National Legal Aid

Inquiry into Australia's Human Rights Framework

National Legal Aid submission to Parliamentary Joint Committee on Human Rights

30 June 2023

National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures; and to Elders past and present.

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1. EXECUTIVE SUMMARY

National Legal Aid (NLA), representing the directors of the eight State and Territory Legal Aid Commissions (LACs), welcomes the opportunity to respond to the Inquiry into Australia's Human Rights Framework (the Inquiry) being undertaken by the Parliamentary Joint Committee on Human Rights (PJCHR).

LACs across Australia assist clients with everyday legal issues that intersect with their human rights. In areas such as housing, corrections, child protection, welfare, health and education, LACs see clients who are impacted by decisions made by agencies that would benefit from a human rights lens.

Robust human rights protections help to foster safe, stable and productive communities. Effective fair policy and justice outcomes positively influence the efficacy of Australia's social contract, promoting respect for public authorities, institutions and the rule of law, which underpin our democratic system of governance.

Through the experience of LACs in jurisdictions with human rights legislation, as well as the experiences and gaps in jurisdictions without statutory human rights frameworks, NLA has a whole of country lens on the need for robust human rights protections enabled through a strong federal human rights legislative framework.

In this submission, illustrated through LAC practice experience and client stories, NLA sets out the benefits of human rights frameworks to embed a human rights culture in government decision making and for clients navigating access to justice. We also discuss gaps we see in current avenues for legal protections and remedies when a client's circumstances engage legal issues of a federal nature and responsibility, such as higher education, social security, taxation, immigration and national security, as well as lessons learned from existing human rights legislation in Australia.

The Inquiry provides a clear opportunity to consider federal discrimination law protections in line with strong human rights protections, including the need for consolidation, simplification and modernisation of existing laws. Through these changes, we anticipate clear benefits to clients of increased access to justice and the ability to better enforce their rights, as well as an opportunity for Australia to better prevent discrimination and harassment from occurring. We consider strong and well-resourced enforcement architecture, including a strengthened and better resourced Australian Human Rights Commission, is essential to eliminate discrimination on the grounds of all protected attributes.

This submission sets out 15 key recommendations that, if implemented, will achieve this reform and aid in stronger human rights protections and cultures across all of Australia's jurisdictions.

About National Legal Aid and Australia's Legal Aid Commissions

NLA represents the directors of the eight State and Territory LACs in Australia. LACs are independent, statutory bodies established under respective State or Territory legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA brings together the practice experience of the eight Australian state and territory LACs.

Each year LACs provide in excess of 1.5 million legal services across the nation. These services are delivered from 78 offices in regions and capital cities, and by outreach including in the community, at community-based organisations, and through health justice partnerships. Services are delivered face to face, by video/phone and online. They cover all law types and include legal advice, information, dispute resolution, legal representation where necessary, and social support and referral services. LACs also have extensive community legal education programs. These programs deliver training to community service providers and seminars/classes to the public, either face to face or online, and publications online and in hard copy.

Key Recommendations

NLA is pleased to make the following recommendations in response to the Inquiry:

1. Australia ratify the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* and the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* to ensure that individual complaints can be made under these treaties at the international level.
2. An Australian Human Rights Framework be re-established.
3. The Australian Parliament enact a federal Human Rights Act for Australia, and that this process include the release of an exposure draft bill for public consultation, with adequate timeframes for expert stakeholders to respond.
4. The Australian Human Rights Framework be based broadly on the model being proposed by the Australian Human Rights Commission, drawing on the existing state and territory instruments, and include the following elements:
    - That the list of specific human rights contained in the statutory text include both civil and political rights and economic, social and cultural rights.
    - A two-part duty on public authorities to comply with human rights and to consider human rights when making decisions, with:
        - the definition of 'public authority' extending to 'functional public authorities' such as disability service providers, aged care operators and immigration detention providers;
        - the definition of 'function of a public nature' being sufficiently broad; and
        - in relation to any executive power for a minister to declare that certain entities are not 'public authorities', this being subject to an oversight and transparency measure (for example, a requirement on the minister to publicly issue reasons for this decision, or the declaration instrument being a legislative instrument able to be subject to disallowance).
        - A 'participation duty' requiring public authorities to consult, engage and partner with marginalised cohorts, including Aboriginal and Torres Strait Islander people, children and people with disability, on policies and decisions that affect their rights.
        - An 'equal access to justice duty' requiring public authorities to take positive measures and make accommodations to realise access to justice principles.
        - An interpretive clause requiring courts to interpret legislation in a way that is consistent with the human rights contained in the Human Rights Act.

  - An interpretive provision that would direct courts, tribunals and public authorities, to international materials for guidance.
- Courts having the power to issue a declaration of incompatibility in the event they are unable to interpret a law in a manner that is consistent with these human rights.
- A direct and enforceable cause of action, allowing parties alleging a breach of the duty by a public authority to commence proceedings in the Australian Human Rights Commission and in the federal courts.
- Flexible damages, including monetary damages, for breach of the duty by a public authority.
- Protection against adverse cost orders for individuals pursuing a direct cause of action under the Human Rights Act.
- The scope and jurisdiction of the Human Rights Act extending to apply to all people within Australia's territory or subject to Australia's jurisdiction, including people under Australia's effective control overseas.

5. Adequate funding of the legal assistance sector across criminal, family and civil areas of law to support equal access to justice.
6. Administrative law actions and remedies to apply as usual in relation to review of decisions affecting human rights.
7. Extension of the Australian Human Rights Commission's powers to intervene and act as amicus curiae to proceedings brought under the Human Rights Act and to proceedings involving the interpretation and application of the human rights in the Act.
8. Develop an established oversight process of reporting and training on the implementation of these 'procedural duties' (the 'participation duty' and 'equal access to justice duty'), from the relevant Australian Human Rights Commission Commissioners to the Government and its public authorities.
9. Develop guidance materials for the public sector and Australian Public Service on the relevance of these 'procedural duties' (the 'participation duty' and 'equal access to justice duty') within existing and proposed policy frameworks, priority actions and implementation strategies.
10. Ensure collective consultation, engagement and partnership with communities that experience structural disadvantage and, in relation to this, supporting First Nations communities' self-determination in response to Voice, Treaty and Truth.
11. Consideration of whether a correlative right to participate directly and autonomously in legal proceedings may enhance the efficacy of the 'equal access to justice duty'.
12. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to:
    - Assuming a Human Rights Act is enacted, include the Human Rights Act within the definition of "human rights" in section 3.
    - In any event, broaden the definition of 'human rights' in this statute to include the Universal Declaration on the Rights of Indigenous Peoples.[1]

[1] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007).

