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Submission to the Inquiry into Australia's Human Rights Framework

INCORPORATING A FAIR GO INTO LAW: A Human Rights Act for Australia

SUMMARY

CLA has campaigned for a National Human Rights Act (HRA) since 2019. Our preferred model aligns with the model developed by the Australian Human Rights Commission (AHRC) and referred to in the call for submissions to this Inquiry. The history of our campaign to have this model implemented in the ACT and federally is available at Human Rights - Civil Liberties Australia (cla.asn.au).

A HRA that creates a clear path to remedies for human rights complainants that is consistent, transparent and, where necessary, mandated is a clear benefit to Australians. The beneficial effect of implementing the AHRC model HRA on otherwise powerless individuals would be incalculable. The Government's ambitious rights reform agenda will also be far easier to implement with a quality assurance and control system for human rights underpinned by a HRA.

Integrating human rights is a row already well hoed by major private corporations in developing and maintaining their social licence to operate, enhancing corporate reputation while engaging with social risk and creating opportunities for shared value with stakeholders. Thirty-nine years of experience in implementing HRAs in the ACT, Victoria and Queensland has demonstrated the value of a governance culture built around a positive duty to consider human rights imposed by a HRA on executive government and its decision makers.

That history also shows the absence of a clear pathway to remedy creates a complaints process that is inconsistent with our obligations to treat all rights as inter-related, indivisible, inter-dependent and equally important. The ACT's "No Rights Without Remedy" Inquiry provided a thorough airing of the consequences of this inconsistency for individuals and governments. The process leading to the ACT Government's decision to create a clear pathway to mandated remedies for all human rights breaches shows the benefit of a HRA based positive duty on effective decision making and how a consistent complaints process might be addressed federally.

Implementing the AHRC model HRA also offers short and medium term political advantages separate to benefits arising for individual complainants, empowering local MPs to help their constituents, and offering the opportunity to make decisions in a forum that can emphasise the need for balance between competing rights, rather than a win at all costs approach that labels any compromise as catastrophic. A HRA may also help create an environment where nuance returns to public debate about our future and the intergenerational decisions we take to change it.

Finally, meeting all four Universal Declaration of Human Rights (UHDR) tests by implementing the AHRC model HRA will increase our stock of social capital and underpin a more sustainable society.

INCORPORATING A FAIR GO INTO LAW

A Human Rights Act for Australia

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This submission addresses all matters for inquiry and report, in particular:

- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);

- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:

    - the role of the Australian Human Rights Commission;
    - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and

- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland.

CLA is also a member of Charter of Rights Campaign Coalition and endorses its submission.

INCORPORATING A FAIR GO INTO LAW: The Origins of a Fair Go

Governing is for the people, not over the people. A country's ethical infrastructure manages the immensely complicated process of balancing government's decisions on what would be to its benefit, and to the nation's benefit, with the effect those decisions have on limiting the rights of individuals.

The formal element of ethical infrastructure deals largely with the legal consequences of breaching human rights. It is made up of Parliament, Executive Government and the system of commissions, tribunals and courts, and enforcement agencies like the police. It is designed to apply core values and principles consistently to all laws and regulations and to every decision arising from them.

The informal element focusses on the social consequences of unethical behaviour and covers unwritten conventions and the words and deeds of leaders. In other words it sets up an expectation that our leaders will do the right thing, and there is an infrastructure of ethical checks and balances in place that will hold them to account if they don't.

Some 191 countries, including Australia, have signed on to a specific governance model for their ethical infrastructures articulated through the Universal Declaration of Human Rights (UDHR) and the family of human rights instruments relating to it.[1]

The model says that:

- Human Rights should be protected by rule of law;
- Rule of law can only be realised when there is a common understanding and practice of those rights;[2] and
- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge against them.[3]

The UDHR's objective for this ethical infrastructure model is the long term sustainability for the governments of UN members. As the UDHR says at para 3 of the Preamble:

- *Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.*

Government decisions are by nature complex and they often balance competing rights. Government decisions also contain a substantial power imbalance between decision makers and the people their decisions affect, and carry a risk that bureaucracies will be inadvertently inhumane if their attention is focussed on matters other than the rights of individuals.

[1] Australia and Australians played major roles in creating the Universal Declaration of Human Rights: https://en.wikipedia.org/wiki/H._V._Evatt https://en.wikipedia.org/wiki/Jessie_Street and, see particularly: https://www.cla.asn.au/News/dead-to-rights-how-an/? https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights

[2] **Preamble,** Universal Declaration of Human Rights

[3] Article 10, Universal Declaration of Human Rights

Countries like Australia that are subject to the family of UN human rights instruments[4] need to meet four tests to reach the long term sustainability promised by the UDHR model. They must:

- Pass all laws and regulations they make through the filter of UDHR human rights obligations;
- Pass all decisions made by Executive Government through the same human rights filter;
- Make sure every citizen has a common understanding of those rights; and
- Make sure that anyone within their jurisdiction who believes their rights have been qualified or abused can access an independent authority that evens out the power imbalance when their complaints are considered, by conciliation and/or tribunal ruling.

Australia is the only advanced democracy not to legislate for a national Human Rights Act (HRA) to provide a foundation for the ethical infrastructure needed to meet the consistency, transparency, accountability and fairness required by the UDHR model.

The 'fair-go' nation has not entrenched a fair go into its national law.

[4] Australia has agreed to be bound by:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Political Rights of Women
- 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 and Degrading Treatment or Punishment
- Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention relating to the Status of Stateless Persons
- Convention Relating to the Status of Refugees
- Slavery Convention of 1926
- Supplementary Convention on Slavery
- Convention on the Rights of People with Disabilities

INCORPORATING A FAIR GO INTO LAW: The Australian model for a fair go

In the absence of a HRA, Australia falls back on the doctrine of responsible government, as articulated by Sir Robert Menzies in 1967.[5] It argues that Australia's basic freedoms are adequately protected by the common law and by the good sense of executive government as checked by voters at elections and by Parliament at all other times.

With no HRA to articulate the federal government's human rights obligations to its citizens or underpin a consistent approach, successive governments have made what is already a very complicated piece of infrastructure even more complicated, less transparent and less likely to lead to consistent decisions and actions by its agencies that help sustain our society, or are fair to the individuals affected by them.

This complex ethical infrastructure is imposed on the Australian federal system, with a Constitution that defines the jurisdictions of the Commonwealth and states and territories and the powers that might override them. A few rights are guaranteed by the Constitution:[6] we have inherited others through English Common Law.[7] Human rights are also scattered through commonwealth, state and territory legislation, but clumps of them are focussed in various (anti) discrimination laws, which allow individuals to make a complaint and seek remedy for breaches of some rights.

The commonwealth has a range of legislation offering remedies for discrimination on the grounds of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction, and social origin.

Each state and territory has similar but not identical legislation for their jurisdictions: either a Discrimination Act (ACT), an Anti-Discrimination Act (NSW, Northern Territory, Queensland and Tasmania) or an Equal Opportunity Act (South Australia, Victoria, WA). In addition, the ACT (2004), Victoria (2006) and Queensland (2020) have Human Rights Acts/Charter.

In Victoria, legislation and government decision making must account for human rights, but only discrimination cases can seek remedy through the Victorian Human Rights Commission. Human rights can be used at court, but only as a secondary cause of action.

The ACT legislation is the same in essence as the Victorian legislation, except that human rights complaints can be taken to the ACT Supreme Court as a primary cause of action. The Court may grant the relief it considers appropriate, but it cannot award damages.

Queensland has built on the Victorian legislation by allowing any human rights complaint to be taken before the Queensland Human Rights Commission. It does not provide access to the Queensland Supreme Court for human rights complainants. None of the three jurisdictions with a Human Rights

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[5] R.G Menzies, *Central Power in the Australian Commonwealth,* London, 1967, p. 54.
'Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.'

[6] From a human rights perspective, the Constitution guarantees: right to vote; acquisition of property on just terms; trial by jury; freedom of interstate trade, commerce and intercourse; freedom of religion; no discrimination between residents of states; and an implied freedom of political communication.

