

# Free & Equal

## Position paper: A Human Rights Act for Australia



Summary report

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# A Human Rights Act for Australia

Position paper: Free and Equal

Summary report



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Emeritus Professor  
Rosalind Croucher AM FAAL

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*President  
Australian Human Rights Commission*



## President's foreword

This Position Paper offers a model for an Australian Human Rights Act and associated reforms. It seeks to complete the central, missing piece of our domestic legislative framework for the promotion and protection of human rights in Australia – by bringing rights home.

In doing so, it proposes how to belatedly meet the intended design of the Australian Human Rights Commission itself. When established on a permanent footing in 1986, the Commission was intended to have a complaint handling jurisdiction for human rights complaints through an Australian Bill of Rights Act.

While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in domestic legislation, Australia stands alone in not having introduced a Human Rights Act.

But just because 'everyone else' has one, does that necessarily mean that we need one too? That is a fair question to ask. There is a strong sense of rights and freedoms in Australia and some argue that our rights and freedoms are protected well enough without one. Our experience with COVID-19 responses challenges that assertion. That indefinite administrative detention is not unlawful under our existing laws suggests why our current protections, including the rule of statutory construction, known as the principle of legality, are just not enough.

The Commission has been handling human rights complaints since 1981, through the lens of the international treaties, and we seek to resolve matters through conciliation. However, this process is without any recourse to enforceable remedies through the courts. This stands in contrast to complaints brought under federal discrimination laws that the Commission also administers.

Providing a pathway to enforceable remedies in a Human Rights Act would substantially improve access to justice and accountability for government decision making.

As it stands, our Constitution protects some rights, expressly or impliedly, the principle of legality acts as a handbrake of a limited kind on encroachment of rights, and the parliamentary scrutiny of legislation plays a role. In this Position Paper, the Commission concludes that this is insufficient and does not provide the human rights protection that all people in Australia are entitled to.

The Commission has long supported the introduction of a federal Human Rights Act as the best way to anchor the promotion and protection of human rights in Australia and this Position Paper offers a viable and actionable set of proposals to achieve this.

The model for a Human Rights Act put forward here builds on the excellent work of the National Human Rights Consultation Committee, chaired by Fr Frank Brennan SJ, and its report of 2009, and the research and advocacy of the Human Rights Law Centre, Law Council of Australia and many other community partners, for bringing rights home. It is a model that retains and emphasises the supremacy of the parliament – an entirely different approach to rights protection from jurisdictions such as the United States of America.

The beauty of a Human Rights Act, and other measures that *frontload* rights-mindedness, is that they are expressed in the positive – and they are embedded in decision making and *ahead* of any dispute.

A Human Rights Act *names* rights; it provides an obligation to *consider* them and a *process* by which to do it – together supporting a cultural shift towards rights-mindedness, becoming part of the national psyche, not just an afterthought.

The purpose of such an Act is to change the culture of decision making and embed transparent, human rights-based decisions as part of public culture. The outcome needs to be that laws, policies and decisions are made through a human rights lens and it is the upstream aspect that is so crucial to change.

In leading this *Australian* Conversation on Human Rights, the Commission, as Australia's National Human Rights Institution, is taking seriously – and aspirationally – the statutory mandate given to us by parliaments since 1981.

I commend the proposals in this Position Paper as the second major contribution in this conversation and look forward to an open and rigorous discussion of its merits.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL  
**President**







# Summary report

## Overview of the Position Paper

The full Human Rights Act Position Paper, as summarised here:

- identifies the gaps in Australia's current framework and makes the case for a federal Human Rights Act (Chapters 2 and 3)
- outlines the Commission's proposed model for a Human Rights Act (Chapters 4 to 12)
- considers existing parliamentary scrutiny mechanisms and improvements that can be made with the introduction of a Human Rights Act (in Chapter 13)
- focuses on the role of Commission and the enhanced contributions the Commission can make to promoting and protecting human rights in the light of a federal Human Rights Act (Chapter 14)

### (a) Why Australia needs a Human Rights Act

- *Australia does not adequately protect human rights at the present time*

Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal.

The Australian Constitution offers only limited protection for a small number of discrete human rights. This includes the implied right to freedom of political communication; and a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution.

The common law recognises a number of rights and freedoms. The common law protects human rights indirectly through statutory interpretation principles such as the 'principle of legality', which presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'. However, common law protections are fragile, as Parliament can pass a law that overrides them at any time.

While Parliamentary scrutiny measures enable some consideration of human rights during the law-making process, these measures alone have not resulted in an embedded human rights culture within Parliament. Parliament routinely passes laws that are not human rights compliant.

While discrimination laws implement key aspects of the international treaties Australia has ratified, they are only a partial implementation of them, with many key international rights finding no corresponding federal protections.

Human Rights Acts have been passed in Victoria, the Australian Capital Territory and, most recently, Queensland. The lack of an overarching federal instrument means that a person's access to rights protections is wholly contingent on where they live.

The Commission's ability to resolve human rights complaints can be very limited. Unlike complaints alleging unlawful discrimination, if the Commission cannot conciliate a human rights complaint, the person cannot then bring court proceedings, nor obtain any enforceable remedies.

UN Treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system. Many of Australia's commitments to human rights are confined to rhetoric without corresponding domestic protections.

The need for a Human Rights Act can be summed up in one simple statement: people's human rights matter all of the time. Government that is here to serve the people, should consider their impact on people whenever they make decisions.

- *The current rights framework in Australia is not easily explainable, or readily comprehensible, to all people in Australia.*

The above patchwork of rights is difficult to explain to everyday Australians, whose rights are meant to be protected.

Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all.

- *A Human Rights Act for Australia is an evolution not a revolution*

Human Rights Acts have been passed in three states and territories in Australia and been in operation since 2004. Throughout this paper there are references to case studies of how a Human Rights Act has made a positive difference to the protection of human rights in these jurisdictions, as well as in the multiple countries that have introduced such legislation over the past 20 years.

The proposed model for a federal Human Rights Act builds on the success and lessons from these existing models, while also tailoring a Human Rights Act to the specific constitutional requirements of Australia.

The proposed model for a Human Rights Act set out in this paper also seeks to build on the lessons from the Australian Human Rights Commission having administered a human rights and ILO 111 complaints handling stream under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) since 1986. There are deficiencies to how these complaint processes operate, which limit their effectiveness. In the Commission's model for a Human Rights Act, these existing human rights complaint streams would be replaced with a much clearer set of rights in the HRA.

By learning from the lessons of other models, and building on the legacy of the AHRC Act processes that have been in domestic law for 36 years, the Commission's proposal for a Human Rights Act is an evolution not a revolution.

## People's rights matter, all of the time



The impact of laws, policy and practice on people's human rights should always be considered.



Parliament, governments and public officials should be held to account for how they consider human rights impacts in their decision-making.



This reflects: our commitment to democratic principles, and 'Australian values' that respect civil liberties, rights and fundamental freedoms.

### It means that:

1 Laws should respect human rights.

2 When decisions are made, the human rights impacts should be considered.

3 Remedies should be available where human rights have not been considered or have been breached without justification.

1

2

3

### The legal framework should:

- **Protect** human rights.
- **Prevent** violations of human rights.
- **Provide** effective relief for breaches of human rights.



- *Principles to guide human rights protection in Australia*

The following principles have guided the Commission in designing its model for a Human Rights Act.

**A. Australian:** We need a Human Rights Act that reflects our shared values and embeds rights into our own domestic system.

**B. Democratic:** We need a Human Rights Act to strengthen existing democratic and rule of law principles. The model should be parliamentary, accountable, participatory and balanced.

- **Parliamentary** – by preserving parliamentary sovereignty in a model based on dialogue.
- **Accountable** – by enhancing the rule of law and providing a check on executive power.
- **Participatory** – by improving the quality of public debate and enabling minority and vulnerable groups to have a voice in decisions that affect them.
- **Balanced** – by setting out a framework for navigating the intersection of varied public interests and rights.

**C. Preventative:** We need proactive measures to prevent human rights abuses, through a Human Rights Act that embeds procedural measures to enable early consideration of human rights, and fosters a culture of respect for human rights throughout the whole of government.

**D. Protective:** We need safeguards against human rights abuses, through a Human Rights Act with pathways for individuals to access justice and redress through courts.

**E. Effective:** We need a Human Rights Act that facilitates better decision making based on human rights standards, and equality of access to effective interventions to protect human rights.

