



7 November 2019



Australian Human Rights Commission
National Conversation on Human Rights
GPO Box 5218
Sydney NSW 2001
via email

Dear Commission,

**Submission to the Australian Human Rights Commission National
Conversation on Human Rights Project**

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the Australian Human Rights Commission's National Conversation on Human Rights Project.

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, undertakes casework for disadvantaged clients and engages in law reform and policy work in areas where the operation and effectiveness of the law could be improved. In 2018, KLC provided 1708 advices and ran 284 cases.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC regularly acts for clients in discrimination matters at the Australian Human Rights Commission (AHRC), Anti-Discrimination Board NSW (ADB) and the Fair Work Commission (FWC).

KLC has advocated for stronger human rights protections for many years at the state, federal and international levels, to ensure our clients have access to effective remedies when their human rights are breached. KLC welcomes the AHRC's National Conversation as an important opportunity to discuss Australia's international human rights obligations, and the development of an effective human rights framework to promote, protect and fulfill the human rights of everyone in Australia.

Executive Summary

Australia is party to the key international human rights conventions, and has an obligation to adopt laws and other measures to give effect to the human rights enshrined in these treaties in domestic law. However, Australia is yet to give comprehensive protection to human rights in domestic law. Currently, human rights in Australia are protected through a myriad of federal, state and territory laws, policies and practices, and through the common law. KLC is concerned that the current legal framework makes it difficult for ordinary Australians to identify their rights and freedoms, and to understand the extent to which their rights are recognised at law. The complex interactions of the various sources of law also make it difficult to concisely articulate how these legal rights work. This hinders the promotion of respect for fundamental human rights. KLC believes that it would assist ordinary Australians' understanding of their rights and responsibilities to set these out in one single document.

Moreover, Australian law currently adopts a bottom-up approach, addressing the protection of each right individually. This is an unsatisfactory approach in which some fundamental rights are adequately protected whilst others are not protected at all. KLC believes that this creates too much ambiguity and leaves too many gaps in the law. KLCs recommends that the most appropriate way to ensure human rights are protected under Australian law is for the enactment of a national human rights act.

Enacting a national human rights act would allow more concise classification and better protection of human rights and freedoms. A national human rights act would also recognise that human rights are indivisible, and would not privilege some rights over others, unlike the existing piecemeal approach to human rights protection in Australia.

The enactment of comprehensive human rights legislation, along with an implementation strategy and a judicial body for the determination of disputes would constitute an effective system of human rights protection for 21st century Australia, and would ensure Australia complies with our international human rights law obligations.

This submission will address the following questions from the Issues Paper:

1. What human rights matter to you?
2. How should human rights be protected in Australia?
3. What are the barriers to the protection of human rights in Australia?
4. How should the Government address the situation where there is a conflict between different people's rights?
5. What should happen if someone's human rights are not respected?
8. What should the Australian Human Rights Commission and the government do to educate people about human rights?
10. How should we measure progress in respecting, protecting and fulfilling human rights?
12. Are there other issues on which you wish to comment?

Recommendations

This submission recommends:

1. Any human rights framework for Australia should protect all human rights in law, reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated.
2. Australia should sign the *International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families*; the *International Convention for the Protection of All Persons from Enforced Disappearance*; the *Optional Protocol of the International Covenant on*

Economic, Social and Cultural Rights; and the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*.

3. Human rights should be protected in Australia through the federal enactment of comprehensive, judicially enforceable human rights act.
4. This national human rights act should protect all human rights reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated. Alternatively, at a minimum, the national human rights act should protect all the human rights contained in the ICCPR and ICESCR. The objects of a human rights act should be the protection, promotion and attainment of human rights in Australia.
5. This human rights act should provide access to effective remedies, through making available the full suite of judicial remedies where a breach of the human rights act has been established, including compensation, declarations and injunctions.
6. The federal government should consolidate existing anti-discrimination legislation and enact a comprehensive Equality Act that:
 - a) addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against systemic and intersectional discrimination;
 - b) The harmonisation of this legislation should reflect at least the highest level of protection currently provided under discrimination law across the relevant States, Territories or Commonwealth.
7. The federal government should amend Part IIB Division 2 of the *Australian Human Rights Commission Act 1986* (Cth) so that applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies. Parties should only be ordered to pay the costs of the other sides if one of the following exceptions applies:
 - The party instituted the proceedings vexatiously or without reasonable cause; or
 - The party caused the other party to incur costs by an unreasonable act or omission.
8. The time limit to lodge a complaint of sexual harassment to the Australian Human Rights Commission should be extended to 12 months and the onus of establishing why an application should not be accepted out of time should be reversed.
9. The Commonwealth government should:
 - Improve the quality of Statements of Compatibility;
 - Amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to guarantee the PJCHR a minimum time period to consider each Bill or legislative instrument before it is debated in Parliament; and

