR further recommends that in respect to protection of the family, a federal Human Rights Act reflect modern societal views and broadly define family to ensure that the protections afforded extends to all manner of families.** It is now well understood that a "family" can mean many different things and come in many different forms.

#### **10.10.4 Freedom of Thought, Conscience, Religion or Belief**

The AHRC proposes a provision protecting "Freedom of thought, conscience, religion and belief". ALHR notes that, while the 'right to believe' is an absolute personal right exercised internally, there is no absolute right in international human rights law to manifest or act upon one's religious belief externally so as to negatively impact upon the human rights of others.

This is reflected in Article 18(3) of the ICCPR which recognises that the right to manifest one's religion or beliefs may be subject to limitations prescribed by law and necessary to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others." ALHR notes that the federal Labor party has recognised the importance of specifically reflecting Australia's international obligations pursuant to Article 18(3) within the context of the protection of freedom of thought, conscience, religion and belief in Australia.

ALHR therefore recommends that the protection of the right to freedom of thought, conscience, religion and belief in a federal Human Rights Act be drafted in such a way as to fully reflect the substantive scope and content of this right and its limitations as articulated within Article 18 of the ICCPR.<sup>136</sup>

**ALHR recommends words to the effect that "limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others" are added to the proposed AHRC model provision.**

The clear need for a federal Human Rights Act to ensure that international law is comprehensively adopted in this regard is evidenced by, for example:

- (a) The prevalence of religion-based conversion therapy;<sup>137</sup>
- (b) The propensity to discriminate against the LGBTIQ+ community within the education system based on religious beliefs.<sup>138</sup>
- (c) The flawed iterations of the previous federal government's "Religious Discrimination" draft exposure bills which would have privileged religious freedoms over all other human rights in Australia in a way that did not comply with international human rights law standards.

#### **10.10.5. The need for a stand alone National Commissioner for LGBTIQ+ Australians**

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<sup>136</sup> *Consultation Draft – Draft National Platform*, dated 19 May 2023, p. 58.

<sup>137</sup> Supporting conversion therapy survivors, News, La Trobe University  
<<https://www.latrobe.edu.au/news/articles/2021/release/supporting-conversion-therapy-survivors>>.

<sup>138</sup> Brisbane's Citipointe Christian College defends demanding parents sign contract on student gender identity, homosexuality - ABC News  
<<https://www.abc.net.au/news/2022-01-31/qld-school-contract-lgbtqi-citipointe-christian-college/100791734>>.

## **ALHR recommends that the federal Government establish a stand alone National Commissioner for LGBTIQ+ Australians**

ALHR submits that there is a clear and urgent need for a national Commissioner for Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and Asexual (LGBTIQ+) issues within the AHRC. The AHRC has national responsibility for receiving and conciliating discrimination complaints under all Commonwealth anti-discrimination laws with positions dedicated to specific protected attributes or communities.<sup>139</sup> Yet, as Alastair Lawrie has noted, 2013 amendments to the *Sex Discrimination Act 1984 (Cth)* adding sexual orientation, gender identity and intersex status as protected attributes in that law did not create such a position. These are now the only attributes in the four main Commonwealth anti-discrimination laws not to have a Commissioner attached to them.<sup>140</sup>

### **10.10.6 Environment and Human Rights**

As noted above, ALHR endorses the submission and recommendations made by the Environmental Defenders Office in their submission to this Inquiry. ALHR is also pleased to articulate the following key points for the Committee.

