THE LAW SOCIETY OF NEW SOUTH WALES
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Submission to the Australian Human Rights Commission's National Conversation on Human Rights

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The NSW Young Lawyers Human Rights Committee welcomes the opportunity to make a submission to the Australian Human Rights Commission's National Conversation on Human Rights ("**the Conversation**").

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Human Rights Committee

The Human Rights Committee ("**the Committee"**) comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the Committee share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

Scope of Submission

This submission addresses the following questions from the Issues Paper:

- Question 1: What human rights matter to you?
- Question 2: How should human rights be protected in Australia?
- Question 4: How should the government address the situation where there is a conflict between different people's rights?
- Question 5: What should happen if someone's rights are not respected?
- Question 6: What can the community do to protect human rights? How can the government support this?
- Question 7: How should individuals, business, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

- Question 8: What should the Australian Human Rights Commission and the government do to educate people about human rights?
- Question 9: What actions are needed to ensure that the government meets it obligation to fulfil human rights – for example, in addressing longstanding inequalities in the community?
- Question 10: How should we measure progress in protecting and fulfilling human rights?

Summary of Recommendations

In summary, the Committee makes the following recommendations:

1. Recommendation 1: The Australian Human Rights Commission ("**AHRC**") should adopt as a guiding principle of the Conversation that all human rights are important and must be protected by law;
2. Recommendation 2: The federal Parliament should enact a national Human Rights Act;
3. Recommendation 3: A national Human Rights Act should include, at a minimum, the civil, political, economic, social and cultural rights in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*;
4. Recommendation 4: A national Human Rights Act should include a provision for the concurrent operation of State and Territory human rights legislation;
5. Recommendation 5: The AHRC should be given a mandate to develop policies on competing human rights claims, including a set of key guiding principles;
6. Recommendation 6: While Australia's human rights framework is evolving, Australia should look to other jurisdictions for guidance on how to resolve competing human rights claims;
7. Recommendation 7: An Australian Human Rights Act should include statutory limitations and defences to certain rights claims similar to section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("***Victorian Charter***"), section 13 of the *Human Rights Act 2019* (Qld) ("***Queensland Act***") and section 28 of the *Human Rights Act 2004* (ACT) ("***ACT Act***");
8. Recommendation 8: The AHRC should seek the input of community organisations in developing a competing rights policy;
9. Recommendation 9: The AHRC should be empowered to investigate breaches of anti-discrimination law on its own motion and commence court proceedings without an individual complaint;
10. Recommendation 10: The Commonwealth Government should implement the Productivity Commission's recommendation to provide an additional $120 million each year to the legal assistance sector;
11. Recommendation 11: Australian governments should end prohibitions on community organisations using government funding to engage in public campaigns;

12. Recommendation 12: Australian governments should integrate a greater understanding of the international and Australian human rights systems into school curriculums through primary and secondary education;
13. Recommendation 13: The AHRC should develop educational programs targeted at school students and the general community, and these should be made available in community languages;
14. Recommendation 14: The Commonwealth Government should reverse the planned funding cuts of $300,000 to the AHRC and restore the $4.9 million that has been cut from the AHRC since 2014; and
15. Recommendation 15: The Commonwealth Government should expand current mandatory workplace reporting requirements to require Australian employers to report on equality indicators in relation to all protected attributes under Commonwealth anti-discrimination legislation.

What human rights matter to you?

The Committee recognises the fundamental principle that human rights are indivisible. This principle is expressed in the *Vienna Declaration and Programme of Action* ("***Vienna Declaration***"), which was adopted unanimously by 171 States at the World Conference on Human Rights on 25 June 1993[1] and adopted by the United Nations General Assembly ("**UNGA**") on 20 December 1993.[2] The *Vienna Declaration* states:

> "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and religious particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[3]

The UNGA has further recognised that civil and political rights depend upon economic, social and cultural rights:

> "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."[4]

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[1] United Nations Office of the High Commissioner of Human Rights, "World Conference on Human Rights, 14-25 June 1993,Vienna, Australia" <https://www.ohchr.org/en/aboutus/pages/viennawc.aspx>.
[2] United Nations General Assembly, "World Conference on Human Rights" (Document Number A/Res/48/121, 14 February 1994) <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/121>.
[3] *Vienna Declaration* [5].
[4] United Nations General Assembly, "International Conference on Human Rights" (Resolution 2442 (XXIII), 19 December 1968) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/02/IMG/NR024402.pdf?OpenElement>, citing United Nations

There is increasing recognition of the human right to a healthy environment. Australia is one of only 15 States in the world that do not recognise such a right at the federal level.[5] In the case of the *Gabčíkovo-Nagymaros Project*, then Vice-President of the International Court of Justice ("**ICJ**") Judge Christopher Weeramantry explained:

> "The protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration [of Human Rights] and other human rights instruments."[6]
>
> In light of the above, the HRC considers the human right to a healthy environment indivisible from civil, political, economic, social and cultural rights.

Australia is a party to numerous human rights treaties, including the following 7 core international human rights treaties:

- *International Covenant on Civil and Political Rights* ("***ICCPR***");
- *International Covenant on Economic, Social and Cultural Rights* ("***ICESCR***");
- *International Convention on the Elimination of All Forms of Racial Discrimination* ("***CERD***");
- *Convention on the Elimination of All Forms of Discrimination against Women* ("***CEDAW***");
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* ("***CAT***");
- *Convention on the Rights of the Child* ("***CROC***");
- *Convention on the Rights of Persons with Disabilities* ("***CRPD***").

The above human rights treaties repeatedly reaffirm the indivisibility of human rights. For example, the preamble to the *ICCPR* states that "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created where by everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". The preamble to the *ICESCR* contains an equivalent statement.

International Conference on Human Rights, "Final Act of the International Conference on Human Rights" (1968) 4 [13] <http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf>.

[5] Meg Good, "Should Australia recognize the human right to a healthy environment?", *The Conversation* (22 February 2018) <https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>.