- Extend the mandate of the PJCHR to include the domestic consideration, follow up and oversight of implementation of recommendations and views of UN human rights mechanisms.
10. The Commonwealth, State and Territory governments should provide increased funding for strategic advocacy and law reform activities to community legal centres and should remove existing advocacy restrictions from funding agreements.
 11. The Commonwealth parliament should enact a comprehensive, judicially enforceable national human rights act.
 12. This national human rights act should protect all human rights reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated. Alternatively, at a minimum, the national human rights act should protect all the human rights contained in the ICCPR and ICESCR. The objects of a human rights act should be the protection, promotion and attainment of human rights in Australia.
 13. A national human rights act should incorporate principles of balancing of rights from international human rights jurisprudence;
 14. The Commonwealth government should give the Australian Human Rights Commission the mandate to develop a policy on balancing competing rights.
 15. A national human rights act should provide access to effective remedies, including the full suite of judicial remedies where a breach of the human rights act has been established, including compensation, declarations and injunctions.
 16. A national human rights act should provide for a standalone cause of action for human rights breaches under the Act.
 17. The Commonwealth government should provide increased funding to the Australian Human Rights Commission to enable it to fulfil its educative role.
 18. The Commonwealth government should provide increased funding to community legal centres to enable them to deliver community legal education on human rights in order to build awareness in the community on human rights.
 19. The Commonwealth government should measure progress in respecting, fulfilling and protecting human rights through:
 - a) Conducting a comprehensive review of the national human rights act within 5 years of its commencement;
 - b) Ongoing and public measurement of the implementation rate of UN Treaty Body concluding observations on Australia and

recommendations made through the UN Universal Periodic Review process; and

- c) Ongoing and public measurement of the implementation rate of UN Treaty Body views on individual communications.

20. The federal government should increase funding to the Australian Human Rights Commission to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.

Question 1: What human rights matter to you?

KLC submits that all human rights are important, due to the principle that human rights are universal, indivisible, interdependent and interrelated.¹ As stated in the Vienna Declaration, Australia must protect and promote *all* human rights:²

The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and religious particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

An effective system of human rights protection for 21st century Australia should protect, promote and fulfil all the human rights that Australia has agreed to uphold through international instruments. Australia was a leader in the drafting of the foundational human rights document, the Universal Declaration of Human Rights. Australia is a signatory to the seven core human rights treaties:

- *International Covenant on Civil and Political Rights (ICCPR)*;
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;
- *Convention on the Elimination of all forms of Racial Discrimination (ICERD)*;
- *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*;
- *Convention on the Rights of the Child (CRC)*;
- *Convention on the Rights of Persons with Disabilities (CRPD)*; and

¹ UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) para 5.

² *Ibid* para 5.

- *Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT).*

Australia has yet to sign the:

- *International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families;*
- *International Convention for the Protection of All Persons from Enforced Disappearance;*
- *Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR);* and
- *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3-CRC).*

As Australia is a dualist state, ‘statements of international law [are not] automatically rendered part of Australian domestic law’.³ This means that the Australian government must enact laws to give effect to its international human rights treaty obligations. To date, Australia has failed to comprehensively enact these human rights protections at law. At a minimum, Australia’s domestic law should achieve protection of the human rights detailed in these core instruments.

There is a pressing need for Australia to enact comprehensive human rights legislation. Our current legal framework is ad hoc and does not provide comprehensive protection or remedies against human rights breaches. This failure to protect human rights results in serious human rights breaches and impacts most heavily on marginalised groups, including Aboriginal and Torres Strait Islander people, people with disability, older persons, young people, people from a culturally and linguistically diverse background and people experiencing mental illness.

Recent times have seen public discourse about the importance of protection of individual rights, such as freedom of religion. KLC believes that piecemeal protection of human rights is inadequate and fails to recognise the indivisibility of human rights. We submit that comprehensive legislative enactment of our

³ *Wurridjal v Commonwealth* [2009] 237 CLR 309, 412 (Kirby J).

human rights obligations is crucial to recognising the indivisibility of human rights, and will ensure a fairer society for everyone in Australia.

