Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

A FEDERAL HUMAN RIGHTS ACT

DECEMBER 2023

THE CASE FOR A LEGISLATIVE HUMAN RIGHTS INSTRUMENT IN AUSTRALIA

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

ALA members regularly act to protect human rights. Whether we are acting for someone who has been injured in a car accident, unfairly detained, discriminated against or accused of a crime, our members are fighting to protect peoples' dignity and seek justice for wrongdoing. However, in jurisdictions without legislative human rights protections, including federally, most human rights remain largely unenforceable, and remedies for their breach unavailable.

For this reason, among the many others outlined in this position paper, ALA members are committed to advocating for the protection of human rights – that includes the introduction of a federal Human Rights Act.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1] The ALA office is located on the land of the Gadigal people of the Eora Nation.

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[1] <www.lawyersalliance.com.au>.

Contents

Introduction

Human rights are inalienable, universal and protect human dignity. They are based on centuries of common law and widespread international consensus.

Human rights are protected through the rule of law, which is itself a principle integral to many justice systems across the world. The rule of law encourages law makers and judges to protect human rights and to also offer remedies for any breaches of those human rights. The relationship between human rights and the rule of law has been described as "indivisible and intrinsic".[2]

Australia is the only Western democracy without a federal Human Rights Act, Bill of Rights or Charter of Rights. Polls, however, consistently show that an overwhelming majority of Australians support a legislative human rights instrument.[3]

The ALA strongly supports a federal legislative Human Rights Act, as recommended by the Australian Human Rights Commission (AHRC) in its December 2022 report, *Free and Equal – Position paper: A Human Rights Act for Australia* ('the *Free and Equal* report').[4] Such a legislative instrument would provide additional protection of human rights in Australia and enhance our democracy by building a stronger human rights culture in Australia. A federal Human Rights Act would give expression to important Australian values, such as equality, diversity, respect and inclusion.

A federal Human Rights Act would ensure that those who wield power within Australia's federal institutions are subjected to a code of conduct, in accordance with the rule of law, that would operate to prevent them from exercising power in such a way as to infringe upon the rights of people domiciled in Australia or under Australian jurisdiction. A Human Rights Act can be a powerful tool not only in keeping society diverse, fair, respectful and inclusive, but also being an essential adjunct to the institutions of parliamentary democracy and the common law.

A federal Human Rights Act would also give domestic effect to Australia's international human rights obligations, including those detailed in and enlivened by the following instruments:

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[2] United Nations, *Rule of Law and Human Rights* (Web Page) <www.un.org/ruleoflaw/rule-of-law-and-human-rights>.

[3] See: Human Rights Law Centre, 'COVID-19 sees huge increase in support for a Charter of Human Rights: poll' (Media Release, 9 September 2021) <https://www.hrlc.org.au/news/2021/9/7/covid-19-sees-huge-increase-in-support-for-a-charter-of-human-rights-poll>; Attorney-General's Department, *National Human Rights Consultation* (Report, September 2009) <https://apo.org.au/sites/default/files/resource-files/2009-10/apo-nid19288.pdf>.

[4] See: Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022).

- *Convention on the Elimination of All Forms of Racial Discrimination* (entry into force on 4 January 1969; entry into force for Australia on 30 October 1975);
- *International Covenant on Civil and Political Rights* (ICCPR; entry into force on 23 March 1976; Article 41 came into force on 28 March 1979; entry into force for Australia on 13 January 1980, except Article 41 which came into force for Australia on 28 January 1993);
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR; entry into force on 3 January 1976; entry into force for Australia on 10 March 1976);
- *Convention on the Elimination of All Forms of Discrimination against Women* (entry into force on 3 September 1981; entry into force for Australia on 27 August 1983);
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT; entry into force on 26 June 1987; entry into force for Australia on 7 September 1989) and the *Optional Protocol to the CAT* (entry into force for Australia on 15 December 2017);
- *Convention on the Rights of the Child* (CRC; entry into force on 2 September 1990; entry into force for Australia on 16 January 1991) and the two optional protocols to CRC:
    - *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (entry into force on 12 February 2002; entry into force for Australia on 26 October 2006);
    - *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (entry into force on 18 January 2002; entry into force for Australia on 2 August 2007);
- *Convention on the Rights of Persons with Disabilities* (entry into force on 3 May 2008; entry into force for Australia on 16 August 2008);
- *Convention in relation to the Status of Refugees* (1951), the *Convention relating to the Status of Stateless Persons* (1954), and the *Protocol relating to the Status of Refugees* (1967); and
- The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP; proclaimed by the General Assembly in 2007, supported by Australia on 3 April 2009).

Enacting a federal Human Rights Act in Australia would enable Australia's human rights framework to be better connected with developments in international human rights law and domestic human rights law in other common law countries, such as the United Kingdom (UK) and New Zealand. This would also have the effect of modernising our democracy and facilitating the development of Australia's human rights law jurisprudence.

Existing mechanisms to protect human rights in the federal context

Australia's parliamentary processes and legal system currently provide some protections for individual rights and a limited range of remedies where those rights are infringed. However, these protections are piecemeal and are located in a range of different pieces of legislation, regulations, parliamentary processes (including via the Parliamentary Joint Committee on Human Rights), the *Australian Constitution* and the common law. As a result, there are significant gaps in human rights protections within the legal framework which make it difficult to give effect to Australia's international human rights obligations.

These gaps would be largely addressed through the development of a federal Human Rights Act, which should protect a broad range of rights.

In addition, there is a need to strengthen the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), as well as to broaden the scope and the impact of statements of compatibility – noting especially the need to include compatibility with UNDRIP as part of the development of those statements of compatibility. This was recommended by the AHRC in 2022.[5]

[5] See: Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022) Chapter 13.

What human rights should be protected in Australia

A federal Human Rights Act would protect human rights in Australia, rights which are currently either not protected or which attract only limited protections.

There are a multitude of human rights which should be included in and protected by a federal Human Rights Act, including but not limited to the following rights which are detailed below:

- The rights of Aboriginal and Torres Strait Islander peoples;
- Whistleblower rights;
- The rights of migrants and asylum seekers; and
- The rights and freedoms of children in the criminal process.

We note there are a number of other important rights to be protected by a federal Human Rights Act, although we do not expand upon these below. These include protecting freedom of speech, the right to protest and the rights of people living with a disability/disabilities.

Rights of Aboriginal and Torres Strait Islander peoples

Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The introduction of a federal Human Rights Act provides a unique opportunity for the Commonwealth to codify the principles of UNDRIP into this new statute. By doing this, any federal Human Rights Act will better represent and protect the rights of Aboriginal and Torres Strait Islander peoples.

While the Federal Government formally announced endorsement of the UNDRIP on 3 April 2009, to date the Federal Government has not ratified UNDRIP into domestic law.[6]

UNDRIP provides the Australian Government with a framework that guides best practice recognition of the specific rights and needs of Aboriginal and Torres Strait Islander peoples. It is the most comprehensive international instrument on the rights of Indigenous peoples and is the product of almost 25 years of deliberation by UN Member States and Indigenous groups worldwide. UNDRIP offers a framework of minimum standards to honour the dignity and well-being of Indigenous

[6] Australian Lawyers Alliance, Submission to the Senate Legal and Constitutional Affairs References Committee, *Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (22 June 2022) 6 <https://www.lawyersalliance.com.au/documents/item/2274>.

peoples globally, and it elaborates on existing human rights, standards and freedoms as they apply to Indigenous peoples. It is important to note that Indigenous peoples, including members of Aboriginal and Torres Strait Islander communities, were involved in the drafting of UNDRIP.