[7] The common law we inherited from the English gives us: property rights; presumption against retrospectivity; fair trial; burden of proof – presumption of innocence; privilege against self-incrimination; legal professional privilege; appeal rights; procedural fairness – right to a hearing and apprehended bias claim; presumption against delegation; defamation; and executive immunity.

Act allows individuals mandated compensation from a tribunal where the primary cause of action is a human rights breach.

Australia's eight jurisdictions fail all four tests set by the UDHR model we have signed on to. Instead of a single statement of principles in parallel HRAs, we have a mish-mash of legislation with interpretations of rights sprinkled through the various laws that differ from jurisdiction to jurisdiction and lack coherence. The upshot is a confused ethical infrastructure that is a vast maze of frustration and helplessness for people with human rights complaints, not fit for purpose for efficient and effective decision making and open to the removal of rights by stealth.

This presents a challenge for the Australian Government. Attorney-General Mark Dreyfus has argued publicly that the rule of law and human rights of all peoples are core tenets of our modern democracy and having access to justice is an important part of protecting those rights. He has said that his aim is to create a respect for human rights so widespread that it will not be questioned.

The Attorney-General has also outlined an ambitious agenda of human rights reform at the 2022 election and he has delivered on:

- introducing National Anti- Corruption Commission legislation; and
- recovering the role of the Australian Human Rights Commission (AHRC) including legislating for transparent and merit-based appointments to avoid downgrade of AHRC status;

and has promised to:

- enhance the Administrative Appeals Tribunal to an Administrative Review Tribunal;
- enshrine a First Nations Voice in the Constitution as the first step toward implementing the Uluru Statement from the Heart;
- update anti-discrimination law including for the prevention of faith-based discrimination;
- amend the Sex Discrimination Act;
- legislate for further protection of whistle-blowers;
- implement the Respect at Work Report in full; and
- strengthen Australia's privacy law.

Beyond the election promises, there is a vast backlog of issues affecting human rights developing over the past decade that are likely to require attention in the life of this government (see Attachment A). This challenging agenda will be far easier to complete by using ethical infrastructure underpinned by the AHRC model HRA, rather than pushing it through our current complex and opaque ethical infrastructure.

A common misconception of HRAs is that they take away the power of parliament and place it with the judiciary. The dialogue model proposed by the AHRC shows that this is not the case: CLA's view of the dialogue model is at Attachment B. From a government perspective, it is easier to think of the dialogue model HRA as an effective tool for human rights quality assurance and control.

Quality assurance and control systems (QAC) do not transfer power from decision makers. Quality Control focusses on detecting issues and correcting them while quality assurance ensures that the results come out as decision makers expect and processes constantly improve to prevent things going wrong in the future. Both recognise that expertise from the shop floor in the manufacture of a good or service can help the company as a whole avoid damaging financial and reputational downstream costs arising from upstream mistakes. The past 10 years have shown Australia and its governments would benefit from an effective and efficient human rights QAC.

INCORPORATING A FAIR GO INTO LAW: Does Australia really need to spell it out?

Australia believes it is better off than a lot of other countries when it comes to human rights. We think of ourselves as the land of mateship and the fair go, we have free and fair elections and we think we are pretty good at multiculturalism. But that belief does not hold water for a large, and increasing, number of Australians.

Over the past decade, this trust in the common law and the good sense of executive government has been severely tested. The number of Commonwealth Royal Commissions more than tripled over the previous decade[8] and there is a rapidly growing list of policy challenges with human rights implications (see Attachment A). There has also been a clear and measurable decline in trust both in Federal institutions and between people within the Federal Government's jurisdiction.

The 2023 Edelman Trust Barometer[9] noted that, in 2022, all Australian institutions experienced sharp declines in trust, eroding the COVID driven record-high levels of public trust recorded in 2021 and returning to the pre-COVID long term decline in trust. 48% of Australians now see government as unethical and incompetent. Media has been reduced to an echo chamber for 57% of Australians as trust polarises, making it harder for governments to solve problems collaboratively.

Importantly the Edelman Trust Barometer shows that the lack of trust is not just between governments and the people that live in their jurisdictions:

- 61% of Australians say that the lack of civility and mutual respect is the worst they have ever seen;
- More than half of Australians (55%) say their default tendency is to distrust something until they see evidence it is trustworthy;
- 61% of Australians say people are incapable of having constructive and civil debates about issues they disagree on;
- Only 24% of Australians would help someone who strongly disagreed with them or their point of view when they were in need; and
- Only 21% of Australians would be prepared to live in the neighbourhood of someone who strongly disagreed with them or their point of view.

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[8] *2003-2012 Commonwealth Royal Commissions into:*

- the Centenary House Lease
- certain Australian Companies in relation to the UN Oil for Food Programme
- Equine Influenza Inquiry

2013-2023Commonwealth Royal Commissions into:

- Institutional Responses to Child Sexual Abuse;
- Home Insulation Program;
- Trade Union Governance and Corruption;
- Child Protection and Youth Detention Systems of the Government of the Northern Territory;
- Misconduct in the Banking, superannuation and Financial Services Industry;
- Age Care Quality and Safety;
- Violence, Abuse, Neglect, and Exploitation of People with a Disability;
- National Natural Disaster Arrangements;
- Defence and Veteran Suicide; and
- Robodebt Scheme.

[9] 2023 Edelman Trust Barometer | Edelman)

It is no surprise that 54% of Australians now believe that the social fabric that once held this country together has grown too weak to serve as a foundation for unity and common purpose. For further discussion on the implications of a decline in social capital, see Attachment B.

This fall in trust presents two profound problems for governments:

- There are substantial inter-generational decisions the government will need to make around the sustainability of both our society and our planet, like climate change and the social wage, which will need all Australians to accept, or trust that their particular circumstances will be accounted for; and
- We are losing the economic, cultural and societal benefits of Australia's stock of social capital and its contribution to productivity – the social norms, networks and trust that facilitate cooperation within or between groups and generate benefits to society by reducing transaction costs, promoting cooperative behaviour, diffusing knowledge and innovations, and enhancing personal well-being and associated spill-overs.[10]

It would be easy to say that Australia's decline in trust just reflects a world that has seen an increase in social dislocation, identity politics and right wing populism. However, Australia's poor ethical infrastructure has contributed to the decline in Australia in three ways:

Firstly, for all the talk about human rights being inalienable and indivisible and to be applied equally, the fact is that in Australia your rights depend on where you live. All Australians are not equal under the law. For example:

- As a prisoner in the ACT, you can vote in elections in that jurisdiction – but if you are locked up in a NSW jail, you can't vote in NSW elections.
- If you live in Queanbeyan in southern NSW, you have the right to access voluntary assisted dying. If you take one step across the border into the ACT, the ACT government was prevented until recently, by Commonwealth legislation, from even debating whether voluntary assisted dying should be allowed, and from voting on the issue.

These and a myriad of other anomalies arising from human rights evolving in distinct jurisdictions eat into Australians' perception of whether Australian governments are giving them a fair go.

Secondly, most Australian jurisdictions are not required by legislation to balance the greater good against the rights of individuals, and are not held accountable by individuals for many of the rights they might breach in pursuing other priorities like security and efficiency. As a result Governments increasingly forget to be humane to the powerless. For example:

- You are a woman with an intellectual disability. Your mother has just had a stroke and is now in a care home. You have been threatened with eviction from social housing – the house you have lived in your whole life – because your mother was the tenant and she isn't there anymore. You have no right to the house.

[10] In 1998, the World Bank defined the social capital of society as:

> "the institutions, the relationships, the attitudes and values that govern interactions among people and contribute to economic and social development. Social capital, however, is not simply the sum of institutions which underpin society, it is also the glue that holds them together. It includes the shared values and rules for social conduct expressed in personal relationships, trust, and a common sense of 'civic' responsibility that makes society more than just a collection of individuals."

- You are a model prisoner and you have won parole, but you can't get out of jail and back into the community because a stable home is a condition of your parole and the Housing Authority has taken you off its priority list...because you are in jail.
- You were made a part of ParentsNext[11], a compulsory federal program that affected certain families relying on the Parenting Payment. Under the program, parenting payments can be automatically and immediately cut off if a parent does not attend prescribed activities. As a result, children and their parents were left without adequate money for food, shelter and other necessities.
- You were the victim of the Robodebt scandal.