ALHR supports the AHRC's proposal to include the human right to a healthy environment in a federal Human Rights Act. The human right to a healthy environment has not emerged from a single international human rights instrument, rather it has developed through international environmental law, the 'greening' of international human rights law, and from the recognition of the right at a domestic and regional level by countries across the globe. The right to a healthy environment is now recognised in the domestic legal systems of more than 80% of UN member states, with 156 out of 193 having either incorporated the right into their constitutions, enacted legislation or ratified a regional instrument which enshrines the right.<sup>141</sup>

In recent years, a range of international legal entities have recognised the human right to a healthy environment, culminating in the UN General Assembly adopting resolution *A/76/L.75* on 28 July 2022, "recognising the right to a clean, healthy and sustainable environment as a human right," by 161 votes in favour, no votes against and 8 abstentions. Australia voted in favour of the resolution.

In Australia, there is growing recognition of the human right to a healthy environment at a state and territory level. As noted above, the Australian Capital Territory has committed to protecting the human right to a healthy environment in the *Human Rights Act 2004 (ACT)* and has consulted on the appropriate scope of that human right.<sup>142</sup> To similar effect, the Queensland Land Court has accepted that a healthy environment is an essential precondition of fundamental human rights, including the right to life, in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 at [1480]. A

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<sup>139</sup> Alastair Lawrie, "Where's Our LGBTIQ+ Commissioner?" available at: <https://alastairlawrie.net/2022/09/03/wheres-our-lgbtiqa-commissioner/>

<sup>140</sup> Ibid. ALHR commends do the committee the detailed analysis written by Alastair Lawrie on the need for an LGBTIQ+ Commissioner available here: <https://alastairlawrie.net/2022/09/03/wheres-our-lgbtiqa-commissioner/>

<sup>141</sup> United Nations Human Rights Council, *A/HRC/43/53* Right to a healthy environment: good practices Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (30 December 2019) p. 13.

<sup>142</sup> ACT Justice and Community Safety Directorate, Right to a Healthy Environment, accessed 28 June 2023 <<https://www.justice.act.gov.au/safer-communities/right-to-a-healthy-environment>>.

federal human rights Act that protects the human right to a health environment would be entirely consistent with this UN country endorsed, mutually agreed law reform and domestic and regional jurisprudence.

However, ALHR is concerned that the AHRC's definition of the right to a healthy environment is restrictive and does not reflect its use and meaning in international human rights law. ALHR recommends that the human right to a healthy environment be defined broadly in a federal Human Rights Act, according to emerging international customary laws and established norms with respect to the right.

**ALHR therefore recommends that the human right to a healthy environment be defined in similar terms to the UN General Assembly Resolution (A/76/L.75) that articulates the right as follows:**

*Recognizes the right to a clean, healthy and sustainable environment as a human right. This language reflects the UN Human Rights Committee Resolution (A/HRC/RES/48/31) passed on 8 October 2021 that recognised the human right to a healthy environment in similar language. A broad definition of the human right to a healthy environment incorporates established procedural and substantive elements of the right.*

We are specifically concerned that the AHRC's proposed definition of the human right to a healthy environment does not appropriately protect the human right to non-toxic environments in which to live, work and play (internationally recognised as a substantive aspect of the right to a healthy environment).<sup>143</sup> The limitation to a protection from 'unlawful' pollution, implies that lawful pollution is permissible irrespective of whether it infringes upon the human right to a healthy environment. This is antithetical to principles that underpin the human right to a healthy environment.

ALHR further notes that the explicit protection of the human right to a healthy environment has contributed to positive human rights outcomes across the globe. A 2012 study, conducted by David Boyd, UN Special Rapporteur on Human Rights and the Environment, on the constitutional protection of environmental rights found that countries that had enshrined the right to a healthy environment enjoyed greater environmental outcomes. A further study in 2016, conducted by Jeffords and Minkler, found that the codification of environmental rights led to better scores on the Environmental Performance Index.

**ALHR submits that the duties and obligations conferred upon the Australian government by the human right to a healthy environment include procedural and substantive aspects.**

The procedural components of the human right to a healthy environment are the means by which individuals are empowered to enforce their rights and ensure the human right to a healthy environment is upheld in practice. This includes access to environmental information, public participation in decision-making and access to justice to enforce the right. ALHR emphasises that the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

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<sup>143</sup> United Nations Human Rights Council, *A/HRC/43/53 Right to a healthy environment: good practices Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (30 December 2019).