A federal Human Rights Act should reflect and protect the rights that are central to UNDRIP. The key rights and principles enshrined in UNDRIP centre on the following: the right to self-determination; participation in decision-making; respect for and protection of culture; equality; and non-discrimination.

When incorporating the above rights and principles into a federal Human Rights Act in Australia, it is essential that Aboriginal and Torres Strait Islander peoples participate in the development of any such content and are provided with the opportunity to participate in the decision-making process.

Protection of cultural heritage rights

Codifying the principles of UNDRIP into the contents of a federal Human Rights Act should also deliver stronger cultural heritage rights and protection. Australian law is currently inadequate in protecting both tangible and intangible Aboriginal and Torres Strait Islander cultural heritage.

A key example of this was Rio Tinto's destruction of two sites of sacred and cultural importance at Juukan Gorge in Western Australia in May 2020. Juukan Gorge was a unique and sacred Aboriginal site with signs of continual occupation for hundreds of generations. Although a momentous loss of cultural heritage, this demolition was technically permitted under the law at that time, which allowed for destruction, damage or alteration to an Aboriginal site if the Minister consented.[7]

A further example can be seen in the problematic nomination process for a proposed radioactive waste facility at Wallerberdina Station in the Flinders Ranges. The Adnyamathanha Traditional Lands Association, the peak body for the Adnyamathanha people, passed several resolutions making clear their opposition to the radioactive waste facility due to the location of the proposed facility being on culturally important sites. Despite this, the Commonwealth failed to acknowledge those resolutions in their decision-making and a multi-year legal and political battle ensued, causing significant distress to the community.

The above examples show that proper consultation with Aboriginal and Torres Strait Islander peoples remains essential in identifying culturally important sites, and this consultation must be

[7] *Aboriginal Heritage Act 1972* (WA) s 18.

done in meaningful and culturally appropriate ways. Incorporating two specific principles enshrined within UNDRIP into a federal Human Rights Act will be crucial in ensuring proper and meaningful consultation around cultural heritage. These are:

> *Article 11: Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites*… and
>
> *Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them*.

Urgent action is required at a national level to preserve Aboriginal and Torres Strait Islander cultural heritage in Australia. Aboriginal and Torres Strait Islander voices must be leading this process.

The inclusion of the right to the protection of cultural heritage in a federal Human Rights Act would create a clear requirement for decisionmakers to consider the interests and rights of relevant traditional landowners in decisions affecting cultural heritage. Further, it will help ensure that proper consultation processes and heritage assessments are conducted in relation to protecting this cultural heritage.

Addressing violence against Aboriginal and Torres Strait Islander women and children

There is a crisis which has unfolded across Australia concerning Aboriginal and Torres Strait Islander women and children who are missing or who have been murdered – those whose disappearance or murder is recorded, and those whose disappearance or murder goes unreported or not accepted by authorities.[8] There are several structural and institutional changes that need to occur to address this national crisis as a matter of urgency.

A federal Human Rights Act would help to ensure that the Commonwealth Parliament develops legislation, policies and programs which are compatible with human rights protected under that federal Human Rights Act, including those designed to reduce violence toward and increase the safety of Aboriginal and Torres Strait Islander women and children.

What has transpired in Victoria since the Victorian Government passed the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ('the Victorian Charter') offers a clear demonstration of the important role a legislative human rights instrument can play in both:

- responding to violence against women, especially the underlying causes of violence; and
- ensuring the rights of Aboriginal and Torres Strait Islander peoples.

First, legislative protection of human rights through the Victorian Charter directly prompted the Victorian Government to frame its 10-year plan to address violence against women, entitled *A Right to Respect: Victoria's Plan to Prevent Violence against Women 2010–2020* ('*A Right to Respect*'), through the lens of protecting and promoting human rights.[9] The Victorian Charter and the rights enshrined therein were very influential on the plan's development,[10] implementation strategies,[11] and required reporting mechanisms.[12] As expressed in *A Right to Respect*:[13]

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[8] See Bridget Brennan et al, 'How many more?', *ABC News* (online, 24 October 2022) <https://www.abc.net.au/news/2022-10-24/murdered-and-missing-indigenous-women-four-corners/101546186>.

[9] Victorian Equal Opportunity and Human Rights Commission, cited in: Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better* (Report, 2022) 40 <https://www.hrlc.org.au/reports-news-commentary/2022/6/2/charters-of-human-rights-make-our-lives-better>.

[10] Government of Victoria, *A Right to Respect: Victoria's Plan to Prevent Violence against Women 2010–2020* (2009) 10 <http://www.daru.org.au/wp/wp-content/uploads/2013/06/a-right-to-respect-victorias-plan-to-prevent-violence-against-women-2010-2020.pdf>.

[11] Ibid 33.

[12] Ibid 27.

[13] Ibid 22.

> *The Victorian Charter of Human Rights and Responsibilities Act 2006 is one simple but important law that sets out our freedoms, rights and responsibilities. It imposes a positive duty on government to ensure that our work in preventing and reducing violence against women is consistent with the human rights that are contained in the Charter. It commits government to addressing violence against women not only through a criminal justice and service system response but also through fostering an 'inclusive human rights culture' of non-violence and gender equity.*

The Victorian Government's legislated duty to protect and promote human rights, as part of the Victorian Charter,[14] also formed the basis for the First Peoples' Assembly of Victoria and the Victorian Government establishing the Yoorrook Justice Commission ('Yoorrook') in May 2021.[15]

Yoorrook is the first formal truth-telling body for First Nations peoples in Australia,[16] which has the powers of a Royal Commission but "is led by First Peoples and is conducted in line with First Peoples' ways of knowing, being and doing".[17] Yoorrook continues to explore past and ongoing injustices experienced by Aboriginal and Torres Strait Islander peoples since colonisation, and will ultimately make recommendations "for healing, system reform and practical changes to laws, policy and education, as well as matters to be included in future treaties".[18] With its strong connection to the Victorian Charter, Yoorrook employs a "rights-based analytical framework to assess systemic injustices",[19] and seeks to promote human rights, two of which are freedom from violence (including sexual violence) and access to justice.[20]

The above case study of Victoria demonstrates that legislative protection of human rights provides a crucial framework for responding to violence against women, including Aboriginal and Torres Strait Islander women; ensuring the rights of Aboriginal and Torres Strait Islander women and children; and empowering Aboriginal and Torres Strait Islander communities to heal through truth-telling and to seek justice.

A federal Human Rights Act – if it addresses rights concerning being free from violence and if that federal Human Rights Act is utilised to its full extent – would greatly assist the Commonwealth Government in responding appropriately to address violence toward Aboriginal and Torres Strait Islander women and children, as well as to ensure their safety.