[6] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice-President Weeramantry)* ICJ Rep 88, 91-2 <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>.

In light of the indivisibility of rights, the Committee emphasises that all human rights are important. We caution against any attempt to treat particular rights as more important than others. The Committee therefore recommends that the AHRC adopt as a guiding principle of the Conversation that all human rights are important and must be protected by law.

Recommendation 1: The AHRC should adopt as a guiding principle of the Conversation that all human rights are important and must be protected by law.

How should human rights be protected in Australia?

The Committee supports the AHRC's recommendation for a Human Rights Act for Australia.[7] We consider that a federal Human Rights Act would encompass and unify human rights protections in Australia at a national level as well as "help to build a culture that respects the human rights of all people in Australia".[8]

Current Human Rights Protections in Australia

Human rights are inadequately protected under Australia's current legal framework, which is composed of the *Australian Constitution*, common law principles, anti-discrimination legislation and State and Territory human rights legislation. We outline current human rights protections and their limitations below.

The Australian Constitution

The *Australian Constitution* contains express protections for the following rights:[9]

- The right to trial by jury on indictable Commonwealth offences;[10]
- Freedom of trade, commerce and intercourse within the Commonwealth;[11]
- Freedom of religion; and[12]
- The right not to be subject to discrimination on the basis of the State in which one lives.[13]

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[7] Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009).
[8] Ibid 38 [227].
[9] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 32 [2.11].
[10] *Australian Constitution* s 80.
[11] *Australian Constitution* s 92
[12] *Australian Constitution* s 116.
[13] *Australian Constitution* s 117.

The High Court has also recognised that the *Australian Constitution* contains implied rights and freedoms, such as freedom of political[14] communication and the right to vote.[15] However, the Australian Law Reform Commission recognises that "[t]he *Constitution* does not directly and entirely protect many of [these] rights, freedoms and privileges".[16] Constitutional law expert George Williams asserts that, while some rights are "given a broad operation by the High Court … the few civil and political rights in the Constitution have, due to a combination of narrow drafting and constrained interpretation by the High Court, had little (if any) effect".[17] Professor Jeffrey Goldsworthy provides a historical explanation for the limited rights protections in the *Australian Constitution*:

> "With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box."[18]

Common law

Two limited ways in which the common law protects rights are the following:

- The principle that "courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty";[19] and
- The principle that legislation should be construed so as not to interfere with fundamental rights, unless an intention to do so is manifested by "unmistakeable and unambiguous language".[20]

It is inherent in above principles that legislation can infringe both Australia's obligations international treaties and fundamental rights by unmistakeable and unambiguous language.[21] Sir Anthony Mason, writing extrajudicially, observed that the common law system for the protection of rights lacks comprehensive

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[14] *Australian Capital Territory v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[15] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [85].
[16] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 34 [2.19].
[17] George Williams, "The High Court, the Constitution and Human Rights" (2015) 21(1) *Australian Journal of Human Rights* 1, 4.
[18] Jeffrey Goldsworthy, "Constitutional Implications Revisited" (2011) 30 *University of Queensland Law Journal* 9, 25.
[19] *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).
[20] *Coco v The Queen* (1994) 179 CLR 427, 435-437 (Mason CJ and Brennan, Gaudron and McHugh JJ).
[21] See, eg, *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 [41] (Brennan, Deane and Dawson JJ).

protection.[22] It is particularly difficult for the common law to protect rights that require government to take active measures,[23] such as many economic, social and cultural rights.

Anti-discrimination legislation

Although Australia lacks a federal Human Rights Act, anti-discrimination law partly implements the rights to equality and non-discrimination.[24] The main instruments of anti-discrimination law at the Commonwealth level are:

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

Each State and Territory has its own anti-discrimination laws as well.[25] Despite the above, the United Nations Human Rights Committee ("**UNHRC**") has expressed concern "that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law".[26]

The power to implement a federal Human Rights Act

Section 51(xxix) of the *Australian Constitution* provides that the federal Parliament has power to make laws with respect to external affairs. As former High Court Justice Michael McHugh observes:

> "Under the external affairs power conferred by [s 51(xxix)] of the Constitution, the federal Parliament has power to enact legislation that gives effect to human rights conventions and treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."[27]

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[22] Sir Anthony Mason, "The Role of a Constitutional Court in a Federation: a Comparison of the Australian and the United States Experience" (1986) 16 *Federal Law Review* 1, 12.
[23] Australian Human Rights Commission, "Common Law Rights, Human Rights Scrutiny and the Rule of Law" (19 July 2013) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law>.
[24] See, eg, *ICCPR* art 2(1) and art 26.
[25] *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).
[26] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [12].
[27] Michael McHugh, "A Human Rights Act, the Courts and the Constitution" (Conference Paper, Australian Human Rights Commission, Sydney, 5 March 2009) 13.

The *Australian Bill of Rights Bill 2017 (Cth)* ("***Bill of Rights Bill****")* was a private member's bill for a federal Human Rights Act. Although the *Bill of Rights Bill* was never passed, it remains useful as a source of guidance on what a federal Human Rights Act might include. For example, cl 8 of the *Bill of Rights Bill* models an effective way of addressing concerns that a federal Human Rights Act may exceed the legislative power of the federal Parliament. As the Explanatory Memorandum to the *Bill of Rights Bill* explains, "Clause 8 that the Act will only apply to the extent that it does not exceed the Commonwealth's legislative power set out in section 51 of the Constitution".[28]

State and Territory Human Rights Acts

The viability of a Human Rights Act at the Commonwealth level is illustrated by the fact that three Australian jurisdictions have already implemented such legislation. Australia's State and Territory Human Rights Acts are as follows:

- *Human Rights Act 2004* (ACT) ("***ACT Act***");
- *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("***Victorian Charter***"); and
- *Human Rights Act 2019* (Qld) ("***Queensland Act***").

We will refer to the three Acts collectively as the "***State and Territory Human Rights Acts***".