13. The House and Senate standing orders be amended to require that bills not be passed until the Parliamentary Joint Committee on Human Rights has opportunity to consider and report, with only limited exceptions to account for certain urgent matters. In the event a Bill needs to be urgently passed, the standing orders should require the Parliamentary Joint Committee on Human Rights to conduct a review of the Bill as soon as practicable thereafter.
14. The federal discrimination law framework be amended to achieve consolidation, simplification and modernisation, increased access to justice, and better prevention and enforcement, including through:
    - Simplifying direct discrimination provisions by removing comparator tests.
    - Broadening the law to include: additional protected attributes; protecting against discrimination on the grounds of physical features; lawful sexual activity; status as a parent or carer; religion; political belief or activity; industrial activity; nationality; irrelevant criminal record; homelessness; socio-economic status; and being a victim of violent crime or family violence.
    - Updating the protected attribute of 'intersex status' within the *Sex Discrimination Act 1984* (Cth) to be 'sex characteristics' based on international definitions.
    - Repealing the general religious exceptions in the *Sex Discrimination Act 1984* (Cth).
    - Amending the *Disability Discrimination Act 1992* (Cth) to make it unlawful for a person not to make, or propose not to make, reasonable adjustments for a second person who, because of their disability, requires adjustments.
    - Including in the *Sex Discrimination Act 1984* (Cth) a positive obligation on employers to grant reasonable accommodations for pregnant workers.
    - Amending the onus of proof to be borne by the respondent once a complainant establishes a prima facie case of discrimination.
    - Expanding the coverage of the prohibition against discrimination to all areas of public life.
    - Consideration be given to extending the vilification protection from race to all other protected attributes, qualified by giving due regard to the context of the conduct and the harm caused.
    - Introducing an equal access to costs model for all discrimination matters.
    - Better implementing trauma-informed systems and processes within the approach to discrimination.
    - Broadening the Australian Human Rights Commission's functions to enable voluntary audits and inquiries into systemic issues.
    - Expanding the positive duty beyond the *Sex Discrimination Act 1984* (Cth) so that duty holders must proactively take measures to eliminate unlawful discrimination and advance equality in relation to all protected attributes.
    - Introducing a reporting framework to monitor compliance with discrimination laws by the insurance industry.
15. The Australian Human Rights Commission be adequately resourced to perform the functions required of it under statute and to remain compliant with international minimum standards for national human rights institutions.

Detailed responses, engaging the Inquiry's Terms of Reference, are provided in the sections that follow.

2. SCOPE AND EFFECTIVENESS OF AUSTRALIA'S HUMAN RIGHTS FRAMEWORK 2010

Australia's Human Rights Framework, established in 2010, had five broad pillars of 'reaffirm', 'educate', 'engage', 'respect' and 'protect'. In terms of practical implementation in the domestic sphere, however, these five pillars were essentially reducible to two categories: human rights education in communities, schools and the public service sector; and human rights compatibility. Human rights compatibility involved reviewing and scrutinising legislation and proposed bills for consistency with human rights, primarily through establishing the PJCHR[2] and a statutory requirement for statements of compatibility to accompany bills and disallowable instruments introduced into parliament.[3]

Recommendation 2: An Australian Human Rights Framework be re-established.

2.1 HUMAN RIGHTS EDUCATION

Regarding the first category, it is largely accepted that the scope and effectiveness of the human rights education proposed under the framework was undermined by inadequate funding and resourcing.[4]

Under the 2010 Framework, $2 million in funding to non-government organisations and $6.6 million in funding to the Australian Human Rights Commission (AHRC) was provided over four years for the development and delivery of human rights education to the community. $3.8 million was put toward an education program for the Australian Government and public sector, involving a training toolkit and the development of guidance materials for public sector policy development and implementation. This funding was not renewed after four years, and the Australian Public Service program lapsed. No additional funding announcements were tied to the National Human Rights Action Plan (NHRAP) 2012, discussed at section 2.4 of this submission below, and there was limited commitment federally and buy-in at the state and territory level, to carry initiatives and reforms forward.

2.2 PARLIAMENTARY SCRUTINY MECHANISM

In contrast, the parliamentary scrutiny of domestic laws for human rights compatibility, established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), has endured. This scrutiny mechanism was a welcome step in embedding human rights considerations as an express part of the dialogue that attends the development of legislation and its passage through parliament. By virtue of the PJCHR's influence and the statutory requirement to produce statements of compatibility, parliamentarians – and, in the case of government-sponsored bills and disallowable instruments, the executive, including the staff of departments and agencies from which ministers may seek advice – are now required to turn their minds to the existence of

[2] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.
[3] Commonwealth of Australia, *Australia's Human Rights Framework* (April 2010) 2.
[4] See, for example, Australian Human Rights Commission, Submission to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (December 2022).

Australia's international human rights obligations, and the potential application of these obligations to domestic lawmaking.

However, key shortcomings in the scope and effectiveness of the scrutiny mechanism remain, including that:

a. There are limits on the scope of the definition of 'human rights' referable in the PJCHR's work.

b. There are no objective standards in relation to content or the level of analysis that statements of compatibility must adhere to.

c. A bill may pass through the parliament without the PJCHR having the opportunity to examine and report on its provisions, there being no precondition that parliamentary processes make allowance for human rights scrutiny in their timeframes.

d. Non-disallowable instruments do not require statements of compatibility with human rights, undermining the commitment to transparency as to when laws may be engaging human rights, which is otherwise advanced by the scrutiny mechanism.

e. The PJCHR may make findings or recommendations related to the human rights compatibility of a bill or instrument, but this does not trigger any formal process in relation to the passage of that bill or instrument through parliament, such as a requirement on the parliamentary member introducing it to provide a response; and

f. There is potential for the PJCHR's public hearing and reporting functions performed as part of its parliamentary inquiries to be politicised, given the absence of a strong domestic human rights literacy to ground discussion and debate in firm principles.

In NLA's view, these are shortcomings in the parliamentary scrutiny mechanism which are clearly compounded by the lack of a comprehensive human rights framework and, in particular, a federal human rights statute. Such a framework and statute would provide pillars to buttress the parliamentary scrutiny mechanism, enhancing the PJCHR's oversight on executive power through, for example, enforceable duties on public decision-makers and an accessible complaints pathway where these duties are breached. Additional recommendations in relation to the parliamentary scrutiny mechanism are provided at section 4.1 of this submission.

2.3 NATIONAL HUMAN RIGHTS ACTION PLAN 2012

In 2012, a NHRAP was launched to further the Australian Government's commitments under the Framework. In addition to re-emphasising human rights education and scrutiny, the NHRAP identified 'access to justice' as a priority human rights issue that Australians expect their governments to act on, and, within this priority space, stated that 'to ensure access to justice, the Australian Government will amongst other things support legal aid services through the National Partnership on Legal Assistance Services'.[5]

The NHRAP identified specific groups in Australia whose human rights are disproportionately engaged by decisions of public sector departments and agencies, such as people in prisons, people at risk of homelessness, people with disability, women, older persons, children and young people, Aboriginal and Torres Strait Islander peoples, and culturally and linguistically diverse cohorts

[5] Commonwealth of Australia, *Australia's National Human Rights Action Plan* (2012) 13.

including migrants and refugees.[6] These were, and continue to be today, prominent client groups in the work of LACs across Australia.

Despite this express and implicit recognition of the significant role of legal aid services in Australia's human rights framework, LACs, along with the broader sector of Community Legal Centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS), have consistently faced levels of funding that are inadequate to meet legal need whilst having to address rising costs of service provision. No new funding for the legal services sector was attached to the NHRAP 2012.

Legislation to consolidate federal anti-discrimination laws was also identified as a key action under the NHRAP 2012, but was never completed, with the framework and plan lapsing following changes in government.

3. FEDERAL HUMAN RIGHTS ACT

3.1 GENERAL OVERVIEW OF NECESSITY OF A FEDERAL HUMAN RIGHTS ACT

NLA strongly supports the introduction of a federal Human Rights Act to protect rights more comprehensively in Australia, including:

a. To better reflect the international commitments Australia has made through the ratification of various treaties and adoption of instruments.

b. To address the gaps and inadequacies in human rights protection across existing federal law sources and mechanisms.

c. To promote the interpretation of existing laws consistently with human rights.

d. To provide clear and principled guidance to government to develop new laws and policies and to make service decisions – which impact people's day-to-day lives, including frequently people who face various disadvantages outlined in 2.4 – in ways that best respect, protect and fulfil human rights.