These examples are the type of daily government induced trauma thousands of Australians have to overcome before they can start to make progress in their lives. None of these individuals, and thousands like them, could access a tribunal to get fair and equal treatment in the jurisdictions they occurred in.

Thirdly, the fact that we have such a limited and confusing formal ethical infrastructure means that we put a lot of trust in that informal element of unwritten conventions and rights-based leadership. There is increasing evidence that the trust is misplaced when it comes to protecting our rights.

The informal ethical infrastructure is largely what maintains the checks and balances between parliament, executive government and the judiciary. It has been a long time since parliament has broken party lines to prevent unethical behaviour on the part of executive government: meanwhile, the judiciary's capacity to interpret law consistent with our informal ethical infrastructure has been whittled away as common law is increasingly replaced by statute.

This has meant that there is no effective counterbalance in place to stop the sacrifice of our rights in order to make the leaders look decisive. This trend has become pervasive in Australian law making and Australians are being treated less fairly and equally as a result.

Australia's anti-terrorism laws are a case in point. Since the attack on the World Trade Centre in New York in 2001, Australian governments have passed some 100 pieces of legislation that constrain our rights in the name of combating the threat of terrorism.

There is no evidence that the threat level, in Australia, is proportional to the severity of the legislation put in place to demonstrate how tough our leaders want to be seen to be on terrorists. This legislation has now evolved to the point where federal government agencies can hold a 14-year-old child in detention for 168 hours without informing the child's parents, purely because the child witnessed what the agencies believe is a terrorist incident.[12]

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[11] ParentsNext was a pre-employment program that aimed to help parents and carers plan and prepare for work before their youngest child started school. It contained mutual obligation payments, The Australian Government has moved to abolish ParentsNext from 1 July 2024 and replace it with a new voluntary program and has abolished all compulsory requirements for participants in ParentsNext.

[12] the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* gave ASIO special powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth)('The ASIO Act') to seek two kinds of special warrants: a warrant which authorises the questioning of a person; and a warrant which authorises detention and questioning of a person. The detention authorised by the ASIO Act is not limited to persons who are suspected of being involved in committing or planning to commit a terrorist offence. The detention and question warrants can apply to anyone who is able to 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence'.

Because a question and detention warrant can authorise the detention of a person for up to seven days, this means that a person who is not suspected of a terrorism offence can be detained for longer than a terrorist suspect who is questioned by the Australian Federal Police under the Crimes Act 1914. Sc: Australian Human Rights Commission : A Human Rights Guide to anti Terrorism laws https://humanrights.gov.au/our-work/legal/human-rights-guide-australias-counter-terrorism-laws#3_7

An Australia that legislates to lock up minors without charge is not the Australia that most of us think we live in but we have very little, if any, protection from what it has become.

The Northern Territory intervention, Robodebt and our treatment of people seeking asylum are human rights breaches on a substantial scale. They are also evidence of a theme that has led to questions arising from outside Australia about the increasing gap between who we say we are as a nation, and what we do. The world is beginning to suspect that Australia is less open, less tolerant, less fair than we claim to be.

- It sees that we hold trials in secret and secretly imprison our own citizens as well as bringing the full weight of the law to bear on journalists and lawyers who might embarrass us.
- It sees that we keep asylum seekers outside our jurisdiction so they cannot access what rights our law would otherwise provide, and we hide them from people who want to tell the truth about how we treat them.
- It sees that we abuse children we have placed in juvenile jail and that we assume social security recipients are criminals and treat them accordingly.
- It sees that we protect the powerful from scrutiny as they rip off the powerless and that we increasingly assume that the poor deserve to be poor.
- It sees that we marginalise Australia's First Nations people, deny them their history and their culture, and jail them in unprecedented, disproportionate numbers. For years we turned our backs on their offer of forgiveness and reconciliation.

The usual response is that these are uninformed criticisms of isolated acts arising in specific circumstances, that they are unrepresentative of the "real Australia," the land of mateship and the fair go, or that these issues can be resolved by more enlightened governments. But these acts are real enough to those who suffer them and the rest of the world notices, and draws its own conclusions about an ethical infrastructure that permits any Australian government, enlightened or otherwise, to commit these acts.

The increasing frequency of these acts over the past two decades is a trend headed in the wrong direction. Australia's jurisdictions have failed the UDHR tests for ethical infrastructure and it is increasingly easy for other nations claim hypocrisy when we comment on their human rights failings. Australians now mistrust government and each other to the point that our social fabric is seriously weakened.

Despite the best intentions of those who implemented and maintained the National Human Rights Framework in the wake of the 2009 National Human Rights Consultation (Brennan) Report, the Framework has failed to protect Australians from repeated abuses of human rights precisely because it was designed to operate within a flawed ethical infrastructure.

Our reliance on the doctrine of responsible government has not delivered us the ethical infrastructure necessary to face some of the biggest issues in our political history. We need to change it. It is time for the government to underpin its ethical infrastructure with a commitment to a HRA that articulates its obligation to be humane to the powerless… and give everyone a fair go.

INCORPORATING THE FAIR GO INTO LAW: Stories from outside the politics

While the Commonwealth and five state and territory jurisdictions have struggled with the prospect of a HRA, CLA has yet to encounter any fundamental objection to the idea of a HRA amongst decision makers outside the political sphere.[13] This is not surprising. Large scale providers and advocates who service vulnerable people see at first hand the effects of unaccountable government decision making in the pursuit of security and efficiency. A HRA offers the opportunity for them to work more effectively with Government to address their clients' issues.[14]

Aboriginal Land Councils we have talked to hold similar views to providers and advocates, and also see a HRA as an opportunity for embedding the United Nations Declaration of the Rights of Indigenous Peoples principle of free, prior and informed consent in Australian law.

Businesses and business organisations we have talked to are generally neutral on the principle of a HRA as HRAs mostly target government decisions, and are only likely to comment on the issue in the context of proposed legislation. However, human rights are common ground between corporate management of risk, cost and trust, and the government's relationships with individuals.

Arguably the biggest gains in human rights in Australia over the past decade have been through corporate commitments widely adopted by the private sector, based on a clear understanding of the need for a stable, rules based and sustainable international and domestic business environment.

These have included the business led campaign to end modern slavery, campaigns by business based philanthropic organisations on issues ranging from the lack of healthcare for migrant and vulnerable workers to the lack of parity between Indigenous and non-Indigenous Australians, and the commitment by over 110 major corporations in Australia to the United Nations Global Compact.[15]

The UN Global Compact supports companies to do business responsibly by aligning their strategies and operations with Ten Principles on human rights, labour, environment and anti-corruption within the scope of UN sustainable development goals.[16]

[13] Over the past three years, CLA has held 81 meetings to discuss the prospect for a HRA. 48 of these meetings were with Federal and State politicians across the political spectrum and 35 were with senior business representatives, service providers and advocates. CLA expects that many of these organisations will be putting in submissions of their own. We have also written 185 letters to engage other parties of which 61 were with senior business representatives, service providers and advocates. CLA agreed to keep the detail of our discussions and correspondence confidential, but we can generalise about the responses we have received.

[14] Some of the large scale providers and advocates to publicly support a HRA include: Amnesty international, ACOSS, Oxfam, the Uniting Church, Equality Rights Alliance, Community Legal Centres Australia, Jesuit Social Services, Save the Children, Australian Lawyers for Human Rights, Australian Law Council, ACTU, Australian Services Union and the Wilderness Society.

[15] The United Nations Global Compact was opened in 2000 by the then UN Secretary General Kofi Annan and is now the world's largest corporate sustainability initiative with over 11 383 participating business and 3,000 non-business organisations based in 167 countries. The Global Compact Network Australia Ltd is the Australian Local Network of the UN Global Compact. It aims to facilitate the progress of companies engaged in the UN Global Compact through their activities and create opportunities for multi-stakeholder engagement and collective action. Australian members include Accenture, ANZ, AGL, Australia Post, Brambles, Bunnings, Coles Group, Deloittes, EY, GHD, Glencore, Fortescue, Ikea, NAB, Optus, Pacific Hydro, Rio Tinto, Telstra, Visy and Sydney Airport.