The *State and Territory Human Rights Acts* are legislative instruments like the human rights laws operating in New Zealand and the United Kingdom.[29] In particular, George Williams, a leading constitutional lawyer and academic, notes:

> "the Victorian Charter of Rights is designed to prevent human rights problems arising in the first place by improving the work of government and Parliament in the making and application of laws and policies. It does so by ensuring that human rights principles are a mandatory part of governmental decision-making … The Victorian Charter of Rights demonstrates that it is possible to look again at some of the most basic assumptions and beliefs that underlie our system of government, and as a result, to bring about legal reform."[30]

The main objects of the *Queensland Act* are to:

- "protect and promote human rights";

[28] Explanatory Memorandum, *Australian Bill of Rights Bill 2017* cl 8.
[29] George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30(3) *Melbourne University Law Review* 880, Part IV(A).
[30] George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30(3) *Melbourne University Law Review* 880, Part IV(A).

- "help build a culture in the Queensland public sector that respects and promotes human rights"; and
- "help promote a dialogue about the nature, meaning and scope of human rights".[31]

The *State and Territory Human Rights Acts* use a "dialogue model" in which "each of the three arms of government – the executive, the legislature (parliament) and the courts – have a legitimate role to play, while the parliament maintains sovereignty".[32] The AHRC's proposal for a Human Rights Act reflects this model:

> "A Human Rights Act would be Parliament's clear statement of the fundamental rights and values to which Australia is committed … A Human Rights Act would set out the human rights that all people in Australia are entitled to have protected, and explain that we are all responsible for respecting the rights of others … In this way, a Human Rights Act would be an extremely powerful tool for furthering the type of human rights dialogue and education that occurred during this Consultation process."

The *State and Territory Human Rights Acts* provide that human rights can be limited in certain circumstances. For example, s 7(2) of the *Victorian Act* provides that:

> "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
> (b) the importance of the purpose of the limitation; and
> (c) the nature and extent of the limitation; and
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."[33]

The Committee considers it appropriate that a Human Rights Act include a power to limit human rights in certain circumstances. However, as the Commonwealth Parliamentary Joint Committee on Human Rights ("**PJCHR**") recognises, there are "a number of absolute rights that may never be subject to permissible limitations in any circumstances. These include the right not to be subjected to torture, cruel, inhuman or

[31] *Queensland Act* s 3.
[32] Legal Affairs and Community Safety Committee, *Human Rights Bill 2018* (Report No 26, February 2019) 3.
[33] See also *ACT Act* s 28; *Queensland Act* s 13.

degrading treatment, and the right not to be subjected to slavery".[34] Serious consideration should be had to the inclusion of absolute rights in a Commonwealth Human Rights Act.

The need for a Commonwealth Human Rights Act

Australia is the only democratic country that does not have a national Bill of Rights or Human Rights Act.[35] Although the PJCHR provides some scrutiny of Bills against human rights treaties to which Australia is a party, the PJCHR has significant limitations. The PJCHR is often not given adequate time to assess the human rights implications of Bills, with some Bills being passed into law before the PJCHR has finished its review.[36] Moreover, the PJCHR's recommendations are often ignored by the Government, with George Williams and Daniel Reynolds noting that "extraordinarily high numbers of rights-infringing Bills" were passed following the PJCHR's introduction.[37] A Commonwealth Human Rights Act has significant potential to enhance the consideration of human rights by all branches of the Commonwealth Government.[38]

Regarding the legislature, the *State and Territory Human Rights Acts* require a statement of compatibility to be prepared in respect of any proposed Bill. The statement of compatibility must express an opinion on whether the Bill is compatible or consistent with human rights, amongst other things.[39] Although section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) presently requires the Government to prepare statements of compatibility, such statements often lack rigour in terms of their human rights analysis.[40]

Regarding the executive, the *State and Territory Human Rights Acts* make it unlawful for public authorities or public entities to act in a way that is incompatible with a human right or to fail to give proper consideration to

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[34] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 9, 5 September 2017) 79 [1.302].
[35] George Williams, "The High Court, the Constitution and Human Rights" (2015) 21(1) *Australian Journal of Human Rights* 1, 2.
[36] United Nations Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia* (1 December 2017) [11] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/AUS/CO/6&Lang=En>.
[37] George Williams and Daniel Reynolds, "The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights" (2015) 41(2) *Monash University Law Review* 469, 506.
[38] Michael McHugh, "A Human Rights Act, the Courts and the Constitution" (Conference Paper, Australian Human Rights Commission, Sydney, 5 March 2009) 13.
[39] *ACT Act* s 37; *Victorian Act* s 28; *Queensland Act* s 38.
[40] See United Nations Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia* (1 December 2017) [11] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/AUS/CO/6&Lang=En>.

a relevant human right. Parliamentary sovereignty is explicitly maintained by an exception that applies where a law requires the public authority or public entity to act in a way that is inconsistent with a human right.[41]

Regarding the judiciary, the *State and Territory Human Rights Acts* require, so far as it is possible to do so consistently with the law's purpose, that laws must be interpreted compatibly with human rights.[42] The mandate that an inconsistent purpose will prevail over human rights is again an explicit recognition of parliamentary sovereignty.

The above provisions are only illustrative of the way in which a Commonwealth Human Rights Act would enhance consideration of human rights across all branches of the Commonwealth Government. The *State and Territory Human Rights Acts* contain other relevant provisions, which require closer consideration when determining the precise form that a Commonwealth Rights Act should take.

