

RIGHTS IN SIGHT

...THE ROAD TO A FEDERAL HUMAN RIGHTS ACT

Observations, strategies, hints and tips from CLA'S discussions and correspondence with more than 70 decision makers and affected parties on a possible Federal Human Rights Act (FHRA).

THE VISION: *Upholding all human rights through an ethical infrastructure that is applied consistently, drawing on a single codified set of human rights, is the best way to create a society that is sustainable and liveable, and that enjoys the greatest possible freedom.*

THE PROMISE: *A Human Rights Act articulates the government's obligations to the powerless*

THE OPPORTUNITY:

CLA has concluded that a future Labor Government, either in its own right or with cross bench support, offers the best chance of implementing a FHRA since the Brennan Report in 2009.

COVID 19 constraints and a range of state and federal government decisions on justice, movement and privacy in particular have raised the profile of Australians' human rights. The last two years have also shown that, in the absence of a FHRA in our federal jurisdiction, human rights cannot be reconciled to broader societal imperatives, from law and order to pandemic responses, without being weaponised.

Australia tells the rest of the world that human rights are inter-related, indivisible, inter-dependent and equally important. Domestically, our rights to privacy, protection from discrimination, freedom of thought, speech and movement, education, social security, work, culture and procedural fairness in law are being played off against each other in a game of identity politics that is sliding us all into social dislocation and distrust.

On the upside, there have never been more people working to bring about a HRA. From Human Rights Commissions in every jurisdiction to the Law Council of Australia, from the Human Rights Law Centre to every Council of Social Services, from the Uniting Church in Australia and Jesuit Social Services to Humanists Victoria there is work being done to encourage the political leadership necessary to take advantage of this opportunity and deliver a FHRA.

There is work for every advocate keen for the Federal Government to uphold all of our human rights equally and provide a consistent process for reconciling the rights of individuals with national imperatives that places us and the governments we elect on an equal footing.

See **Attachment 1** for a summary of the arguments for and against a FHRA arising from CLA discussions.

THE NEED FOR POLITICAL LEADERSHIP:

In discussions with CLA, FHRA advocates and their opponents agreed that a FHRA is unlikely to proceed without clear political leadership because the political capital required to invest in its success will not be repaid at the ballot. This view was informed by their previous experience and based on four assumptions that FHRA advocates will need to overcome:

- *No political upside*: While fixes for *individual* rights can attract political action, a FHRA is next week's political problem. It does not resolve any immediate issue in a way that will resonate with the public.
- *No friends with benefits*: Who will march for a FHRA? Support for a FHRA is wide but commitment is shallow. While advocates for political, economic, social and cultural reform are usually in favour of a FHRA, it is a secondary cause for them and they are not prepared to divert time and resources from their primary cause, or sacrifice political capital, to ally with FHRA advocates.
- *No platform*: A FHRA debate will descend very rapidly into identity based political debates that are unwinnable for advocates in the current media environment.
- *No electoral certainty*: Those who support a FHRA are unlikely to win an election with it and it may help them lose one. Those who oppose a FHRA are unlikely to lose an election by doing so.

See **Attachment 2** for who's where on the road to a FHRA.

CLA'S FOCUS:

CLA is well aware of the width and depth of work being done across Australia on a future FHRA. We have chosen to focus our resources on two clear objectives:

- *Rights In Sight*: encouraging a review of Australia's human rights framework in the first 100 days of the next Labor Government to avoid a FHRA becoming an electoral liability in the identity politics and dog whistling that dominates election campaigns; and
- *No Rights Without Remedy*: ensuring a future FHRA allows individuals easier and quicker access to the lower-level commissions, tribunals and courts to seek mandated remedies or compensation for human rights breaches by Government decision makers.

CLA is also considering a campaign to encourage social, economic and political reformers to include a FHRA as the means to remedy and compensate breaches of the rights they are advocating for.

RIGHTS IN SIGHT:

In the hyperbolic election environment of Death Taxes, Mediscare and Electric Vehicles ending the Weekend, CLA understands the concern of FHRA advocates in politics about proposing a FHRA for an election campaign. As one interviewee said to CLA, "the party that promotes a FHRA will be portrayed as giving bigger televisions to paedophiles in jail."