Recommendations:

- 1. Any human rights framework for Australia should protect all human rights in law, reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated.**
- 2. Australia should sign the *International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families*; the *International Convention for the Protection of All Persons from Enforced Disappearance*; the *Optional Protocol of the International Covenant on Economic, Social and Cultural Rights*; and the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*.**

Question 2: How should human rights be protected in Australia?

Australia is the only western democracy without a national human rights act or bill of rights. Human rights are not adequately protected in the Australian Constitution. Despite significant public support for a human rights act, successive federal governments have failed to enact such protection.⁴

KLC submits that human rights should be protected in Australia through the federal enactment of a comprehensive, judicially enforceable human rights act. A human rights act should encompass all of Australia's international human rights obligations, and as a minimum requirement, should not derogate from Australia's obligations under the International Bill of Rights. The objects of a human rights act should be the protection, promotion and attainment of human rights in Australia.

The jurisdictional application of the Act should be determined by whether the person was within Australia's territory or effective control at the time of the alleged breach of human rights, and whether the breach occurred within Australia. This would ensure the Act applies to both citizens and non-citizens. The Act should cover human rights breaches committed by federal and state

⁴ 87% of Australians support the introduction of a Human Rights Act. See, National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

government authorities, government departments, and government bodies which exercise public functions or decision-making, such as privatised service providers.

The human rights act should provide access to effective remedies, through making available the full suite of judicial remedies where a breach of the human rights act has been established, including compensation, declarations and injunctions.

Recommendations:

- 3. Human rights should be protected in Australia through the federal enactment of comprehensive, judicially enforceable human rights act.**
- 4. This national human rights act should protect all human rights reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated. Alternatively, at a minimum, the national human rights act should protect all the human rights contained in the ICCPR and ICESCR. The objects of a human rights act should be the protection, promotion and attainment of human rights in Australia.**
- 5. This human rights act should provide access to effective remedies, through making available the full suite of judicial remedies where a breach of the human rights act has been established, including compensation, declarations and injunctions.**

Question 3: What are the barriers to the protection of human rights in Australia?

The current legal framework is inadequate

Australia's current legal framework is ad hoc and does not provide comprehensive protection of human rights or access to effective remedies when human rights are breached. Currently, there are some human rights protections in Australia through the Constitution, the common law and anti-discrimination legislation at the state, territory and federal levels. The ACT, Victoria and Queensland also have human rights acts.

However, as the case studies below illustrate, this patchwork of laws does not guarantee human rights nor provide access to effective remedies. KLC often advises and represents clients who are facing human rights breaches. It is

frequently difficult to find a relevant cause of action to comprehensively address these human rights issues or ensure access for these clients to effective remedies. Gaps in human rights protection at both the state and federal level are a barrier to the protection of human rights in Australia and demonstrate the need for a comprehensive national human rights act.

Case study – Jessica (right to a fair trial (minimum guarantees in criminal proceedings) and access to justice)⁵

Jessica contacted Kingsford Legal Centre after being charged with criminal offences which she did not understand. She lives with psychological disability and receives the disability support pension. She does not have a caseworker who can help her with documents and appointments. Jessica was facing potential fines and imprisonment.

Jessica attended mentions at court with the assistance of Legal Aid duty lawyers but was not able to get ongoing legal assistance of any kind. Without comprehensive legal support, Jessica is having to navigate the process for applying under section 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW) in court on her own.

The limited availability of legal assistance in NSW demonstrates the need for strong legislative protections of the right to a fair trial and to equal treatment before the courts.

Case study- Martha (right to housing)⁶

Martha is 66 years old and had been living in public housing for the past 25 years with her abusive husband. Her husband was the tenant and she was an authorised occupant. After Martha's husband left her, she found out that he was running several businesses. Martha doesn't have any access to profits from the businesses. Her sole source of income is the age pension. Martha applied to remain living in the property, however her request was denied because Housing NSW's recognition as a tenant policy does not apply in circumstances of family

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 ('ICCPR'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13 ('CRPD').

⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11 ('ICESCR').

breakdowns. Martha was not eligible to be housed elsewhere either because her husband ran a business, even though she did not have access to any of the profits of the business and could not afford to rent in the private market. Because she could not enforce her right to housing, Martha faced homelessness.

Case study – Ali (freedom of religion, the right to not be discriminated against on the basis of religion, right to education)⁷

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family.