The Committee submits that there is a need for comprehensive human rights protections in Australia. Former Australian Disability Discrimination Commissioner Graeme Innis AM states that, while there have been "some very encouraging developments in human rights protection at the federal level … [t]he fact is that human rights are still insufficiently protected in Australia".[43] Innis highlights the mandatory detention of asylum seekers as an example:

> "This policy has had devastating impacts on both adults and children. One boy was so affected and distressed by his detention at Woomera immigration detention centre, that in the space of four months, he tried to hang himself four times, climbed into the razor wire four times, slashed his arms twice, and went on hunger strike twice. This boy was only fourteen years old. He was eventually found to be a refugee.
>
> Some important changes have been made to immigration policy since then, which mean that children aren't held in immigration detention centres anymore. However, Australia's mandatory detention policy still stands, and children continue to be detained in alternative forms of detention."[44]

The AHRC considers that a federal Human Rights Act would have numerous benefits, a selection of which are quoted in the table below, including that such an Act would:

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[41] *ACT Act* s 40B; *Victorian Act* s 38; *Queensland Act* s 58.
[42] *ACT Act* s 30; *Victorian Act* s 32; *Queensland Act* s 48.
[43] Graeme Innis, "A Human Rights Act for Australia" (Speech, Queensland Charter Group, Brisbane, 6 March 2009).
[44] Ibid.

- protect all people within Australia's territory and all people subject to Australia's jurisdiction;
- protect rights recognised in international human rights treaties to which Australia is a party;
- allow rights to be limited and balanced (with the exception of absolute rights) in accordance with strict criteria;
- require the government to consider human rights at the early stages of the development of law and policy;
- require parliamentary scrutiny of new legislation to ensure that it is compatible with human rights;
- require legislation to be interpreted consistently with human rights;

…

- require public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights in decision-making; and
- provide for an effective remedy when a public authority breaches human rights.[45]

Which rights should a federal Human Rights Act include?

The *State and Territory Human Rights Acts* include many rights from the *ICCPR*. The *Queensland Act* further includes rights to education and health services from the *ICESCR*.[46] Although the inclusion of rights to education and health services in the *Queensland Act* is a positive development, it falls significantly short of the recommendation of the United Nations Committee on Economic, Social and Cultural Rights that Australia:

> "a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation;
>
> b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission;
>
> c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights."[47]

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[45] Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009) 41 [243].
[46] *Queensland Act* ss 36-37; *ICESCR* arts 12-13.
[47] Committee on Economic, Social And Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, 42nd sess, UN DOC E/C.12/AUS/CO4 (22 May 2009) [11].

The AHRC recommended a Human Rights Act that "at a minimum … should explicitly recognise and protect the civil, political, economic, social and cultural rights in the ICCPR and ICESCR".[48] The Committee supports this recommendation.

We note that the *State and Territory Human Rights Acts* each contain a provision to the effect that the rights contained in the relevant are not exhaustive. For example, s 12 of the *Queensland Act* states:

> "A right or freedom not included, or only partly included, in this Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included."[49]

Such a provision helps to ensure that human rights are not inadvertently compromised as a result of not being included in the Act. The Committee therefore recommends that such a provision be included in a federal Human Rights Act.

Concurrent operation with State and Territory human rights legislation

Section 109 of the *Australian Constitution* provides that "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." In other words, a Commonwealth law will render an inconsistent State law invalid to the extent of the inconsistency.

Care should be taken to ensure that a federal Human Rights Act does not limit the protection of human rights under State and Territory human rights legislation via the operation of s 109 of the *Australian Constitution*. The case of *Viskauskas v Niland*[50] highlights the risk of inconsistency issues within the space of anti-discrimination law. In *Viskauskas v Niland*, a claim of racial discrimination under the *Anti-Discrimination Act 1977* (NSW) was unsuccessful by reason of an inconsistency between the relevant State and federal anti-discrimination legislation. The High Court considered that "the two legislatures have legislated upon the same subject, and have prescribed what the rules of conduct will be and (if it matters) the sanctions imposed are diverse".[51] Following *Viskauskas v Niland*, the *Racial Discrimination Act 1975* (Cth) was amended to clearly state its intention to not "exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention [that is, the *CERD*] and is capable of acting concurrently with this Act".[52] The

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[48] Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009) 44 [271].
[49] See also *Victorian Act* s 5; *ACT Act* s 7.
[50] (1983) 153 CLR 280.
[51] *Viskauskas v Niland* (1983) 153 CLR 280 [293].
[52] *Racial Discrimination Act 1975* (Cth) s 6A(1).

Committee recommends that a federal Human Rights Act include a similar provision to ensure that the protective effect of State and Territory human rights legislation is maintained.

Recommendation 2: The federal Parliament should enact a national Human Rights Act.

Recommendation 3: A national Human Rights Act should include, at a minimum, the civil, political, economic, social and cultural rights in the *ICCPR* and the *ICESCR*.

Recommendation 4: A national Human Rights Act should include a provision for the concurrent operation of State and Territory human rights legislation.

How should the government address the situation where there is a conflict between different people's rights?

Australian society in the 21st century is diverse, multicultural and complex. As different groups and individuals interact with each other and attempt to exercise their rights, it is inevitable that some conflict will arise.

In attempting to resolve conflicts between different people's rights, the Australian Government has an opportunity to look to other nations which have implemented human rights frameworks and who have been operating within these frameworks for years. Canada, and in particular the Canadian province of Ontario, have explicitly addressed the issue of conflicting rights. In its policy on competing human rights, the Ontario Human Rights Commission summarised the search to resolve conflicting rights as:

> "… challenging, controversial and sometimes dissatisfying to one side or the other. But it is a shared responsibility and will be made easier when we better understand the nature of one another's rights and obligations and show mutual respect for the dignity and worth of everyone involved."[53]

A competing human rights situation occurs where a party exercising a legally protected human right results in interference with another party's human right.[54] The process of resolving such a dispute has often been described as a matter of "balancing" one right against the alleged opposing right. However, Justice Frank Iacobucci of the Canadian Supreme Court recognises that the more accurate description is one of

[53] Ontario Human Rights Commission, *Policy on Competing Human Rights* (January 2012) 3.
[54] Ibid 5.