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[14] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2).
[15] See: Governor of Victoria, *Letters Patent: Yoorrook Justice Commission* (12 May 2021) 1 <https://yoorrookjusticecommission.org.au/key-documents>.
[16] Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 22.
[17] Ibid 5.
[18] Yoorrook Justice Commission, *What is Yoorrook?* (Information Sheet 1, March 2022) 1.
[19] Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 22.
[20] Ibid 26.

Whistleblower rights

The protection of whistleblowers is essential for promoting integrity, accountability and trust in both public and non-public institutions.

Public sector whistleblowers perform an important function for the community, ensuring that public officials can truly be held to account if they operate outside the confines of the law. Private sector and not-for-profit sector whistleblowers perform similarly significant functions in those respective domains.

Despite that, the victimisation of whistleblowers – including but not limited to the termination of their employment, reputational damage and even prosecution – too often follows whistleblower disclosures.

Comprehensive protections for whistleblowers are thus essential to support whistleblowers, keep them safe, and honour their right to freedom of expression – as enshrined in international law through both the *Universal Declaration of Human Rights* and the ICCPR.[21]

In 2023, the Commonwealth Parliament enacted amendments to the *Public Interest Disclosure Act 2013* (Cth). At the time of writing, the Attorney-General's Department is consulting on further public sector whistleblower reforms, including on the establishment of a Whistleblower Protection Authority or Commissioner.[22]

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[21] See: *Universal Declaration of Human Rights*, article 19; *International Covenant on Civil and Political Rights*, article 19(2).

[22] Attorney-General's Department, Australian Government, *Public sector whistleblowing stage 2 reforms* (Web Page, 16 November 2023) <https://consultations.ag.gov.au/integrity/pswr-stage2>.

There have also been some reforms to the various other whistleblower protections frameworks,[23] which have contributed to what is a patchwork of inconsistent protections for whistleblowers in Australia and which have underscored the need for harmonisation with one legislated whistleblower protections framework applicable to public, private and not-for-profit sectors.

A federal Human Rights Act would assist in protecting core rights relevant to whistleblowers, such as the right to freedom of expression, which would be helpful for whistleblowers when internal processes within federal agencies or institutions fail to protect whistleblower rights. This would complement recent reforms to strengthen the *Public Interest Disclosure Act 2013* (Cth) and the future establishment of a Whistleblower Protection Authority or Commissioner.

Migrants and asylum seekers

Better and more humane outcomes for migrants and asylum seekers could flow from the introduction of a federal Human Rights Act in Australia.[24] A federal Human Rights Act should include rights and freedoms which can then be activated to address matters including:

- children being locked up in immigration detention;
- inadequate access to healthcare and treatment for migrants and asylum seekers;
- the indefinite detention of stateless persons, which the High Court of Australia has affirmed would be addressed with a federal Human Rights Act in Australia;[25]
- sending migrants and asylum seekers to offshore detention facilities, especially where there is no intent of actually processing their applications or confirming their refugee status but where the use of offshore detention facilities is intended to act as a deterrent to others who may be contemplating coming to Australia; and
- the well-documented harm done to women and children in particular in Australia's detention centres – both onshore and offshore (including Manus and Nauru) – including as a result of poor living conditions, a lack of access to education, and the aforementioned limited access to healthcare.

[23] See, eg, The Treasury, Australian Government, *Response to PwC – whistleblower protections* (Web Page, 4 October 2023) <https://treasury.gov.au/consultation/c2023-444750>; Australian Lawyers Alliance, Submission to The Treasury, *Response to PwC – Whistleblower protections: Exposure Drafts of the Treasury Laws Amendment (Measures for Consultation) Bill 2023 (Cth) and Treasury Laws Amendment (Measures for Consultation) Regulations 2023 (Cth)* (4 October 2023) <www.lawyersalliance.com.au/documents/item/2580>.
[24] See more: Submissions by Claire O'Connor SC, attached to the ALA's submission to the Inquiry into Australia's Human Rights Framework (30 June 2023) <www.lawyersalliance.com.au/documents/item/2499>.
[25] *Al Kateb v Godwin* [2004] 219 CLR 562 (Gleeson CJ and McHugh J).

Rights and freedoms of children in criminal process

The crisis of child mass incarceration

A federal Human Rights Act should include better protection of the rights of children, including those in prison or youth detention.

The over-incarceration of Aboriginal and Torres Strait Islander youth and children (and related deaths in custody) is a national crisis and a direct violation of guarantees under the *Universal Declaration of Human Rights*, the CRC and UNDRIP.

The UN's CRC remains binding on the Federal Government at an international level. Whilst the position is more complex with respect to state and territory laws that breach international treaty obligations, the general rule under international law is that a country cannot rely on its domestic law as a reason for breaching its international obligations.[26]

Australia was a leading participant in the extensive process of consultation which was undertaken prior to ratification of the CRC and, in the drafting of key authoritative instruments that are used to inform the contents of the CRC including the:

- *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (Beijing Rules).
- *United Nations Guidelines for the Prevention of Juvenile Delinquency 1990* (Riyadh Guidelines).
- *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty 1990*.

In respect of sentencing children, the CRC provides very specific guidelines including the principle of proportionality which includes an obligation to "ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".[27]

Adopting the principle of proportionality means that:

- A sentence must be proportionate *both* to the seriousness of the offence and to the circumstances of the offender, including his or her age, physical and mental health, family

[26] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27; see also, Ian Brownlie, *Principles of Public International Law* (4th ed, 1990) 35-36.
[27] Australian Human Rights Commission, *Human Rights Brief No. 2*: *Sentencing Juvenile Offenders* (Web Page) <https://humanrights.gov.au/our-work/human-rights-brief-no-2#D>.

and socio-economic background, cultural affiliations, intellectual development, and level of educational attainment.

- The sentencer must make the decision in the individual case. Beijing Rule 16.1 (used to inform the content of the CRC) sets out the obligation to obtain 'social inquiry reports' prior to sentencing and that the sentencer 'should be informed of relevant facts about the juvenile, such as social and family background, school career, education experiences etc.'[28]

Laws providing for mandatory detention of young people who criminally offend violates this and other fundamental principles under the ICCPR and CRC. For example, the principle of individualised sentencing means that mandatory sentences of any kind, many bail laws and detention contravene the CRC.[29]

Raising the age of criminal responsibility is a key measure in reducing the rate of incarceration of young people, who by accepted legal principle, should only be detained as a last resort. Currently, the minimum age of criminal responsibility in Australia is 10 years. This is in breach of international human rights standards and puts Australia out of step with much of the rest of the world – the worldwide median age of criminal responsibility is 14 years.[30]

Several studies confirm that imprisonment generally has a 'criminogenic' effect because of difficulties adjusting to life post-incarceration, stigma making it difficult for people released from prison to find employment or housing, weakened links with families and friends, and exposure to older people in prison that may provide an 'education in crime' and build networks with older people who criminally offend.[31] In 2020, close to 600 children aged 10 to 13 years were locked away in prisons across Australia and many more were pushed through the criminal legal system.[32]

Aboriginal and Torres Strait Islander children are disproportionately impacted by laws that imprison them. In 2020, 65 per cent of children in detention, some as young as 10 years old, identified as Aboriginal or Torres Strait Islander.[33] The mass imprisonment of Aboriginal and Torres Strait Islander