- *Australian*

Australian values align with human rights. Many Australians assume that human rights are already protected in Australian law. Despite community expectations, key civil and political rights like freedom of speech and protections against arbitrary detention are not fully protected in Australia. Social, economic and cultural rights such as rights to health and education also reflect important Australian values, yet these are only reflected in laws to a limited extent, and related services can be withdrawn at any time.

A Human Rights Act would enable us to articulate and embrace our values through an Australian instrument. This would recognise the rights and freedoms that Australians already support, providing clarity and certainty. It would mean that Australians will have a shared understanding of what constitutes our rights, clear expectations of government and grounds for holding government accountable to these expectations.

The systems set up by the Human Rights Act would ensure that the rights of all people in Australia are respected in everyday life. All of us deal with government agencies that make decisions that affect our lives. For example, when attending school, accessing healthcare or aged care, obtaining an ID or interacting with the police. A Human Rights Act will apply to all of these areas. It would support decision makers to consider human rights in a way that is more appropriate to individual circumstances and protect against arbitrary or unfair decision making.

- *Democratic*

Without a Human Rights Act in place, laws can be passed, and executive decisions can be made, without consideration for human rights. This has negative implications for democratic principles and the rule of law.

There are relatively few parliamentary or judicial safeguards on the exercise of discretionary executive power in Australia. Parliament routinely passes laws that expand upon executive power, which lessens accountability over decision-making. Examples include counter-terrorism laws that have affected rights to free speech and the right to a fair trial, and delegated decision-making under legislation such as the *Biosecurity Act 2015* during COVID-19.

In parliament and within government, political or economic justifications can easily override human rights, without being tested. Recent public discussions about how far government and private action should be able to limit freedom of speech, freedom of religion, the right to equality and a person's privacy, are examples of areas where there is an inadequate legal framework to resolve complex interactions between fundamental rights and freedoms.

A Human Rights Act would strengthen existing democratic principles, with an emphasis on the role of Parliament in a dialogue model. It would provide accountability for executive decision-making through judicial pathways, without infringing on parliamentary sovereignty. A Human Rights Act would also ensure that laws, policies and decisions affecting human rights are publicly justified and subject to scrutiny and debate. It would provide a coherent framework for managing intersecting rights and freedoms, by requiring parliamentarians and decision-makers to rationally justify limitations on human rights.

Through these mechanisms, a Human Rights Act would increase public participation in decision-making and ensure that transparency and openness are built into government processes. It would help to increase public trust in government and how it operates, at a time when trust in democratic institutions has declined.

- *Preventative*

Without a duty on government to consider and act in accordance with human rights in the early stages of decision-making, human rights breaches may only be apparent after extensive damage has already occurred, resulting in significant human and financial costs. Recent Royal Commissions have highlighted the systemic violations that can occur when human rights are ignored at all levels of government.

A Human Rights Act would ensure that systematic steps are taken to prevent breaches of human rights from occurring in the first place. It would lead to procedures being put in place to ensure that government considers human rights at an early stage in law, policy and administrative processes, which will also filter into operational decision making.

Parliamentary scrutiny would be conducted through the lens of Australian human rights law, with statements of compatibility prepared for Ministers by departments referring to human rights obligations under Australian law, rather than international law. Through such shifts, there would be a greater upstream embedding of human rights principles in laws, policies and practices.

A Human Rights Act would also spread awareness and understanding of human rights throughout government and the public at large, building a human-rights culture that would embed principles of fairness and respect into the fabric of public life in Australia.

- *Protective*

The consequences of Australia's lack of legal human rights protections acutely affect people who experience disadvantage and marginalisation. It is the most vulnerable people who can fall through the cracks in the existing frameworks.

While the capacity to vote politicians out of power is a fundamental aspect of Australia's democracy, the majority view is not always aware of, or sympathetic to, the human rights of vulnerable and marginalised groups. Sometimes public pressure will result in parliament making changes to laws that better protect these groups, but these changes often occur belatedly.

Vulnerable and marginalised people and groups may also be subject to unfair administrative decision making by public bodies. Human rights considerations in government decision-making can mean the difference between being homeless and being housed; being destitute and being able to afford basic necessities; being locked up and being free; being shut away from society and being provided with supports to engage in life; being removed from home and living with family.

A lack of care for human rights can escalate to human rights violations occurring at a systemic level, affecting innumerable vulnerable people.

A Human Rights Act would mean that if a person's human rights were breached or disregarded, there would be pathways to enable them to seek and receive justice. Currently, there are very limited options for people to gain redress for human rights abuses, both formally and informally.

- *Effective*

A Human Rights Act could reduce social and other costs, providing economic benefits for Australians. It would be designed to be effective through the prevention of costly breaches. It would lead to improvements in the quality and accessibility of service delivery through a more considered and flexible approach to service provision. There may be initial upfront costs, but long-term savings to individuals, to government and to the court system.

## **(b) A Human Rights Act based on dialogue**

The Commission proposes a Human Rights Act built on the legislative dialogue model. Dialogue Human Rights Act models incorporate a formal 'dialogue' between the executive, legislature and judiciary, with each branch of government sharing responsibility for respecting and protecting human rights. Dialogue models also strongly focus on the 'upstream' arena of decision making and policy development.

In accordance with this model, there would be a specific 'positive duty' on the executive to act compatibly with human rights, and give proper consideration to human rights when making decisions. Government entities, known as 'public authorities' would be bound by this duty.

Parliament would be required to consider human rights when making and debating laws, through existing parliamentary scrutiny measures. The judiciary would be required to interpret laws in a way that is compatible with the Human Rights Act where it is reasonably possible to do in light of Parliament's intention. The judiciary would also review the executive's compliance with the positive duty in relation to particular decisions and issue remedies for breaches of the Human Rights Act.

Unlike the state and territory models, and the UK model, the Commission's model does not include provision for a formal 'declaration of incompatibility' by a federal court, given some uncertainty about the constitutionality of such a provision.

### **(c) What rights should be included in a Human Rights Act?**

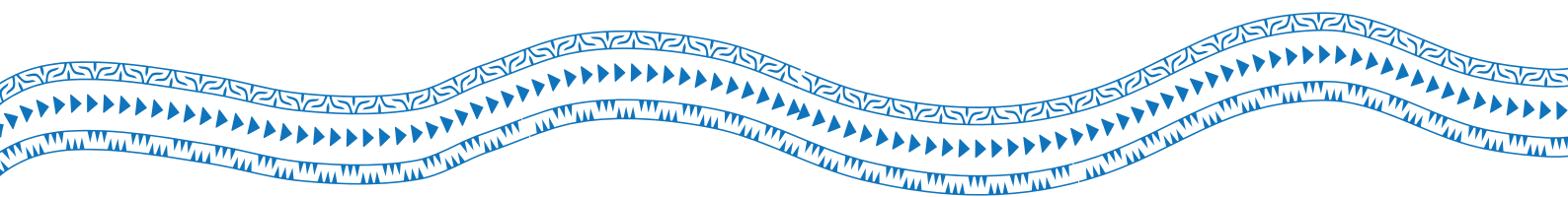
The key function of the Human Rights Act will be to coherently implement Australia's international obligations domestically, and to reflect and codify fundamental common law rights. It would provide the 'bedrock of rights' in Australian law.

The Commission's recommended model primarily incorporates rights derived from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). When formulating the wording of these rights, the Commission has taken into account state and territory human rights instruments, and Australia's specific constitutional and federal structure.

The Commission has also reflected Australia's obligations arising from 'thematic' treaties beyond ICESCR and the ICCPR, relating to particular subsections of the population, such as children (Convention on the Rights of the Child (CRC)) and persons with disability (Convention on the Rights of Persons with Disabilities

(CRPD)); as well as rights and principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), noting Australia's particular obligations to First Nations peoples. The Commission has proposed embedding key overarching principles from these instruments through the inclusion of a 'participation duty' and a related 'equal access to justice duty' in relation to the Executive.

The Commission also proposes that the thematic instruments are reflected through the inclusion of a clause that requires the Human Rights Act to be interpreted in light of international human rights instruments. This clause would reference the seven core treaties that Australia has ratified, and UNDRIP. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act, and considering how the rights in the Human Rights Act may apply to federal legislation that raises human rights considerations.