"reconciliation" – that is, instead of considering which right should triumph, decision makers should look for a solution that allows the seemingly incongruent rights to compatibly co-exist.[55]

When rights are considered in the abstract, this process of reconciliation may seem daunting. However, a key to rights reconciliation is the understanding that rights do not exist in a vacuum, but rather in the factual matrix unique to the situation. As the existing statutory body in this area, the AHRC is uniquely placed to ensure that our system has at its foundation a fundamental appreciation for context. This is due to the AHRC having both expertise in human rights law and an appreciation of the human rights conflicts faced by Australians on a daily basis. Accordingly, the Australian Government should grant the AHRC the power to develop guiding principles in relation to our system.

In developing the guiding principles for the Australian system, the AHRC should consider the appropriateness of the guiding principles that have evolved in the Canadian case law over the years, including:

1. Few rights are absolute;
2. There is no hierarchy of rights;
3. Rights may not always extend as far as claimed;
4. The full context, facts and values at stake must be considered;
5. Decision makers must look at the extent of the interference with a right;
6. The core of a right is more protected than its periphery;
7. Decision makers should aim to respect the importance of both sets of rights; and
8. Statutory defences may restrict rights of one group to protect the rights of another group.[56]

Although it may be the case that not all of the above principles are wholly appropriate in an Australian context, such principles nonetheless provide a valuable starting point for the AHRC to develop a set of guiding principles for the reconciliation of competing human rights claims.

By recognising the principle that many rights can be limited in appropriate circumstances and emphasising the importance of context, Canadian courts have been able to reconcile competing rights claims by allowing context to inform where the line is drawn between the conflicting rights. For example, the Canadian case of *R v Mills* was a sexual assault case in which the defendant sought the production of the complainant's

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[55] Frank Iacobucci, "'Reconciliating Rights' the Supreme Court of Canada's Approach to Competing Charter Rights" (2003) *The Supreme Court Law Review: Osgoode's Annual Constitutional Case Conference* 137, 141.
[56] Ontario Human Rights Commission, *Policy on Competing Human Rights* (January 2012) 18.

psychiatric records. The competing rights in the case were the right to privacy, the right to make full answer and defence and the right to equality. Justices McLachlin and Iacobucci of the Canadian Supreme Court noted that the way these competing rights were to be resolved depended on the nature of the proceedings. Their Honours emphasised:

> "no single principle is absolute and capable of trumping the others; all must be defined in light of competing claims… This illustrates the importance of interpreting rights in a contextual manner – not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances."[57]

In drafting the relevant legislation, the Australian Government should allow a level of flexibility and discretion when resolving competing rights claims. By respecting both sets of rights, courts will have a better chance of finding constructive compromises that "may minimise apparent conflicts … and produce a process in which both values can be adequately protected and respected."[58] For example, *R v O'Connor* was another case about the production of medical records. In this case, the Canadian Supreme Court reconciled the rights of the respective parties by requiring the records to be reviewed by the court in order to determine whether the records were relevant to the defence.[59]

A key feature of both domestic human rights legislation and international human rights law is the inclusion of both defences to the breach of a right and limitations on rights. By explicitly addressing the more common competing rights claims legislators can provide clear guidance on how to manoeuvre in a particular conflict. For example, article 19(2) of the *ICCPR* protects individual's freedom of expression. However, article 19(3) of the *ICCPR* recognises that such a right "carries with it special duties and responsibilities" and allows for the right to limited where it is necessary to ensure the rights of others are respected.

Ontario has also recognised the importance of its human rights commission in the resolution of competing rights claims. The Ontario Human Rights Commission has been given a mandate to prepare policies in respect to interpreting the provisions of the Ontario Human Rights Code.[60] This development of social policy alongside human rights law allows human rights issues to be applied to the day-to-day lives of individuals and brings a level of reality to seemingly abstract concepts.

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[57] *R v Mills* [1999] 3 SCR 668 [61].
[58] *R. v N.S.* [2010] ONCA 670 [84].
[59] *R v O'Connor* [1995] 4 SCR 411.
[60] *Human Rights Code 1990 (Ontario)* s 30; Lorne Foster and Lesley Jacobs, "The Ontario Human Rights Commission and the Framework for Mapping and Addressing Competing Human Rights" (2010) 8(3) *Canadian Diversity* 361, 375.

The AHRC should engage in extensive community consultation in developing a competing rights policy. By adopting a multifaceted approach, which involves the judiciary, legislature, executive and the Australian Government, the AHRC can ensure that competing rights issues are reconciled appropriately and respectfully.

Recommendation 5: The AHRC should be given a mandate to develop policies on competing human rights claims, including a set of key guiding principles.

Recommendation 6: While Australia's human rights framework is evolving, Australia should look to other jurisdictions for guidance.

Recommendation 7: An Australian Human Rights Act should include statutory limitations and defences to certain rights claims similar to section 7 of the *Victorian Charter*, section 13 of the *Queensland Act* and section 28 of the *ACT Act*.

Recommendation 8: The AHRC should seek the input of community organisations in developing a competing rights policy.

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

As the Committee previously stated in its submission to the AHRC's National Inquiry into Sexual Harassment in Australian Workplaces, the individual complaint-based procedure in anti-discrimination law limits its capacity to address systemic harms and repeat offenders.[61] In that submission, the Committee recommended that the AHRC be given the power to independently conduct investigations and commence court proceedings – even in circumstances where an individual complaint has not been received – with sufficient resourcing provided to the AHRC to perform such a role.

