

## CIVIL LIBERTIES AUSTRALIA SCOPING PAPER

### NO RIGHTS WITHOUT REMEDY MODEL HUMAN RIGHTS ACT (NRWR)

#### THE NEW PARADIGM

The majority report of the Joint Parliamentary Committee for Human Rights (JPCHR) has recommended NRWR as the model best equipped to protect and promote Australians' human rights. NRWR is the model championed by the Australian Human Rights Commission (AHRC) and is being implemented in the ACT.

The NRWR model is a new paradigm in two important respects:

- It imposes a positive duty on decision makers to protect and promote human rights; and
- Unlike existing HRA in Australian jurisdictions, it provides a clear pathway to remedy by allowing individuals to take any human rights complaint to independent third party conciliation and, if that is not successful, to the relevant independent tribunal for a mandated remedy.

These two points are key elements of the mechanism by which the JPCHR, the AHRC and the ACT Government expect the NRWR model to deliver a fair and sustainable society (*see endnote*).

#### **NRWR HRA: The Quality Assurance and Control mechanism for good governance**

Quality control in general aims to ensure products and services meet required quality standards through inspection, testing and verification before delivery to the customer.

From the Universal Declaration of Human Rights (UDHR) perspective, human rights are the quality control standards applied by states to deliver the good governance needed to ensure that society is fair and sustainable. The ethical infrastructure built on those standards sets the acceptance criteria and quality control measures, monitors performance and identifies defects and non-conformities.

To ensure that the rights and ethical infrastructure package applies those standards consistently, UDHR requires a NRWR HRA.

The upstream costs of establishing any HRA of the Australian HRA models has mostly been about instilling a new culture into government decision making. The motivation for making the new culture stick in non NRWR HRA models like Victoria and to a lesser extent the ACT and Queensland, tends to be internal to government and based on simplicity, efficiency and effectiveness – motives that can become less powerful over time.

NRWR models introduce a new external incentive. “Customers” for a HRA will have the ability to hold Government to account through both third-party conciliation and the

courts for individual decisions that lead to human rights complaints. This places the discipline of third-party scrutiny on individual decision makers, adding a powerful and consistently applied motive for getting decisions right.

Importantly, the *cumulative* effect of these complaints provides a continuing critique of the Government's human rights performance that feeds directly into the quality control measures for governance.

### **The cost of poor quality control on governance**

There has been a lot of work on the consequences for business of not imposing a QAC on their production and sales. There is a consensus that the cost of poor quality in a thriving company will be about 10-15% of operations. These losses are in wasted resources and time, discarded products and downtime on the production floor and customer dissatisfaction leading to lost customers and sales.

CLA has not been able to find much work on the cumulative cost to government of not imposing effective QAC on governance, but it is reasonable to conclude that it would parallel business outcomes. Importantly, poor governance QAC leads to a lack of confidence in the Government's accountability amongst the customers for its decisions, and a lack of trust that the Government is acting in the best interests of those affected by them.

One indirect method of looking at the cumulative cost to government in not imposing effective QAC on governance is through independent measures of trust in government.

Trust measures like the Edelman barometer have shown a steady decline in Australians' trust in Government to the point where 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. 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, a worry for governments now facing substantial intergenerational decisions on climate change and the social wage.

Direct costs for individual decisions that have come to the public attention are easier to find. Robodebt is by far the Australian government's most catastrophic policy failure. The adoption of digitisation for debt recovery between 2014 resulted in the raising of 794,000 false and unlawful debts against approximately 526,000 members of one of the most vulnerable and stigmatised groups of citizens in the country at a cost to revenue of \$1.751 billion.

Robodebt could not have happened if the Federal Government had imposed a NRWR HRA as even the most cursory examination of the scheme would have revealed breaches in the Government's ethical obligations as a model litigant and the capacity

for individuals to make human rights complaints to an independent tribunal would have alerted the Government and the public that there was an issue that had to be fixed.

In the absence of a NRWR HRA, the width of governance failures arising from government decisions, and the cost of those failures, remains opaque.

### **Implementing the NRWR model – will there be a cost in increased litigation?**

One of the cost related assertions made about the shift to a NRWR HRA is that it will be a lawyers' picnic, with a substantial increase in the number of cases brought before independent tribunals. Noting that the NRWR HRA will elevate human rights complaints to the same position as discrimination complaints, it is useful to draw comparisons with the way in which Australian jurisdictions treat discrimination cases now.