The Commission's proposed Human Rights Act includes the following rights:



Recognition and equality before the law; and freedom from discrimination



Right to life



Protection from torture and cruel, inhuman or degrading treatment



Protection of children



Protection of families



Privacy and reputation



Freedom of movement



Freedom of thought, conscience, religion and belief



Peaceful assembly and freedom of association



Freedom of expression



Taking part in public life



Right to liberty and security of person



Humane treatment when deprived of liberty



Children in the criminal process



Fair hearing



Rights in criminal proceedings



Compensation for wrongful conviction



Right not to be tried or punished more than once



Retrospective criminal laws



Freedom from forced work



Cultural rights



Cultural rights - First Nations peoples



Right to education



Right to health



Right to an adequate standard of living



Right to a healthy environment



Right to work and other work-related rights



Right to social security



The Commission's proposal also includes the following cross-cutting procedural duties:

- Participation duty
  - » First Nations peoples (embedding UNDRIP principles)
  - » Children (embedding CRC principles)
  - » Persons with disability (embedding CRPD principles)
- Equal access to justice duty.

- *Approach to ICESCR rights*

In order to ensure that ICESCR rights are justiciable and constitutionally compliant, the Commission proposes articulations of ICESCR rights that are somewhat narrower than the full expression of those rights contained in ICESCR. The Commission has focused on including the essential, core and/or immediately realisable aspects of these rights. Importantly, the proposed articulation of ICESCR rights is designed to accord with the Commission's proposal for including a direct cause of action for unlawfulness under the Human Rights Act. All ICESCR rights are implemented through the Commission's proposals, to varying degrees and in a range of ways.

The Commission recognises that ICESCR implementation, particularly with regard to the principle of progressive realisation, occurs primarily outside of the realm of the courts. Progressive realisation is most relevant to 'upstream' decision making about policy and resourcing. Parliamentary scrutiny and Commission reporting would provide opportunities to address the broader aspects of ICESCR rights that extend beyond the narrower articulation of rights in the Human Rights Act to be applied by courts. The Commission also envisions that legal foundations in a Human Rights Act would be complemented by overarching national targets and measurable indicators assessing human rights implementation, enabling the progressive realisation of rights over time.

- *Approach to First Nations rights*

The Commission considers that, in combination with a Human Rights Act, a range of steps should be undertaken to implement the rights of First Nations peoples, particularly as set out in UNDRIP. This includes through introduction of a National Plan to implement UNDRIP, and a constitutional Voice to Parliament as the first step towards the full realisation of the Uluru Statement from the Heart.

Within the Human Rights Act model itself, the Commission proposes that UNDRIP be reflected in the following manner, subject to further consultations with First Nations peoples:

- A 'participation duty' applicable to the executive, to reflect principles of self-determination through practical measures by public authorities, to complement a Voice to Parliament mechanism.
- The inclusion of cultural rights, non-discrimination rights and ICESCR rights, alongside the participation duty, to incorporate key UNDRIP rights within a Human Rights Act. These would be included with a standalone cause of action, and representative standing to enable organisations to bring claims on behalf of communities – recognising the collective aspect of these rights.
- First Nations participation reflected in parliamentary scrutiny processes through the requirement to list in Statements of Compatibility steps taken to ensure that participation of First Nations peoples has occurred, where relevant, which would also be subject to assessment by the Parliamentary Joint Committee on Human Rights.
- A clause enabling human rights in the Human Rights Act to be interpreted in light of UNDRIP in cases where the rights of First Nations peoples have been affected.
- The right to self-determination articulated in a preamble to the Human Rights Act as an overarching principle of the instrument.

## **(d) Positive duty on public authorities**

### **• *Nature of the duty***

A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to give proper consideration to human rights when making decisions. This is also known as a ‘positive duty’ applying to public authorities. The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. The requirement to ‘act compatibly’ with human rights is a substantive obligation on public authorities.

Public authorities would also be required to engage in participation processes where the ‘participation duty’ is relevant, as part of the ‘proper consideration’ limb.

Compliance with the positive duty would be reviewable by courts (and possibly by tribunals as discussed below in relation to administrative law remedies).

The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

### **• *Scope of public authorities***

The scope of public authorities with obligations to comply with the positive duty includes ‘core’ executive bodies, such as government departments, agencies and offices, and the police. It also includes ‘functional’ public authorities, which are private businesses, non-government organisations and contractors that have functions of a public nature and are exercising those functions on behalf of government. Private entities only have to comply with the Human Rights Act when they carry out public functions.

The Commission has proposed adapting state and territory definitions of ‘public authorities’ to suit the federal context, in a manner that is flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with the Human Rights Act. There is a range of factors included in the definition that indicate whether or not an entity is a functional public authority (for example, whether the function is conferred on the entity under a statutory provision, and whether the entity is publicly funded). The definition also includes examples of functions that are definitively of a public nature. Examples of functional public authorities at the federal level would include a private company operating a federal prison; and a private service provider delivering services through the NDIS.

Not included in the scope of public authorities are the Parliament of Australia, except when acting in an administrative capacity; the courts, except when acting in an administrative capacity and where the Human Rights Act applies to the court’s own procedures; and entities declared by Human Rights Act regulations not to be a public authority.

The Commission also proposes including an ‘opt-in’ clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act.

### **• *Implementing the duty***

A positive duty must be accompanied by intensive measures to ensure cultural change and the adoption of a preventative approach to human rights protection within public authorities. There should be a transition period pre-introduction (1 year) to develop proficiency within the public service. Human Rights Act implementation should include an initial whole-of-government education program, followed by permanent routine educational requirements at all levels of government to maintain fluency with the Human Rights Act.

There should also be permanent, dedicated internal departmental teams with human rights expertise and responsibility for consultation and education on Human Rights Act matters; the development and implementation of human rights action plans by federal departments and agencies; the development of tailored guidelines, checklists and resources to enable staff within public authorities to make human rights-compliant decisions within their areas of competence; and respect for human rights included within public sector codes of conduct.

The Commission considers that it would have a central role in providing tailored and general education about the Human Rights Act for public authorities, and would require dedicated ongoing resourcing to do so.

## **(e) Procedural duties**

### **• *Participation duty***

In addition to the positive duty on public authorities to consider and act in accordance with human rights, the Commission proposes that an overarching ‘participation duty’ be introduced into a Human Rights Act. The participation duty would primarily operate as an aspect of the binding positive duty on public authorities.

The participation duty would also apply to proponents of legislation in a non-binding respect, reflected in Statements of Compatibility and assessed by the Parliamentary Joint Committee on Human Rights (PJCHR).

### **Participation duty on public authorities**

The participation duty would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The ‘participation duty’ addresses a fundamental problem in the development of federal policies and decisions – inadequate engagement with the very people to whom those decisions directly apply.

The Commission’s proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures concerning consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in decision-making processes.

International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would be a means of realising key procedural elements of the existing rights in the Human Rights Act, in relation to these three groups.

The duty will apply differently to each of these groups, as defined by the relevant international instruments. However, the same underlying requirement applies — when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions.

- Where decisions of public authorities will affect the rights of First Nations peoples and communities, participation processes should be facilitated in line with UNDRIP principles and standards relevant to consultation and participation.
- When individual children are affected by a decision, the ‘best interests’ principle should be applied, and the child should be heard, with their views given due weight in accordance with their age and maturity. When children as a group are affected by proposed policies or laws, the best interests of children should be proactively considered, and children should be consulted as part of the development process.

- Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. When decisions have an impact upon people with disabilities as a group, persons with disability, including through their representative organisations, should be consulted as part of the process.

The participation duty would arise when public authorities are developing policies, or making decisions, that affect the rights of these three groups. The duty would arise when decisions are being made that directly concern these groups, or where the decision is likely to have a disproportionate impact on the group in question. For example, changes to planning policies may have a disproportionate impact on people with disabilities if they affect accessibility.

Where decisions are made that affect groups of people, the decision maker need only show that there was sufficiently fair and representative consultation, not that participation occurred comprehensively with all relevant bodies or individuals.

The Commission has developed a set of guidelines that encompass key considerations for determining the quality of a general participation process. These include, for example, that consultations should occur at a formative stage; and that the results of the consultation should be conscientiously taken into account.

Such objective criteria can be applied by the courts when determining whether the Human Rights Act was breached due to failure to consult in relation to particular right(s). Where public authorities can show that they enabled affected person(s) to genuinely participate in a decision made about them, this will fulfil the participation duty, and point to the fulfilment of the substantive right under consideration by a court. As with substantive rights in the Human

Rights Act, the participation duty could be justifiably limited through the application of the limitations clause.