[16] (Principle One, UN Global Compact): "In addition, beyond respecting human rights, business is encouraged to take action to support human rights. This means seeing the opportunity to take voluntary action to make a positive contribution towards the protection and fulfilment of human rights whether through core business, strategic social investment/philanthropy, public policy engagement/advocacy, and/or partnerships and other collective action. Action to support human rights should be a complement to and not a substitute for action to respect human rights."

It is easy to dismiss these views and public statements by business organisations[17] as window dressing or "rights washing", but that is not the view of the business organisations we have talked to and their approach has lessons for a future HRA.

The core strategy for a sustainable business manages economic/financial, environmental and social risks. It understands that these risks are inter-related and equally important. Sustainable businesses recognise that employees, shareholders, the communities they work in and governments they work with have rights and interests that need to be reflected in the way they do business.

In other words, sustainable businesses manage community expectations around their contribution to equity, diversity, social cohesion and quality of life. Human rights are therefore an increasingly important part of the corporate toolbox for managing social risk.

Governments have the opportunity to draw on private sector experience to deliver three outcomes through rights enforced by a HRA:

- generating a social licence to operate; and
- enhancing corporate reputation (making politicians and political institutions more respected and trusted); while
- engaging with social risk, effectively targeting social impact mitigation strategies and creating opportunities for shared value with stakeholders.

These outcomes will be important for determining and delivering the changes necessary for a stable, sustainable, rules-based society.

[17] For example: *"Business has a responsibility to respect human rights and to work with governments and non-government organisations to address human rights abuses." (Jennifer Westacott, Business Council of Australia); and*
"Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities." (Minerals Council of Australia: Enduring Value).

PUTTING A FAIR GO INTO LAW: The ACT Case Study

Australia has had 39 years of experience of its jurisdictions administering HRAs. The ACT enacted its HRA in 2004, followed by Victoria in 2006, and finally Queensland in 2019.[18] Of the three, the ACT will become the Australian jurisdiction closest to passing the UDHR tests when it implements its "No Rights Without Remedy" reform agenda. The case for change made by the successful petitioners to "No Rights Without Remedy" provides some useful lessons for developing a federal HRA.

ACT HRA Section 40B (for the full text see Attachment D) makes it unlawful for an ACT public authority to act in a way that is incompatible with a human right; or in making a decision, to fail to give proper consideration to a relevant human right.

Two decades of practice has allowed the ACT to develop the strongest connection between governance and human rights of any Australian jurisdiction. As ACT Minister for Human Rights Tara Cheyne noted in her evidence to the May 2023 hearing for this Inquiry:

> *"…the Human Rights Act affects the operation of all legislation in the ACT by imposing on officials a statutory obligation to take account of human rights principles when interpreting all ACT primary and subordinate legislation; by institutionalising consideration of fundamental civil and political rights during the development of law and policy; and requiring all officials to make decisions that are compatible with all human rights stated in the Human Rights Act 2004."*

The combination of the ACT HRA declaring it unlawful for decision makers to ignore human rights, together with a law making process that requires the Attorney General to sign off on a Bill's compatibility with Human Rights before it enters the Assembly, means that the ACT meets the first two UDHR tests. However, as the Minister said in her evidence,[19] the ACT does not meet the final test: making sure that human rights complainants have access to a tribunal that can mandate a remedy.

ACT HRA Section 40C (for the full text see Attachment D) allows a complainant to take a case to the ACT Supreme Court. However, the expense, the risk of being having costs awarded against the plaintiff, the timeframe for decisions and the limited scope for the Supreme Court to mandate a remedy effectively prices most complainants out of the process.[20]

In 2021, CLA, Canberra Community Law, Australian Lawyers for Human Rights and ACTCOSS, with support from the ACT Bar Association, put the "No Rights Without Remedy" petition to the ACT Assembly to:

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[18] There is also increased interest in, and lobbying is underway for, HRAs for South Australia, the Northern Territory, Tasmania and Western Australia, and the promise of work toward a HRA appears in the policy platforms of Western Australia and Tasmanian Labor Parties.

[19] *Probably the most significant development has been an accessible complaints mechanism. As you've heard, we do have that standalone action to the Supreme Court. I think it is right to say that it is costly. It can be costly, at least. The Supreme Court, I think to a layperson, is seen as a big jump.* **Parliamentary Joint Committee on Human Rights Hearings 12/05/2023: Inquiry into Australia's Human Rights Framework: Minister Tara Cheyne.**

[20] The Productivity Commission was told in 2019 that the average internal cost of an ACT Supreme Court case was $15 444 – and less than half the civil cases it considered were settled in 12 months. By contrast, the average internal cost at ACAT was $717 in 2019 and ACAT cases were settled in an average of 162 days. See: Productivity Commission Ongoing Report On Government Services Section C: Justice. NB: While the ACT Supreme Court carries the risk that costs could be awarded against the applicant, parties to ACAT cases generally carry their own costs.

a. enable a complaint about any breach of the Human Rights Act 2004 to be made to the Human Rights Commission for confidential conciliation; and

b. if conciliation fails, enable a complaint about a breach of the Human Rights Act 2004 to be made to the ACT Civil and Administrative Tribunal (ACAT) for resolution.

The successful petitioners and other witnesses at the subsequent inquiry argued that consistency in respecting, protecting and promoting human rights needs a complaints handling process that offers a consistent opportunity for individuals to seek remedy for breached rights, irrespective of the right or the individual. CLA noted that the ACT law, as it affected the rights complaints process, inadvertently divided complainants into three classes:

1. People with rights complaints that fall under discrimination law can settle with the decision maker and, if that is unsuccessful, seek independent conciliation through the ACT Human Rights Commission (ACT HRC). ACT HRC can pass the case on to the ACT Civil & Administrative Tribunal (ACAT) for a mandated remedy at the applicant's request if conciliation is unsuccessful.
2. People with rights complaints in health, disability, community services and abuse of the vulnerable can seek independent conciliation through the ACT HRC if initial discussions with the decision maker do not resolve the issue, but cannot access mandated remedies or compensation through ACAT; and
3. People with any other rights complaint. They have no access to either the ACT HRC or ACAT, and must rely on the regulatory or administrative good will of decision makers for remedies, or take the case straight to the ACT Supreme Court.

The Inquiry found that this inconsistency left a substantial number of ACT human rights complainants with no pathway to a mandated remedy if decision maker conciliation broke down or was inadequate to deal with the issue. This inconsistency was not mitigated by the existing link between the ACT's Human Rights Act and the ACT Supreme Court.

The ACT Government's response was to agree to legislate to give all human rights complaints access to independent conciliation through the ACT HRC, effectively eliminating the third class of complainant and making the ACT equivalent to the Queensland human rights complaints process.

The ACT Government also agreed in principle that any complainant would be able to take their complaint about a breach of the ACT HRA to ACAT if conciliation was unsuccessful, effectively making any human rights complaint the equivalent of a discrimination complaint. The ACT Government noted that legislation for universal access to an ACAT mandated remedy was subject to quantifying the required resources for ACAT.[21]

Two clear lessons for a future federal HRA arose from the inquiry:

1. The strength of the ACT HRA to date is the positive duty in Section 40B that has driven accountability for human rights decisions into policy and legislative processes.
2. A pathway for every human rights complainant to an independent tribunal is critical to an ethical infrastructure based on the UDHR model, both for consistency in the application of justice for human rights complainants and because of the increased accountability it places on decision makers.