[28] Ibid.
[29] Ibid.
[30] Australian Human Rights Commission, National Children's Commissioner, *Children's Rights Report 2016*, (Report No 187, 29 November 2016) <https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>.
[31] Australian Government, Productivity Commission, *Australia's Prison Dilemma* (Research Paper, October 2021) 15 <pc.gov.au/research/completed/prison-dilemma>.
[32] Sophie Trevitt, Human Rights Law Centre, 'Australian governments continue to fail kids by refusing to raise the age at which children can be locked in prison' (Media Release, 27 July 2020).
[33] Lorena Allam, 'Jailing of nearly 500 children aged 13 and under a 'failure' by Australia's top legal officers, advocates say', *The Guardian* (online, 27 July 2021).

children is a national crisis that must be addressed by reconsidering outdated notions of retributive punishment that leave little room for understanding the health and welfare implications of intergenerational trauma and incarceration.[34]

Incorporating the CRC's principles and the aforementioned associated international instruments into domestic legislation through a federal Human Rights Act has the potential to create a positive and progressive impact on the value and role of human rights in Australian society. In addition, Australia's diversionary programs and justice reinvestment goals could be further enhanced by a cohesive framework of established human rights principles enacted in federal legislation.

Delivering on the rights of children under the CRC through a federal Human Rights Act offers a positive step towards actualising the human rights of children in Australia, while also providing constructive guidance in moving towards a rehabilitative approach to justice.

A stain on our record - Northern Territory's Don Dale prison

Article 37(b) of the CRC states:

> *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

While the CRC has intended detention to be a measure of last resort, with each case to be considered individually and sentencing to be proportionate to the circumstances of the young person who has offended as well as of the offence, growing numbers of children in prison prove that Australia is a far cry from adherence to its international obligations.

The incarceration of Aboriginal and Torres Strait Islander children in the condemned youth detention facility known as Don Dale, continues unabated in Darwin. There is currently a record high number of 'prisoners', with some as young as 10 and 11 years of age, and many (if not) all being Aboriginal or Torres Strait Islander.[35]

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[34] See: David McCallum, 'Law, Justice, and Indigenous Intergenerational Trauma—A Genealogy' (2002) 11(3) *International Journal for Crime, Justice and Social Democracy* 165–177.

[35] Office of the Children's Commissioner, Northern Territory, *Don Dale Youth Detention Centre Monitoring Report* (No. 461, 6 October 2021); Lorena Allam, ''System is broken': all children in NT detention are Aboriginal, officials say", *The Guardian* (online, 31 May 2019).

Don Dale was originally an adult maximum-security prison, repurposed as a youth detention centre in 2015 and became the subject of a 2017 royal commission after distressing footage of the treatment of juvenile detainees was broadcast on the ABC, showing the use of restraints, strip searches, teargas and spit hoods.

While the Royal Commission into the Protection and Detention of Children in the Northern Territory ('Royal Commission') found that the facility was 'wholly inappropriate' for children and recommended it be closed, the Northern Territory Government declared acceptance of all but 10 of the 227 Royal Commission's recommendations.

The Royal Commission found that the Northern Territory's detention system failed to uphold basic binding human rights standards in the treatment of young people who were denied their basic needs such as water, food and use of toilets.[36]

A 2022 article referred to the following example:[37]

> *Billy spends twenty to twenty-two hours each day on his own in that cell, released for only fifteen minutes every four hours, to sit in a concrete yard in the company of one other child. There's virtually no sport or recreation available and little education. Most, if not all the children held in Don Dale, require therapeutic, trauma-informed care from qualified and experienced staff. This was the basis of three White/Gooda Royal Commission recommendations (2017): 16.7, 19 and 28.2. What they get is trauma-compounding. Note again, Billy is only eleven years old.*
>
> *Back in 2011, then-CEO of NT Adult Corrections, Ken Middlebrook, described Berrimah Jail in his evidence to a coronial inquest as being 'only fit for a bulldozer'. I've been through the place. It's derelict, all crumbling concrete and rusting steel mesh, with a dilapidated basketball court with broken hoops. Most of the staff are inadequately qualified to work effectively with the troubled Indigenous child inmates. This is barbarism. And yet it continues unabated. We have moved backward. We have become backward.*

According to data provided by the Department of Territory Families, Housing and Communities, there were 54 incidents of self-harm between July 2021 and December 2021 inside Don Dale – a more than 500 per cent increase from the corresponding period in 2020, when there were eight instances of self-harm reported.[38]

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[36] See: *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vol 4.
[37] John B. Lawrence SC, 'Indigenous child abuse continues in Australia,' *Arena* (online, 29 June 2022).
[38] Steve Vivian, 'Self-harm incidents inside Don Dale spark intervention of NT Children's Commissioner,' *ABC News* (online, 10 June 2022).

For those who witness and hear about these deaths, there is a compounding effect of trauma that must not be ignored. For example, a First Nations boy attempted to take his life by stabbing himself in the stomach and, days later, three other children in Don Dale were reported to have been hospitalised after self-harming.[39]

Despite growing concern, conditions continue to be completely unacceptable for the detention of children.[40]

The incarceration of children and the associated violence that children experience in prison is not only immoral, but unlawful, and a gross form of institutionalised violence experienced predominantly by Aboriginal and Torres Strait Islander young peoples and children.

While the Royal Commission recommended that the Northern Territory Government close the centre and replace it with a new purpose-built facility, Don Dale prison remains open. It is operated by the Department of Territory Families, Housing and Communities. The Department owes a duty of care towards young people in Don Dale, along with the standards set out in various international legal conventions as signed and ratified by Australia.[41]

The choice to continue along the path towards mass incarceration of Aboriginal and Torres Strait Islander children is a choice which denies their basic human rights.

[39] Amanda Parkinson and Zizi Averill, 'Self-harm and suicide rates double across Northern Territory detention centres', *NT News* (online, 6 July 2022) <https://www.ntnews.com.au/news/indigenous-affairs>.
[40] Lorena Allam, '"Is it really going to take a death?": legal advocates say Don Dale must be shut down', *The Guardian* (online, 10 June 2022).
[41] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Res 45/113, UN Doc (adopted 14 December 1990); *United Nations Convention on the Rights of the Child*, 1577 UNTS 3 (adopted 2 September 1990).

Elements of a Human Rights Act

In its *Free and Equal* report, the AHRC provides a model for a federal Human Rights Act and an explanation of a federal Human Rights Act's components and associated reforms.

The ALA broadly endorses the AHRC's model, with some specific exceptions regarding how 'public authority' should be defined (namely, to include courts as a 'public authority') and regarding notification to Parliament regarding incompatible laws.

A federal dialogue model

The model of human rights protection that best suits Australia's system of parliamentary democracy – including maintaining the sovereignty of Parliament – is a federal Human Rights Act which follows a dialogue model of human rights protection. This is similar to what exists in the UK, New Zealand, Victoria, the Australian Capital Territory (ACT) and Queensland.