### **Participation duty on proponents of legislation**

The participation duty would also apply as a non-binding duty for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in Statements of Compatibility. This would also be subject to scrutiny by the PJCHR. Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question.

- *Equal access to justice duty*

In addition to an overarching participation duty, the Commission proposes a complementary 'equal access to justice duty' for public authorities.

This duty would mean that public authorities have a positive duty to realise access to justice principles – and would require active steps by public authorities to ensure the provision of key elements of a functioning justice system. Specifically, it would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.

This duty would create an obligation to meet minimum requirements associated with the right to a fair hearing, overlaid by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law. This is a principle of *equal* access, in order to overcome current barriers to access faced by particular groups.

The purpose of this duty is not only to codify, but to strengthen and support key principles established by common law courts by linking them to positive human rights obligations as defined by international law. The duty would embed non-discrimination principles

into planning and policy by public authorities associated with the justice system. The duty may arise as part of a consideration of whether related Human Rights Act rights were breached by public authorities due to a failure to implement minimum justice guarantees.

- *Technology and decision making*

Increasingly, public authorities are utilising technology, such as artificial intelligence (AI), when making decisions, including decisions that directly affect people's rights. It is important that the same procedural fairness principles and rights consideration apply to *all* decisions made by public authorities, *regardless of how the decision is made*. This should be explicitly clarified in the Human Rights Act.

#### **(f) Jurisdiction and scope**

A Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination. This reflects the fundamental principle that human rights are universal and apply equally to all human beings.

A Human Rights Act should include individuals under Australia's 'effective control' overseas in order to fully implement Australia's international obligations.

In light of Australia's constitutional structure and the existing Human Rights Act instruments in states and territories, the Commission proposes that a federal Human Rights Act should be restricted to federal laws and federal public authorities. The Human Rights Act instruments in place in Victoria, Queensland and the ACT should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act.

#### **(g) Interpretation of rights in the Human Rights Act**

The Commission proposes that the Human Rights Act provide guidance about how rights in the Human Rights Act should be interpreted. As Human Rights Act rights are derived from international law, it is necessary for courts, tribunals and public authorities to be directed to consider international source instruments and related authoritative international materials, in order to gain context for how the rights are to be understood.

The Human Rights Act should include a clause that references the seven core treaties that Australia has ratified and requires the rights in the Human Rights Act to be interpreted in light of those treaties. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act.

This approach would also encourage consideration of explanatory General Comments and other relevant international materials, ensuring that the Human Rights Act remains a 'living document' that takes into account developments in international law, including after the Human Rights Act is adopted.

#### **(h) Interpretation of federal laws and limitations on human rights**

The interpretive clause provides guidance to courts about how they should interpret legislation in light of the human rights contained within the Human Rights Act. Courts are to prefer an interpretation that is compatible with human rights, provided that this is consistent with the intention of Parliament, as expressed through the statute under analysis.

The limitations clause provides guidance on the ways in which human rights can be permissibly limited. This can be relevant to the task of interpreting statutes in a way that is consistent with human rights. A statutory restriction on human rights may be permissible (and therefore consistent with human rights) if it is justified by the limitations clause, for example because it is proportionate to the achievement of some other public purpose or the fulfilment of a different, competing human right.

The limitations clause will also be relevant in assessing whether decisions or actions of public authorities that limit human rights are permissible. This will be particularly relevant to claims by individuals that their human rights have been breached.

Public authorities will need to have regard to the interpretative clause when making decisions or taking action pursuant to statutory authority. More generally, they will need to have regard to the limitations clause in relation to any decision or action that has the potential to impact on human rights.

- *Interpretive clause*

An interpretive clause requires courts to interpret legislation, where possible, in a way that is consistent with human rights. At the same time, the interpretive clause must require courts to respect the parliamentary intention underlying the statute – noting that, in a dialogue model, parliamentary intention will prevail, due to the ultimate supremacy of Parliament.

The Commission's approach to the interpretive clause is designed to chart a middle ground between a constitutionally suspect approach that would grant too much interpretive power to the courts to alter the meaning of legislation; and an approach that would simply be akin to the existing common law principle of legality. The approach that received the most support in consultations is the following formulation.

All primary and subordinate Commonwealth legislation to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.

In addition to this clause, the Commission also proposes clarifying that courts cannot declare that Acts of Parliament are invalid on the ground that they are incompatible with human rights. However, a statutory instrument that is not compatible with human rights may be invalid if it goes beyond what is authorised by the empowering Act, read in accordance with the interpretive clause.

- *Limitations clause*

A limitations clause describes the circumstances in which human rights may be permissibly limited.

Most human rights are not absolute, and circumstances may require that different rights be balanced against important public interests, and against countervailing rights. For example, it may be necessary to balance the right to freedom of expression with the right to privacy; and the right to access information with national security interests.

The Commission proposes an overarching limitations clause be included in the Human Rights Act. The limitations clause should be based on the 'proportionality' test that is strongly established in international law and applicable to human rights instruments. The wording of the limitations clause should serve a dual purpose of being a straightforward and complete legal test for the courts to apply, and a clear directive to public servants on how to conduct the limitations analysis in their day-to-day work.

A clause of this kind should incorporate an overarching statement to the effect that the rights and freedoms contained in the Human Rights Act may be subject only to such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society. The Commission has not proposed a particular form of words for the limitations clause but has identified its important elements. When deciding whether a limit is reasonable and justifiable, the following factors are relevant:

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, the limitations clause should prescribe that absolute rights such as freedom from torture and freedom from forced work must not be subject to any limitations.

The Commission proposes that the limitations clause include examples that highlight the minimum core of certain ICESCR rights. This will signify that ICESCR rights should not be limited to such an extent as to encroach upon the minimum protection required by the right.

### **(i) Notification to Parliament regarding incompatible laws**

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 though applying 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 trigger a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.

However, the High Court's comments in *Momcilovic v The Queen* have led to legal uncertainty about the constitutionality of DOIs at the federal level. This poses a risk that a federal Human Rights Act could not validly include a provision empowering federal courts to make them.

In light of this uncertainty, the Commission has considered a number of options to address potential constitutional concerns. It does not propose incorporating a formal DOI power for the courts to apply, and instead suggests an alternative approach.

In the course of applying the interpretive clause in the Human Rights Act, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the Human Rights Act or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.

The Commission proposes that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question. This will require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act. It will not require a formal DOI to be issued by the court to Parliament.

### **(j) Cause of action, complaints and remedies**

The integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision making and policy design.

However, sometimes better processes and education will not be enough, and breaches of human rights may occur. In those circumstances a Human Rights Act should provide a cause of action, a complaints pathway, and enforceable remedies.

The Commission recommends that each right should have a direct cause of action, and an associated range of remedies. Currently, individuals can bring human rights complaints through the Commission's existing *Australian Human Rights Commission Act 1986* (Cth) jurisdiction. This is by reference to international instruments that are scheduled to the legislation.

Under a Human Rights Act, individuals will continue to be able to make complaints to the Commission but rather than such complaints referring to international instruments, it would be by reference to the rights enumerated in the Human Rights Act. Consistent with federal discrimination law, there would also be a new pathway to bring claims before the courts alleging a breach of these rights.

- *Cause of action*

The Commission's proposed rights are all amenable to enforcement by complaints bodies and courts. Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action. This would provide clarity and consistency and enable the enforcement of rights in accordance with Australia's international obligations.

The Human Rights Act should also allow for Human Rights Act rights to be raised in the context of another legal proceeding (for example, in a judicial review proceeding or as part of a bail application).





# What happens if my rights are breached?

Where there is an alleged breach of rights, a person has a cause of action.

Administrative review pathways available.

Complaint to the AHRC for conciliation. Focus is on quick, cost-effective resolution of complaint.

This model builds on existing practice in federal discrimination law, and ensures focus of accountability is not on the courts.

When applying the interpretive clause, courts may indicate that the legislation is not compatible with human rights, which must be brought to the attention of Parliament by the Attorney-General.