[21] https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/2155487/JCS-07-Inquiry-into-Petition-32-21-No-Rights-Without-Remedy-Revised-Government-Response-tabled-22-November-2022.pdf

These lessons provide practical and real time precedents for the model HRA proposed by the AHRC in its March 2023 discussion paper and referenced by the PJCHR in its call for submissions to this inquiry. It is no surprise that the AHRC model aligns with the ACT HRA amendments in train. As AHRC Commissioner Croucher said to the May 2023 hearing:

> *"A human rights act would build on the experience of complaint handling over 40 years and address the weaknesses of our current scheme. In particular, by providing a pathway to enforceable remedies, a human rights act would substantially improve access to justice and accountability for government decision-making. It would provide a greater incentive to think about human rights early when decisions are made and before they become complaints. It would be an evolution, not a revolution, in our ability to handle and respond to complaints"*

CLA also addressed public awareness, cost and governance issues at the "No Rights Without Remedy" Inquiry. We noted that part of the ACT Government's strategy to make sure that everyone within its jurisdiction had a common understanding of their rights was to produce "Charters" that explained rights under ACT law for specific groups. These included:

- ACT Charter for Rights of Kids in Care;
- Charter of Rights for Victims of Crime; and
- The ACT Charter of Rights for People Who Experience Mental Health Issues.

CLA noted the potential for confusion as these Charters were the initiative of the relevant agencies and were not coordinated centrally. CLA suggested instead that agencies adopt a standard Schedule that identifies:

- how people can expect to be treated by public authorities under any legislation related to the Schedule;
- any specific rights that underpin that treatment; and
- the ethical infrastructure needed to seek fast, fair remedy for breaches of those rights.

The Schedule would be attached to any ACT Bill the relevant human rights compatibility statement identifies as either promoting or limiting human rights, and would draw on that compatibility statement for its content. CLA drafted a standard schedule and applied it to the ACT's Public Health Amendment Bill (No 2) 2021 by way of illustration. A copy of the draft schedule is at Attachment E and it offers a mechanism for the Commonwealth to educate the public on the likely effect of new legislation once a Federal Human Rights Act is in place.

CLA noted that the "No Rights Without Remedy" proposal increases accountability by allowing individuals to hold decision makers to account for rights breaches, and by ensuring independent third party scrutiny on any case that is not settled by the decision maker. CLA expects that this will increase the priority on getting decisions right and managing disputes at the lowest possible level, in turn reducing the downstream costs arising from complaints.

CLA accepted that resources for both ACAT and the ACT HRC are calibrated to existing workloads and there may be a need for additional resources as the number of applications before the ACT HRC and ACAT rise. It is important to put that rise into context. In 2020-2021, ACAT conducted 6357

substantive hearings and received 4136 applications. Of these applications, only 39 were discrimination referrals from the ACT HRC.[22]

Over the same period, ACT HRC received 1819 enquiries and 922 complaints, of which 200 related to discrimination.[23] The ACT HRC is therefore an effective filter for ACAT and, while both organisations could make a case for greater resourcing, ACT HRC is likely to require more resources to deal with the increase in applications, and for helping ACT agencies to improve their decision making.

CLA understands that discrimination applications are likely to be more complex and take more time to resolve, and that it is possible that other human rights applications are as complex as discrimination cases, but the increase in cases would have to be substantial to have more than a minor effect on the overall ACAT workload.

While CLA expects that human rights complaints will rise under a HRA, we also expect that the federal context for that rise will match the context in the ACT. AHRC resolved 3736 complaints under discrimination legislation in 2021-22, of which roughly 2% went to AAT for mandatory remedy (around 74 cases).[24] The AAT resolved 43 084 cases over the same period.[25] AHRC cases are therefore currently about 0.172% of AAT cases and the increase would need to be in orders of magnitude to affect AAT's overall workload.

The ACT Government introduced a Wellbeing framework for its budget process in 2020 and conducted its first Wellbeing survey of budget outcomes in 2022, a move that the Federal Government is contemplating for its budget process.

Because "No Rights Without Remedy" will allow individuals to hold ACT Governments to account for any rights breaches, CLA expects that it, together with the template schedule, will improve Wellbeing Framework measures of people's confidence that the ACT government can be trusted to behave ethically. We expect that the same outcome would arise from a Federal HRA.

The effect of this increased confidence on the Government's capacity to make and deliver substantial inter-generational decisions around the sustainability of both our society and our planet, like climate change and the social wage, and on Australia's stock of social capital, is discussed below.

[22] ACAT Annual report 2020-21 p26. See: https://www.acat.act.gov.au/__data/assets/pdf_file/0005/1887404/ACAT-Annual-Review-2020-21_FINAL.pdf
[23] ACT Human Rights Commission Annual Report 2020-21 p12
[24] Australian Human Rights Commission Annual Report 2021-2022 p17. See: https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2021-2022
[25] Administrative Appeals Tribunal Annual Report 2021-2022 p3. See: https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202122/AAT-Annual-Report-2021-22.pdf

INCORPORATING A FAIR GO INTO LAW: The Short and Longer Term Political Benefits

Implementing the AHRC model for a HRA will provide a pathway to alleviating the misery of people whose rights have been abused by government decisions, and reduce the barriers they encounter to leading productive lives. 101 examples of these remedies and the effect they had on complainants have been compiled in the Human Rights Law Centre's "101 cases: How Charters of Human Rights make our lives better."[26] The beneficial effect of implementing the AHRC model HRA on the lives of otherwise powerless individuals is incalculable, impactful and overwhelmingly positive.

Implementing the AHRC model HRA also offers short and medium term political advantages separate to benefits arising for individual complainants. A large number of representations to politicians at the constituency level are claims that a government agency has abused a right. Implementing a HRA will, for the first time, empower MPs to guide their constituents to a pathway to settle claims that currently fall outside discrimination law.

Clashes of rights in an environment driven by identity politics feeds dog whistle activism and damages both sides of the dispute, as cases about the right of schools to exclude teachers purely on the basis of their sexuality have recently demonstrated. As the Edelman trust barometer noted, that environment has now led 61% of Australians to say that people are incapable of having constructive and civil debates about issues they disagree on.

A HRA offers the opportunity to make decisions in an environment that emphasises the need for balance between competing rights, rather than a win at all costs approach that labels compromise as catastrophic. The entry rules set by a HRA for constructive and civil discussions on competing rights will help many Australians to regain their trust in the judgement of other Australians.

A clear, independent and disinterested pathway to remedy will also offer some protection from identity politics for complainants as they search for remedy through either an independent and confidential third party conciliation through the AHRC, or by an independent tribunal through AAT.

This, combined with the change in the culture of decision makers driven by a positive duty to uphold and promote human rights, will help create a future where nuance can return to public debate about our future and the intergenerational decisions we take that will affect it.

In this context, CLA welcomed the move away from relying on the populist view of Gross Domestic Product (GDP) as the sole measure of economic growth raised in 2022-23 Budget Paper No. 1, Statement 4. GDP has been the dominant economic metric for growth for the past century[27] but is now widely considered a poor indicator of society's wellbeing as it conflates economic growth with progress. As a single measure it can incorporate destructive activities as positive and exclude negative externalities.[28] Bald GDP measures might also exclude health, social reproduction[29] and citizen satisfaction.

If all externalities of modern growth were measured, every company in the market would struggle. This is because one of the two principal failures of GDP as a measure of progress is that it ignores the

[26] https://charterofrights.org.au/101-cases

[27] CLA assumes that GDP consists of: the sum of (consumption + private investments + Government spending + exports) minus imports.

[28] For example: Cyclone Katrina was a net positive for US GDP despite being the most devastating US natural disaster on record. Katrina's Economic Impact: One Year Later - ABC News (go.com)

[29] i.e. – the persistence of inequality over time

cost to future generations of growth in this one. To put it in an economic context – societies that rely on GDP to measure progress discount the value of future generations' welfare in monetary terms.

The other principal failure is that GDP assumes individuals and groups within society will remain *inherently* willing to trust and cooperate with each other, and with Government, in the interests of all, supported by shared intercultural norms and values.

The most damaging consequence of these failures is a mindset that rewards procrastination, based on the comfort of two linked assumptions arising from trusting GDP as an indicator of societal growth:

- economic growth will allow future generations of this society to remedy, mitigate or compensate for the mistakes we make, which in turn assumes future generations will be prudent enough to spend our growth for their collective benefit in a way that we didn't; and
- over time, decision makers in that society will retain the trust of individuals and groups within it to make decisions that are in everyone's interest.[30]

CLA argues that Australia is on the threshold of decisions on climate change and the social wage that negate the first assumption, and Australia's social capital, and the ethical infrastructure that supports it, may not sustain the trust and cooperation needed to make these decisions in future.