Therese MacDermott, Senior Lecturer at Macquarie University, states that "[t]he failure to invest the anti-discrimination agencies which are involved in the oversight of Australian anti-discrimination laws with specific powers to actively engage in the litigation process diminishes the recognition of the broader community interest in redressing discriminatory practices".[62] She contrasts the power given to anti-discrimination

[61] NSW Young Lawyers Human Rights Committee, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) 20.
[62] Therese MacDermott, "The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants" (2018) 18(1) *International Journal of Discrimination and the Law* 22, 33.

agencies with the Fair Work Ombudsman, who has "the capacity to initiate civil prosecutions and to impose other sanctions such as infringement notices and enforceable undertakings".[63] MacDermott concludes:

> "A potential reform for Australian anti-discrimination law, therefore, involves an enforcement model where a regulatory agency has multi-faceted functions, including the capacity to initiate litigation where necessary. This would enable the risk that an antidiscrimination agency might commence litigation to operate as a useful source of leverage. In addition, it would allow for the strategic use of litigation as a way of dealing with particularly egregious contraventions, in order to clarify the scope and application of the relevant laws, and as a means of general deterrence."[64]

Giving the AHRC own-motion investigation powers and the ability to commence court proceedings in discrimination matters is likely to promote systemic change and greater compliance with anti-discrimination law. These powers could be used to address industries where discrimination is particularly endemic, or to target repeat respondents. It would also have the positive impact of reducing the existing burden on complainants to undergo the complaints process, conciliation and litigation, often without assistance.

Recommendation 9: The Australian Human Rights Commission should be empowered to investigate breaches of anti-discrimination law on its own motion and commence court proceedings without an individual complaint.

What can the community do to protect human rights? How should the government support this?

Community organisations play a vital role in protecting human rights. Although this submission focuses on community legal centres ("**CLCs**"), similar themes apply to community organisations in general.[65]

The role of CLCs in protecting human rights include:

- Providing legal services to disadvantaged members of the Australian community, improving access to justice and assisting disadvantaged people to exercise their rights under law;

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[63] Ibid 34.
[64] Ibid.
[65] See, eg, Human Rights Law Centre, *Defending Democracy: Safeguarding Independent Community Voices* (June 2017) 3 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5936933d579fb38a23dc2eda/1496748893178/DefendingDemocracy_online_June2017.pdf>.

- Providing community legal education, enhancing awareness about human rights and how such rights can be exercised; and
- Engaging in advocacy and law reform activities to address systematic violations of human rights.

The Committee recommends that Australian governments increase support to community organisations in two ways. First, Australian governments should increase funding to community organisations. The Commonwealth Government is yet to implement the Productivity Commission's recommendation from 2014 that it provide an additional $120 million each year to the legal assistance sector.[66] The government-funded legal assistance sector in Australia consists of legal aid commissions, CLCs, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services.[67] Increasing funding to CLCs would support such organisations to maintain and develop their role in protecting the human rights of vulnerable people.

Second, Australian governments should end prohibitions on community organisations using government funding to engage in advocacy. The Commonwealth Government prohibits CLCs from using Commonwealth funding "to lobby governments or to engage in public campaigns".[68] The United Nations Special Rapporteur on the Situation of Human Rights Defenders has recommended that Australian governments end such prohibitions,[69] noting that "advocacy" is inseparable from the "frontline services" that non-government organisations provide.[70]

Recommendation 10: The Commonwealth Government should implement the Productivity Commission's recommendation to provide an additional $120 million each year to the legal assistance sector.

Recommendation 11: Australian governments should end prohibitions on community organisations using government funding to engage in public campaigns.

[66] Productivity Commission, *Access to Justice Arrangements*, vol 2 (5 September 2014) 738-9.
[67] Ibid 665.
[68] *National Partnership Agreement on Legal Assistance Services* 2015-20 cl B7.
[69] United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Australia* (28 February 2018) [107].
[70] Ibid [53]-[54].

How should individuals, businesses, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

The Committee submits that we all have a responsibility to respect human rights. Unfortunately, for many individuals, businesses, community organisations and others, sometimes encouragement and incentives are needed to support and even enable respect for human rights.

Other than a growth in social awareness and social movements which help promote and disseminate information regarding human rights, incentives and effective accountability measures are some of the strongest tools for protecting human rights.

In Australia, the conversation should involve a discussion of the kinds of rights Australia needs to better protect. Even though Australia may have a relatively diverse and developed social, political and economic system, with certain rights such as the right to vote[71] or the right to an education[72] codified in part in statute, it is important to acknowledge that even express rights are still susceptible to infringement by both State and non-State actors. Therefore, when it comes to raising awareness and encouragement amongst individuals of respecting and fulfilling human rights, education at every level is vital. This should include education in the more traditional sense such as through schools and universities, and less conventional methods across different mediums which have the capacity to reach and engage with individuals of all ages and all demographics. For example, the #MeToo movement used a social platform that was easily accessible to many individuals and had a simple but very powerful message. The impact of this movement appears to have had a profound impact, whilst at the same time educating many individuals on the rampant and prolific nature of sexual harassment and sexual assault in society. This had the effect of creating a dialogue amongst people about which rights are being infringed and which rights need better protecting.

Businesses should be a particular focus regarding compliance with human rights obligations. The AHRC's complaint statistics show that, in 2017-18, "the main respondent organisation categories were private enterprise (57%), State departments/statutory authorities (14%) and Commonwealth departments/statutory authorities (12%). These are consistently the main respondent organisation categories."[73]

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[71] *Electoral Act 1918* (Cth) s 245.
[72] See, eg, *Education Act 1990* (NSW) Pt 5; *Education and Training Reform Act 2006* (Vic) Pt 2.1; *Education (General Provisions) Act 2006* (Qld) ch 9.
[73] Australian Human Rights Commission, *2017-18 Complaint Statistics* (Report, 2018) 4.

The United Nations Global Compact ("**Global Compact**") is a global initiative with over 13,500 participant business and non-business organisations aimed at strengthening corporate sustainability in the corporate world.[74] The Global Compact created ten principles aimed at guiding businesses to realign and redevelop their business practices in accordance with international human rights standards, specifically concerning labour, the environment and anti-corruption.[75] Principle One of the UN Global Compact states that "Businesses should support and respect the protection of internationally proclaimed human rights".[76] The Global Compact also recognises that "Action to support human rights should be a complement to and not a substitute for action to respect human rights".[77]

In 2011, the United Nations Human Rights Council endorsed and passed resolution 17/4 which introduced the Guiding Principles on Business and Human Rights.[78] These principles encouraged States to take greater responsibility for ensuring that businesses operating within their territory were adhering to their human rights obligations. In 2018, the Commonwealth Parliament passed the *Modern Slavery Act 2018* (Cth) which created a new statutory reporting regime for larger organisations in relation to their operations and supply chains. The NSW Parliament has also passed the *Modern Slavery Act 2018* (NSW). Whilst it is too early to comprehensively assess the effectiveness of these Acts, the fact that both jurisdictions have implemented a new statutory regime should be recognised as a step forward in encouraging businesses to review and comply with their obligations to respect human rights and to protect workers in their supply chains. These examples also demonstrate that governments have the power to encourage respect for human rights through statutory measures and this means of supporting respect for human rights should be acknowledged and encouraged.