NLA strongly supports the longstanding calls for a federal Human Rights Act for Australia. It considers that the major arguments in favour of a federal human rights statute are, by now, well established and canvassed, including by the AHRC,[7] Human Rights Law Centre,[8] Law Council of Australia[9] and Amnesty International.[10]

Australia's obligations to respect, protect and fulfil a multiplicity of human rights, arising from the international human rights instruments that successive Australian Governments have ratified or

[6] Ibid 24.
[7] Australian Human Rights Commission, A National Human Rights Act for Australia, https://humanrights.gov.au/human-rights-act-for-australia
[8] The Human Rights Law Centre's 'Charter of Rights' campaign, for example, provides comprehensive information and resources for communities and stakeholders, and has garnered widespread support from high-profile organisations and peak bodies throughout Australia: Human Rights Law Centre, Charter of Rights, Join the Campaign (website, 2022) https://charterofrights.org.au/
[9] Law Council of Australia, Human Rights, https://lawcouncil.au/tags/human-rights
[10] Amnesty International, A Human Rights Act for Australia, https://www.amnesty.org.au/campaigns/human-rights-act/#:~:text=A%20Human%20Rights%20Act%20will,when%20their%20rights%20are%20abused

supported, including the seven core human rights treaties, are not properly implemented in Australia's domestic law, which is fundamentally 'piecemeal' in its human rights coverage.

While Australia has agreed to be bound by international human rights treaties and instruments, an international instrument does not form part of Australia's domestic law unless and until it is incorporated into Australian law through legislation enacted by the Australian Parliament.[11] Therefore, many of Australia's international human rights obligations are neither observed nor enforceable within Australia.

Currently at the federal level, Australia has anti-discrimination laws that protect people from discrimination based on their race, age, gender identity, sexuality and disability. This legislation implements, in part, Australia's obligations under the International Convention on the Elimination of all forms of Racial Discrimination), the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (CRPD). However, there are significant issues in the federal legislative framework around anti-discrimination, which require modernisation and consolidation, as outlined in the recommendations above and further at section 4.2 of this submission. Many other international human rights, including many basic human rights arising under the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Rights of the Child (CRC), are not implemented at a federal level, meaning they are not justiciable in many Australian courts.

Further, although each of the core international human rights instruments have complaints mechanisms through which individuals may allege breaches of their rights by a state party, the decisions of these complaints bodies are not binding on Australia. There are many examples of such bodies making adverse findings against Australia and Australia subsequently failing to provide a remedy.[12] In addition, Australia is yet to ratify the treaties that provide for individual complaints to be made in response to alleged breaches under the ICESCR and the CRC. The inability of individuals to enforce their rights following a complaint being substantiated at the international level, strengthens the calls for a federal Human Rights Act.

Nationally, human rights protection in Australia presently emanates from a patchwork of disparate sources and mechanisms, these being:

a. the limited safeguards for individual rights implied into the text of the Australian Constitution, which arise in the context of limitations on the scope of legislative powers;
b. the common law recognition of rights, including rules of procedural fairness, fair trial rights and the right to sue in tort, and accompanying protections such as the principle of legality;
c. any rights that parliament may see fit to include in the significant body of legislation it creates, which, being vast in quantity and sphere of application, is a disparate mechanism of statutory rights protection;
d. the parliamentary human rights scrutiny regime; and
e. the work of the AHRC.

[11] *Kioa v West* (1985) 159 CLR 550.
[12] There have been 52 instances where Australia has been found to be in breach of its international human rights law obligations following an individual complaint to a UN complaints body. Of these substantiated complaints, 34 were unremedied and 12 were partially remedied: 'Complaints upheld against Australia', *Remedy Australia* (webpage) https://remedy.org.au/cases/

Australia's human rights framework is further complicated as certain state and territory jurisdictions – the Australian Capital Territory (ACT), Victoria, and Queensland – have introduced their own human rights legislation. Individuals in these jurisdictions have greater recognition and protection of their human rights, and better recourse in the event their human rights are breached, compared to individuals in other Australian jurisdictions. This undermines the notion of human rights as being universal and inalienable.[13] NLA suggests that the introduction of a federal Human Rights Act would provide an impetus and a blueprint for jurisdictions without Human Rights Acts to follow, and, in this manner, guide consistency in human rights protection nationally.

In NLA's view, the details of the limitations of the constitutional, common law and disparate statutory rights protections in Australia, are comprehensively and persuasively drawn out by the AHRC in its position paper.[14] NLA re-emphasises the fact that, given there is very limited constitutional protection of even the most basic human rights in Australia, and common law rights and protections may be overridden by a clear and express statutory intention, it is left to the proactive will of parliament to legislate consistently with human rights. However, without one overarching, readily comprehensible and accessible statutory expression of what Australia understands its human rights obligations to include and entail, parliamentarians have in practice often overlooked human rights. Lawmakers have drafted or assessed legislation without a human rights proportionality lens, passed laws that are not human rights compliant, and, even in legislative spheres where a specific human right is regularly invoked and highly relevant, failed to turn their minds to providing an express statutory basis for that right to apply in Australian law and be justiciable in Australian courts.[15]

The federal 'Intervention' (the *Northern Territory National Emergency Response Act 2007(Cth)* and subsequent *Stronger Futures* legislation) stands as a prescient and recent example of a comprehensive legislative and executive regime targeted towards First Nation people that involved many, varied and complex human rights breaches. The first iteration of the Intervention required Parliament to suspend Part II of the *Racial Discrimination Act 1975* (Cth) 'RDA' under 'special measures'.[16] Even after the RDA was reinstated, the UN Special Rapporteur on the Rights of Indigenous Peoples in 2010 found the measures to be incompatible with Australia's human rights obligations.[17]

NLA understands there appears to be broad public support for a federal Human Rights Act. Amnesty International Australia's recent report found that 73% of people are in favour (38% strongly support and 35% support).[18] Only 3% of respondents showed some level of opposition (only 1% strongly), while 16% were non-committal (neither oppose or support) and 7% were

[13] Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) preamble.
[14] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022).
[15] This concern is shared by the United Nations High Commissioner for Human Rights who, following Australia's most recent Universal Periodic Review, recommended that Australia adopt a 'bill of rights or a Human Rights Act with a clause of precedence over all other legislation'. Source: Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/WG.6/37/AUS/1 (28 December 2020).
[16] *Racial Discrimination Act 1975* (Cth) s 8 (1).
[17] UN Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* James Anaya (March 2010)
[18] Amnesty International Australia, *2022 Human Rights Barometer: What are Australians current attitudes to their rights and the rights of others?* (Report, 2022) 5.

unsure.[19] Further, knowing that Australia is the only liberal democracy without a Human Rights Act bolsters the case for its introduction: 59% of the sample were more supportive when informed of this.[20]

As the AHRC has previously noted, 'Australia's strong traditions of liberal democracy, an independent judiciary and a robust media have been sufficient to protect the rights of *most* people in Australia, *most* of the time', however 'not all people can be confident of enjoying this protection in respect of all aspects of their lives all of the time'.[21] LACs frequently encounter individuals whose rights are not respected in all aspects of their lives, all of the time. NLA agrees with the AHRC that 'it is the most vulnerable who can fall through the cracks in the existing framework'.[22] We believe a federal Human Rights Act will go some way to closing the current gaps in Australia's human rights framework.