Given the assumptions around a FHRA campaign of no political upside, no platform and no electoral certainty, no party looking for an absolute majority is game to take it on. The only remaining road to a FHRA – the review on whether Australia should upgrade its current Federal Human Rights Framework to

a FHRA as promised by Labor in its national platform - will need to occur early in a new Labor Government to ensure that ensuing legislation does not get caught up in the following election. CLA lobbied Labor to retain this promise at Labor's last national platform review, and continues to press Labor for a commitment to hold the promised review in the first 100 days of a new Labor Government.

CLA lobbied the Greens to promise a FHRA as an election commitment. We have also lobbied the Greens, and continue to lobby the centre independents in both houses of parliament, to view a FHRA as an exchange for their support to establish any future Labor minority government, or for support on any key piece of legislation for a future Labor Government. The key arguments we have drawn on are:

- A FHRA is the basis for reconciling any conflict between human rights consistently and fairly (eg: between sexual orientation and religion) and balancing human rights with broader societal imperatives (eg: the right to move freely during a pandemic) independently of executive government. A FHRA is therefore a barrier to weaponising human rights by identity politics practitioners and a brake on the slide into social dislocation and distrust.
- Australia's ethical infrastructure needs to apply human rights consistently and fairly. Any improvement in Australia's ethical infrastructure, including a national integrity commission, will fit more effectively into an ethical infrastructure underpinned by a FHRA.
- A FHRA is a process that local members can use to help resolve claims by individual constituents that the Federal Government has breached their rights. One interviewee said that this would deal with 60% of all constituent complaints. See **Attachment 3** for CLA's checklist for an effective FHRA

While CLA keeps the contents of its discussions with FHRA advocates and opponents confidential, we are happy to help anyone interested in lobbying Labor, the Greens and centre independents for "Rights In Sight." Contact Chris Stamford at hracampaignmanager@cla.asn.au

NO RIGHTS WITHOUT REMEDY:

HRAs in Australia guide the development of legislation and encourage human rights accountability in Government decisions. Individuals can generally access commissions, tribunals and lower courts to seek remedy for some human rights breaches through separate discrimination legislation. However, even in Victoria and Queensland that have HRAs, individuals cannot use the HRA as a primary cause to access the courts. In the ACT you can "lawyer up" at considerable expense and get to the ACT Supreme Court on a matter that only arises from the ACT HRA, but the Court cannot set compensation.

CLA noted an emerging view that a FHRA would only be truly effective if individuals had easier and quicker access for mandated remedies and compensation for a breach of *any* of their human rights. This would make remedy for all human rights breaches accessible and affordable for individuals whose complaints were not dealt with by Departmental complaints processes or conciliated by Human Rights Commissions (HRCs). It would also put the pressure of external and public scrutiny on Departments to ensure that their human rights complaints processes are effective.

CLA is developing a test case for this approach in the ACT. We are coordinating with Australian Lawyers for Human Rights (ALHR), Canberra Community Law (CCL) and the ACT Council of Social Services (ACTCOSS) to petition the ACT Assembly to consider:

- extending the ACT HRC's complaints processes to cover all rights in the ACT HRA; and
- allowing individuals to seek mandatory remedy/compensation through the ACT HRC, ACAT (and the Supreme Court if required) for any breach of a right under the ACT HRA.

CLA lobbied the ACT Attorney-General, the Minister for Human Rights, the Opposition Leader and Shadow Attorney-General, the shadow Assistant Attorney-General and the Assembly's Justice and Community Safety Committee (JACS) chair and members in advance of the petition to gauge possible responses to it. The petition has now obtained more than the required 500 signatures and will be considered by the ACT Legislative Assembly for referral to the JACS Committee. A committee review will serve two purposes for CLA:

- It will make a recommendation to the Assembly on the legal, ethical, budgetary and administrative aspects of extending the human rights complaints process to the lower courts; and
- Provide a thorough dress rehearsal by a state Labor/Greens Government for the same argument at a review of the Federal Human Rights Framework promised by the next Federal Labor Government.