305 discrimination complaints were handled by the NT Anti-Discrimination Commission (NTADC) in 2022-23, of which 181 were finalised. Only two complaints were forwarded to the NTCAT for a mandatory ruling. In the same period, 2589 other matters were initiated in NTCAT. The NTADC is therefore an effective filter for NTCAT. This outcome is reflected in other jurisdictions.

In 2020-2021, The ACT's ACAT conducted 6357 substantive hearings and received 4136 applications. Of these applications, only 39 were discrimination referrals from the ACT HRC. Over the same period, ACT HRC received 1819 enquiries and 922 complaints, of which 200 related to discrimination.

The Federal experience was similar. The AHRC resolved 3736 complaints under discrimination legislation in 2021-22, of which roughly 2% went to AAT for mandatory remedy (around 74 cases). The AAT resolved 43 084 cases over the same period. Unresolved AHRC complaints are therefore currently about 0.172% of AAT (now ART) cases.

The experience in South Australia follows the Federal and ACT pattern. Of the 17532 applications received by SACAT in 2022-23 only 35 were referrals from Equal Opportunity SA under the Equal Opportunity Act. Over the same period Equal Opportunity SA received 553 enquiries of which 399 were within the scope of the Equal Opportunity Act. As is the case with the ACT HRC and AHRC, Equal Opportunity SA is an effective filter for discrimination complaints.

In 2022-23, Queensland Human Rights Commission (QHRC) accepted 289 work related discrimination complaints and 325 other discrimination complaints. The Queensland Industrial Relations Commission (QIRC) hears work related discrimination cases that have not been resolved by QHRC conciliation, and the Queensland Civil and Administrative Tribunal (QCAT) hears non-work-related cases.

In 2022-23, 3142 matters were filed with the QIRC, of which 102 matters were referrals from QHRC. Over the same period 29 120 matters were lodged with QCAT, of which 103 were referrals from QHRC.

In 2022-23 QHRC filtered discrimination complaints effectively for both QIRC (resolving 65% of work related discrimination complaints through conciliation) and QCAT (resolving 68% of non-work related discrimination complaints through conciliation).

The story is similar in NSW, Victoria and WA.

A NRWR HRA will increase the number of complaints moving to third party conciliation, noting that these cases would otherwise have been dealt with at the agency level. Some of the savings from delays by agencies in resolving human rights complaints can be hypothecated to accommodate the increased resources needed by the third-party conciliator, but there will still be a cost.

Given the proportion of Tribunal workloads currently dedicated to resolving discrimination referrals, it is unlikely that the number of Tribunal cases arising from a NRWR HRA will increase sufficiently to need a specific increase in tribunal resources.

## **Conclusion**

A NRWR HRA helps build trust in Government through increased accountability delivered through a QAC driven by external scrutiny and the capacity of third parties to hold Government accountable.

The cost of not implementing a NRWR QAC can be measured by:

- the cumulative decline in citizens' trust in government; as well as
- wasted resources; and
- time driven by poor decisions and downtime in government activity to fix failures in the decision-making process.

The cost to government of putting the infrastructure in place for a NRWR HRA is in cultural change management and increasing the capacity of the third-party conciliator. There is strong evidence to suggest human rights complaints are amenable to resolution through conciliation and will rarely need to go to arbitration.

ENDNOTE: No Rights Without Remedy – NRWR – is the model chosen by the Australian Human Rights Commission and the Parliamentary Joint Committee on Human Rights for when a federal Human Rights Act is introduced. NRWR has already started to operate in the ACT.

Under NRWR, a person can make a formal complaint if any of their legislated human rights are breached...after they have asked the government department or agency to fix the problem, and their initial complaint/request has been refused.

Conciliation: The state/territory (or federal) Human Rights Commission can try to solve the problem by conciliation (basically getting the parties together to talk through to a solution).

*This is by far the cheapest and quickest solution for everyone...other than the government not making the wrong decision in the first place*

Tribunal: If conciliation is not successful, a person may be able to take their case to the relevant tribunal (eg, ACAT, NTCAT, VCAT, SACAT, NSWCAT, etc) for a binding legal decision. The decision may provide the remedy by ordering the government to fix the problem, or by awarding compensation, or by making whatever ruling the tribunal thinks is appropriate.

*Note: In most jurisdictions, people will retain the ultimate right to appeal to higher courts. But this is a very expensive and very slow way to solve what is usually a 'small' problem.*

ENDS

NOTE: The NRWR principle is already operating in the ACT, using conciliation. The ACT Government has agreed to budget and legislate for the second phase, tribunal resolution, in the 2024-25 financial year. All three major parties in the ACT support the plan