We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion. The lack of legal protections in NSW and at the federal level meant that Ali couldn't access to his right to education nor freedom of religion.

Case study- Rema and Franco (the right to not be discriminated against on the basis of disability, right to inclusive education)⁸

Rema called KLC for advice about her 6-year-old son Franco. Rema had enrolled Franco in the local independent school that his older brothers also attended. The school was aware of Franco's diagnosis of autism and request for reasonable adjustments, including the request for an Aide. In late November before Franco was meant to start Kindergarten, the Principal wrote to Rema to say that Franco could not start at the school as they could not provide the adjustments requested. All they could offer was a place in another school over 40 kilometres away. Rema was left with barely any time to find Franco a place in a local school. Even a disability discrimination complaint at this point would not have resolved the issue before Franco was due to start school. In any event, Rema would not have been able to make a disability discrimination complaint under the NSW Anti-Discrimination Act, as the school was a "private educational authority" and thus exempt from the operation of the Act.

⁷ ICCPR arts 2, 18, 26; ICESCR art 13.

⁸ ICCPR arts 2, 26; ICESCR arts 2, 13; CRPD arts 3, 4, 5, 24.

Case study – Fei (violence against women)⁹

Fei was in a relationship with Alan for 5 years. The relationship was violent from the beginning, with Alan constantly subjecting Fei to verbal abuse at home. He would also push her around the home and physically restrain her whenever he felt jealous of her socialising with other people. Fei did not report this early abuse to the police or to her doctor, as they had a young child together early in the relationship, and she did not want to split up the family.

On one occasion Alan became enraged that Fei had started hanging out with some old friends and he punched her in the face at home and smashed her mobile phone against a mirror, causing significant damage to their rental property. Fei had a bruised and swollen face for weeks. A neighbour called the police, and they attended and took out an apprehended violence order to protect Fei. Fei and Alan remained together for another 6 months. At that point Alan again physically assaulted Fei causing bruising to her face. Fei left the family home with their child shortly afterwards.

Fei received a Victims Compensation recognition payment of \$1,500. The only injuries she could prove were the bruises that resulted from the incident attended by the police.

The NSW victims support scheme does not recognise the barriers victims of domestic and family violence experience in reporting violence. The scheme imposes onerous time limits that many women are unable to meet. Even where women can meet the time limits and evidence requirements, they are only entitled to small amounts of compensation under the scheme, making it difficult for women to flee abusive relationships. If decision-makers in NSW were trained in human rights and required to take human rights into

⁹ Violence against women has been recognised as a human rights issue – for example, violence against women can infringe on the right to life, the right to health, and the right to be free from cruel, inhuman and degrading treatment. Violence against women is also a form of sex discrimination and a cause and consequence of gender inequality: United Nations Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 19 – Violence against women*, UN Doc CEDAW/C/GC/19 (1992); United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (2010); ICCPR arts 2, 7, 26; ICESCR art 2; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 1–2.

consideration in decision-making, it is likely the Victims Compensation scheme would be improved.

How does the current framework protect human rights?

The Australian Constitution

The Constitution expressly provides protection for a small number of rights, including the:

- Right to vote¹⁰
- Protection against the acquisition of property on unjust terms¹¹
- The right to trial by jury for a federal indictable offence¹²
- Freedom from state adoption of religion¹³; and
- Prohibition on discrimination on the basis of State of residency.¹⁴

In *Nationwide News Pty Ltd v Wills* the High Court found that the Constitution includes the implied right to freedom of political communication.¹⁵ The High Court has also recognised the right to vote.

The common law

The common law offers limited protection of human rights in Australia, largely through principles of statutory interpretation. In *Chu Keng Lim v Minister for Immigration*, the High Court found that in cases of ambiguity, courts should “favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty”.¹⁶ In *Coco v The Queen* (1994), the High Court found that legislation should be construed so as not to interfere with fundamental rights, unless an intention to do so is manifested by “unmistakeable and unambiguous language”.¹⁷ However, these principles

¹⁰ *Australian Constitution* s 41.

¹¹ *Ibid* s 51 (xxxi).

¹² *Ibid* s 80.

¹³ *Ibid* s 116.

¹⁴ *Ibid* s 117.

¹⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; See also, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁶ *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

¹⁷ *Coco v The Queen* (1994) 179 CLR 427, 435-37 (Mason CJ and Brennan, Gaudron and McHugh JJ).

provide insufficient human rights protections, as governments can override the common law by demonstrating a clear intention to override rights in new legislation.