The key arguments we have drawn on in the lobbying process are:

- While the ACT should be justly proud of its Human Rights Act, it has inadvertently created a two tier approach to remedying rights breaches that clearly disadvantages powerless ACT residents.
- The human rights agenda will continue to expand (eg, Modern Slavery laws, new Anti-Discrimination provisions). Without a clear, consistent, integrated and accessible complaints process that covers every right under the ACT HRA, the number of ACT residents falling through the cracks will increase, defeating the Government's intent.
- A JACS review is likely to find that the cost of any potential increase in cases before the ACT's HRC and community tribunal will be offset by a more efficient and effective departmental complaints processes driven by external and public scrutiny.
- Concern that expanding the complaints process will place too much power in the hands of an unelected judiciary can be mitigated by coordinating standard "charters" to be included as schedules to any legislation directly affecting individuals and their rights under the HRA. These "charters" will identify how people can expect to be treated under legislation related to the charter; any specific rights that underpin that treatment; and the ethical infrastructure available to seek fast, fair remedy for breaches of those rights.

While CLA keeps the contents of its discussions with FHRA advocates and opponents confidential, we can help anyone interested in finding out more about CLA's preparations for the JACS review as part of its "No Rights Without Remedy" strategy. Contact Chris Stamford at hracampaignmanager@cla.asn.au

*See **Attachment 4** for CLA's summary of the argument for extending the ACT HRC's human rights complaints process.*

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Civil Liberties Australia (CLA) is a community service association. Among other activities, we campaign for national rights laws for Australia, and for the states and the NT which do not have such laws, as well as proposing improvements to the laws in the ACT, Victoria and Queensland. All CLA members are volunteers: no-one is paid.

ARGUMENTS FOR AND AGAINST A FEDERAL HUMAN RIGHTS ACT (FHRA) FROM CLA DISCUSSIONS

Those who are in favour of implementing a FHRA agree that it would:

- articulate the government's obligation to be humane to the powerless;
- allow human rights to be applied consistently in the Federal jurisdiction;
- lead directly to economic, social and political benefits including reductions in inequality;
- contribute to stability in the business, social and cultural environment;
- provide a mechanism for engaging with societal risk;
- provide a valuable legal umbrella for non-government philanthropic projects;
- underpin and complement a federal Integrity Commission, and
- help restore the credibility of, and trust in, Government.

Those who are not in favour of a FHRA argue that either:

- the current system is not broken and therefore does not need the external stimulus of a FHRA for reform, and that confidence can be restored from within the system, usually by demonstrating moral authority through leading a return to values inherent in the doctrine of responsible government that have been temporarily set aside; or
- a HRA places too much power in the hands of an unelected judiciary and threatens the authority of parliament, implying that a FHRA will reduce the power of politicians over the judiciary; or
- a FHRA will give an advantage in law to some rights that are not compatible with their beliefs (for example, employing LGBTQI teachers at some religious schools),

WHO'S WHERE ON THE ROAD TO A FEDERAL HUMAN RIGHTS ACT

Who's where on the road to a Federal Human Rights Act: POLITICAL

- There is no indication that the current, or any future, Coalition Government will bring forward a FHRA in any form or provide bi-partisan support for HRA legislation proposed by others.
- Labor's national platform commits a future Labor Government to a review about whether Australia should upgrade its current Federal Human Rights Framework to a HRA. Initial indications from within Labor are that the review will be conducted early in the first term of a future Labor Government.
- The Greens are committed to implementing a national HRA.
- Independents in both houses contacted by CLA have indicated they will respond positively to a HRA proposal, but not as a key element of their next election campaigns.
- Independent Member for Clark Andrew Wilkie's Australian Bill of Rights Bill 2019 remains before the House of Representatives. The Wilkie Bill would:
 - render invalid any Commonwealth, State or Territory law that is inconsistent with the Bill of Rights (that is, with a Human Rights Act);
 - allow the Australian Human Rights Commission (AHRC) to inquire into any act or practice that may infringe a right or freedom in the Bill of Rights; and
 - allow for complaints to be made to the AHRC that allege that an act or practice infringes a right or freedom in the Bill of Rights.

The Wilkie Bill does not provide access to the lower tribunals and courts for individuals seeking a mandated remedy for a human rights breach.