Environmental Matters (Aarhus Convention) establishes best practice standards for the procedural aspects of environmental human rights.

If protected under a federal Human Rights Act, there would be a positive obligation imposed upon the Australian government to ensure that the public, including vulnerable groups, and affected parties have access to environmental information and that such information is both cost and language accessible. The community and affected parties should also be consulted in a timely and genuine manner on environmental decisions, especially proposed developments, and the Australian Government should be required to demonstrate that it has taken into account the views of the community in any final environmental decisions, policies or outcomes.

**Finally ALHR recommends that the Committee consider the integration of the procedural rights enshrined under the Aarhus Convention into a federal Human Rights Act, irrespective of whether Australia is strictly bound by that treaty.**

### 10.10.7. Business and Human Rights

With respect to human rights and business, in 2011 the UN General Assembly adopted the United Nations Guiding Principles for Business and Human Rights (UNGPs), which Australia subsequently endorsed and agreed to implement domestically.<sup>144</sup> The UNGPs implement the UN Protect, Respect, Remedy Framework which is designed around three pillars:

- Pillar I: The State duty to protect human rights
- Pillar II: The business responsibility to respect human rights
- Pillar III: Access to remedy for victims of business-related human rights harm.

An important aspect of the implementation of the business and human rights agenda, as outlined in the UNGPs, is human rights due diligence. This broadly requires businesses to identify, prevent, mitigate and account for how the entities address human rights risks and impacts of their operations and business relationships including in supply chains. While there is no specific domestic legislation with respect to human rights due diligence in Australia, that may soon change due to the Australian Government's recent action to strengthen modern slavery and supply / value chain management and reporting obligations, for example by recommending in its recent report to include human rights due diligence as part of our modern slavery reporting requirements.<sup>145</sup> A federal Human Rights Act would complement efforts by the Attorney-General's Department and provide a further impetus for effective implementation on the ground.

With respect to supply and value chain management more broadly, by enacting a federal Human Rights Act, Australia would align itself with many of its trade partners, providing greater consistency and certainty across jurisdictions with respect to the meaning and application of rights based language that appears in domestic laws around the world. Trade agreements are increasingly being used to

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<sup>144</sup> Australian Human Rights Commission, Business and Human Rights, accessed 23 June 2023

<<https://humanrights.gov.au/our-work/business-and-human-rights/about-business-and-human-rights>>.

<sup>145</sup> Australian Government, Report of the statutory review of the Modern Slavery Act 2018 (Cth): The first three years (2023) <<https://www.ag.gov.au/sites/default/files/2023-05/Report%20-%20Statutory%20Review%20of%20the%20Modern%20Slavery%20Act%202018.PDF>>.



implement international human rights instruments and commitments including the Paris Agreement and the Sustainable Development Goals.<sup>146</sup> A failure to harmonise approaches in human rights may leave Australia lagging behind its contemporaries and less able to engage in substantive thematic issues in a financially competitive and complementary way.

Enacting a federal Human Rights Act would greatly improve and harmonise existing legislation with respect to modern slavery, wage theft, and promote Business and Human Rights by ensuring new laws and policies about how business is conducted will need to take a broad range of human rights into account.

#### **10.10.8. Economic, Social and Cultural Rights**

**A federal Human Rights Act represents an important opportunity for Australia to give full effect to its international obligations in respect of economic, social and cultural (ESC) rights, and to demonstrate Australia’s meaningful commitment to the full equivalence of ESC rights with civil and political rights.**

Australia is bound by the ICESCR , having signed the Covenant in 1973 and ratified it in 1975. However, there remains a gulf between Australia’s commitment to ESC rights at the international level and its incorporation of those rights into domestic law.