3.2 HUMAN RIGHTS EXPERIENCES FROM THE LEGAL AID FRONTLINE

The LACs across Australia deal day-to-day with clients whose legal issues routinely involve the decisions made or powers exercised by government departments and agencies, such as housing, police, corrections, child protection, welfare, health, and education. As human rights laws place obligations upon the state, or constrain the exercise of state power, such laws are inherently relevant to the work of LACs.

NLA can draw upon the experience of LACs in those jurisdictions with human rights legislation, and the differences seen in these jurisdictions as opposed to those without such a statutory framework, to help inform the present inquiry. LACs can also point to the gaps in avenues for legal protections and remedies that are observed when a client's circumstances engage legal issues of a federal nature and responsibility, such as higher education, social security, immigration and national security.

Human Rights Acts in Practice

Robust human rights protections help to foster safe, stable and productive communities. Fairer and more effective policy and justice outcomes positively influence the efficacy of Australia's social contract, promoting respect for public authorities, institutions and the rule of law, which underpin our democratic system of governance.

The following section of this submission provides some examples and case studies only where any necessary consent to publish has been obtained and the factual circumstances deidentified, or where the information was already available in the public realm.

Australian Capital Territory

The ACT was the first jurisdiction to introduce standalone human rights legislation in Australia. The *Human Rights Act 2004* (ACT) has been in force now for close to twenty years and protects both civil and political rights and some economic, social and cultural rights.

[19] Ibid.
[20] Ibid.
[21] Australian Human Rights Commission, Submission to National Human Rights Consultation, *National Human Rights Consultation* (June 2009) 2 (emphasis added).
[22] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 15.

In 2009, the Five Year Review of the *Human Rights Act 2004* (ACT) emphasised its positive impact in fostering a culture of human rights consideration 'upstream' within government, noting that 'one of the clearest effects of the HRA has been to improve the quality of lawmaking in the Territory'.[23] This was echoed in the opinion of Helen Watchirs and Gabrielle McKinnon, who, writing in 2010, considered that the Act 'had its most immediate impact on the development of policy and legislation':[24]

> *Although the dialogue generated within the ACT executive by the compatibility certification process is not always obvious to the general public, it has played a significant role in shaping policy and legislation. The requirement to consider human rights has been incorporated into the Cabinet Paper Drafting Guide, and rights issues are considered in policy work on a daily basis and are canvassed regularly in legislative proposals. Examples of such issues that have been considered from a human rights perspective within the executive include sentencing laws, emergency electro-convulsive therapy, exclusion from public employment based on criminal history, voting rights of prisoners and the wearing of headscarves in ACT schools. Human rights compatibility of proposed legislation is assessed by the Human Rights Unit within the ACT Department of Justice and Community Safety, and comments on draft Cabinet Submissions are also provided by the ACT HRC when it has sufficient resources. In most cases, human rights considerations can be accommodated through minor modifications and redrafting of a Bill, but at times will act as a brake on policy proposals that would impose unjustifiable restrictions on human rights.*[25]

The *Human Rights Act 2004* (ACT) has also had an observable impact in legal negotiations and proceedings, including in the work of Legal Aid ACT.

Some of the cases of note in this jurisdiction, which have raised the *Human Rights Act 2004* (ACT), include:[26]

a. ***Importance of a stable home in minimising hardship*** – The case of *Commissioner for Social Housing v Cook (Residential Tenancies)* [2020] ACAT 36 considered the circumstance of the housing authority issuing a 'no cause' termination notice requiring a tenant to vacate his home because he had been sent to jail for a relatively short period of time, which, in rendering him without stable accommodation, would also effect his chance to be granted parole and his rehabilitation prospects upon release. The case clarified that the Tribunal may take human rights considerations into the balance when deciding whether to exercise its jurisdiction to evict a tenant.

b. ***Detainees denied open air and exercise*** – In *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83, the ACT Supreme Court ruled that the fresh air policy of a prison to allow access only to the rear courtyard of a cell for certain segregated detainees contravened the right to humane treatment when deprived of liberty under section

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[23] Australian National University ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) 27.
[24] Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *University of New South Wales Law Journal* 136, 141.
[25] Ibid, 141-142.
[26] See further, ACT Human Rights Commission, *20th Anniversary of the ACT Human Rights Bill* (2023) https://hrc.act.gov.au/wp-content/uploads/2023/05/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL_A-COLLECTION-OF-20-HUMAN-RIGHTS-CASE-STUDIES_2023.pdf

19 of the *Human Rights Act 2004* (ACT). There was no room for the detainee to exercise or to view the outside environment and confining the detainee's time outside to that space was likely to poorly impact their mental health. After the Supreme Court issued a declaration of incompatibility, the prison changed its policy to better manage minimum entitlements to time outdoors.

c. ***Freedom of information for health care accountability*** – Mr Allatt made a freedom of information request for records about the treatment of his wife who died while in the care of a public mental health service, but the government refused to release many records on the basis these contained sensitive information. In *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67, the Tribunal used the *Human Rights Act 2004* (ACT) to interpret the exemptions in the freedom of information laws with the right to seek and receive information, deciding that the strong public interest in the transparency, accountability and oversight of the membership of clinical review committees outweighed any sensitivity or privacy concerns of the health professionals involved.

The *Human Rights Act 2004* (ACT) was first amended in 2008 to include a direct duty on public authorities to comply with human rights, but also, importantly, a direct right of action to the ACT Supreme Court for breach of this duty, with the possibility of a remedy other than damages.

To date, the ACT remains the only jurisdiction to provide a direct right of action in its human rights legislation. This right of action is only to the ACT Supreme Court, with 'piggybacking' of human rights issues onto other claims still needed in the ACT Civil and Administrative Tribunal (ACAT) or Magistrates Court. While the ACT Supreme Court pathway has shown that the government can be held to account for making decisions incompatible with human rights, Legal Aid ACT maintains that what is needed for a stronger regime is a more accessible complaints pathway, as set out in its submission to the ACT's recent 'Inquiry into Petition 32-21 (No Rights Without Remedy)'.[27]

Victoria

The *Charter of Human Rights and Responsibility Act 2006* (Vic) commenced two years after the ACT legislation.

In its 2019 submission to the AHRC's *Free & Equal Project*, Victoria Legal Aid provided the following assessment of the impact of the Victorian Charter, which remains relevant:

> *The Victorian Charter has played a crucial role in making sure that the impact of decisions on people's everyday lives is at the centre of government decision-making. The Victorian Charter has substantially contributed to a more rights-respecting culture within the Victorian Government, including the public service, through embedding consideration of human rights during the development of new laws, policies and guidelines, and as part of government decision-making. The Victorian Charter has also provided a helpful framework for decision-makers without placing unreasonable constraints on decision-making.*
>
> *By ensuring that human rights are central to government decision-making and actions, the Victorian Charter plays an essential preventative role, including through promoting rights to a fair hearing, equality and freedom from discrimination, and freedom of*

[27] See Legislative Assembly for the Australian Capital Territory Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (Report 7, 10th Assembly, June 2022).