Treasury noted that five 5 broad themes important to wellbeing have emerged for consideration from the public response to 2022-23 Budget Paper No. 1, Statement 4: "prosperous", "inclusive", "sustainable", "cohesive" and "healthy."[31] Three of these: inclusive, sustainable and cohesive echo the concerns in this paper and the concerns of people and organisations CLA has discussed a federal HRA with. In particular, the response identified that a Wellbeing budget should measure:

- A society that allows all people to afford life's essentials.
- A society that provides people access to secure, well-paying jobs.
- A society that supports social and economic accessibility and intergenerational mobility.
- Gender equality, including at work and in the community.
- A society that supports diversity and equity.
- Leadership in government and business that is representative of our diverse society.
- A society and economy that is resilient and adapting to a changing climate.
- A society that sustainably uses our natural resources, on track to reach to net zero emissions.
- A society that values the social, cultural and economic significance of our natural environment.
- A society where people feel safe at home, online and in the community.
- A society that is Closing the Gap and values First Nations culture.
- A society where people have the time and opportunity to participate in the arts, culture and sporting activities.

[30] For a more detailed view of the CLA approach to Wellbeing budgets and their link to a Human rights Act, see: https://www.cla.asn.au/News/can-a-wellbeing-budget-complement-human-rights/

[31] See: https://treasury.gov.au/sites/default/files/2023-04/c2023-386696-measuring-what-matters.pdf pp10-11

- A society that has close relationships with family and friends.
- A government that is trusted by the public.
- People participate in the democratic process and engage in their community.
- A society that supports engagement in the community through volunteering or other means

In other words, it is social capital that many of the respondents want Treasury to measure through a Wellbeing budget. However, discussion on measuring social capital needs to start with a statement of the values we want our social capital to be invested in and a description of the principles on which to build the infrastructure necessary to build that social capital.

Governments building Wellbeing economies all identify human rights and the ethical infrastructure required to protect and promote them as critical to that task. (See Attachment F). The lack of a HRA based on the AHRC model and failing to meet the UHDR tests we signed for in 1948 means that we are not only failing human rights complainants and putting at risk the government's ambitious reform program, we are also failing our future.

INCORPORATING A FAIR GO INTO LAW: What, How and Why Now

CLA strongly recommends that the Australian Parliament takes the lessons learned from the ACT, Victoria and Queensland as applied in the AHRC model, and establish a federal HRA that incorporates the rights covered by the UN family of human rights Australia has already ratified, together with UNDRIP.

At a minimum, a federal HRA that meets the UDHR tests should:

- make it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right;
- provide individuals with a clear pathway through independent third party conciliation to an accessible tribunal able to provide mandated remedies for human rights complaints; and
- limit the capacity of Parliament to override the HRA to threats to national security, and a state of emergency.

Governments could also help meet the UHDR tests by educating individuals through schedules to subsequent legislation that identify the rights that may be limited by it and the means by which complaints will be handled. The Schedules would be based on the compatibility statements issued with the explanatory memorandum to the Bill.

A HRA that creates a clear path to remedies for human rights complainants that is consistent, transparent and, where necessary, mandated is a clear benefit to Australians. The Government's ambitious rights reform agenda will also be far easier to implement with a quality assurance and control system for human rights underpinned by a HRA. A federal HRA would also act as a template for, and a spur to, HRAs in WA, SA, Tasmania and the Northern Territory.

Major private corporations are already integrating human rights in developing and maintaining their social licence to operate, enhancing corporate reputation while engaging with social risk and creating opportunities for shared value with stakeholders.

NGOs know the fight for a fair go is never ending: it is their core business.

Thanks to COVID, Australians have never been more aware of their rights.

Our social capital is at a low ebb, and the lack of trust between Australians, and between Australians and Government is a genuine obstacle to productivity growth and to making the intergenerational decisions necessary for a sustainable future.

The Rights Time is now.

Lead author: CLA HRA Campaign Manager Chris Stamford
Co-authors: CLA President, Dr Kristine Klugman and CLA CEO, Bill Rowlings

29 June 2023

ATTACHMENT A

HUMAN RIGHTS RELATED ISSUES FACING THE AUSTRALIAN GOVERNMENT

Issues affecting human rights that have emerged over the past decade

National:

- Alzheimer's/dementia increasing
- Abortion rights
- Australian Criminal Cases Review Commission, concept and structure(s)
  – Appeal right: second and subsequent appeals (convictions?) based on new evidence
- Bail laws (common, national)
- Brereton inquiry into SAS in Afghanistan
- Clogged courts
- Clogged jails
  – methods to deliver justice at lower levels, cost
- Contracts/costs (refugees)
- Contracts (replacing Public Servants)
- Continuing Detention Orders, etc. and VERA-2R risk assessment 'tool'
- COVID-19 pandemic & emergency powers/use /abuse of laws
- Cyber safety: personal, corporate and national
- Defamation laws
- Discrimination
- Domestic violence
- Defence (soldiers right to be consulted on Defence Regulations)
- Education/training of APS, police, troops in human rights
- Failure To Disclose issues (DPPs and police)
- Forensics (need Forensic Science Regulator)
- Gambling
- High Court reform
  – Do we increase the number of judges to manage the increased caseload?
- Inconsistent standards among judges/magistrates in different jurisdictions
- Internet, electronic and social media rights:
  – need for individual rights and protections
  – need for make people responsible for their comments/postings
- Jails/detention facilities:
  – rights to 'normal' human rights protections
  – rights to communicate, access to computers, phones, messaging, apps
- – rights to rehabilitation (e.g., education, TAFE training, access to computers, etc.)
- Measuring Australians' status re human rights
  – Wellbeing Budget, or similar
- Media: rights of the media
- Media: rights of people c.f. media rights
- NACC (National Anti-Corruption Commission) outcomes
- NAZI and other symbols misuse
- PIP (problems of Police-Investigating Police, in all jurisdictions)

- Privacy
- Protests/protestors increasing: (climate, oil, fracking, etc.)
  – Laws relating to protests becoming more draconian
- Religious discrimination
- Rights of Children
  – Age of Criminal Responsibility;
  – Custody/detention (Indonesian boat crew, First Nations, Biloela family)
  – Protection and Detention of Children in the NT (e.g. Don Dale) and all jurisdictions
- Rights of the Aged
- Rights of those servicing Australia's overseas commitments
  – Afghan staff working for Australia in case of sudden departure by Australia
- Sport/sporting rights:
  – power of sport bodies to instantly stand down on allegation only, before trial
  – rights of sportspeople to contractual relief at various ages (18, 21, 25?)
- The right to stand for federal parliament c.f. citizenship(s)
  – electronic voting, by voters, by MPs
- The Voice

International:

- Julian Assange
- Defence bases/exercises in Australia
  – whose rights apply to US troops in Darwin and whose rights apply to other troops in crimes and accidents?
- Detention: the consequences of incarceration on Nauru, Manus Island and Christmas Island
- Extraditions (both into Australia, and from Australia)
- Lack of Human Rights Act in Australia (cf NZ, Canada, UK, USA) and our international standing at the UN and other multilateral fora.
- Right to enter/leave Australia for Australians enshrined in law
- Right for Australia to ensure international sporting bodies abide by Australian law in Australia (e.g., wearing 'Pride' or similar armbands for Women's Football World Cup)
- Climate compensation/rights for small countries/islands c.f. large polluting countries

ATTACHMENT B

PARLIAMENTARY SOVEREIGNTY IN HUMAN RIGHTS LEGISLATION[32]