ALHR welcomes the Australian Human Rights Commission’s proposed inclusion of ESC rights within a federal Human Rights Act. However, ALHR endorses the submission and recommendations of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand) in calling for stronger ESC rights protection than is envisaged in the Commission’s position paper.<sup>147</sup>

Australia is obliged, pursuant to article 2(1) of the ICESCR, to progressively realise economic, social and cultural rights using the maximum available resources. This obligation is to be achieved by all appropriate means, including the adoption of legislative measures. ALHR notes the position taken by the Australian Human Rights Commission in its position paper, in which the Commission has ‘chosen not to require progressive realisation principles to be considered by the courts.’<sup>148</sup> ALHR submits that now is the moment for Australia to give full effect to its ICESCR obligations in respect of progressive realisation.

The protection of ESC rights is particularly important if Australia remains committed to meeting its ‘Close the Gap’ targets for First Nations peoples. At present, Australia continues to face deeply unequal outcomes in health, employment, housing and other socio-economic indicators between First Nations people and non-Indigenous populations. This persistent inequality has attracted the attention and concern of the UN Committee on Economic, Social and Cultural Rights.<sup>149</sup> The explicit protection

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<sup>146</sup> Cordonier Segger, Marie-Claire (2021) *Crafting trade and investment accords for sustainable development : Athena’s treaties*. First edition. Oxford: Oxford University Press.

<sup>147</sup> Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia’s Human Rights Framework* (June 2023).

<sup>148</sup> Australian Human Rights Commission, *Position Paper: A Human Rights Act for Australia* (2023), 128.

<sup>149</sup> United Nations Committee on Economic, Social and Cultural Rights, *Fifth Periodic Reports of States Parties: Review of the Report of Australia* (31 May 2017), Press Release at <https://www.ohchr.org/en/press-releases/2017/05/committee-economic-social-and-cultural-rights-reviews-report-australia>.

of ESC rights in a way that reflects the international legal scope and content of these rights and states' obligations, is an essential step towards achieving substantive equality in Australia.

As noted above within this submission, ALHR supports the inclusion of the following ESC rights in a federal Human Rights Act, as set out in the Australian Human Rights Commission position paper:

- Cultural rights, including the distinct protection of the cultural rights of First Nations peoples;
- The right to education, including the right of children to have access to free primary and secondary school education without discrimination and the right to access to further vocational education;
- The right to health, including the right to access physical and mental health services without discrimination and the right to emergency medical treatment;
- The right to work and other work-related rights, including the right to the free choice of trade, occupation or profession, the right to enjoyment of just and favourable conditions of work, and the right to strike in conformity with the law;
- The right to an adequate standard of living, including the right to adequate housing, protection from unlawful or arbitrary eviction;
- The right of access to adequate food, water and clothing; and
- The right to social security.

**ALHR reiterates its call to the Australian Government to ratify the Optional Protocol to the ICESCR.<sup>150</sup> This would allow individuals to access an international complaint mechanism to assert their rights under the treaty, in circumstances where all domestic remedies have been exhausted.**

**Finally, ALHR endorses the recommendation of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand) in respect of amendment of the *Australian Human Rights Commission Act 1986 (Cth)* to include the ICESCR in the definition of human rights,<sup>151</sup> so that the Covenant falls explicitly within the mandate of the Australian Human Rights Commission.<sup>152</sup>**

#### **10.10.9 Legislated statutory review**

**ALHR recommends that a federal Human Rights Act should explicitly 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.

#### **10.10.10 Resourcing**

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<sup>150</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UN Doc A/RES/63/117 (5 March 2009, adopted 10 December 2008).

<sup>151</sup> *Australian Human Rights Commission Act 1987 (Cth)* ss 3, 11.

<sup>152</sup> ESCR Network (Australia & Aotearoa/New Zealand), *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework* (June 2023), 28.