> *expression. In our casework, we see firsthand the risks to our clients when laws are passed, or policies or decisions are made, which do not adequately take human rights into account. In these limited situations where human rights are not respected, the Victorian Charter also provides an important corrective function to ensure that people can assert their human rights through courts or tribunals.*[28]

Like the ACT, the Victorian experience highlights the utility of the Charter, not only in relation to successful outcomes in litigation, but also in early negotiations with government departments and agencies:

> *The cases in which hardship has been avoided, or court action is no longer necessary, are an often overlooked but essential element of the Victorian Charter's effectiveness. For example, VLA has assisted tenants to avoid being evicted from their homes by negotiating with community housing providers and emphasising the rights and obligations which apply under the Victorian Charter. In our experience, community housing providers are open to discussing the parties' Victorian Charter rights and obligations, and frequently agree to take further steps to address the issues which gave rise to the eviction notice rather than unfairly evicting our clients into homelessness. …*
>
> *In addition, the utility of the Victorian Charter in bolstering existing legal cases has prompted the development of human rights interpretation through the common law and provided critical guidance to lawyers, members of the public and the Victorian Government to clarify the scope of various Victorian Charter rights and responsibilities.*[29]

The following case studies and client stories provide several illustrations of the successful application of the Charter in Victoria Legal Aid's work across the following areas:[30]

a. ***Cultural rights and the right to self-determination for Aboriginal people in Victoria*** – For example, Victoria Legal Aid has raised arguments about Aboriginal and Torres Strait Islander clients' cultural rights as relevant factors for Magistrates to consider as part of bail applications, in line with the Supreme Court case of *DPP v SE* [2017] VSC 13, in which Justice Bell found that cultural rights in the Victorian Charter supply an additional basis upon which Courts should respect cultural rights of Aboriginal and Torres Strait Islander people when conducting bail hearings and interpreting section 3A of the *Bail Act 1977* (Vic).

b. ***Safeguarding the rights and wellbeing of people experiencing mental health issues*** – Victoria Legal Aid relied on the Victorian Charter as part of the case of *PBU & NJE* [2018] VSC 564, which led to broader systems change to ensure that people experiencing mental health issues' human rights are appropriately taken into account by treating psychiatrists, doctors and other health professionals, the Mental Health Tribunal (MHT) and the Victorian Civil and Administrative Tribunal (VCAT). Victoria Legal Aid represented PBU and NJE in the Victorian Supreme Court to clarify when electro-convulsive treatment (ECT) can be performed without a person's consent. Both had ECT ordered against their will by the MHT which VCAT had affirmed. This case is the first time the court considered laws that govern the use of compulsory ECT in Victoria. Supreme Court Justice Bell found that VCAT had misapplied the

[28] Victoria Legal Aid, *A Charter of Human Rights for Australia*, Submission to the Australian Human Rights Commission's Free and Equal Inquiry Discussion Paper: A Model for Positive Human Rights Reform in Australia (29 November 2019).
[29] Ibid 5-6.
[30] Some of these examples were previously highlighted in Victoria Legal Aid's submission 6-11.

law in relation to whether PBU and NJE had the capacity to decide if they wanted ECT and that their rights to equality before the law, freedom from non-consensual medical treatment, privacy and health were all engaged. Justice Bell held that restrictions on human rights under the Victorian Charter must be demonstrably justified to comply with the law, and that people experiencing mental health issues should face the same standard as all other people when their capacity to consent is assessed: "The issue is closely connected with the need to respect the human rights of persons with mental disability by avoiding discriminatory application of the capacity test. More should not be expected of them, explicitly or implicitly, than ordinary patients."

Further, *JL v Mental Health Tribunal*[31] was a significant case that helped clarify the mandatory requirements when psychiatrists make orders for compulsory mental health treatment. Victoria Legal Aid's client JL (not his real name) was placed on a temporary treatment order (TTO) in August 2020, which placed him in a psychiatric unit receiving mental health treatment against his will. Victoria Legal Aid sought a judicial review in the Supreme Court, arguing the TTO was invalid because the authorised psychiatrist's delegate who made the order failed to state whether it was an inpatient or community TTO (an inpatient order being much more restrictive). The application submitted that subsequent treatment orders that extended JL's compulsory treatment to a significant period of time were also invalid, and that Victoria's Human Rights Charter had been breached by failing to properly consider JL's human rights. Although the Supreme Court found that subsequent treatment orders were still valid, importantly it ruled that the TTO was invalid because the psychiatrist did not comply with a mandatory requirement for its making and that the invalid TTO was also incompatible with JL's human rights. His Honour Justice Ginnane found that in subjecting a person to compulsory inpatient medical treatment the psychiatrist limits consumers right to be free from medical treatment without consent (s 10(c) of the Victorian Human Rights Charter), and to the right to be free from unlawful deprivation of liberty (s 21(3) of the Charter). In deciding whether to make an order about breach of our client's human rights, His Honour stated: "The Court has a discretion whether to make a declaration, but I consider that I should, as it is an appropriate remedy when a breach of significant legislation is established and when action incompatible with a person's human rights has occurred."[32] Accordingly, His Honour declared that our client's TTO was invalid and of no force or effect and unlawful under the Victorian Charter of Human Rights. This case strengthened consumers' human rights and accountability of psychiatrists to follow proper process when making a TTO.

c. ***Promoting the rights and dignity of people with disability*** – A mother with a physical disability, Jenny was living with her adult children, Beth and Anna, and her primary school-aged child in public housing in a regional area when Victoria Legal Aid took on Jenny's case. The Director of Housing had obtained orders requiring the family to vacate the property and were on the cusp of purchasing a warrant to force the police to evict them. The eviction process was due to concerns about the property's cleanliness. Eviction presented a very real risk of homelessness and break-up of the family. Beth and Anna have disabilities and National Disability Insurance Scheme (NDIS) plans. The family was finding it difficult to keep the property clean due to a deterioration in Jenny's health and the nature of Beth and Anna's disabilities. Victoria Legal Aid wrote a letter to the Director of Housing setting out their obligations under the Charter to properly consider our client's human rights, including the

[31] *JL v Mental Health Tribunal* [2021] VSC 868 and *JL v Mental Health Tribunal* (No 2) [2022] VSC 222.
[32] *JL v Mental Health Tribunal* (No 2) [2022] VSC 222 at [19].

best interests of the child and preventing the arbitrary interference with the home. We asked to engage with the Director of Housing around alternatives to eviction and foreshadowed a potential application to the Supreme Court in relation to their Charter obligations. This provided an opportunity to actively engage with representatives of the adult children, their NDIS support coordinators and social housing advocacy agencies to ensure appropriate supports were in place to address the concerns of the Director of Housing. The Charter was instrumental in requiring the Director of Housing to engage with alternatives to eviction and resulted in the family being able to continue residing at the premises.

d. ***Promoting the rights of people in prison*** – Victoria Legal Aid successfully relied on the Charter when advocating on behalf of a transgender woman incarcerated at a minimum security men's prison. VLA's client Marnie began transitioning during her incarceration, so was registered with Births, Deaths and Marriages (BDM) under her dead name and with the "sex marker" "male". Under Victorian law, Marnie was required to seek written approval from the Secretary of the Department of Justice and Community Safety (Secretary) before applying to BDM to have this information changed. In early 2021, Marnie submitted an application to the Secretary for approval. By the time her VLA lawyer spoke to Marnie in late 2022, it had been well over a year since the application had been submitted and, despite a number of enquiries being made by Marnie and her social workers, no decision had been made. In the absence of a decision, Marnie was frequently deadnamed and misgendered by prison officials. Marnie was also concerned that re-entering the community without changing her identity documents would undermine her prospects of reintegration and cause her further psychological distress. VLA wrote to the Secretary, emphasising (among other factors) their obligation to make a decision consistent with Marnie's Charter rights, and in particular her rights to equality, protection from cruel, inhuman and degrading treatment, and to humane treatment when deprived of liberty. Subsequent to VLA's letter, the Secretary approved Marnie's application.

e. ***Demonstrating unfairness in the law, such as the risk of imprisonment for unpaid fines for people experiencing hardship*** – The case of *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 is a prominent example. Mr Taha has an intellectual disability and had accumulated fines totaling $11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and ordered that he serve 80 days jail for failure to pay pursuant to the *Infringements Act 2006* (Vic). Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision. Given the constraints of the *Infringements Act*, an application for judicial review was made to the Supreme Court. The majority found that a unified construction of the relevant provision under the *Infringements Act* was supported by the Victorian Charter – requiring the rights to equality, liberty, and a fair hearing to be taken into account as part of the interpretive process. Ultimately, the Court of Appeal upheld the Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether the person has a disability or whether there are other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act*.