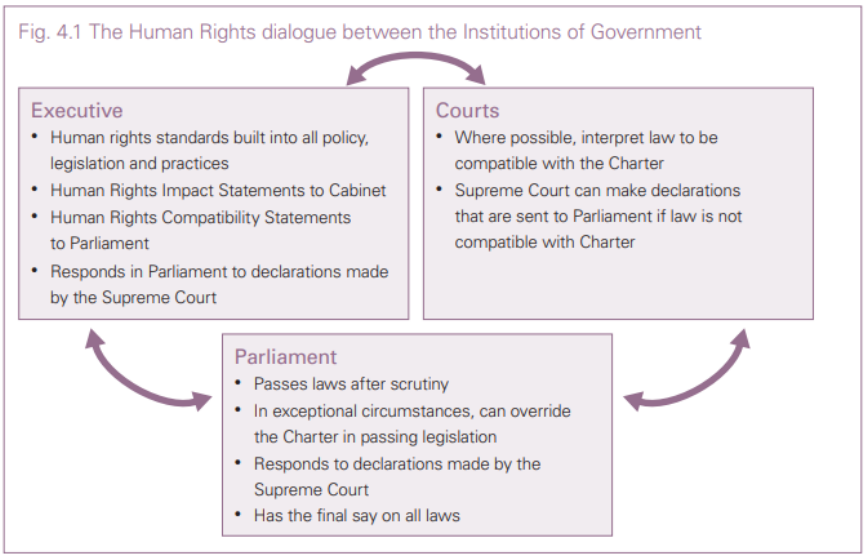
A common misconception that comes with the implementation of a human rights act is that it takes away the power of the Parliament and places it with the judiciary. This is not the case. Parliamentary sovereignty is maintained in a variety of ways in jurisdictions with Human Rights Acts through the use of a 'dialogue model'.

This model generally forces inconsistencies found by the courts between human rights legislation and subordinate legislation back to parliament for a decision, and provides parliament with the capacity to override human rights legislation in defined circumstances.

This paper explores the application of the dialogue model to preserve the power of Parliament in HRA legislation in Queensland, Victoria, the ACT, Canada and New Zealand.

State Legislation on Human Rights

A uniform similarity between the *Human Rights Act 2019* (Qld) ('Qld Act'), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Act') and the *Human Rights Act 2004* (the ACT Act) is that all promote the use of a 'dialogue model' to keep the three branches of government separate. The model encourages discussion or dialogue about human rights with the judiciary interpreting the laws and adjudicating the rights, the legislature scrutinising legislation and making laws, and the executive in developing policies and making administrative decisions.[33]



(Image from Rights, Responsibilities and Respect - The Report of the Human Rights Consultation Committee, http://qls.com.au/files/95218049-7619-4360-a0f2-a5ae009d7cbc/VHRCC_Report.pdf)

Under Victorian, Queensland and ACT Acts, the judiciary interprets whether legislation is compatible with human rights. The judiciary cannot invalidate any legislation they interpret as incompatible with the human rights legislation; instead, the Supreme Court can make a declaration of incompatibility.

[32] This paper was drafted at the request of CLA by Owen Kipling, Graduate of the Curtin University School of Law
[33] Human Rights Bill 2018 Report No. 26, 56th Parliament, Legal Affairs and Community Safety Committee, February 2019, https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2019/5619T7.pdf, p. 4

The court cannot strike down legislation; the declaration is merely a referral to Parliament.[34] The final say remains with the Parliament as to whether they want to overturn the legislation. The Parliament could essentially do nothing when given the declaration, and the law will be under the obligation to be changed.[35] This position is similar to New Zealand and the United Kingdom.[36] In New Zealand the courts have stated that they will strike down inconsistent subordinate legislation if the statute pursuant to which it was enacted does not expressly authorise the inconsistency. [37]

For Victoria and the ACT, the declaration triggers a conversation with the Attorney-General, as well as Parliament.[38]

Section 8 of the Qld Act states that:

> *An act, decision or statutory provision is compatible with human rights if the act, decision or provision—*
> *(a) does not limit a human right; or*
> *(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.*

Section 13(2) provides a list of factors to consider when deciding whether a human right is limited:

> *(a) the nature of the human right;*
> *(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;*
> *(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;*
> *(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;*
> *(e) the importance of the purpose of the limitation;*
> *(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;*
> *(g) the balance between the matters mentioned in paragraphs (e) and (f).*

Section 8 and 13 of the Qld Act provide limitations as to when a Supreme Court can make a declaration that a statute is incompatible with the Human Rights Act. Although not as clear, the Victorian Act possesses a similar provision in section 7 and the ACT Act possesses similar provisions in Sections 30 and 31.

Statutory Protection

To further safeguard Parliament's sovereignty, Queensland and Victoria provide specific provisions which enable Parliament to pass laws which may be incompatible with their respective human rights legislation. The ACT Act does not contain an override provision.

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[34] Ibid pg 5.

[35] Human Rights Bill 2018 Report No. 26, 56th Parliament, Legal Affairs and Community Safety Committee, February 2019, https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2019/5619T7.pdf, p. 5

[36] Ibid p.4

[37] Report on the Consultation into Human rights in Australia 2009, p 245

[38] 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf, p. 140.

Section 43 of the Qld Act provides that Parliament may issue an override declaration which allows an Act to have effect despite being incompatible with one or more human rights. The provision details that an override declaration is intended to be used only in exceptional circumstances, and lists the following as examples:

- War
- A state of emergency
- An exceptional crisis situation constituting a threat to public safety, health or order

Section 31 of the Victorian Act provides a similar provision. The Explanatory Memorandum for the Victorian Act gives two examples of exceptional circumstances: threats to national security, and a state of emergency that threatens the safety, security and welfare of the people of Victoria.[39]

A recent review recommended repealing the provision, and that explanatory material for the amending statute should note that Parliament has continuing authority to enact any statute and the statement of compatibility is the mechanism for reporting this incompatibility. [40] The argument was that the provision was unnecessary as section 16 of the Constitution Act 1975 (Vic) already allows the Parliament to make laws in and for Victoria in all cases (subject to the Australian Constitution).[41]

The recommendation was ultimately rejected to give a clear statement of Parliament's sovereignty and provide transparency by requiring the relevant Member of Parliament to make a statement justifying the override.

Alternative Override Positions – Canada and New Zealand

The position in Canada is slightly different to other jurisdictions. Canada's Charter of Rights somewhat limits Parliament's sovereignty by allowing Canada's courts to declare statutes as invalid because they are incompatible with human rights.[42] Canada's override provision permits any Canadian Parliament to expressly declare a statute is valid notwithstanding its Incompatibility with human rights expressed by the judiciary.[43] Canada's Parliament, in comparison to Australia, has to be proactive in validating legislation found incompatible with their human rights act by the judiciary.

The activist position taken by the New Zealand courts has created a half-way house between Canada and the Victorian and Queensland Acts.

[39] 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf, p. 196.

[40] See Recommendation 46, Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act, https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act.

[41] 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf, p. 197.

[42] Constitution Act 1982 (Can) s 32.

[43] Ibid s 33. See discussion at 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf, p. 196.

ATTACHMENT C

IMPLICATIONS OF THE DECLINE IN AUSTRALIA'S SOCIAL CAPITAL

Low social capital and declining ethical infrastructure has a dramatic effect on productivity and wellbeing across society. Symptoms include a lack of networks, rules and roles, low trust and cultures that promote low collaboration and behaviour by individuals and institutions that:

- worsens rather than improves economic performance;
- acts as a barrier to social inclusion and social mobility;
- divides rather than unites communities or societies; and
- facilitates rather than reduces crime, education underachievement and health-damaging behaviour.[44]

As the Edelman trust barometer report noted, this is a rising concern for Australia. These symptoms are the stuff of headlines in this country and recent OECD measures for social capital support them. Of Australia's six current OECD social capital indicators,[45] only two: "having a say in government" and "social interactions" are at or better than the OECD average and stable or improving. While "life satisfaction," "social support" and "trust in government" are currently at or better than the OECD average they are declining relative to other OECD countries.

The OECD social capital indicator for Australia on "the gender gap in feeling safe" is worse than the OECD average and also declining relative to other OECD countries.

It is important that social capital is directed to broader socially inclusive ends. A criminal gang has social capital, as does a white supremacist organisation. A HRA provides guardrails for the development of a more broadly inclusive social capital with an associated increase in productivity across society.