Such a Human Rights Act in the federal context could provide additional human rights protections to all people in Australia in four ways:

1. The federal Human Rights Act would require the courts to interpret all existing legislation and regulations in a manner that is compatible with the protected human rights;
2. The federal Human Rights Act would require that when new legislation and regulations are introduced into the Commonwealth Parliament, they are to be accompanied by a Statement of Compatibility in which the relevant Minister is required to certify that the proposed legislation/regulation is compatible with human rights;
3. The federal Human Rights Act would require all public authorities to act in a manner that is consistent with the protected human rights, or in making a decision to take into account the protected human rights. The definition of a 'public authority' would include a public or private body whose functions include functions of a public nature. The phrase 'functions of a public nature' includes functions of a regulatory nature. This would mean that all federal regulatory bodies would have obligations to act compatibly, and make decisions which are compatible, with the rights protected in the federal Human Rights Act; and
4. The federal Human Rights Act would require all non-government organisations that perform functions of a public nature to comply with the human rights protected by the federal Human Rights Act.

A comprehensive and encompassing definition of 'public authority'.

The courts as a 'public authority'

The AHRC's proposed definition of 'public authority' includes a "public body with powers or functions under Commonwealth law",[42] including "[c]ourts when acting in an administrative capacity, and where the Act applies to the court's own procedures."[43]

This reflects a similar approach to that which was taken in the Victorian Charter,[44] the ACT's *Human Rights Act 2004* ('the ACTHRA'),[45] and Queensland's *Human Rights Act 2019* ('the QHRA').[46]

This is a different approach to what was taken in the UK *Human Rights Act 1998* ('UK HRA'),[47] and the New Zealand *Bill of Rights Act 1990* ('NZBORA').[48] In both the UK HRA and NZBORA, the courts are included within the definition of 'public authority'. It is not limited to 'administrative capacity'.

The underlying rationale for the Victorian Charter, the ACTHRA and the QHRA not following the approach of the UK HRA and the NZBORA was because the High Court has determined that in Australia there is a unified common law which is not susceptible to direct influence by legislation in any one state.[49] The view was taken that inclusion of the courts within the definition of 'public authority' would create an obligation on the courts to interpret the common law in a manner compatible with human rights (as per the interpretative function), and that this would be inconsistent with the *Judiciary Act 1903* (Cth) and arguably would be struck down by the High Court.[50]

This problem does not arise for a federal Human Rights Act as a federal legislative Human Rights Act would not offend the principle of the unified common law across all states and territories. Accordingly, the courts should be included within the definition of public authority in their own right

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[42] Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022) 149.
[43] Ibid.
[44] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(j).
[45] *Human Rights Act 2004* (ACT) s 40(2)(b).
[46] *Human Rights Act 2019* (Qld) s 9(4)(b).
[47] *Human Rights Act 1998* (UK) s 6(3)(a).
[48] *Bill of Rights Act 1990* (NZ) s 3(a).
[49] See: *Lipohar v The Queen* (1999) 200 CLR 485; *Esso Australia v The Commissioner of Taxation* (1999) 183 CLR 10.
[50] Victorian Human Rights Consultation Committee, Victoria Department of Justice, *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee* (November 2005) 59.

in a federal Human Rights Act as per the NZBORA and UK HRA, and not limited to 'administrative capacity'.

Inclusion of the courts within the definition of 'public authority' in this way would create an obligation on the courts to develop, interpret and apply the common law in a manner consistent with human rights values (in addition to their statutory interpretation obligations). Moreover, to exclude the courts from the definition of 'public authority' significantly narrows the opportunity for a federal Human Rights Act to have indirect horizontal application to non-government organisations through the radiating effect of the courts developing, interpreting and applying the common law in a human rights-compatible manner.

According to Swiss human rights academic Georg Sommeregger, the principle of indirect horizontal effect performs a deft 'balancing act', recognising the increased power and influence of private actors, but not 'falling into the abyss of an annihilation of the private sphere'.[51] He states that under indirect horizontal effect the courts play an essential screening role in interpreting the civil law in

[51] Sommeregger, Georg (2005), 'The Horizontalization of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere via Legislation', Chapter Three in A. Sajo and R. Utiz, *The Constitution in Private Relations: Expanding Constitutionalism*, Eleven International Publishing (2005) 41, referred to in Louis Schetzer (2018) 'Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services' (Faculty of Law, University of NSW, February 2018) 52-53.

light of constitutional values, before any obligations extend to individuals.[52] This view is shared by British constitutional law academic Dawn Oliver, who also supports the courts carrying out their interpretive functions under human rights charters to provide some human rights protection against actions of non-state actors.[53]

An alternative approach to achieve the indirect horizontal effect referred to above would be to expressly provide that the federal Human Rights Act:

a. applies to a law of the Commonwealth whether made before or after the commencement of the federal Human Rights Act; and

b. applies to the common law as it applies in Australia.

The meaning of 'public authority' – what are 'functions of a public nature'

A federal Human Rights Act with a definition of a 'public authority' that includes a public or private body whose functions include functions of a public nature would also require all non-government organisations that perform functions of a public nature to comply with the human rights protected by the federal Human Rights Act.

The federal Human Rights Act should provide a non-exhaustive list of factors and indicia that may indicate that the organisation is performing a function of a public nature, similar to what is provided in section 4(2) of the Victorian Charter, section 40A(1) of the ACTHRA and section 10(1) of the QHRA. This list should include the following:

- Whether the function is conferred on an entity under a statutory provision;
- Whether the function is connected to or generally identified with the functions of government;
- Whether the function is of a regulatory nature;
- Whether the entity is publicly funded to perform the function; and
- Whether the entity is a government-owned corporation.

[52] Ibid.

[53] Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] *Public Law* 476, 492-493, referred to in Louis Schetzer (2018) 'Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services' (Faculty of Law, University of NSW, February 2018) 53, Chapter 2.

Functions of a regulatory nature

A federal Human Rights Act which requires all public authorities to act in a manner that is consistent with the protected human rights, or in making decisions to take into account the protected human rights, needs a detailed and comprehensive definition of what is a 'public authority'. This definition should include a public or private body whose functions include functions of a public nature. The phrase 'functions of a public nature' should be defined to include functions of a regulatory nature. This would mean that all federal regulatory bodies would be required to act compatibly, and make decisions which are compatible, with the rights protected in the federal Human Rights Act.

The operation of government and statutory regulatory schemes that govern the licensing, accreditation or regulation of non-government service providers is a mechanism by which government can secure human rights compliance from non-government service providers undertaking contracted-out services. Where those schemes operate pursuant to legislation or are operated by a government department or agency, as 'core' public authorities they are required to comply with human rights obligations. Given the guidance that has been specified in the Victorian Charter,[54] the ACTHRA,[55] and the QHRA,[56] it is likely that any statutory or private regulatory schemes are public authorities when performing functions of a regulatory nature.

A similar provision in a federal Human Rights Act would mean that the regulatory body governing the provision of aged-care services, currently the Australian Aged Care Quality and Safety Commission ('the Commission'), would have obligations to act compatibly, and make decisions that are compatible, with the rights protected in the federal Human Rights Act. Accordingly, in fulfilling its own public authority human rights obligations, the Commission would need to include requirements for human rights compliance as a precondition for licensing or industry accreditation, including requirements for annual reporting of human rights compliance by organisations in order to maintain their licensing or accreditation status. A failure to adhere to required human rights standards would have adverse consequences for the organisations themselves, including possible cancellation of contracted arrangements or punitive responses from the regulator.

Similarly, the National Disability Insurance Scheme Quality and Safeguards Commission would have obligations to act compatibly, and make decisions which are compatible, with the rights protected in the federal Human Rights Act.