Discrimination law

Currently, anti-discrimination law remains one of the only avenues where people who have experienced human rights breaches can seek redress. However, anti-discrimination law alone is inadequate to meet Australia's international human rights obligations. Australia's reliance on anti-discrimination law for human rights matters is a barrier to the effective protection of human rights in Australia.

The main anti-discrimination laws at the federal level are the:

- *Racial Discrimination Act 1975* (Cth);
- *Sex Discrimination Act 1984* (Cth);
- *Disability Discrimination Act 1992* (Cth); and
- *Age Discrimination Act 2004* (Cth).

Protections against discrimination in employment are also provided under the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth). Each State and Territory has also enacted anti-discrimination legislation.¹⁸

However, existing anti-discrimination laws in Australia are inadequate due to their inconsistency, limited scope, failure to address systemic or intersectional discrimination and wide exemptions. Disappointingly, plans to consolidate federal anti-discrimination law were abandoned in 2013. The retention of separate legislation dealing with different grounds of discrimination makes it difficult for complainants who experience intersectional discrimination.

Numerous exemptions to discrimination law act as a defence to claims of discrimination. Indeed, permanent exceptions in the *Sex Discrimination Act 1984* (Cth) for religious organisations mean that LGBTI people can be treated unfavourably at work, or in education, without recourse.¹⁹

The discrimination complaints process relies on the person who has experienced discrimination to bring a complaint. The complaints process fails to

¹⁸ *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

¹⁹ *Sex Discrimination Act 1984* (Cth) s 38.

adequately address the power imbalance between complainants and respondents, as complainants bear the onus of proof. As it is a costs jurisdiction, many complainants settle through confidential alternative dispute resolution processes, limiting broader dialogue around systemic discrimination.

In 2017, the ordinary time limit for making complaints of discrimination to the Australian Human Rights Commission was reduced to 6 months,²⁰ and complainants must now seek leave to take their matters to court,²¹ limiting access to effective remedies.

Recommendations:

- 6. The federal government should consolidate existing anti-discrimination legislation and enact a comprehensive Equality Act that:**
 - a) addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against systemic and intersectional discrimination;**
 - b) The harmonisation of this legislation should reflect at least the highest level of protection currently provided under discrimination law across the relevant States, Territories or Commonwealth.**
- 7. The federal government should amend Part IIB Division 2 of the *Australian Human Rights Commission Act 1986* (Cth) so that applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies. Parties should only be ordered to pay the costs of the other sides if one of the following exceptions applies:
 - The party instituted the proceedings vexatiously or without reasonable cause; or
 - The party caused the other party to incur costs by an unreasonable act or omission.**
- 8. The time limit to lodge a complaint of sexual harassment to the Australian Human Rights Commission should be extended to 12 months and the onus of establishing why an application should not be accepted out of time should be reversed.**

State and Territory human rights acts

The ACT, Victoria and Queensland have enacted human rights acts. These are the:

- *Human Rights Act 2004* (ACT) (**ACT Act**);

²⁰ Complaints may be accepted after 6 months in some circumstances.

²¹ *Human Rights Legislation Amendment Act 2017* (Cth), amending *Australian Human Rights Commission Act 1986* (Cth) ss 46PH(1)(b), 46PO.

- *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**);
- *Human Rights Act 2019* (Qld) (**Queensland Act**).

These human rights acts are based on the ‘dialogue model’ of human rights protection. Under the dialogue model, parliament, the executive, and the courts share responsibility for the interpretation and enforcement of human rights. These state and territory human rights acts do not give the courts the power to invalidate legislation for inconsistency with human rights. Rather, the courts may make a declaration of incompatibility or inconsistency. However, a declaration of incompatibility or inconsistency does not affect the validity of the law. Under these human rights acts, the general process is that if a declaration of incompatibility is made, the Attorney-General must respond. However, there is no requirement for the parliament to amend the law to comply with human rights.

While a positive development, these state and territory human rights acts do not comprehensively implement Australia’s international human rights law obligations. These acts broadly cover civil and political rights, and some limited economic, social and cultural rights.

Legislative scrutiny

The Commonwealth Parliamentary Joint Committee on Human Rights (**PJCHR**) was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and commenced operation in 2012. The PJCHR’s key function is to examine bills for compatibility with the seven core human rights treaties to which Australia is a party.