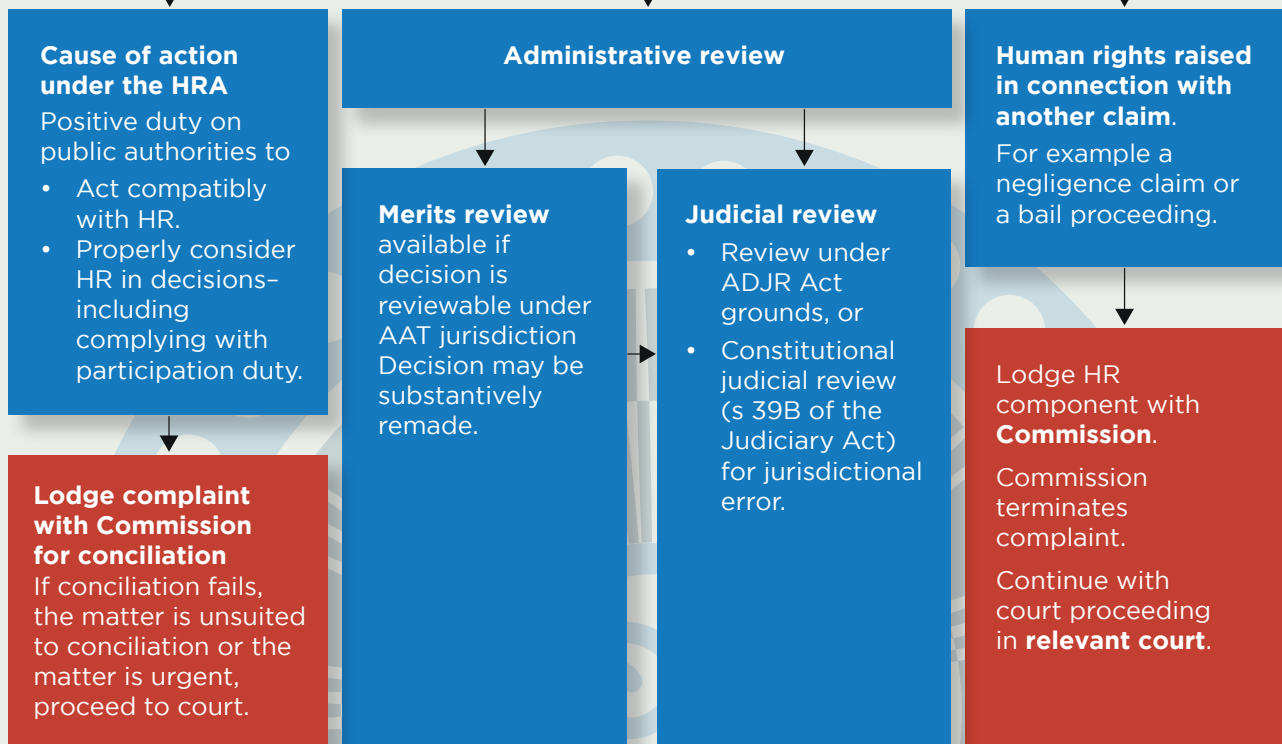
Matters that don't resolve or that are unsuited to conciliation, can proceed to Federal Circuit and Family Court:

- by individuals or representatives
- with cost protections
- courts able to award a range of remedies

Some, limited, matters may go direct to court where there is urgency.

# Pathways through complaints and courts

## Alleged breach of human rights by a public authority



## Federal Court or Federal Circuit and Family Court

When applying the interpretive clause, courts may indicate that the legislation is not compatible with human rights. This does not invalidate the decision or the law under which it was made.

Must be brought to attention of the Parliament by the Attorney-General, for consideration.

### HRA Remedies

**Remedies for HRA breach** may include: injunctions, orders requiring action, declaratory relief monetary damages, admin law remedies – e.g. quashing decision.

### Admin Law Remedies

**ADJR:** quashing or setting aside the decision; referring a decision back to the original decision-maker; declaratory relief; requiring parties to act or refrain from acting.

**Constitutional judicial review:** writ of certiorari, writ of mandamus, writ of prohibition, injunction.

- *Remedies*

The Commission proposes that the Human Rights Act give courts discretion over the range of remedies available, noting the range of different kinds of human rights claims and the importance of flexibility. Available remedies may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.

- *Complaints*

The Human Rights Act should allow a person to make a human rights complaint to the Commission. The Commission's existing unlawful discrimination jurisdiction could be suitably adapted to human rights complaints.

The Commission proposes implementing a Human Rights Act complaint system that mirrors the discrimination law jurisdiction. This would mean that there would be requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then make an application to a court for adjudication.

The same processes that currently exist for unlawful discrimination matters would apply in the human rights context (including all the termination grounds, and representative complaints processes). For example, existing termination grounds would enable a person to proceed to court when there is another claim on foot in a court or tribunal (that the human rights claim will be joined to).

The Commission also proposes one additional termination ground. This would enable a claim to be fast tracked to the court where there is an imminent risk of irreparable harm, to circumvent the complaint process when there is urgency. There would be an adapted and quick internal lodgment and review process, so that the Commission could return a response quickly in urgent cases.

The Commission suggests that the complaints model be subject to review at a future date, through the broader Human Rights Act review process.

An accessible complaints process including conciliation would reduce the impact of a Human Rights Act on the judicial system. Litigation need not be the only port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed.

- *Administrative law*

Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could have an impact on those mechanisms by supplementing existing bases for challenging government decisions.

The Administrative Appeals Tribunal (AAT) has the function of conducting a merits review of many kinds of government decisions. In doing so, the AAT reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. This process is often described as 'stepping into the shoes' of the original decision maker. A 'correct' decision is one made according to law. A 'preferable' decision is the best decision that could be made on the basis of the relevant facts. If human rights (either consideration of, or substantive compliance with) were a requirement for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider those human rights issues again independently.

In the Commission's Position Paper, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (December 2021), the Commission recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts, in relation to unlawful discrimination matters. This could also be extended to the resolution of disputes in relation to Human Rights Act matters.

A person who considers that a statutory decision maker did not give proper consideration to a relevant human right, as required by a Human Rights Act, could seek judicial review of the decision through the courts. Under existing grounds for review, a person may be able to argue that the decision was affected by jurisdictional error, that the decision involved an error of law or that the decision was an improper exercise of power because of a failure to take into account a relevant consideration that the decision maker was bound to take into account. Principles of administrative law, and administrative remedies should apply as usual to decisions that require adherence to the Human Rights Act.

- *Standing and costs*

The Commission proposes that standing under the Human Rights Act be afforded to individuals who claim that their human rights were breached by public authorities, and organisations or entities acting in the interest of a person, group or class affected by human rights breaches (representative standing).

It is important that representative standing be circumscribed to ensure that claims address a specific breach of human rights in relation to a particular individual or a clearly defined and identified group of individuals. The organisation initiating a claim should also have some kind of subject matter connection and/or representative interest in the matter at hand.

An additional means of enhancing access to justice is to include protections against adverse cost orders.

### **(k) Periodic reviews**

The Human Rights Act should include a provision for a periodic statutory review process within a set timeframe. The Commission proposes that an initial review be undertaken at the five-year mark, with the timeline for subsequent reviews assessed at that stage.

### **(l) Parliamentary scrutiny**

The Commission has made recommendations designed to improve the operation and effectiveness of parliamentary scrutiny of laws for compatibility with human rights. These proposals would strengthen mechanism of accountability for human rights protection provided by the PJCHR, ensuring early consideration of human rights in the development of legislation and embedding human rights in primary legislation against which the scrutiny is conducted.

The principal recommendation of this Position Paper is for a Human Rights Act. The work of the PJCHR will then complement this legislation in its role of review. The range of matters to be addressed in a statement of compatibility will principally focus on the rights and freedoms in the Human Rights Act. The Commission advocates that the PJCHR also continue a wider scrutiny role, referable to all the international treaty obligations and UNDRIP.

The Commission also sets out practical and procedural suggestions to strengthen the operation of the PJCHR.

### **(m) Role of the Commission**

In addition to complaints-handling functions, the Commission proposes that it have the following specific functions in relation to a Human Rights Act.

- Reporting, reviews and oversight. This would include powers to conduct own-motion systemic inquiries in relation to human rights breaches; and to review the policies and practices of public authorities to assess their compatibility with the Human Rights Act.
- Annual reporting.
- Extension of existing intervention powers to enable the Commission to intervene in court or tribunal proceedings involving the interpretation or application of the Human Rights Act.

- Education and public awareness.
- Public sector training and guidance, including support for the initial roll-out, ongoing education programs to improve human rights compliance, and the development of public sector guidelines and protocols.