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[54] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2)(c).
[55] *Human Rights Act 2004* (ACT) s 40A(1)(c).
[56] *Human Rights Act 2019* (Qld) s 10(1)(c).

A function is connected to or generally identified with the functions of government

The phrase 'connected to or generally identified with the functions of government' requires further legislative guidance in order to reduce uncertainty and confusion amongst non-government organisations as to whether they are public authorities subject to human rights obligations. Section 10(3) of the QHRA and section 40A(3) of the ACTHRA list particular functions that are defined as being of a public nature. The statutory eight-year review of the Victorian Charter recommended that the Charter be amended to include a similar provision. The review noted that such a provision was necessary given that several non-government organisations experienced continuing uncertainty about whether they are functional public authorities. The review noted that this was a barrier to the incorporation of the Charter in the day-to-day work of these organisations and inhibited the development of a human rights culture within those organisations.[57]

The clarification of the phrase 'function of a public nature' assists in providing greater certainty to non-government organisations that perform public functions as to their obligations under the legislation. A federal Human Rights Act should include a similar provision to section 10(3) of the QHRA and section 40A(3) of the ACTHRA that lists particular functions that are defined as being of a public nature. For the federal Human Rights Act this should include:

- prison and other places of detention or correctional facilities;
- emergency services;
- public health services;
- public disability services;
- aged care services;
- public education, including public tertiary education and public vocational education;
- public housing and Commonwealth-funded housing support services;
- public transport; and
- the provision of water supply.

[57] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 64-65.

The meaning of 'public authority' – including an 'opt-in' provision

A federal Human Rights Act should also include a provision that enables an entity to request the Federal Attorney-General to declare that the entity is subject to the human rights obligations of a public authority under the human rights charter (that is, an 'opt-in' provision). Such a provision, if promoted well and related to government contracting and tender processes, could provide a vehicle by which businesses and community organisations are encouraged to respect human rights and adhere to human rights compliant conduct.

The original intention for the section 40D 'opt-in' provision in the ACTHRA was to encourage voluntary compliance with human rights standards across the private sector. However, none of the seven organisations that have voluntarily agreed to be subject to the ACTHRA under section 40D could be regarded as a private sector organisation. Each organisation is a non-government, not-for-profit organisation that has a long-standing commitment to human rights values. According to Dr Louis Schetzer's doctoral field research involving each of these organisations, the organisations exhibited exceptional practice in terms of operationalising human rights standards throughout their policies and activities. Human rights practices were considered to be embedded in the culture and service practices of these organisations.[58]

While section 40D has not as yet attracted private sector organisations to opt-in to the human rights obligations as originally intended, the 'opt-in' provision has had an important influence in the development of a human rights culture within the ACT. The organisations who have opted in provide an example to other organisations in terms of the practical incorporation of human rights practice into their operations. Within a limited budget, each organisation was able to audit and review its policies, operations and procedures to ensure that the organisation fulfilled its human rights obligations under the ACTHRA. The organisations considered that by embedding human rights standards into their policies and operations, the quality of their service delivery to service users was improved. Moreover, the organisations noted that by opting-in to the ACTHRA, they secured greater certainty regarding their human rights obligations under the ACTHRA.[59] The example provided by these not-for-profit opt-in organisations in the ACT indicates that the process of implementing a human rights-compliant business model for service delivery does not involve a significant or overly burdensome financial cost and can result in significant benefits for the organisations concerned.

[58] 'The ACT Human Rights Act – How it has been applied by non-government organisations' (Chapter 11) in Louis Schetzer (2018), 'Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services' (Faculty of Law, University of NSW, February 2018).
[59] Ibid 289.

An 'opt-in' provision could provide government with a further tool to encourage business and community organisation compliance with human rights. The Commonwealth Government could develop a government tender pre-qualification process in which prospective tenderers for government contracts have to satisfy, among other things, their capacity to adhere to the federal Human Rights Act. Organisations that voluntarily elect to be subject to the federal Human Rights Act pursuant to the 'opt-in' provision could be provided with an exemption to this requirement.

Interpretation and limitation of rights

A legislative federal Human Rights Act can provide a formula by which human rights are balanced against each other and other competing public interests. This is achieved by a provision that sets out the circumstances in which a human right can be limited. The legislative human rights instruments in New Zealand, Victoria, the ACT and Queensland all contain a provision which provides that human rights can be subject only to reasonable limits that are justifiable in a free and democratic society. This is similar to the limitations provision contained in the Canadian *Charter of Rights and Freedoms*, which is entrenched in the Canadian *Constitution*.

According to the Canadian Supreme Court, for a limitation on a right to be reasonable and demonstrably justified, two conditions must be satisfied:[60]

- The objective of the law that seeks to limit human rights must be of sufficient importance to warrant overriding a protected right or freedom. The objective must relate to concerns which are pressing and substantial; *and*
- The means chosen to achieve that objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are designed to meet the objective in question, whether they impair rights or freedoms as little as possible and whether there is proportionality between the effects of the measures and the objective which the law that seeks to limit human rights is seeking to achieve.

This proportionality test has been enshrined in the ACTHRA,[61] the Victorian Charter,[62] and the QHRA.[63] A similar provision should be included in a federal Human Rights Act. In this way a federal Human Rights Act would provide a proportionality test that will enable a considered approach to

[60] *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.
[61] *Human Rights Act 2004* (ACT) s 28.
[62] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[63] *Human Rights Act 2019* (Qld) s 13.

balancing the rights which may be in conflict with each other and/or other competing public interests.

In its 2021 policy position paper, titled *"Do not enter!" Balancing and promoting human rights in a health crisis*,[64] the ALA noted the impact of closing Australia's borders on international human rights obligations, including the right to freedom of movement,[65] the right to family life,[66] the right to enjoy highest attainable standard of physical and mental health,[67] and the right to life.[68] We noted that determinations regarding border restrictions and limitations on international travel during the COVID-19 or any pandemic should always respect international human rights norms, including the right to enter and exit one's country and the right to maximum physical health.

This policy paper also notes that how those human rights interact with each other must be a critical consideration for policies aimed at responding to pandemics, such as border closures.[69] Additionally, the extent to which Australia may close its borders to prevent exit and entry is subject to Australia's international human rights obligations under the ICCPR and the ICESCR.

For example, in restricting the right to freedom of movement under Article 12.3 of the ICCPR, the right to leave one's own country can be subject to restrictions provided by law that are necessary to protect public health. The UN Human Rights Committee ('UNHRC') has stated that the laws authorising the application of restrictions should use precise criteria. The UNHRC has also stated that such restrictive measures must conform to the principle of proportionality – they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[70] The UNHRC states that the right guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the circumstances.[71]

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[64] See: Australian Lawyers Alliance, *"Do not enter!" Balancing and protecting human rights in a health crisis* (Policy Paper, 9 December 2021) <https://www.lawyersalliance.com.au/documents/item/2217>.
[65] *International Covenant on Civil and Political Rights*, article 12.
[66] Ibid, article 17.
[67] *International Covenant on Economic, Social and Cultural Rights*, article 12.
[68] *International Covenant on Civil and Political Rights*, article 6.
[69] See: Australian Lawyers Alliance, *"Do not enter!" Balancing and protecting human rights in a health crisis* (Policy Paper, 9 December 2021) <https://www.lawyersalliance.com.au/documents/item/2217>.
[70] Office of the High Commissioner for Human Rights (1999) *CCPR General Comment* No. 27: Article 12 (Freedom of Movement), adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999. CCPR/C/21/Rev.1/Add.9, General Comment No. 27, paragraphs 13-14.
[71] Ibid, paragraph 21.