While KLC supports scrutiny of all bills for compliance with Australia’s international human rights law obligations, we submit the PJCHR is largely ineffective. The recommendations and comments of the PJCHR are rarely appropriately responded to, or considered, and are often ignored. When the PJCHR raises concerns about human rights issues in bills, the bills are often routinely passed without amendment to address these concerns. George Williams and Daniel Reynolds note that as of 4 January 2016, there were 95 instances where the PJCHR found that legislation before it was, or may be,

incompatible with human rights, but on 69 occasions (73%) that finding had no impact on the passage of the legislation.²²

In addition, the timeframes within which the PJCHR is required to operate are insufficient to allow proper consideration of the compatibility of bills and legislative instruments with Australia's international human rights obligations. The PJCHR's reports are often delayed, and there is a growing trend of bills going to a vote before the PJCHR has reported on their compatibility with human rights.²³

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) also requires the Commonwealth government to prepare Statements of Compatibility (**SOCs**) for bills and legislative instruments. However, the SOC's are often poor and fail to contain accurate or thorough human rights analysis. An analysis of 129 SOC's produced in the first 6 months of the Committee's operation found that 'most SOC's are brief and many display a disturbing lack of analytical rigour'.²⁴

Recommendations:

9. The Commonwealth government should:

- **Improve the quality of Statements of Compatibility;**
- **Amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to guarantee the PJCHR a minimum time period to consider each Bill or legislative instrument before it is debated in Parliament; and**
- **Extend the mandate of the PJCHR to include the domestic consideration, follow up and oversight of implementation of recommendations and views of UN human rights mechanisms.**

Advocacy restrictions on community legal centres

Community Legal Centres have traditionally engaged in advocacy for the promotion and protection of the human rights of marginalised groups. However, government funding restrictions act as a barrier to human rights advocacy.

22 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 490.

23 Williams and Reynolds, above n 22, 476.

24 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58, 81.

Despite the Productivity Commission's Access to Justice report noting law reform advocacy as central to the efficacy of legal assistance services, the federal government has restricted community legal centres from engaging in systemic advocacy through the National Partnership Agreement on Legal Assistance Services funding agreements since 2014. Under the NPA, community legal centres are restricted from using federal funding for advocacy for law and policy reform. The current agreement provides 'Commonwealth funding should not be used to lobby governments or to engage in public campaigns'. Previous federal funding agreements had included law reform and legal policy as core services under the NPA. Some states still allow CLCs that receive state government funding to engage in law reform and policy work.

Community legal centres, due to the volume of disadvantaged clients they service, are in a unique position to identify systemic issues in law and policy and recommend reform measures that will improve the lives of their clients and the communities in which they work. CLCs have traditionally taken a community development approach, placing client voices at the centre of their law reform work, and have brought about many positive reforms. The restrictions mean that many CLCs and their clients are effectively silenced on law reform and policy issues, reducing access to justice for people across Australia.

Recommendation:

10. The Commonwealth, State and Territory Governments should provide increased funding for strategic advocacy and law reform activities to community legal centres and should remove existing advocacy restrictions from funding agreements.

We need a national human rights act

As the above discussion illustrates, human rights are not adequately protected in Australia through patchwork legislation, the common law, and ineffective parliamentary scrutiny processes.

KLC submits that in order to meet our international human rights law obligations, we need a national human rights act. This national human rights act should protect all human rights reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated. Alternatively, at a

minimum, the national human rights act should protect all the human rights contained in the ICCPR and ICESCR.

Recommendations:

- 11. The Commonwealth parliament should enact a comprehensive, judicially enforceable national human rights act.**
- 12. This national human rights act should protect all human rights reflecting the principle that all human rights are universal, indivisible, interdependent and interrelated. Alternatively, at a minimum, the national human rights act should protect all the human rights contained in the ICCPR and ICESCR.**

Question 4: How should the Government address the situation where there is a conflict between different people's rights?

Where there is a conflict between different people's rights, the government must engage in a process of balancing these competing rights. This would be a matter for judicial interpretation and responsibility should fall on the judicial body which hears cases under the proposed national human rights act. Balancing rights should be dealt with on a case-by-case basis, with consideration of the individual circumstances of each party in the context of Australian and international human rights law.