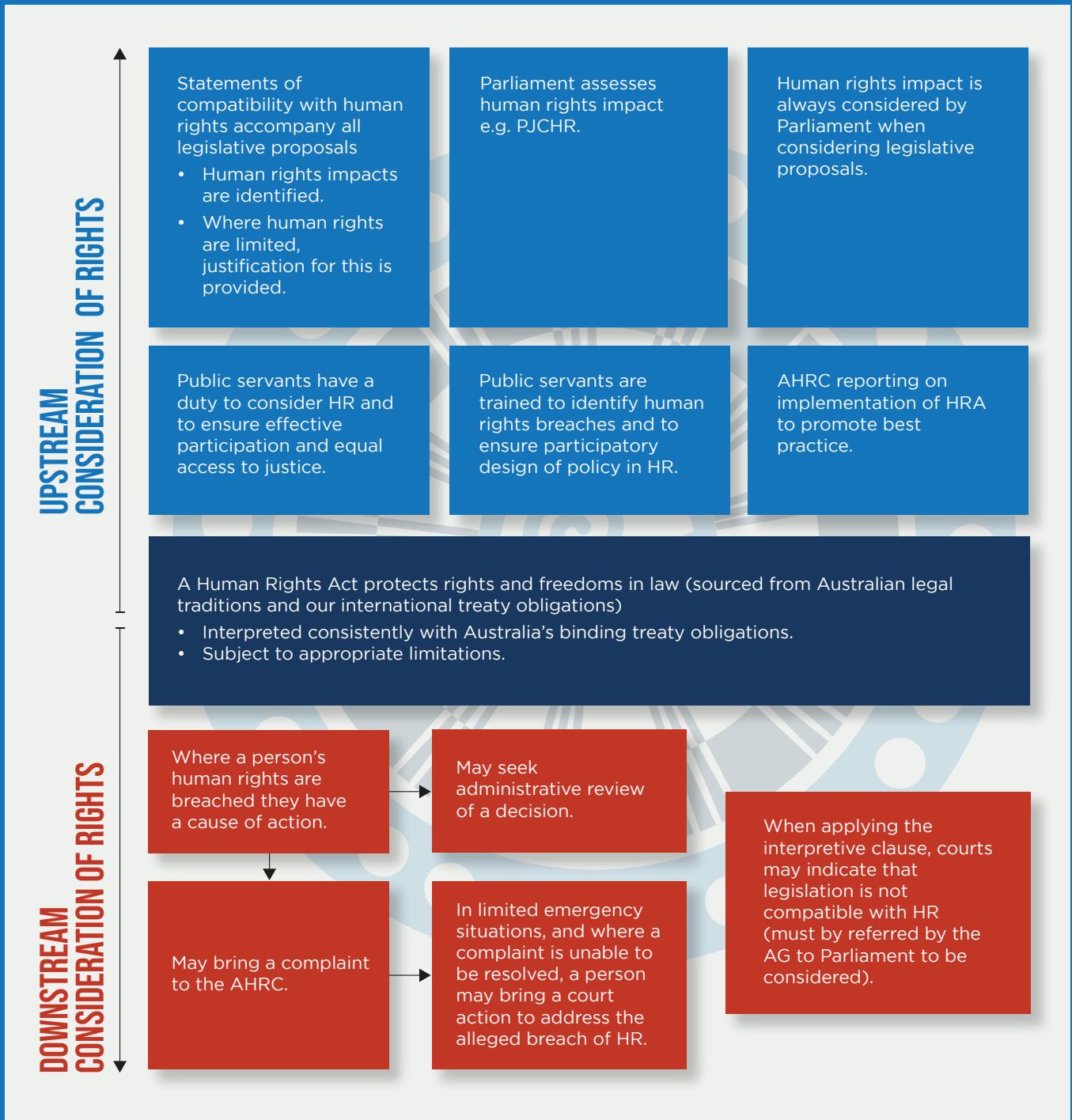
The Commission must be equipped with the necessary tools and resources to protect and promote human rights in line with the Paris Principles. The Paris Principles set out internationally accepted standards that must be met by National Human Rights Institutions such as the Commission.



# Recommendations

The Commission’s model for a Human Rights Act seeks to ensure appropriate consideration of human rights upstream – namely, in a preventative manner and in advance – by also

ensuring that there are protections and remedies for when human rights are not appropriately treated. The balance between upstream and preventative measures and remedial elements is summarised in the diagram below



The Commission makes the following recommendations for improved human rights protection at the national level in Australia.

**1. The Commission recommends that the Australian Parliament enact a federal Human Rights Act. The Human Rights Act should include the elements proposed in this Position Paper.**

**2. The Commission recommends the following measures to improve the parliamentary scrutiny processes.**

- The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.
- Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended, along the lines of the power of the UK Human Rights Committee, to allow it to ‘make special reports on any human rights issues which it may think fit to bring to the notice of Parliament’ (but excluding consideration of individual cases). The resourcing of the PJCHR should be increased to enable it to perform this wider inquiry role.
- Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to require statements of compatibility for all legislative instruments.
- The range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken in accordance with the participation duty proposed in the Commission’s model for a Human Rights Act.

- Statements of Compatibility should include consideration of compliance with UNDRIP.
- With the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could be amended, or an accompanying legislative instrument drafted to provide greater clarity on expectations in statements of compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.
- A public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.
- Consideration should be given to having designated human rights advisers in Departments.

## Free & Equal inquiry process

The Free and Equal project was announced on 10 December 2018, Human Rights Day, and commenced in early 2019. The project aims to set out the Australian Human Rights Commission’s proposed reform agenda for the better protection of human rights at the national level in Australia. From 2019–2021, the Commission’s consultative process included:

- the release of an Issues Paper<sup>1</sup>
- three Discussion Papers, including a submissions process<sup>2</sup>
- the Free and Equal national conference on human rights<sup>3</sup>
- a visit and conduct of technical workshops with the United Nations High Commissioner for Human Rights, and
- a series of roundtables, technical workshops and stakeholder consultations.<sup>4</sup>

The project is culminating with the release of three papers – two position papers on key reform priorities, and a final report.

The first Position Paper was released in December 2021: *Free & Equal: A reform agenda for federal discrimination laws*. It set out a reform agenda to modernise our federal discrimination laws, including by remedying deficiencies in the current laws, by placing a greater focus on prevention of discrimination and by introducing co-regulatory approaches<sup>5</sup> that enable governments and businesses in particular to be better equipped to prevent and/or deal with discrimination.

But addressing discrimination alone is not enough to ensure that people's human rights are protected.

This second Position Paper sets out reforms to improve the protection of human rights in Australia, designed to complement protections against discrimination and dealing with issues that discrimination laws are not capable of addressing. A positive framing of human rights through a Human Rights Act is needed to ensure cohesive protections are in place in Australia, and it would complement the existing discrimination law framework.

It sets out the Commission's case for the introduction of a federal Human Rights Act in Australia; and an outline of the Commission's proposed model.

Indeed, for many years, some have asserted that alternative ways of protecting human rights render a Human Rights Act unnecessary in Australia – but we have not seen a noticeable improvement in the protection of human rights in Australia over the past generation. These alternative measures to a Human Rights Act have had more than enough time to show if they can ensure that there is always a fulsome consideration of human rights in the way we design, implement and talk about laws and policies.

The Commission's model has been tested through consultations with *Free & Equal* stakeholders. It draws on comparative international models, international instruments and the recommendations of previous inquiries, including the 2009 Report of the National Human Rights Consultation Committee, chaired by Fr Frank Brennan SJ.<sup>6</sup> Domestic human rights legislation in the ACT, Victoria and Queensland has also provided important guidance and lessons as to how a Human Rights Act could operate federally.<sup>7</sup> The experience of COVID-19 has tested their particular design and suggested where improvements could be made.

The Commission's model takes into account this experience, Australia's constitutional and federal structure, Australia's international obligations, Australian values and our legal system.

## Outcomes – the value of human rights

*All human beings are born free and equal in dignity and rights* – Article 1, Universal Declaration of Human Rights

Australian society prides itself on being built on values that underpin human rights.

We believe that everyone should be treated fairly and equally.

We value a free, open and just society, one that enables us to make our own decisions about how we live and express ourselves, individually and in association with others.<sup>8</sup>

We are opposed to cruelty and the abuse of power.

Australia is a strong democracy with a robust electoral and parliamentary system, an independent judiciary and respect for the rule of law. For this reason, many people perceive that their human rights are legally protected when in fact they are not.



Australia has not implemented key rights contained in human rights treaties through a cohesive legislative instrument or the Constitution. This renders Australia an anomaly among all other liberal democracies.<sup>9</sup>

There is a gap between what we expect from government, and how our laws and administrative systems operate in practice.