In these cases, not only were individual people better off as a result of the application of the human rights legislation, but the decisions directly led to broader systemic reforms, such as the

implementation of new training for public agency staff, professional guidelines, and duties on judicial officers, helping to prevent future breaches and the need for further litigation.[33]

Queensland

The *Human Rights Act 2019* (Qld) was passed with the express intention of ensuring that 'respect for human rights is embedded within the culture of the Queensland public sector'.[34] In comparison to Victoria and the ACT, this legislation is still relatively new. However, Legal Aid Queensland considers that the experience of its staff as human rights advocates and advisers accords with the Victorian and ACT experience of a positive impact on the ways in which decisions are made, albeit with those signs of positive change and gradual improvement being more modest in Queensland, as may be expected from a shorter period of legislative operation.

The *Human Rights Act 2019* (Qld) has application to several of the regular practice areas of Legal Aid Queensland, including criminal law, child protection and anti-discrimination law. Over the sample period of January to June 2023, in cases of persons advised by lawyers in its anti-discrimination practice, Legal Aid Queensland identified that rights under the *Human Rights Act 2019* (Qld) were engaged in 38 per cent of cases. Those matters included:

a. Use of police powers including police search powers in ways that may be incompatible with human rights.
b. Decisions of school authorities that limit access to education and involve possible unequal treatment of students.
c. Decisions of prison authorities that infringe human rights of prisoners, and especially prisoners who have multiple disadvantages.
d. Decisions of courts and tribunals that limit access to justice of persons with a disability.
e. Decisions of health authorities that limit access to a health service.
f. Decisions of public authorities that limit the cultural rights of First Nations persons in prisons.
g. Decisions, acts, and omissions that limit the human rights of children detained in watchhouses.

The case of *Sandy v Queensland Human Rights Commissioner [2022] QSC 277* involved a successful judicial review of a decision by the Queensland Human Rights Commission (QHRC) to refuse a complaint by a First Nations person who was incarcerated. The substantive complaint related to the person's application for exceptional circumstances parole for the purpose of receiving culturally appropriate medical care in their community. Although the Commission's decision was ruled to be made without power, the Court also had regard to the human rights complaint, finding that the Commission's reasons "*did not identify or acknowledge the potential or actual impact on human rights in the reasoning process, let alone consider whether the limit was reasonable or justified".*[35] The decision serves to illustrate the overall importance of the Human Rights Act 2019 (Qld) (the HRA) as a vital accountability mechanism. Of course, few people will be able to access judicial review, so the case equally illustrates the importance of accessible complaints mechanisms for raising breaches of human rights.

[33] Ibid.
[34] Human Rights Bill 2018, Explanatory Notes, Queensland Parliament 5.
[35] *Sandy v Queensland Human Rights Commissioner* [2022] QSC 277 [108] (Williams J).

The QHRC has been active in exercising its power to intervene in proceedings raising a question of law in relation to the application of the HRA.[36] For example, in *Owen-Darcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, the Chief Executive was found to have infringed the right of a prisoner to be treated with humanity and with respect for the inherent dignity of the human person.[37] The Chief Executive was unable to justify the deprivation of 'meaningful human contact' by demonstrating that no adequate alternatives existed for 'achieving the necessary safety and security goals of dissociation'.[38]

Areas of Application for a Federal Human Rights Act

Informed by the practice experience of LACs in the areas of disability, social security, migration and criminal law, this section provides examples regarding how a federal human rights framework could prevent and address limitations on human rights that fundamentally impact people's lives, by providing a framework for making complex decisions and balancing competing priorities.

Minimum Age of Criminal Responsibility

Contact with the criminal justice system is harmful to children and can permanently impact the wellbeing and development of children and is in itself a driver of further criminalisation. As NLA stated in its submission to the Council of Attorney Generals – Age of Criminal Responsibility working group:

"The impact of the criminal justice system on children leads to a cycle of disadvantage that extends beyond increased reoffending. Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education or find employment and are more likely to die an early death. The cycle of disadvantage can be intergenerational and lead to untold financial and social costs."[39]

NLA argues that raising the minimum age of criminal responsibility is an important tool in protecting the rights and wellbeing of children and diverting them away from our youth justice system.

The low minimum age of criminal responsibility in Australia is particularly concerning given, in the experience of LACs, the most vulnerable children are disproportionately represented in the criminal justice system in the 10 to 14-year-old age group. This observation is supported by research which has consistently demonstrated that the youngest children in the justice system are most often Aboriginal and/or Torres Strait Islander children, those with disability, and those who are involved in child protection systems.[40] The below case involved a child with all three of these features:

[36] See, for example, *Attorney-General for the State of Queensland v Sri & Ords* [2020] QSC 246, *SQH v Scott* [2022] QSC 16, *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252, *Owen-D'Arcy v Chief Executive of QCS* [2021] QSC 273.
[37] *Owen-D'Arcy v Chief Executive of QCS* [2021] QSC 273, [235]-[242].
[38] *Owen-D'Arcy v Chief Executive of QCS* [2021] QSC 273, [250].
[39] National Legal Aid, Submission to Council of Attorney-General Age of Criminal Responsibility Working Group Review, 2020, 20 https://www.nationallegalaid.org/resources/nla-submissions/
[40] Susan Baidawi & Alex R. Piquero, 'Neurodisability among children at the nexus of the child welfare and youth justice system', (2021), vol 50 (4), *Journal of Youth & Adolescence* 803-819.

'Ali's story'[41] Ali is a 12-year-old Aboriginal boy residing in out of home care (OOHC) in a group home. Ali had a traumatic childhood and both of Ali's parents are now in custody, charged with a serious crime. Ali was arrested by police and charged with intimidating an OOHC worker. The allegation was that Ali said to the carer, 'leave me alone or I'll kick you'. Ali spent a night in detention before being released by the court to return to the group home. Within hours Ali was arrested again for pushing a worker and damaging the windscreen of a staff car. He was refused bail and spent 10 days in custody. Legal Aid NSW arranged for a psychological assessment. Ali was diagnosed with Fetal Alcohol Spectrum Disorder and assessed to have the cognitive ability of an 8-year-old. He was found to be unfit to be tried and the charges against Ali were dismissed unconditionally.