In balancing rights, a test which has arisen in other areas of law involves judicial consideration of the necessity and proportionality. This process would require a court to consider whether Australia can be justified in upholding a person's rights, even when doing so would breach the rights of another person, because the rights are necessary to achieve a legitimate aim and are proportionate to the aim pursued. The consideration of necessity would require the court to consider the extent of Australian society's communal interest in upholding the human right, and the consideration of proportionality would require the court to determine whether the harm caused to another person is no more than necessary to achieve that communal interest.

Judges would also be required to consider the content of the human rights in question, and the difference between absolute and non-absolute human rights. While non-absolute rights may be limited in their ordinary application in certain circumstances, absolute rights may never be breached or limited under any circumstances. For example, Article 4 of the ICCPR allows for temporary

suspension of the application of some rights in extreme circumstances such as the declaration of a 'state of emergency.'²⁵ However, certain rights such as freedom from torture and slavery are considered "absolute rights" and no breach of these rights is ever justified. Judges would be required to consider the specific status of the rights in question when engaging with any rights balancing exercise.

Australia can take inspiration from the existing procedures of the international community in developing an approach to balancing human rights. For example, the Canadian *Charter of Rights and Freedoms* recognises that there are circumstances where duties to uphold human rights are in direct conflict.²⁶

Judges are required to consider whether the duty to uphold an individual's human rights will impose any "undue hardship." However, there is no single rule for judges to apply in making this determination. Judges must consider the unique facts of each case and the totality of the situation in order to determine the extent to which the accommodation of human rights is necessary and achievable.

Recommendations:

- 13. A national human rights act should incorporate principles of balancing of rights from international human rights jurisprudence;**
- 14. The Commonwealth government should give the Australian Human Rights Commission the mandate to develop a policy on balancing competing rights.**

Question 5: What should happen if someone's human rights are not respected?

A national human rights act should ensure that people whose rights have not been respected or have been breached have access to effective remedies. International human rights law recognises the importance of access to effective remedies for violations of human rights. For example, article 2(3) of the ICCPR requires state parties "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..."²⁷ The UN

²⁵ ICCPR art 4.

²⁶ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

²⁷ ICCPR art 2(3).

Human Rights Committee has stated that the right to an effective remedy includes providing reparations to individuals whose rights have been violated, and may involve “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”.²⁸

As the central aim of a national human rights act should be to ensure that the government acts in accordance with its human rights obligations, the act should give individuals a standalone cause of action to sue to the government should their rights be breached. A national human rights act should include access to the full suite of judicial remedies including declarations, injunctions, orders to cease the offending conduct and damages.

Currently, no charter in Australia provides for a freestanding cause of action where damages are available. The *Human Rights Act 2004* (ACT) has a freestanding cause to seek a remedy, but damages are not available.²⁹ Under the Victorian Charter, a claimant can only bring a case under the Charter if they can ‘piggy back’ it to an existing cause of action for an unlawful act or decision.³⁰ However, the review of the Charter found that this requirement to piggy back a cause of action has caused delays and excessive resources being spent on jurisdictional issues rather than resolving human rights claims.³¹

Recommendations:

- 15. A national human rights act should provide access to effective remedies, including the full suite of judicial remedies where a breach of the human rights act has been established, including compensation, declarations and injunctions.**
- 16. A national human rights act should provide for a standalone cause of action for human rights breaches under the Act.**

²⁸ Human Rights Committee, *General Comment No 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 16.

²⁹ *Human Rights Act 2004* (ACT) s 40.

³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³¹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 22.

What should the Australian Human Rights Commission and the government do to educate people about human rights?

Raising awareness and engaging in human rights education is a key function of the Australian Human Rights Commission. The Commonwealth government should increase funding to the AHRC to allow it to fulfil its educative role. This could lead to a greater culture of respect for human rights in the Australian community.

The federal government should also provide increased funding for community legal centres to engage in community legal education about human rights. The Australian public should be equipped with the ability to identify their human rights, when their rights are breached, and to be empowered to assert their rights. A strong, ongoing program of human rights education in both the community and within the public sector is necessary to achieve this culture of respect for human rights in Australia.

Community legal education initiatives, such as those undertaken by KLC, provide a valuable service to the community by enhancing access to justice. Community legal education involves the development of resources such as brochures, information flyers and publications, the conducting of seminars, workshops and presentations for people working in community services and for members of the public. Increased government funding to provide these services would enhance education about human rights and contribute to the creation of human rights based culture in Australia.