Human rights are not always respected and protected by governments in Australia. Failures to protect human rights can affect all kinds of people, and any lack of respect for human rights degrades society at large. Often, those most harmed by human rights breaches are the most vulnerable among us.

The need for better human rights protections in Australia can be summarised by one simple proposition: we should have proper protection of human rights at the national level because everybody's human rights matter, all the time.

To do so requires that human rights are embedded within the laws of our country, so that they have practical effect for individuals, and are consistently and coherently applied by government. A Human Rights Act would ensure that the rights and freedoms that Australians rightly expect – and assume – are protected,<sup>10</sup> are in fact protected.

There is nothing exceptional about the idea that when making laws, or taking actions or decisions under them, parliamentarians and public officials should consider the human rights impact of their actions and should favour options that positively protect human rights or cause minimal harm to them.

Where parliamentarians or public officials make decisions or take actions that may harm a person (by infringing their human rights) they should transparently justify this choice, by identifying whether limitations on human rights are necessary, reasonable and proportionate to achieving the intended purpose.

A Human Rights Act as proposed by the Commission would mean that the following is reflected in our federal laws:

- assurance of fairness in government, legal and administrative decisions that affect rights
- priority given to respecting and protecting human life
- freedom to speak, create, protest, travel and organise
- freedom to live in accordance with your own beliefs, values and ideals
- freedom to make personal choices without interference, coercion or surveillance, including medical decisions and decisions about your family life
- protections against cruel treatment, arbitrary detention, and unjust court processes
- recognition of the essential standards required for a dignified life – including the provision of access to basic healthcare, housing, education and work; and protections against homelessness, hunger and poor working conditions
- assurance of equal treatment and respect, regardless of your sex, gender, sexuality, disability, age, nationality, race or religion
- embedding of supports to ensure the full autonomy of people with disabilities
- recognition and respect for the self-determination of First Nations peoples
- ensuring that the best interests of children are prioritised in decisions that affect them
- opportunities for disadvantaged, disenfranchised and vulnerable people and groups to participate more fully in the democratic process.

The COVID-19 pandemic has highlighted how important human rights protections are in times of emergency and uncertainty. They help us to discern our priorities, and make difficult decisions that respect human life and ensure that other rights are not unnecessarily restricted. As we emerge from the pandemic, it is clear that strong rights protections are needed and wanted to help us navigate our collective future, through both times of calm and times of crisis.

## Responding to COVID-19 – a case study

### (a) Role of human rights in times of crisis

Human rights law provides a framework for making decisions in times of crisis.<sup>11</sup> It provides a mechanism that can ensure that the usual rule of law principles and political norms are not secondary when responding efficiently and effectively to emergencies. Human rights not only provide an important check on executive power; they *help* us make emergency decisions that are rational, balance multiple factors, minimise human cost, and prioritise human life.

In the case of COVID-19, the human rights framework enables unprecedented measures to protect human life. The right to life is absolute and the right to health requires government to ensure access to healthcare and to prevent the spread of epidemics.<sup>12</sup> In some cases, this will mean that important rights are justifiably limited in order to protect public health – for example, freedom of association and freedom of movement.

Wherever rights are balanced against each other or limited, the human rights framework provides guidance on how to approach the assessment. All limitations on rights must be:

- Lawful, namely prescribed by law and accessible to the public.

- In pursuit of a legitimate aim, such as the promotion of other human rights and public interests (for example, public health).
- Reasonable, necessary and proportionate. This means that interferences with rights must be
  - » A rational means of achieving the legitimate aim
  - » Necessary to achieve the aim (including in light of other options)
  - » Proportionate to the aim (no more than what is required to achieve the aim, and the least intrusive option possible).
- All measures taken must also be non-discriminatory.

When applying these criteria to COVID-19 measures such as lockdowns, we can come to conclusions about appropriate courses of action that align with human rights. Each measure must be lawful and clearly communicated to the public. COVID-19 measures are in pursuit of public health outcomes, and therefore have a legitimate aim. Whether a measure is reasonable, necessary and proportionate depends on the circumstances, including the level of risk to health (which changes over time), the necessity of the measure to addressing the health risk, and the extent of the impact on other important rights.

For example, restrictions on the right to protest may be justified when the population is unvaccinated and COVID-19 is prevalent in the community, but may be less justifiable when there are high vaccination rates and precautionary measures are taken by the protest organisers to mitigate COVID-19 risks. The implementation must also be proportionate – for example, excessive or criminal sanctions for peaceful protesting would be unnecessary to realising the goal of the restrictions – protecting health.

The human rights framework also requires safeguards such as time constraints and reviews on any steps taken to limit human rights. If the measures are no longer necessary, they should cease. It has been noted that ‘infrastructure deployed as a temporary measure tends to persist after crises’.<sup>13</sup> This must be avoided.

Additionally, measures taken must be equitable and should not discriminate; for example, a person’s nationality should not affect their access to social security and health services during a pandemic.

Australia’s COVID response was relatively effective in protecting rights to life and to health, compared to many other nations. However, there were key failures which resulted in human rights breaches, and insufficient consideration for certain vulnerable and marginalised groups throughout the COVID response. A domestic Human Rights Act would have provided law and guidance that may have improved Australia’s response in certain key respects.

### **(b) Some key human rights concerns associated with Australia’s COVID-19 response**

- *Lack of lawful basis for measures*

Many restrictions on rights and penalties were introduced to combat the COVID-19 pandemic through delegated legislation, without legislative oversight or review.<sup>14</sup> Many of these measures were also implemented without sufficient transparency about government decision-making process, including regarding the evidence upon which decisions were based.<sup>15</sup> They were often accompanied by increased police enforcement powers.

- *Border closures*

Australia implemented international and internal border closures and restrictions for extended periods of time during COVID-19. This included the unprecedented step of travel caps effectively preventing thousands of Australian citizens from re-entering Australia;<sup>16</sup> and an outright ban on citizens returning from India (with penalties of 5 years imprisonment or a \$66,000 fine) during the Delta outbreak, which drew concern by the Office of the High Commissioner for Human Rights.<sup>17</sup> These policies resulted in the potential for physical endangerment of Australians overseas;<sup>18</sup> extended periods of family separation; high financial costs associated with inflated travel prices, accommodation abroad and mandated hotel quarantine upon return to Australia; lost employment opportunities; and mental health impacts. The Senate Select Committee on COVID-19 found that

The government’s pandemic plan should have provided a workable means of repatriating citizens early in the pandemic. Instead, when Australia’s international border closed, Australian citizens stranded overseas were effectively abandoned.<sup>19</sup>

- *Vaccine rollout*

Australia has a high vaccination rate against COVID-19.<sup>20</sup> However, Australia’s initial vaccine rollout was plagued with problems and lengthy delays, affecting the right to health for all Australians.<sup>21</sup> There were also inequities associated with vaccination of certain vulnerable groups.

- *Lack of consideration for vulnerable groups*

First Nations peoples have lower vaccination rates compared to the overall population despite being classified as high priority at the commencement of the rollout, and there have been several outbreaks in remote First Nations communities.<sup>22</sup>

The needs of children have not been prioritised in COVID-19 policy and children have faced difficulties regarding their mental health, learning and social life,<sup>23</sup> exacerbated by the slow vaccination rollout. This was 'disproportionately borne by the most vulnerable' children and families, including those with low income.<sup>24</sup>

Available reporting indicates that prisoners have lower vaccination rates and limited access to testing, despite prisons being particularly susceptible to COVID-19 outbreaks.<sup>25</sup>

Insufficient steps were taken to reduce the number of people in immigration detention who did not pose any threat to public safety, despite outbreaks and the high risk of COVID-19.<sup>26</sup> By contrast, the UK reduced the number of people held in immigration centres by more than two thirds in March 2020.<sup>27</sup>

A disproportionate number of deaths from COVID-19 occurred in residential aged care facilities. The Senate Select Committee on COVID 19 found that 'the crisis in aged care was entirely predictable and – to a large extent – avoidable'.<sup>28</sup>

The Senate Select Committee on COVID-19 commented that 'many countries vaccinated people with a disability first. This was not the case in Australia where the government failed to implement strategies which would protect this vulnerable group.'<sup>29</sup> The Disability Royal Commission also expressed concern about the treatment of persons with disability living within closed residential settings, finding that steps taken to lockdown facilities or restrict visiting may have reduced formal and informal oversight mechanisms.<sup>30</sup>

### (c) The role of a Human Rights Act

The Senate Select Committee on COVID 19 released its final report in April 2022. It made the following key recommendation:

All Australian Governments ensure that restrictions enacted to combat the COVID-19 pandemic are proportionate, the minimum necessary intrusion on rights at all times and are removed fully as soon as the public emergency is over.<sup>31</sup>

The Committee also recommended that

the Australian Government urgently review its pandemic planning to deliver immediate improvements including:

...