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

The Committee recommends that Australian governments integrate a greater understanding of the international and Australian human rights systems into school curriculums through primary and secondary

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[74] United Nations Global Compact Network Australia, "UN Global Compact" (2016) <http://www.unglobalcompact.org.au/about/un-global-compact>.
[75] Ibid.
[76] United Nations Global Compact, "Principle One: Human Rights" <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1%3E>.
[77] Ibid.
[78] United Nations Human Rights Council, "Human rights and transnational corporations and other business enterprises" (Resolution 17/4, 16 June 2011) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

education. Initiatives aimed at encouraging children to engage with diverse cultures may be an effective way to address racism, individual prejudices and biases within the community. Australian governments also need to continue to monitor and assess the gaps in education to promote respect for human rights, not only in a general sense but also through a tailored and directed response. Policy and educational initiatives designed to bridge those gaps in society must also focus on people who are disenfranchised or disengaged. This includes specific industries, businesses and particular community groups.

The AHRC should develop human rights educational programs targeted at school students and the general community, and these should be made available in community languages. These educational programs should aim to make people aware of their rights, what those rights mean in everyday life, and how to seek redress if those rights are breached. The Commission should also develop targeted human rights education for groups that experience human rights breaches at disproportionate rates, including Aboriginal and Torres Strait Islander people, people with disability, people from a culturally and linguistically diverse background, LGBTIQ+ people and children.

The Commonwealth Government should provide additional funding to the AHRC, as Australia's national human rights institution, to enable it to effectively fulfil its educative role. The issue of AHRC funding receives further consideration in response to Question 10 below.

Recommendation 12: Australian governments should integrate a greater understanding of the international and Australian human rights systems into school curriculums through primary and secondary education.

Recommendation 13: The Australian Human Rights Commission should develop educational programs targeted at school students and the general community, and these should be made available in community languages.

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

The role of the Australian Human Rights Commission

The AHRC's role in handling human rights complaints and conciliating disputes is central to the AHRC's ability to promote understanding, acceptance and public discussion of human rights, as well as report on

laws made by the Parliament and actions that need to be taken by Australia to comply with international instruments.[79] In 2017-18, the AHRC conducted approximately 1,262 conciliation processes, with 931 complaints resolved at this stage.[80] Given that a significant proportion of complaints are resolved by conciliation, the AHRC's reporting function is essential to gaining insight into Australia's progress in respect of human rights as well as the experiences of victims of human rights violations, especially regarding the satisfaction of complainants with the complaint service and dispute resolution process.

The Committee proposes that a larger focus should be placed on the experience and satisfaction of complainants within the dispute resolution process and how complainants feel the process could be improved or whether the process should be changed. The AHRC's Conciliation Register, last publicly updated in 2016, provides detailed qualitative data useful for promoting the understanding of human rights violations. If continued, the Conciliation Register would enable better measurement of progress in the respect, protection and fulfilment of human rights on a qualitative level, supporting the AHRC's current quantitative data collection.

However, the Commonwealth Government has cut $4.9 million from the AHRC since 2014,[81] with further cuts of $300,000 to take place over the next three years.[82] The Special Rapporteur noted such cuts in criticising "attacks" on the AHRC and other attempts "to intimidate and undermine the Australian Human Rights Commission".[83] The Committee shares the Special Rapporteur's concerns. Adequate and secure funding is vital to the AHRC's ability to fulfil its functions. The Committee recommends that the Commonwealth Government reverse the planned funding cuts of $300,000 to the AHRC and restore the $4.9 million that has been cut from the AHRC since 2014.

Mandatory workplace reporting requirements

A significant proportion of the complaints that the AHRC receives concern employment.[84] In most of these cases, victims of human rights violations, especially regarding discrimination, are subject to several

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[79] *Australian Human Rights Act 1986* (Cth) s 11(1)(g), (j)-(k).
[80] Australian Human Rights Commission, *2017-18 Complaint Statistics* (2018) 2 <https://www.humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>.
[81] Commonwealth Government, *Mid-Year Economic and Fiscal Outlook: Appendix A – Policy Decisions Taken since the 2014-2015 Budget: Expense Measures* (December 2014) 120; Commonwealth Government, *Mid-Year Economic and Fiscal Outlook: Appendix A – Policy Decisions Taken since the 2017-2018 Budget: Expense Measures* (December 2018) 136-7.
[82] Commonwealth Government, Budget 2018-19 - Budget Paper No. 2 (8 May 2018) 48, 75.
[83] Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Australia*, UN Doc A/HRC/37/51/Add.3 (23 March 2018) [93]-[95], [107].
[84] Australian Human Rights Commission, *2017-18 Complaint Statistics* (2018) 1 <https://www.humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>.

difficulties in pursuing their case. Complainants often "[run] their own cases with little or no support"[85] and often lack access to direct evidence,[86] instead relying on circumstantial evidence to support their case. For example, the Federal Court in *Sharma v Legal Aid (Qld)* recognised that "it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found".[87]

Complainants may be required to meet the *Briginshaw* test of evidence, which provides as follows:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."[88]

Loretta De Plevitz, lecturer at the Queensland University of Technology, notes that the *Briginshaw* test:

> "… has been misinterpreted in the anti-discrimination jurisdiction to mean that because discrimination and harassment are serious matters *Briginshaw* must be applied to all cases regardless of the circumstances. The indiscriminate use of the principle has undermined the civil standard of proof in this jurisdiction and created uncertainty and injustice. Testing the nature of the allegation and its possible outcome, as suggested in *Dutt v Central Coast Area Health Service*, would restore faith in the jurisdiction and fulfil the express objective of the legislation — to provide equality between the parties."[89]

In *Dutt v Central Coast Area Health Service*, the NSW Administrative Decisions Tribunal decided that potential embarrassment to a respondent in a discrimination case was not enough to engage the *Briginshaw* test.[90]

The United Kingdom and Ireland have employed questionnaire procedures to address the difficulties of adducing evidence in discrimination complaints, where "[t]he complainant can ask the respondent any

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[85] Beth Gaze, "Context and Interpretation in Anti-Discrimination Law" (2002) 26 *Melbourne University Law Review* 325, 337.
[86] Dominique Allen, "Reducing the Burden of Proving Discrimination in Australia" (2009) 31 *Sydney Law Review* 579, 583.
[87] *Sharma v Legal Aid (Qld)* (2002) 115 IR 91, 98, citing *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958.
[88] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-2 (Dixon J).
[89] Loretta de Plevitz, "Briginshaw 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger'" (2003) 27(2) Melbourne University Law Review 308.
[90] *Dutt v Central Coast Area Health Service* [2002] NSWADT 133 [57].

question relevant to the alleged discrimination and questions and responses are admissible as evidence".[91] However, Dominique Allen, senior lecturer at Monash University, highlights that "the questionnaire's effectiveness as a source of evidence depends upon the respondent providing an adequate response".[92] The adequacy of responses a complainant receives may depend on, for example, data their employer collects relating to workplace demographics, which may establish evidence of indirect discrimination.

The United Kingdom also places obligations on employers and other bodies, which are met by:

> "monitoring the composition of the workforce, undertaking periodic self-assessments, and engaging in some affirmative action to improve the integration and representation of both communities in workplaces".[93]

For example, s 55(1) of the *Fair Employment and Treatment (Northern Ireland) Order 1998* ("***FETO***") states that:

> "… the employer shall from time to time review the composition of those employed … for the purposes of determining whether members of each community are enjoying, and are likely to continue to enjoy, fair participation in employment in the concern".

Monitoring is required in relation to any "trade, business or other activity … [including] any activity in the service of the Crown".[94]

These requirements ensure that less burden is placed on complainants during evidence gathering, as statistical data may be key "to establishing proportionality in an indirect discrimination complaint" or establishing a comparator in direct discrimination.[95] For instance, the Western Australia Equal Opportunity Commission, in their *Review of the Equal Opportunity Act*,[96] noted a case example of:

> "an Aboriginal complainant who complained of a lack to access to housing … [who was] unable to provide comparative statistical data because the State Housing Commission [SHC] either did not keep or did not analyse the data".[97]

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[91] Dominique Allen, "Reducing the Burden of Proving Discrimination in Australia" (2009) 31 *Sydney Law Review* 579, 589.
[92] Ibid 603.
[93] Belinda Smith, "It's About Time – For a New Regulatory Approach to Equality" (2008) 36 *Federal Law Review* 117, 138.
[94] *FETO* s 47(2).
[95] Dominique Allen, "Reducing the Burden of Proving Discrimination in Australia" (2009) 31 *Sydney Law Review* 579, 583.
[96] *1984* (WA).
[97] Western Australia Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984* (Report, May 2007) 30.

Following the case, "it was suggested that either the need for such data should be removed, or the SHC should be obliged to collect and provide relevant data to the Commission in a timely fashion".[98]

Employer reporting requirements regarding discrimination in Australia are limited to reporting against gender equality indicators under the *Workplace Gender Equality Act 2012* (Cth) ("***WGEA***"). The *WGEA* applies to higher education providers and employers with 100 or more employees, who must report annually against six gender equality indicators in their workplace profile and reporting questionnaire.[99] The six equality indicators relate to:

- Workplace gender composition;
- Gender composition of governing bodies;
- Equal remuneration between men and women;
- Employment terms, conditions and practices relating to:
    - Working arrangement flexibility; and
    - Working arrangements regarding family or caring responsibilities;
- Consultation with employees on workplace gender equality issues; and
- Any other matters specified in a legislative instrument.[100]

The Committee recommends that the Commonwealth Government expand the current mandatory workplace reporting requirements to require Australian employers to report similar data in relation to all protected characteristics under Commonwealth anti-discrimination legislation. Such reporting requirements would serve two functions:

- First, the progress of Australia in relation to workplaces – such as by examining diversity and inclusion – would be better measured because employers tend to have a greater share of the knowledge about the decision-making process that led to the complainant's treatment.[101] Measuring such progress would assist in measuring Australia's compliance with Article 26 of the *ICCPR*, which provides that, "All persons are equal before the law and are entitled to without any discrimination to the equal protection of the law".
- Second, reporting requirements have the potential to assist the parties to a discrimination complaint to resolve the dispute at an earlier stage. This is because such requirements can provide both

[98] Ibid.
[99] Ibid ss 3(1) (definition of "relevant employer"), 13(1).
[100] Ibid s 3(1) (definition of "gender equality indicators").
[101] Dominique Allen, "Reducing the Burden of Proving Discrimination in Australia" (2009) 31 *Sydney Law Review* 579, 583.

parties with information that will assist the parties to assess the merits of their case and narrow the issues in dispute.

Recommendation 14: The Commonwealth Government should reverse the planned funding cuts of $300,000 to the AHRC and restore the $4.9 million that has been cut from the AHRC since 2014.

Recommendation 15: The Commonwealth Government should expand current mandatory workplace reporting requirements to require Australian employers to report on equality indicators in relation to all protected attributes under Commonwealth anti-discrimination legislation.

Concluding Comments

NSW Young Lawyers and the Human Rights Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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