A federal Human Rights Act must be accompanied by adequate resourcing. Resourcing must include additional funding for the AHRC and delivery of 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, as part of any reforms to Australia’s human rights framework.

## 11. Thematic Case studies

ALHR commends to the Committee the Charter of Rights ‘101 Cases’,<sup>153</sup> and the ACT Human Rights Commission’s “20th anniversary of the Human Rights Bill: a collection of human rights case summaries”<sup>154</sup> for a detailed and compelling selection of case studies that illustrate the concrete benefits being delivered by the Human Rights Acts operating in Queensland, Victoria and the AC.

**We also provide the following brief selection of thematically grouped case studies to illustrate the benefits of legally articulating and protecting human rights in a comprehensive Human Rights Act:**

### Improving service delivery and policy formation

1. The ACT government has published guidelines to instruct government departments on how to consider the human rights protected in the ACT Human Rights Act in the development of legislation and policy. For example, the guide instructs public officials to consider the cultural rights protected by section 27 of the *Human Rights Act 2004* (ACT) when they are developing policies that have the potential to limit the ability of Indigenous or other ethnic groups to continue to take part in distinct cultural practices.<sup>155</sup>
2. The Victorian Charter requires that whenever a public authority uses contractors or other third parties to perform public functions on their behalf, the public authority must take steps to ensure they operate in a manner that is consistent with human rights. Accordingly, the Department of Justice’s Health Unit inserted a requirement into the model Health Service agreements that external service providers must comply with the human rights obligations under the Victorian Charter. Similarly, the Victoria Police have taken steps to ensure the external contractor responsible for the operation of the Melbourne Custody Centre must refrain from acting in a manner that is incompatible with human rights under the Victorian Charter.<sup>156</sup>
3. During the initial stages of the Bushfires Royal Commission all applications made by victims for permission to appear were denied. Advocates argued that the “right to life” in the Victorian Charter of Human Rights and Responsibilities brings with it the need for a proper investigation when people have died, and that the families of victims had a right to be part of that process. They also said that the “right to life” was relevant when looking at what public services could

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<sup>153</sup> Human Rights Law Centre, ‘Charter of Rights 101 Cases’ <<https://charterofrights.org.au/101-cases>>.

<sup>154</sup> ACT Human Rights Commission, 20th anniversary of the Human Rights Bill: a collection of human rights case summaries [https://hrc.act.gov.au/wp-content/uploads/2023/05/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL\\_A-COLLECTION-OF-20-HUMAN-RIGHTS-CASE-STUDIES\\_2023.pdf](https://hrc.act.gov.au/wp-content/uploads/2023/05/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL_A-COLLECTION-OF-20-HUMAN-RIGHTS-CASE-STUDIES_2023.pdf)

<sup>155</sup> Obligations on Public Authorities to act Consistently with Human Rights: [https://www.wa4hra.com.au/obligationson\\_public\\_authorities\\_to\\_act\\_consistently\\_with\\_human\\_rights](https://www.wa4hra.com.au/obligationson_public_authorities_to_act_consistently_with_human_rights)

<sup>156</sup> Using the Victorian Charter of Rights and Responsibilities available at <https://www.legalaid.vic.gov.au/using-victorian-charter-rights-and-responsibilities>

do better in the future. Following this advocacy victims were granted permission to appear before the Royal Commission to tell their stories.<sup>157</sup>