Recommendations:

- 17. The Commonwealth government should provide increased funding to the Australian Human Rights Commission to enable it to fulfil its educative role.**
- 18. The Commonwealth government should provide increased funding to community legal centres to enable them to deliver community legal education on human rights in order to build awareness in the community on human rights.**

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

Implementation of comprehensive human rights law in Australia should involve some mechanisms for tracking the decisions of public agencies and public servants and measuring the extent to which they align with human rights law. It will be necessary to conduct a comprehensive review of the human rights system within the first 5 years of its operation in order to ensure that the system is meeting its objectives and that any issues arising in the early operation of the scheme can be quickly addressed. This review would involve statistical analysis of the number of human rights matters dealt with under the new system, and the implementation of effective remedies.

Progress in respecting, protecting and fulfilling human rights should also be measured against our international human rights obligations. This should include measurement of the implementation rate of UN Treaty Body concluding observations on Australia and recommendations made through the UN Universal Periodic Review process.

Another important measurement is Australia's implementation rate of the remedies recommended by UN Treaty Bodies where individual communications have led to the UN finding Australia in breach of its international treaty obligations. Remedy Australia notes that since 1994, the UN Human Rights Committee has found Australia in breach of the ICCPR and other human rights treaties 47 times.³² Of the 40 communications between 1990-2017 where Australia was found to be in violation of the ICCPR, "only 5 (12.5%) have been fully remedied in accordance with Final Views, with partial remedies forthcoming in a further 10 cases (25%). Sixty-two per cent have not been remedied at all".³³

This non-compliance rate with final views of UN Treaty Bodies is extremely disappointing and demonstrates the lack of effective remedies available to

32 Remedy Australia, *Homepage* <<https://www.remedy.org.au/>>.

33 Remedy Australia, *Follow-up Report on violations by Australia of ICCPR in individual communications (1994-2017)* (October 2017) <https://www.remedy.org.au/reports/2017_RemedyAustralia_Follow-Up_Report_on_individual_communications.pdf>.

people in the Australian community where their human rights have been violated. Australia's compliance with final views should be measured, and the Australian government should make a greater effort to comply with their obligations under human rights law.

Recommendations:

- 19. The Commonwealth government should measure progress in respecting, fulfilling and protecting human rights through:**
- a) Conducting a comprehensive review of the national human rights act within 5 years of its commencement;**
 - b) Ongoing and public measurement of the implementation rate of UN Treaty Body concluding observations on Australia and recommendations made through the UN Universal Periodic Review process; and**
 - c) Ongoing and public measurement of the implementation rate of UN Treaty Body views on individual communications.**

11. Are there any other issues on which you wish to comment?

Need for increased funding for AHRC

The AHRC remains significantly under-resourced, hampering its ability to fulfil its statutory complaint-handling and educative functions³⁴ in an efficient and effective manner.

The AHRC, as Australia's national human rights institution, has key functions including resolving complaints of human rights and discrimination, developing human rights education programs and resources, and providing advice to government on laws, policies and programs. The AHRC has a vital role to play in educating the community, government and the private sector about their rights and obligations under human rights law. The educative and awareness-raising functions of the AHRC have significant potential to lead to the development of a robust human rights culture in Australia.

However, the financial resources allocated to the AHRC remain inadequate and there has been a substantial reduction in funding,³⁵ including further cuts of half a million dollars over the next five years.³⁶

³⁴ *Australian Human Rights Commission Act 1986* (Cth) s 11.

³⁵ The funding cuts to the AHRC announced on 15 December 2014 amounted to \$5 million over three years, or more than \$1.6 million per year. See, Commonwealth Government, 'Mid-Year

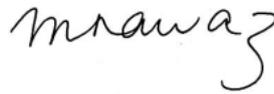
Recommendation:

- 20. The federal government should increase funding to the Australian Human Rights Commission to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.**

Yours faithfully,
KINGSFORD LEGAL CENTRE



Emma Golledge
Director



Maria Nawaz
Law Reform and Policy Solicitor

Jessica Fonti
Student Law Clerk

Economic and Fiscal Outlook: Appendix A – Policy Decisions Taken since the 2014-2015 Budget: Expense Measures' (December 2014) 120. See also: Australian Human Rights Commission, *Corporate Plan 2016-17* (Report, July 2016) 5, online accessed <<https://www.humanrights.gov.au/sites/default/files/document/publication/Corporate-Plan-2016-AHRC.pdf>>.

36 Commonwealth Government, 'Budget 2018-19' (Budget Paper No 2, Parliament of Australia, 2018) 48, 75.