Who's where on the road to a Federal Human Rights Act: ECONOMIC and SOCIAL

The Australian Council of Trade Unions has previously indicated its support for a federal HRA, but has yet to indicate whether it will encourage a future Labor Government to commit to the promised review early in its first term.

Aboriginal Land Council CEOs indicated in discussions with CLA that First Nations people would be more willing to negotiate a treaty and initiate a Makarrata with an Australian Government that has at least committed to an effective FHRA, particularly if it contains a commitment to free prior and informed consent as part of the cultural rights it incorporates.

Business is at the global forefront of applying human rights to managing social risk. Government can call on that experience to help:

- generate a social licence to operate; and

- enhance corporate reputation (making politicians and political institutions more respected and trusted); and
- engage with social risk, effectively targeting social impact mitigation strategies and creating opportunities for shared value with stakeholders.

Discussions between CLA and business leaders indicate that the private sector is unlikely to lead the policy push for a HRA as its influence on business is indirect and the risk of being drawn into identity politics is too high.

Business groups will however review a HRA proposal rationally for its effect on business' need for a stable, rules-based and sustainable international and domestic business environment, providing a counterpoint to the inevitable identity-based debates.

Business groups and entities contacted say they are already operating to rights- and values-based principles with their enablers and customers, and would be comfortable adapting existing processes into a legislated human rights environment.

THE FEDERAL HUMAN RIGHTS ACT CHECKLIST

A HRA identifies the human rights drawn from the seven UN Human Rights Instruments ratified by Australia that the Australian Parliament agrees should be legally protected within its jurisdiction.

Does this HRA and its subsidiary instruments:

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Guarantee that all Australians can fully participate in civil and political life without discrimination or repression by including all rights in the International Covenant on Civil And Political Rights?			
Enable the full enjoyment of civil and political rights by including all rights in the International Covenant on Economic, Social and Cultural Rights?			
Cover rights in other Human Rights instruments ratified by Australia, including: • International Convention on the Elimination of All Forms of Racial Discrimination; • Convention on the Elimination of All Forms of Discrimination against Women; • Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; • Convention on the Rights of the Child; and • UN Declaration of the Rights of Indigenous Peoples.			

A HRA codifies how those rights will be upheld, either in the Act or through subsidiary laws and regulations created to implement the Act. Does this HRA and its subsidiary instruments

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Contain mechanisms to ensure that Parliament is obliged to uphold the provisions of the HRA when passing any new legislation or amendments to existing legislation?			
Permit a stand-alone, direct cause of action to the Federal Court and/or a HRA-based cause of action to attach to an independent legal claim?			
Ensure that courts interpret new legislation or amendments consistently with the HRA, and declare legislation to Parliament if it is inconsistent with a HRA?			
Require Parliament to respond to a declaration by the courts?			
Ensure that an independent tribunal decides and enforces resolutions where rights are in conflict?			
Ensure that an independent tribunal holds government decision makers responsible for acting consistently with the HRA?			
Provide effective, timely and inexpensive access for people to an independent tribunal able to mandate remedies for successful HRA-based complaints raised by individuals about government decisions?			

A HRA specifies the circumstances under which Federal Parliament can override the human rights of individuals in its jurisdiction. Does this HRA and its subsidiary instruments:

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Constrain Parliament's ability to override the HRA to specific and clearly defined circumstances?			

Place a sunset clause on any legislated override?			
Apply to everyone within the Commonwealth's jurisdiction?			

BACKGROUND: *What is the practical effect of a HRA?*

1. Ensures that all new legislation and amendments take into account the Parliament's obligation to uphold human rights included in the HRA.
2. Creates a rule of statutory interpretation that courts will interpret legislation in a way compatible with the rights included in a HRA: and, if they find legislation inconsistent with a HRA, make a declaration to Parliament that further consideration of that law is needed.
3. Creates a duty for government decision makers to properly consider, and act consistently with, human rights in all their decisions and actions.
4. Forms the foundation of an ethical infrastructure to underpin society, based on human rights, ensuring a consistent approach to: compliance monitoring; holding people and organisations to account; conciliation; remedy; damages; and education through mechanisms independent of Government, including Human Rights Commissioners, Integrity Chiefs, Ombudsmen and Tribunals and Courts.
5. Ensures there are ways that are independent of Government to referee rights in tension with each other.