## A place to call home

1. A Victorian man suffering from physical disabilities and limited mobility continued to live in his family home after his mother had been admitted to 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.<sup>158</sup>
2. Following the death of her father and incarceration of her mother, a 23 year old woman agreed to be the guardian of her three younger siblings. She maintained their public housing tenancy and had rental payments deducted from her Youth Allowance payments. While overseas on a study tour, her Youth Allowance was cancelled due to the discontinuation of her enrolment. As a result she accrued significant arrears that she didn't receive notice of. The Department of Housing applied for a possession order after having issued a notice to vacate. The woman's advocates argued that the Department had failed to consider the rights of the young woman and her siblings protected in the Charter of Human Rights and Responsibilities Act. Instead of making a possession order, the Victorian Civil and Administrative Tribunal made an order that the young woman pay \$10 per week towards her rental arrears in addition to her rent.<sup>159</sup>
3. A refugee from Somalia was unable to attend a bail hearing due to the birth of his twin daughters. The man suffered from a serious drug dependency and the hearing was in relation to drug related offences. As a consequence of these events, he had to serve a one month prison sentence. While in prison, he was sent a notice of hearing as the Director of Housing had applied to evict him and his family from their house. He did not receive the notice nor attend the hearing and consequently the Director of Housing set a date to evict the family in two months. The man tried to explain his situation to the Office of Housing and was referred to a support program worker. The Homeless Persons' Legal Clinic represented the family at the tribunal hearing and argued that the Director of Housing had failed to properly consider the family's rights under the Charter and that its actions were breaching their rights. An agreement was reached setting aside the possession order and for the family to pay a lump sum and rent on an ongoing basis.<sup>160</sup>

## Protecting our children

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<sup>157</sup> Federation of Community Legal Centres, Victoria, Strengthening Victoria's Human Rights Charter, Submission to the Four Year Review June 2011.

<sup>158</sup> 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](http://www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf) (Case Study 63, p 36).

<sup>159</sup> Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 in HRLC Charter in Action [www.hrlc.org.au/files/VictorianCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](http://www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf) (Case Study 87).

<sup>160</sup> Ibid, *Case Study 81: Eviction of Parents and Newborn Twins Prevented*:

<<https://charterofrights.org.au/101-cases/2022/10/25/case-81-eviction-of-parents-and-newborn-twins-prevented>>.

1. A young Victorian girl had been abused. Her advocates used the Victorian Charter of Human Rights and Responsibilities Act, and in particular the right to the protection of family and children, to argue that she shouldn't be required to give evidence against the alleged perpetrators. They said that this right should be given proper consideration when determining whether a young person should be required to provide testimony. As a result the girl was not required to give evidence.<sup>161</sup>
2. A Victorian student with a learning disability was threatened with expulsion by his school due to his behavioural issues. His advocate outlined to both the school and to the Department of Education and Early Childhood Development the student's relevant human rights as protected in the Victorian Charter of Human Rights and Responsibilities. As a result of the communication, the boy was provided with support, which reduced his behavioural issues and consequently, he was allowed to stay on at the school.<sup>162</sup>
3. A teenager held in remand in youth detention wanted to see his family for his birthday. However, due to restrictions imposed to prevent the spread of COVID-19, family visits were postponed at the centre. Through conciliation in the QLD Human Rights Commission, the detention centre and the young person's mother agreed on a plan to maintain family contact during the pandemic. The young person talked to his family for one hour on a video call for his birthday, and once the restrictions eased his family was able to visit him in person.<sup>163</sup>
4. In 2017, proceedings were brought by teenagers against the Victorian government for breaches of the Victorian Charter in relation to their detention at an adult prison. The teenagers were frequently isolated for up to 23 hours a day in cells that were designed for adult men, regularly handcuffed for routine activities, capsicum sprayed during a prison disturbance, developed risks of depression, anxiety, cognitive problems, hypersensitivity and paranoia, or exacerbation of existing mental health problems. The Supreme Court of Victoria held that this conduct breached the rights of the child to protection in their best interests and rights of persons deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person. The Court further held that the limitation on the human rights imposed on the teenagers was not demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>164</sup>

## Domestic violence

1. The Victorian Charter of Human Rights and Responsibilities Act was used in a matter relating to the payment of rent and repairs to a property. The woman involved had been forced to flee the property due to domestic violence. The advocate successfully used the Charter in arguing

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<sup>161</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, in HRLC Charter in Action [www.hrlc.org.au/files/VictorianCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](http://www.hrlc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf) (Case Study 48).