The process of balancing rights against each other requires ensuring that, where giving effect to one right may involve imposing restrictions or limitations on another right, those restrictions are proportionate, reasonable and demonstrably justified in a free and democratic society. This means consideration of the following:

- whether the objective that the rights-limiting law is trying to fulfil is of sufficient importance to warrant overriding the protected right or freedom – that is, the objective must relate to concerns which are pressing and substantial;
- whether the means adopted to limit the right are designed to meet the objective in question;
- whether the means adopted impose the least possible restriction on the rights – that is, what other options were available that did not involve a restriction on the rights; and
- whether there is proportionality between the effects of the measures and the objective which the rights-limiting law is seeking to achieve.[72]

In the context of the COVID-19 pandemic, the ALA noted in our policy paper that consideration must be given to appropriately balancing the rights under Articles 12 and 17 of the ICCPR, with the right to life under Article 6 of the ICCPR and the right to enjoy maximum physical health under Article 12 of the ICESCR. Moreover, any limitation on the rights under Articles 12 and 17 of the ICCPR in order to implement measures to prevent, treat and control an epidemic so that individuals may enjoy the right to life and the right to maximum physical health, must be the least possible restriction of the rights to freedom of movement, and exhibit proportionality between the effects of the measures and the objective which the law limiting the rights to freedom of movement is seeking to achieve.

The Government's response to the COVID-19 pandemic illustrates the necessity of a federal Human Rights Act in the age of interconnectedness with the rest of the world. The Government should ensure that any exercise of its mandatory or coercive powers under the *Biosecurity Act 2015* (Cth) must be reasonable, proportionate and comply with Australia's international human rights obligations. A federal Human Rights Act would also ensure that any limitations of the rights in those human rights conventions should not be implemented if there is a less restrictive means reasonably available to achieve the purpose that the limitations seek to achieve.

A federal Human Rights Act would give clarity, cohesion and domestic effect to Australia's international human rights obligations and provide a formula by which human rights can be balanced against each other and other competing public interests.

[72] *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.

Notification to Parliament regarding incompatible laws

As noted by the AHRC, state and territory Human Rights Acts provide that, if a court cannot reasonably interpret a law in a manner that is consistent with human rights via the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI).

DOIs are designed to notify Parliament that a law is considered incompatible with human rights and triggers a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.[73]

The AHRC expressed concerns that there is a level of uncertainty as to whether such a provision in a federal Human Rights Act empowering federal courts to make a DOI offends Chapter III of the *Constitution*.[74]

In response to this uncertainty, the AHRC recommended an approach in which there need not be a formal DOI issued by the court to Parliament. The court would not play any role in this process other than to publish reasons for judgment in the usual way. This approach would simply require the Attorney-General's Department to have processes in place to monitor cases that arise under the federal Human Rights Act, and a statutory mechanism for the Attorney-General to trigger the review of relevant laws when cases arise that highlight incompatibilities.[75]

The AHRC's recommended approach could be further enhanced by providing an obligation on the Attorney-General to notify the Parliament where the Attorney-General is satisfied that an inconsistency between a human right and a Commonwealth statute has arisen in legal proceedings. This could occur by notification by any one of the following three processes:

- Notification from the Attorney-General's Department by virtue of monitoring cases that arise under the federal Human Rights Act and identifying those cases in which an incompatibility between the federal Human Rights Act and Commonwealth laws has been highlighted in the court's decision (as per the AHRC proposal);
- Application from the AHRC to the Attorney-General for a determination by the Attorney-General that an inconsistency between a human right and a Commonwealth statute has arisen in legal proceedings; or

[73] Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022) 261.
[74] Ibid 261–262.
[75] Ibid.

- Application from a party to proceedings to the Attorney-General for a determination by the Attorney-General that an inconsistency between a human right and a Commonwealth statute has arisen in those legal proceedings.

Any such notification should be accompanied by a requirement to report back to the Parliament within a reasonable period as to whether the Parliament intends to remedy the inconsistency and the reasons why.

Placing an obligation on the Attorney-General to notify Parliament in relevant circumstances that could be triggered by the abovementioned three processes, creates a more accessible and transparent framework in which both the litigant and the AHRC are able to take action to better protect the human rights affected by the inconsistency. This would mean that the process to review an inconsistency would not just be the subject of the unlimited discretion of the Attorney-General.

Cause of action, complaints and remedies

A federal Human Rights Act should provide an independent cause of action for victims of a breach of human rights committed by a public authority, with access to a range of remedies including damages, noting the range of different kinds of human rights claims and the importance of flexibility.

In addition, a federal Human Rights Act should provide an accessible complaints process (utilising alternative dispute resolution) by allowing a person to make a human rights complaint to the AHRC.

A federal Human Rights Act should also allow a person to use existing administrative law mechanisms to review the actions and decisions of public authorities, by supplementing existing bases for reviewing government decisions to ensure they are compatible with human rights.[76]

A direct cause of action

A federal Human Rights Act should ensure that persons who allege that their human rights have not been respected can obtain a prompt and effective remedy, including access to injunctions and compensation where applicable. The federal Human Rights Act should include an independent statutory cause of action against a federal public authority for a breach of its human rights obligations as set out under the federal Human Rights Act.

A direct right of action for individuals who allege that their human rights have been infringed by a public authority should be included in a federal Human Rights Act. Such a direct right of action provides a strong incentive for public authorities to ensure that they are human rights compliant in their service delivery and decision-making. If an individual brings an action against a public authority for an infringement of their rights and the court considers that that person's rights have been infringed and that the public authority could have acted or exercised its powers in a manner consistent with human rights, then that court should have the power to grant appropriate relief. This includes remedies available under administrative law and the capacity to grant injunctions to prevent continuing human rights breaches.

In some circumstances it is appropriate for the court to make an order for damages to compensate for financial loss, personal injury or psychological injury arising as a result of a breach of a person's human rights. In addition, in cases of particularly egregious violations of human rights by a public authority, it is appropriate for the court to be able to make an award of punitive damages against that public authority.

The cause of action for an infringement of human rights should be a stand-alone cause of action. The ALA does not support the provision for what has been described as a 'piggy-back' cause of action as exists under section 39(1) of the Victorian Charter.

[76] Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022) Chapter 11.

The AHRC should receive complaints of human rights infringements

The AHRC should have a role in receiving complaints from people who allege that their human rights have been infringed and for a human rights complaint that is accepted by the AHRC to be investigated and referred to a conciliation conference.

The purpose of conciliation of a human rights complaint should be to promote the resolution of the complaint in an informal, quick and efficient manner. The process of conciliation will be deficient if there is no binding or clear outcome from a complaint being brought to the AHRC. If the outcome of the conciliation is an acknowledgment by the respondent public entity that it has acted unlawfully, there needs to be a provision in the federal Human Rights Act that obliges the public entity or gives powers to the AHRC to compel the entity, to remedy the breach or provide some redress to the complainant.