[44] See; Aldridge, Stephen, David Halpern, and Sarah Fitzpatrick. 2002. Social Capital: A Discussion Paper. London, England: Performance and Innovation Unit: Social capital - what is it, and what does it imply for policy (social-capital.net)
[45] Australia's performance against OECD indicators, *Measuring What Matters* Budget Paper No. 1, Statement 4, P 130, Figure 4.2.

ATTACHMENT D

ACT HUMAN RIGHTS ACT SECTION 40B:

Public authorities must act consistently with human rights

(1) It is unlawful for a public authority—

(a) to act in a way that is incompatible with a human right; or

(b) in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and—

(a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or

(b) the law cannot be interpreted in a way that is consistent with a human right.

ACT HUMAN RIGHTS ACT SECTION 40C:

Legal proceedings in relation to public authority actions

(1) This section applies if a person—

(a) claims that a public authority has acted in contravention of section 40B; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

(a) start a proceeding in the Supreme Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

ATTACHMENT E

DRAFT SCHEDULE TO EDUCATE CITIZENS ON THEIR RIGHTS UNDER NEW LEGISLATION

In 2021, CLA undertook to provide the Assembly Standing Committee on Health and Community Wellbeing with the first draft of a template it is developing as a standard schedule to any new ACT legislation or amendment to existing ACT legislation.

The schedule aimed to standardise the ACT Government's current approach to "charters" as part of a broader reform to provide a consistent pathway to remedy across all ACT legislation for a breach of any right covered by the ACT Human Rights Act (the Act). The standard schedule identifies:

- how people can expect to be treated by public authorities under any legislation related to the schedule;
- any specific rights that underpin that treatment; and
- the ethical infrastructure needed to seek fast, fair remedy for breaches of those rights.

The schedule would be applied to any ACT Bill the relevant Human Rights Compatibility Statement identifies as either promoting or limiting human rights or to any Federal Bills after a AHRC model HRA is enacted. CLA has applied the standard template to ACT Public Health Amendment Bill (No 2) 2021 to illustrate the concept.

SCHEDULE TO THE PUBLIC HEALTH ACT 1997 AS AMENDED

THE CHARTER OF COVID RIGHTS

Preamble

This charter of rights explains how people who are subject to government directions pursuant to *Public Health Amendment Bill 2021 (No 2)* (this Amendment) can expect to be treated by relevant decision makers.

Public authorities have an obligation to act consistently with Under the *Human Rights Act 2004* (HR Act) when:

- making and issuing declarations, directions and guidelines pursuant to this Amendment; and
- applying them to decisions they make when protecting the public from the public health risks of COVID19, in circumstances where those risks may not give rise to a public health emergency.

1. Rights promoted by this Amendment

The rights promoted by this Amendment are:

- Right to life (Section 9 of the HR Act) – the measures included in this Amendment have the intent of preventing or limiting the spread of COVID 19, thereby protecting members of the ACT community from the risk of serious illness or death that could result from a COVID 19 infection or equally from other diseases or injury due to a hospital and health system overwhelmed by COVID 19 cases; and

  The child's right to protection - needed because of the child's unique vulnerability and the

child's lesser ability to take certain health measures required by directions under this Amendment (Section 11 2 of the HR Act)

These rights will be protected through directions relating to specific circumstances defined in this Amendment and through guidelines issued to inform decisions made pursuant to those directions.

The ACT Government understands that promoting these rights through this Amendment is likely to limit other rights guaranteed by the HR Act.

2. Rights that may be limited by this Amendment

The rights most likely to be limited by this Amendment include:

- The right to equality (Section 8 HR Act);
- The right to freedom of movement (Section 13 HR Act);
- The right to demonstrate religious beliefs (section 14 (1) HR Act);
- The right to freedom of assembly and association (Section 15 HR Act);
- The right not to have your privacy, family or home interfered with (Section 12 (a) HR Act);
- The right to liberty (Section 18 HR Act);
- The right to be treated humanely when deprived of liberty (section 19 HR Act); and
- The right to work (Section 27 (B) HR Act).

3. Limiting rights under this Amendment – the constraints on Government decision makers:

Every limitation on a human right that is, or may be, imposed by the provisions of this Amendment must be through the ACT Government decision makers meeting their obligation to protect the health and lives of the ACT community from the significant public health risk posed by COVID 19.

Every decision must demonstrate:

- A legitimate purpose (section 28 (b) HR Act) derived from the Objects of this Amendment (this Amendment Division 6C.1 section 118M);
- A rational connection between the limitation and the purpose (Section 28 (2) (a), (c) and (d) HR Act); and
- Proportionality (Section 28 (2)(e) HR Act).

4. When decisions are made that limit your rights – what you can expect from ACT Government decision makers:

The ACT Government recognises that everyone affected by the provisions of this Amendment has the right to be safe, respected, heard and treated fairly. You can:

- expect a timely explanation in writing about what is happening to you;
- ask questions about what is happening to you;
- seek timely clarification on elements of the decision that you do not like or understand;
- expect timely information, in writing, about the process for seeking a review of the relevant decision through this Amendment by either the decision maker or an independent third party;
- expect timely information, in writing, about how to make a complaint or raise concerns; and how complaints will be dealt with;
- expect that your access to appropriate treatment is not constrained; and
- have contact with the people you care about.

5. **When you believe your rights have been breached – what you can expect from ACT Government decision makers:**

The ACT Government recognises that you have the right to an effective remedy by the competent tribunal for acts breaching the fundamental rights granted to you by law, and that remedy may include compensation for losses and damages resulting from rights breached by decisions pursuant to this amendment. You have the right to access the ethical infrastructure you need to seek fast, fair remedy for breaches of those rights. This includes:

- Having a decision reviewed by the decision maker and, if necessary, remade;
- Third party conciliation through the ACT Human Rights Commission conciliation processes; and
- Access to the appropriate tribunal, including ACAT and the lower courts, to obtain a mandated remedy or compensation for any damages or losses resulting from decisions made under COVID directions.

ATTACHMENT F

THE BUILDING BLOCKS OF A WELLBEING ECONOMY

The Wellbeing Economy Governments (WEGo) group is an initiative where member countries (Scotland, Finland, Iceland, New Zealand and Wales) are working together to understand the key priorities for a wellbeing economy. All five members have enacted wellbeing frameworks, Finland is currently the happiest country on earth, Iceland is the fourth happiest[46] and New Zealand is the only country in the world to apply its wellbeing framework as a filter for its budget.

WEGo countries, and other countries that have adopted a wellbeing framework,[47] refer to Sustainable Development Goal 16[48] as the value proposition for social capital in their society. SDG 16 says, in part:

> *"Governments, civil society and communities need to work together to find lasting solutions to conflict and insecurity. Strengthening the rule of law and promoting human rights is key to this process, as is reducing the flow of illicit arms, combating corruption, and ensuring inclusive participation at all times."*

Scotland puts social capital and an ethical infrastructure front and centre in the value statement to guide the actions of Government:

> ***"Our Values:***
>
> *We are a society which treats all our people with kindness, dignity and compassion, respects the rule of law, and acts in an open and transparent way.*
>
> *We respect, protect and fulfil human rights and live free from discrimination."*[49]

It is not surprising that human rights feature as part of the value proposition for social capital. The Preamble to the Universal Declaration of Human Rights (UDHR), concluded by the United Nations in 1948 Paragraph 3 says:

> *"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law."*

In other words, a country is only economically, culturally and socially sustainable if it respects the human rights of the people who live in it.

ENDS Attachments

[46] Happiest Countries in the World 2023 (worldpopulationreview.com)
[47] For example, a recent paper from the Canadian Department of Finance noted that Canada's equivalent to the Wellbeing framework: The Quality of Life framework, will provide a mechanism to link SDGs to federal budget priority setting, and strengthen assessment of environmental, social, and economic factors in budgeting and policy development to improve policy coherence. see Measuring What Matters: Toward a Quality of Life Strategy for Canada - Canada.ca
[48] Peace, justice and strong institutions - United Nations Sustainable Development Goal 16: "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."
[49] NPF_Scotland's_Wellbeing_May2019.pdf (nationalperformance.gov.scot)