<sup>162</sup> Victorian Equal Opportunity and Human Rights Commission at <https://www.humanrights.vic.gov.au/>

<sup>163</sup> Queensland Human Rights Commission, Human Rights Act Case Studies available at:

<https://www.qhrc.qld.gov.au/resources/case-studies/human-rights-case-studies>

<sup>164</sup> Obligations on Courts to interpret legislation consistently with Human Rights available at [https://www.wa4hra.com.au/obligationson\\_courts\\_to\\_interpret\\_legislation\\_consistently\\_with\\_human\\_rights](https://www.wa4hra.com.au/obligationson_courts_to_interpret_legislation_consistently_with_human_rights)

for the reopening of the matter after the limitation period had expired to protect the woman's rights.<sup>165</sup>

2. The Queensland Human Rights Act was used to assist a woman who sought a review of a Department of Education's decision to decline her application to home school one of her children because she had not provided her address. The woman and her children had moved to a new location to escape domestic violence and the woman did not disclose her address in order to keep her family safe. Queensland's Civil and Administrative Tribunal determined that the Education Act should be interpreted in a way that least infringes the child's right to education, the family's right to privacy, their right to protection of children and family and their right to equal protection of the law without discrimination. Accordingly, the Tribunal set aside the Department's decision and substituted it with a decision to grant the application to home school.<sup>166</sup>

## Helping people with disability

1. A woman who had mobility issues made a complaint to the QLD Human Rights Commission about the limited number of accessible parking spots at a bus terminal, and being issued with a number of fines for parking in other places. She said that on two occasions the bus driver refused to engage the ramp, requiring her to struggle up and down the bus stairs. The complaint was resolved on the basis that the transport service agreed to conduct an internal review of its policies and procedures about the use of ramps, and to provide a copy to all bus drivers employed by it. Employees were also required to attend training on the Anti-Discrimination Act and the Human Rights Act, and an internal training module on human rights and improving services to people with disability was introduced.<sup>167</sup>
2. A single mother living with cerebral palsy was at risk of having her one year old daughter taken from her by the Victorian Child Protection Service. The mother sought to demonstrate that, with the appropriate assistance of carers and the use of aids, she was both emotionally and physically competent to care for her daughter. An advocate was able to use the Victorian Charter principles to explain the woman's human rights to the Child Protection Service, through mediation in the Children's Court. These rights included recognition and equality before the law and protection of families and children. The Child Protection Service accepted that the mother had demonstrated her daughter was safe in her care and is no longer involved in their lives.<sup>168</sup>

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<sup>165</sup> Australian Lawyers for Human Rights: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, in Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006; in Charter of Rights in Action [www.hrc.org.au/files/VictorianCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](http://www.hrc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf) (Case Study 74, p 39).

<sup>166</sup> Case Notes - human rights, Queensland Human Rights Commission available at: <https://www.qhrc.qld.gov.au/resources/legal-information/case-notes-human-rights>

<sup>167</sup> Queensland Human Rights Commission, Human Rights Act Case Studies available at: <https://www.qhrc.qld.gov.au/resources/case-studies/human-rights-case-studies>

<sup>168</sup> Victoria's Charter of Human Rights and Responsibilities in Action Case studies from the first five years of operation [https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ab45dd31ae6cf2ed3804195/1521769952176/Victoria\\_nCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ab45dd31ae6cf2ed3804195/1521769952176/Victoria_nCharter_in_Action_CASESTUDIES_march2012.pdf)



3. A man living in an ACT residential aged care facility relied on a wheelchair to move around. Staff at the facility became concerned the man was a danger to himself and others when using his chair so they removed the batteries so the chair would not work. The man's advocate asserted that this breached his right to freedom of movement protected by the ACT's Human Rights Act. In response, and in recognition of the man's rights, the facility worked with the man and his advocate to find other, less restrictive, ways to ensure he was able to move about freely but safely. This included support for him to use the footpaths safely so he could travel from his home to the nearby shops when he wanted to.<sup>169</sup>