Accordingly, the AHRC should have the power to direct a public entity to address the issues raised in the complaint that have been acknowledged by the respondent or which the AHRC considers having been substantiated.

A complaints and conciliation process which does not provide for a clear or binding outcome or provide for the enforcement of the rights that are protected in the legislation, will result in individuals who allege human rights abuses losing confidence in the complaints and conciliation process and ultimately in the federal Human Rights Act and the AHRC itself. This will undermine the role of the AHRC and the ability of the federal Human Rights Act to fulfil its main object of protecting and promoting human rights and a human rights culture.

Periodic reviews of the Human Rights Act

A federal Human Rights Act should include a provision for a periodic and mandatory statutory review process.[77] The first review should be undertaken five years after the federal Human Rights Act comes into operation. That review should include open and thorough public consultation with stakeholders, especially marginalised and vulnerable groups.

The timeframe for further reviews of the federal Human Rights Act should be clearly defined and specified to ensure that they do take place and that those involved undertake the requisite planning to avoid any future delays in those reviews being progressed.

[77] Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (December 2022) 293.

Human Rights Acts and Charters are effective at home and abroad

Drawing on the experiences of legislative human rights instruments in Victoria, the ACT and most recently Queensland, there is significant evidence of the important and practical human rights protections that can be achieved through legislating a federal Human Rights Act.

Documented case studies compiled by the Human Rights Law Centre from the first five years of operation of the Victorian Charter show how the Victorian Charter has resulted in significant and practical human rights protection for some of Victoria's most vulnerable residents.[78] The following examples illustrate how a Human Rights Act can lead to significant, positive, life-changing outcomes for some of the most vulnerable people in our community.

Wheelchair-bound tenant protected from eviction

The Victorian Department of Human Services (DHS) attempted to evict a wheelchair-bound man from his premises. The man suffered from mental illness and spoke a limited amount of English. The DHS used information gathered from police regarding a drug-related allegation against the tenant in order to gain an order for possession. The eviction was on the basis of illegal activity, although at the time the man had not been charged with any offence. A community legal centre argued that the man's rights under the Charter were not being considered, in particular that DHS was acting contrary to the presumption of innocence and with no consideration of procedural fairness. The arguments led to a successful settlement of the manner and the tenant was relocated to alternative accommodation.

Source: Fitzroy Legal Service, Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

96-year-old woman protected from eviction and homelessness

A 96-year-old woman was given a 60-day notice to vacate the home in which she had lived for 21 years. She was unable to find alternative accommodation in this period of time. The notice was contested in VCAT with the advocate arguing that it was a breach of the elderly woman's Charter rights. As a consequence, she was given an additional 30 days and was assisted in finding appropriate accommodation.

Source: Hanover Welfare Services, Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

[78] Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action – Case studies from the first five years of operation* (Report, March 2012).

Right to privacy for person with disability protects dignity

During a routine visit to a disability residential service, a Department of Human Services officer observed carers assisting a client to shower from the door of the unit. The officer provided information on human rights and discussed the impact of the physical environment on the client's right to privacy and on workplace safety. The residential service reviewed the physical environment, arranged for the fitting of a shower curtain, thereby guaranteeing the privacy and dignity of the resident at very little cost to the service.

Source: Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter (2011).

Right to family life and freedom of association for elderly man with disability

A male client in care, who shared his bed with his wife, was about to be forced to use a single bed in order to use a slide sheet for occupational health and safety reasons. A disability advocate successfully employed the Charter to prevent this from happening and for other solutions to be explored.

Source: Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter (2011).

The British Institute of Human Rights has also documented the following case studies indicating the important and practical way in which the UK's *Human Rights Act 1998* has been used to protect and promote human rights for some of the most vulnerable people in the UK:[79]

A federal Human Rights Act could lead to similar protections across the Australian community, resulting in improved quality in service delivery in disability services, aged-care services, veterans' services and social security services.

Megan had a learning disability and lived with her mother but was moved into an NHS residential unit because of concerns about abuse. Megan was told she had to have staff with her whenever she left the unit even though she had been able to go out independently before. The court said this was a disproportionate interference with Megan's right to liberty. Megan was then able to go out by herself. (*P and Q v Surrey County Council 2014 – known as the 'Cheshire West case'*).[80]

[79] The British Institute of Human Rights, *Health, Care & Social Work Stories* (Web Page, 2023) <https://www.bihr.org.uk/get-informed/the-human-rights-act-in-real-life/health-care-and-social-work>.
[80] *P and Q v Surrey County Council* [2014] UKSC 19.

Steven was a young man with a severe learning disability. He lived at home with his father, Mark, but went into a local authority support unit for a couple of weeks when Mark was ill. The local authority then kept Steven there for over a year against his and his father's wishes. When Steven tried to leave the unit after several months, the local authority signed a Deprivation of Liberty (DoLS) Authorisation and later said they were looking for a long-term placement miles away from his father. Steven and Mark took a human rights case to court. The court decided Steven's right to liberty had been breached because of the delay in the DoLS assessment and it hadn't considered Steven and Mark's wishes. The court also decided Steven's right to family life (Article 8) had been breached because the local authority had stopped him from living with his father. (*London Borough of Hillingdon v Neary*, 2011).[81]

Yolande and her children were fleeing domestic violence, and her husband's attempts to track them down as they moved from town to town across the UK. They were referred to Social Services in their borough, but social workers told Yolande that the constant moving of her children meant she was an unfit parent and that she had made the family intentionally homeless. They said that they had no choice but to place her children in foster care. A support worker helped Yolande to challenge Social Services' decision as it failed to respect her and her children's right to family life. Social Services reconsidered the issue, taking the family's human rights into account, and agreed the family would remain together, and that Social Services would help cover some of the essential costs of securing private rented accommodation.

David, a member of staff in a care home in England arranged an afternoon for canvassers to visit the care home and talk to people living there. David realised that although the care home did put measures in place to support people to vote (for example applying for postal ballots or supporting people to go to the polling booth) there was more that could be done. He noticed that canvassers never actually visited to talk to people in the care home, they went door to door on the street, missing the care home. This meant that people living there weren't having the same opportunities to engage in free elections as they would have if they were living in their own homes. David arranged an afternoon and invited canvassers from various parties to come to the care home, deliver information and talk to people who wanted to be involved in these conversations.

[81] *London Borough of Hillingdon v Neary* [2011] EWHC 1377.

Conclusion

Legislating a federal Human Rights Act would enshrine and prioritise values which are important to people across Australia – including the most vulnerable. This reform would promote the rule of law, accountability of decision-makers in Australia, a stronger human rights culture in Australia, diversity, inclusion, equality and respect.

Further, a federal Human Rights Act would operate successfully within Australia's existing parliamentary democracy and justice systems, as well as providing another avenue for enlivening Australia's obligations under international human rights law and frameworks.

The ALA strongly supports a federal legislative Human Rights Act, as recommended by the Australian Human Rights Commission in *Free and Equal – Position paper: A Human Rights Act for Australia*, with some specific exceptions noted in detail above regarding the definition of 'public authority' as well as notification to Parliament regarding laws that are incompatible with a federal Human Rights Act.

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