The minimum age of criminal responsibility represents an age where society recognises a child has capacity to be responsible for criminal acts or omissions. In Australia, the minimum age of criminal responsibility is just 10 years of age.[42] This is inconsistent with international human rights law. The UN Committee on the Rights of the Child (UNCRC) has provided guidance to state parties on an appropriate minimum age of criminal responsibility that complies with the CRC. In the 2018 General Comment, the UNCRC noted that 12 years should be considered the absolute minimum and regarded this as still low. The Committee encouraged state parties to increase their minimum age of criminal responsibility to at least 14.[43] There is considerable evidence in the fields of child development and neuroscience which indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years as their frontal cortex is still developing. Children below the age of 14 are therefore unlikely to understand the impact of their actions or to fully comprehend criminal proceedings.[44]

In 2005,[45] 2012,[46] and again in 2019,[47] the UNCRC specifically reviewed Australia's compliance with the CRC and recommended Australia raise its minimum age of criminal responsibility 'to an internationally acceptable level'.[48] There have been four other recent UN bodies that have recommended raising the minimum age of criminal responsibility, being the UN Committee against Torture,[49] the UN Special Rapporteur on Rights of Indigenous People,[50] the UN Committee

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[41] This case study has been deidentified.
[42] *Crimes Act 1914* s4M & *Criminal Code Act 1995* s7.1.
[43] UN Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 1.
[44] United Nations Convention on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system (18 September 2019), 22
[45] UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.
[46] UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.
[47] UN Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth period reports of Australia, 30 September 2019 [48(a)].
[48] Ibid.
[49] In late 2022 the United Nations Committee against Torture released its concluding observations on the sixth periodic report of Australia. The report notes the committee is "seriously concerned" about the "very low" age of criminal responsibility in Australia. The report recommends Australia bring its child justice system fully into line with the UNCRC including by raising the minimum age of criminal responsibility, in accordance with international standards - Concluding observations on the sixth periodic report of Australia, United Nations Committee against Torture, 38(a).
[50] In her 2017 visit to Australia, the United Nations Special Rapporteur on the Rights of Indigenous People noted that the 'incredibly high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern'. She was particularly concerned about the incarceration of Aboriginal and Torres Strait Islander children for mostly relatively minor non-violent offences and noted "It is completely inappropriate to detain these children in punitive, rather than rehabilitative, conditions. They are essentially being punished for being poor

on the Elimination of Racial Discrimination,[51] and the UN Global Study on Children Deprived of Liberty.[52] Despite strong comments by multiple UN bodies, Australia is yet to take action on this issue and is therefore failing to protect the rights of these vulnerable children.

The enactment of a federal Human Rights Act would provide a mechanism for vulnerable young children under the age of 14 years who have been charged with federal criminal offences to seek appropriate remedies for a breach of their human rights. We consider there would also be preventive benefits in future policy and lawmaking, with a federal human rights framework helping shape rights-based policies that prevent harm to children and young people.

National Disability Insurance Scheme

NLA considers that the experiences of people with disability under the NDIS, and respect for their human rights, would be improved by a federal Human Rights Act.

People with a disability are some of the most marginalised in the community. They are at a considerably greater risk of experiencing violence, abuse, neglect and exploitation during their lifetime when compared to people who do not experience a disability.[53] People with a disability often experience barriers to being heard and feeling they have choice and control over various aspects of their lives, as identified by the Disability Royal Commission.[54]

While one of the objects of the *National Disability Insurance Scheme Act 2013* (Cth), is to give effect to Australia's obligations under the CRPD, this does not give rise to an enforceable action for any breaches of rights that occur in the context of the administration of the NDIS. NLA believes federal human rights legislation could help improve several aspects of the operation of the NDIS, as follows.

Access to NDIS for People in Custody

There are several barriers to people who are in custody obtaining funding through the NDIS and then accessing NDIS supports while in custody. These barriers relate to both the decision-making

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and in most cases, prison will only aggravate the cycle of violence, poverty, and crime. I found meeting young children, some only twelve years old, in detention the most disturbing element of my visit". As recommended by the Committee on the Rights of the Child, the Special Rapporteur urged Australia to increase its minimum age of criminal responsibility - Tauli-Corpuz, V, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia' (2017), 10.

[51] They noted the higher risk of indigenous children being removed from their families and placed in alternative care and expressed its 'deep concern' at the high proportion of indigenous children in the criminal justice system, some at a very young age. The Committee was also concerned about the conditions in which these children were held, noting its concerns extended not only to the Northern Territory. The Committee called upon Australia to raise its minimum age of criminal responsibility - United Nations Committee on the Elimination of Racial Discrimination, 'Concluding observations on the eighteenth to twentieth periodic reports of Australia', (8 December 2017).

[52] Although not specifically aimed at Australia, the 2019 Report of the Independent Expert leading the United Nations Global Study on children deprived of liberty recommended that states should establish a minimum age of criminal responsibility which shall not be below 14 years of age. The Report also recommended that state parties should prioritise restorative justice, diversion from judicial proceedings and non-custodial solutions - Report of the Independent Expert leading the United Nations Global study on children deprived of liberty (2019), 109.

[53] Georgina Sutherland et al, *Nature and extent of violence, abuse, neglect, and exploitation against people with disability in Australia* (Research Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, March 2021) 9.

[54] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 13. See also National Legal Aid's submission to the Royal Commission https://www.nationallegalaid.org/resources/nla-submissions/

process of the National Disability Insurance Agency (NDIA), as well as the accessibility of prisons provided by state and territory governments, and private entities that operate prisons on behalf of government. Persons with disabilities who are not yet participants in the scheme face obstacles in accessing and lodging access forms from prison, and in gathering and providing the necessary evidence including medical and health professional reports. There are strict rules around the types of supports the NDIA will fund. For example, the NDIA is not responsible for funding day-to-day supports while a person is in prison and is only responsible for other supports 'to the extent appropriate in the circumstances of the person's custody'.[55]

In NLA's experience, prisoners are rarely able to access reasonable and necessary supports while they are in custody because of this rule in conjunction with the barriers to arranging assessments in state run prisons. Not only does this mean that prisoners with a disability are not receiving the support they need, but a lack of access to appropriate supports may also influence decisions that are made concerning the person's liberty, such as their likelihood of being granted parole, the likelihood of being the subject of an application for post-sentence detention or the likelihood of a forensic patient being granted release. Issues arise with respect to Australia's compliance with Article 9 of the CRPD relating to accessibility, as well as Article 9 of the ICCPR and Article 14 of the CRPD which relate to the right to liberty and freedom from arbitrary detention.

Remedies for Decisions taken by NDIS Providers

LAC lawyers regularly assist clients with a disability, and their family members, who are in disputes with disability service providers. This can include situations where the NDIS participants' human rights may have been breached, including the right to adequate housing under Article 28 of the CRPD and Article 11 of ICESCR. For example, LAC lawyers have assisted clients where service providers have terminated service agreements relating to the provision of supported accommodation with insufficient notice for the participant to find alternative accommodation. These agreements are not subject to any specific statutory protections, subject only to ordinary contract law, as well as the limited protections under Australian Consumer Law. The termination of agreements at short notice becomes more problematic the more specific the individual's disability support needs are, and can result in the person with disability being placed in a mental health facility or general hospital ward, pending alternative accommodation being located.[56] While complaints can be made to the NDIS Quality and Safeguards Commission regarding the conduct of service providers, this does not provide an NDIS participant with an opportunity to enforce their human rights and seek a remedy, unlike a Human Rights Act with enforcement mechanisms. NDIS disability service providers are defined as public entities under the *Human Rights Act 2019* (Qld).[57]

Restrictive Practices in the NDIS Context

'Restrictive practices' in the NDIS context refer to the seclusion or chemical, mechanical, physical or environmental restraint of a participant.[58] The use of restrictive practices raises significant human rights concerns and potentially engages the right to liberty and security of the person, provided for under Article 9 of the ICCPR and Article 14 of the CRPD, and the right to privacy under

[55] *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) r 7.24.
[56] Luke Henriques-Gomes, 'Funding delays keep NDIS participants in hospital months longer than necessary, report finds' *The Guardian* (online, 20 May 2022) <Funding delays keep NDIS participants in hospital months longer than necessary, report finds | National disability insurance scheme | The Guardian>
[57] *Human Rights Act 2019* (Qld) s 9.
[58] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) reg 6.