BACKGROUND: *The best HRA for Australia based on lessons from the ACT, Victoria and Queensland:*

CLA maintains that:

- Upholding all human rights through an ethical infrastructure that is applied consistently, drawing on a single codified set of human rights, is the best way to create a society that is sustainable and liveable, enjoying the most possible liberties and freedoms;
- A HRA articulates the government's obligation to be humane to the powerless; and
- A HRA provides common ground for discussing ethics inside government, and outside.
- Once a HRA has been legislated, the role of adjudicating when rights come into tension with each other, with other interests, or where multiple competing rights and interests need to be resolved, is best left to an independent commission, tribunal or court.

CLA notes that HRAs in Australian jurisdictions:

- Do not wholly commit their governments to upholding all the human rights covered in UN International Human Rights instruments to the limit of their capacity as jurisdictions;
- Do not commit governments to respond to incompatibility declarations by the courts; and
- Do not provide a simple, efficient and direct pathway to a binding remedy for individuals with a human-rights based complaint about a government decision that is independent of the decision maker.

CLA therefore advocates that:

- The HRA should include all rights Australia is committed to observe, nationally, under the seven UN International Human Rights Instruments.
- The circumstances under which a federal government can override the human rights of individuals are limited to at most: war; a state of emergency; and an exceptional crisis constituting a threat to public safety, health or order; will include a clear appeal mechanism, and will be covered by a sunset clause.

- As there are no rights without remedy, a HRA and subsidiary laws and rules should provide a clear pathway to an independent tribunal for people with a human rights complaint about a government decision (*normally through the decision maker's complaints process, conciliation through the Australian Human Rights Commission and a case before the Administrative Appeals Tribunal; in very rare cases, to higher courts*)

NO RIGHTS WITHOUT REMEDY

You can help the ACT Council of Social Services, Canberra Community Law, Australian Lawyers for Human Rights, Civil Liberties Australia, the Human Rights Law Centre, a range of community organisations and the ACT Commissioner for Human Rights by supporting a petition to the Legislative Assembly to ensure remedies for human rights breaches in the ACT are cheap, effective and accessible to everyone. Sign the petition at [ACT Legislative Assembly - Current e-Petition](#). It may be you one day.

The ACT has every right to be proud of its Human Rights Act: it was the first in Australia. It remains the most advanced one (Victoria and Queensland have followed the ACT's lead). However, in practice you have no rights unless there's a real remedy for breaches of them and the Act in the ACT is running into a few challenges.

You can get conciliation on a human rights complaint through the ACT Human Rights Commission. If that fails, and your case is covered by a special discrimination law, you can have your issue judged independently at the ACT Civil and Administrative Tribunal (ACAT) But if it isn't covered, you can't have your complaint judged independently unless you have the money to "lawyer up" and go all the way to the ACT Supreme Court. Even then, there is no access to compensation for the harm done.

Why does this matter? Here are some examples:

- Your friend is a model prisoner in the Alexander Maconochie Centre (ACT jail). He has received parole approval, but can't get out of jail and back into the community because "a stable home" is a condition of his parole release...and ACT Housing has taken him off its priority list.
- You are a 14-year-old girl excluded by your high school from the educational programs you need because of your behavioural issues. You're on a nightmare-go-round: these are the very educational programs designed to help you and your issues in the first place.
- You are a First Nations' man with mental health disabilities never adequately treated. You're in solitary in the jail management unit 24 hours every day without access to relatives or friends or the things that sustain your culture for no reason other than that's where it is easiest to manage you.

In all of these cases and in many others, despite the fact that the Human Rights Act says the individuals have a legitimate case for a remedy to a breach of their rights, there's no independent tribunal they have access to which can enforce a remedy for them...solve their problem, in other words.

All human rights are universal, indivisible and inalienable and provide basic standards that are vital for the community's welfare and the dignity of each of us. This inconsistent approach to mandated remedies is contrary to human rights principles recognised in Human Rights Acts, detrimental to the value of the ACT as a place to live and damaging to the rights of individuals under the ACT's jurisdiction.

If you sign the petition, you will help the ACT take a step to becoming an even better and fairer place to live.