1. a plan for timely repatriation of Australians overseas in the event of border closures or restricted international travel;
2. evaluate the effectiveness of plans for working with and responding appropriately to the needs of vulnerable people during a pandemic and implement updated plans accordingly, including for older Australians, Aboriginal and Torres Strait Islander Australians, people living with disability and children; and
3. principles for addressing related health impacts, including the social determinants of health, mental health service delivery, and ensuring the health and welfare requirements of people experiencing family, domestic, or sexual violence are met.<sup>32</sup>

If a Human Rights Act had been in place at the federal level at the time of the COVID-19 outbreak, these recommendations would have been *built into* the decision-making responses of the Federal Government from the *outset* of the pandemic.

This is the key value of a human rights framework. It ensures that human rights are considered in the planning phase, encouraging greater due diligence, transparency and accountability.

It requires decisions about prioritising resources and policy responses to be justified publicly with reference to human rights so that the public can properly assess them.

It ensures that the stringent effects of emergency measures are mitigated through the provision of supports and the embedding of safeguards. It prevents emergency measures from becoming the ‘new normal’.

It sets out a balancing process that takes into account the needs of *everyone* in the community and prevents the most vulnerable from falling through the cracks. It prevents arbitrary decisions and blanket rules by requiring sufficient flexibility to respond to individual circumstances: for example, allowing a person to cross a border to bury a family member, or an elderly person to receive a visitor.

It provides a check on executive power by drawing lines that should not be crossed — such as locking vulnerable citizens out of their own country. It ensures that responses to emergencies are humane.

A Human Rights Act may not lead to perfect results, but it would help us make better decisions. COVID-19 has highlighted the need for a shared set of rights and values to guide us through difficult times.

#### **(d) Examples of how Human Rights Acts have been used to address COVID-19**

The following case studies provide examples of how Human Rights Acts have helped protect rights during COVID-19.

#### **UK: Protecting the rights of those in care facilities**

Edna is 83 and lives in residential care, her daughter Emily visits most days after work. Following a COVID-19 outbreak, the home put a ‘no visiting’ policy in place. It has now been 34 days, and Edna is isolated and lonely, missing Emily hugely. Emily had accessed some support on the Human Rights Act and speaks to the care home manager about her mother’s right to privacy, family life, home and correspondence, which the home is legally obliged to respect. Emily discusses how this right includes mental and physical wellbeing, family and other relationships, and while it can be restricted to protect her mum and/or others from harm, this needs to be proportionate.

With no consideration of Edna’s ability to keep in touch with Emily, the manager recognises that a blanket ban on visiting is not the least restrictive option. Knowing that they have legal duties to act in accordance with human rights,<sup>33</sup> a meeting is called to agree what alternatives can be put in place whilst they deal with the current outbreak. After the meeting, staff put in place several measures which are less restrictive to support people’s mental and physical wellbeing while still protecting the right to life.

The measures vary, as staff know the same measure will not work for everyone but include video calls, PPE provision for visitors of those for whom video calls not possible, a gazebo in the garden and a floor-to-ceiling screen. Some restrictions are still needed, but applying the Human Rights Act in practice has ensured this is based on each individual and is more proportionate. Emily now visits her mum every Sunday, wearing full PPE, until the outbreak is contained. The Human Rights Act helped keep a family together at a time when they need each other the most.

Sourced from British Institute of Human Rights.<sup>34</sup>

## Victoria: Accountability for public housing lockdown

In 2020, after COVID-19 cases began emerging in nine high-rise public housing towers in inner north Melbourne, the Victorian Government imposed, without notice to residents, an extremely hard lockdown, detaining around 3,000 people in nine public housing towers. Restrictions were eased in several days for most of the towers, however, 400 people in one tower remained in hard lockdown for two weeks in total, unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise. People subjected to the lockdown complained to the Victorian Ombudsman which investigated whether the lockdown complied with the Victorian Charter.

Despite the obvious risk posed by COVID-19 in high-rise public housing towers, the Victorian Government had not prepared a COVID-19 outbreak management plan for the relevant public housing estates or for high-density public housing more broadly. When cases began emerging, senior health officials were worried about the situation and began discussing using public health powers to put the towers into quarantine with notice to the residents. Following a crisis cabinet meeting, the timeline for the quarantine was brought forward and no notice was proposed. The Deputy Chief Health Officer, who had the power to detain people in quarantine, was given 15 minutes before a press conference to consider the potential human rights impacts and sign the directions imposing the lockdown. The immediacy of the lockdown was not on her advice.

The Victorian Government had no contingency plans for the imposition of a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the Victorian community, let alone one imposed without notice late on a Saturday afternoon. When the lockdown was announced to the media, hundreds of police officers were immediately deployed to the public housing estates and directed people to remain in their homes. Chaos followed. People did not have access to food or medication. Urgent requests

for medication were delayed or neglected. Information was confused, incomprehensible, or non-existent, especially for people from culturally diverse backgrounds. People did not know who was in charge. No access to fresh air and outdoor exercise was provided for over a week.

The Ombudsman concluded that while swift action to address the public health risk in the towers was necessary, the immediacy of the lockdown was not justified, was not based on the advice of public health officials and led to many of the problems in the treatment of the residents. By imposing the lockdown without notice, the Ombudsman concluded that the Victorian Government had breached the residents' right to humane treatment when deprived of liberty. The Ombudsman stated that proper consideration was not given to the residents' rights when imposing the restrictions, as required by the Charter.

The Ombudsman made recommendations including that the Victorian Government apologise to the residents and introduce greater detention review safeguards into public health legislation. While the Victorian Government refused to apologise, it did support amendments to public health legislation.

Inner Melbourne Community Legal provided legal support to residents of the towers during the hard lockdown and has monitored Victorian Government responses to subsequent outbreaks in the towers in 2021. It reports that, while the government's refusal to apologise continues to impede the rebuilding of trust required to respond to the pandemic, and accessible timely communication in community languages remains problematic, there have been significant improvements in the way government has responded to concerns about outbreaks in the last year. Notably, government has favoured a health response driven by community organisations and abandoned the heavy-handed police response that was a feature of the 2020 lockdown.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>35</sup>

### **Queensland: Quarantine exemption for woman with disability**

A woman planned to visit Queensland from interstate to pick up her assistance dog, with her mother and her carer, during a period of COVID-19 border restrictions. She was granted an exemption to enter Queensland where she agreed to isolate for 14 days and then spend a week receiving placement of the dog. However, when they tried to arrange for accessible quarantine accommodation, they were told the woman's needs could not be met and her exemption approval was withdrawn. The assistance dog had been trained specifically for the woman's needs at substantial cost and

they were concerned that she would lose the dog allocated to her if she was unable to visit Queensland.

The complainant chose to have this matter dealt with under the Queensland Human Rights Act. Through early intervention, the complaint was successfully resolved for the woman. Her exemption application to enter Queensland was re-approved. Queensland Health organised suitable accommodation for her, her mother and her carer to complete 14-day hotel quarantine.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.<sup>36</sup>



## Endnotes

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- 8 See, eg, 'Australian values' *Home Affairs* (Web Page) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/social-cohesion/australian-values>>.
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- 11 See, eg, discussion in Sarah Joseph, 'COVID-19, risk and rights: the 'wicked' balancing act for governments' *The Conversation* (Online) 16 September 2020 <<https://theconversation.com/covid-19-risk-and-rights-the-wicked-balancing-act-for-governments-146014>>.
- 12 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12, 4(2) (ICCPR); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 4(2) (ICESCR); CESCR Committee, *General Comment No 14: The right to the highest attainable standard of health*, UN Doc E/C.12/2000/4, August 2000 [16].
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- 15 Senate Select Committee on COVID-19, *Final Report* (April 2022) [5.15]. See also, Paul Karp, 'Human rights commission says national cabinet should not be covered by secrecy laws' *The Guardian* (Online) 17 September 2021 <<https://>



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