## Cultural rights

1. In Queensland, an Indigenous community leader and his family asserted their distinct cultural rights in a complaint against the Queensland Police Service (QPS). The cultural rights of Aboriginal and Torres Strait Islanders are expressly protected by Queensland's Human Rights Act, including the right to maintain distinctive spiritual, material, and economic relationship with the land and waters with which they hold a connection. Adrian Burragubba and his family were camping, practising their culture, and performing traditional ceremonies on a pastoral lease area when police officers claimed they were 'trespassing'. The police required them to pack up their equipment and leave within an hour. A complaint conciliated in the QLD Human Rights Commission resulted in the QPS agreeing to provide a statement of regret which was able to be shared publicly and which acknowledged that the events had caused embarrassment, hurt and humiliation for Mr Burragubba and his extended family. The QPS also committed to take cultural sensitivities into account in the future.<sup>170</sup>

## LGBTIQA+ rights

1. 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.<sup>171</sup>

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<sup>169</sup> Remedies for victims of human rights violations

[https://www.wa4hra.com.au/remedies\\_for\\_victims\\_of\\_human\\_rights\\_violations](https://www.wa4hra.com.au/remedies_for_victims_of_human_rights_violations)

<sup>170</sup> Queensland Human Rights Commission, "Aboriginal and Torres Strait Islander Case Studies" available at <https://www.qhrc.qld.gov.au/resources/case-studies/a-and-tsi-case-studies>

<sup>171</sup> Public Interest Law Clearing House: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 <[http://hrc.org.au/files/VictorianCharter\\_in\\_Action\\_CASESTUDIES\\_march2012.pdf](http://hrc.org.au/files/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf)> (Case Study 6).



## 12. Conclusion

In conclusion, ALHR applauds the Attorney-General and the Committee for its consideration and work towards the introduction of a federal Human Rights Act that protects the fundamental rights of everyone in Australia equally. As it stands, only 12.5 million Australians have explicit human rights protections, less than half of the total population of Australia.<sup>172</sup> Without federal legislation that comprehensively protects the human rights Australia has considered itself bound to, many within the country's jurisdiction remain subject to the good will of the government. As Detailed above, everyone's human rights can be subject to significant limitations, either for short or long duration without any meaningful and accessible redress for those impacts.

Human rights are for everyone, everywhere, all of the time and yet Australia's existing, fractured, selective and piecemeal protections remain ineffective in truly recognising the universal and inalienable application of human rights. Without the implementation of a comprehensive and harmonised federal Human Rights Act, this will continue to be the case.

Everyone within Australia deserves to learn about and enjoy their human rights on an equal basis with others. Human rights should not depend on a person's location within Australia and should only be subject to limitations that are lawful, reasonable, and justifiable in a democratic society. Those who have had their rights limited should have access to affordable and timely pathways for resolution, with the option to proceed further for a determination where resolution is not achieved.

ALHR is committed to working towards legislative protection of fundamental human rights within Australia and sees this Inquiry as a step towards this goal. ALHR commends the three states and territory that have, for some time, had local human rights legislation and believes that all three jurisdictions offer great learnings for the Inquiry and federal Parliament in enacting a long overdue comprehensive federal Human Rights Act.

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<sup>172</sup> Being the estimated populations of Victoria, Queensland and the Australian Capital Territory as at 2023.

**ALHR would be very pleased to appear before the Committee to provide further oral evidence.**

**If you would like to discuss any aspect of this submission, please email me at:**  
[president@alhr.org.au](mailto:president@alhr.org.au)

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'Kerry Weste', written over a light blue rectangular background.

Kerry Weste  
President  
Australian Lawyers for Human Rights