Article 17 of the ICCPR and Article 22 of the CRPD. Information provided by the NDIS Quality and Safeguards Commission revealed that in 2020-21 there were over 1 million unauthorised uses of restrictive practices.[59] A Human Rights Act would provide an alternative legal avenue for people with disability to enforce breaches of their rights rather than having to rely on a claim in tort. It may also contribute to a cultural shift amongst NDIS service providers.

Access to an Effective Remedy in the NDIS Context

It is a requirement of the CRPD that a state party provide an effective remedy when a breach of rights has occurred.[60] However, currently in Australia, when a person is aggrieved by a decision that is made by the NDIA and they experience a detriment, they are unable to seek compensation through the Compensation for Detriment caused by Defective Administration (CDDA) scheme. This is because the NDIA is a body corporate and is therefore not subject to the scheme, unlike non-corporate Commonwealth entities, such as Centrelink. The exclusion of the NDIA from the CDDA scheme raises issues regarding Australia's compliance with the CRPD. For example, state parties are obliged to ensure that 'persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community … '.[61] They are also required to 'provide early and comprehensive … services and support to children with disability and their families', amongst other obligations.[62] Australia is therefore required by the CRPD to not only provide for these rights but to also ensure that any breach of these rights as a result of defective administration, is remedied. Furthermore, it also raises questions with respect to equality and non-discrimination before the law, given the CDDA is available in relation to other Commonwealth programs. The proposed Human Rights Act, through placing a positive duty on the NDIA to give proper consideration to human rights when exercising decision making functions, should lead to better decision making and therefore a reduction in people seeking administrative review and other remedies. However, where breaches of rights do occur as a result of deficient administration by the NDIA, the proposed Human Rights Act will open an alternative pathway for enforcing these rights and accessing a remedy, which is particularly important given the CDDA scheme does not apply to the NDIA.

Case Study - Lucy* sought assistance from LAQ to resolve in issue with her NDIS funding.
Lucy was an NDIS participant with quadriplegia who lost access to her support network when the NDIA unexpectedly and (as was later conceded) inappropriately changed the way the funds in her plan were managed. This happened in the middle of proceedings in the Administrative Appeals Tribunal (AAT) in which Lucy was seeking reinstatement of her funding for support workers after her plan had been cut following a scheduled plan review.

The NDIA acted very slowly to rectify the issue and Lucy was left in a position where she was reliant on friends to survive for a number of weeks. She had some friends who were able to come over to her house a few times a week and open packets of food for her and leave them open on her counter. However, she isn't able to get in and out of bed herself and so was stuck in her

[59] Luke Henriques-Gomes, 'NDIS providers used unauthorised restraints on clients over a million times in 12 months' *The Guardian* (online, 10 November 2021) <NDIS providers used unauthorised restraints on clients over a million times in 12 months | National disability insurance scheme | The Guardian>
[60] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 4; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2518 UNTS 283 (entered into force 3 May 2008) art 3.
[61] Ibid art 19(b).
[62] Ibid art 23(3).

wheelchair for long periods of time between friends popping round (days) and she was only able to shower once or twice in a period of a few weeks.

The other big problem that this caused was that due to the lack of support, Lucy missed out on trials to represent Australia at a major international sporting event, in a sport that was a passion for her. She had been training hard in the months leading up to these trials and had previously represented Australia. Lucy had hoped to do so again.

The NDIA did eventually apologise for the issue, reinstate her funding and rectify her plan management, but Lucy was left without recourse for what she had to go through.
***Lucy's name has been changed to protect their identity.**

Social Security

LACs work daily with clients who rely on social security payments, including Jobseeker and the Disability Support Pension (DSP). For example, during 2021-22, 55% of Victoria Legal Aid's clients were receiving some form of government benefit.[63] Legal assistance provided includes advice in relation to a client's eligibility for a particular social security payment and representation before the AAT seeking a review of a Centrelink decision, such as the refusal of an application for the DSP, or the raising of a debt.

The operation of Australia's social security system is another area that NLA considers would benefit from the implementation of a federal Human Rights Act, given it is administered by a Commonwealth agency and because the most marginalised people in the community often receive one, or more, forms of social security. A right to social security is provided for in Article 9 of the ICESCR. While Australia has a comprehensive social security system, there are regularly discussions around the adequacy and eligibility of such payments, and these are matters that fall within the ambit of the right to social security at the international level.[64] However, the content of the proposed right is less clear with the AHRC appearing to indicate that it would be confined to access and eligibility to payments, as opposed to the adequacy of payments.[65] The eligibility criteria for DSP, new migrants and asylum seekers in accessing social security are examples that clearly demonstrate why social security is a human rights issue, and how a Human Rights Act could lead to a more dignified social security system.

Robodebt

A Human Rights Act could also have played an important role in ensuring the lawfulness of the 'Robodebt' scheme was better scrutinised by independent tribunals, government inquiries, and government agencies tasked with ensuring accountability. In particular, rights around not depriving people of property unlawfully, as well as fair and public hearing rights, would have assisted in ensuring that the relevant departments were required to account for key aspects of the scheme. In addition, rights around privacy and reputation would have served as important protections for those whose criticisms of the scheme resulted in their Centrelink history being publicly released.

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[63] See: Annual Report 2021–22 | Victoria Legal Aid
[64] Committee on Economic, Social and Cultural Rights, *General Comment No. 19 – Article 9 (The right to social security)*, UN Doc E/C.12/GC/19 (4 February 2008) [22], [24].
[65] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 130.

Disability Support Pension

NLA has observed that the DSP has become increasingly difficult for people with a disability to access. The effect of this is that people with a disability are forced onto lower forms of social security payment, such as Jobseeker. In addition, mutual obligations apply to those in receipt of JobSeeker, which can be particularly onerous for persons who experience a disability.

Over a number of years, the eligibility requirements for DSP have been tightened and as a result there has been a substantial fall in the number of people successfully applying for the DSP. The Parliamentary Budget Office has found that the drop is the result of "… new compliance and assessment measures, which applied from 1 January 2012 ...".[66] From 2001-02 to 2010-11 approximately 63 per cent of DSP applicants were successful.[67] In 2016-17 just over 25 per cent of applications were successful.[68]

The key changes were:

- Inability to work: From 1 July 2006, an applicant had to be able to establish that they were unable to work 15 hours a week within the next 2 years.[69] Previously they were required to establish that they could not work 30 hours per week.
- Program of support: From 3 September 2011, a new claimant for the DSP must have actively participated in a "program of support" in order to be eligible, unless they experience a "severe impairment".[70] In practice, this requires a person to participate in a program of support through participation in employment or disability employment services while in receipt of an activity tested income support payment such as Jobseeker or Youth Allowance. The program usually includes activities such as job search, job preparation, or education and training. Ordinarily, 18 months total participation time is required.
- Impairment tables: From 1 January 2012 impairment tables were introduced as part of the DSP eligibility criteria. A person must establish that they have an impairment that is caused by a permanent condition and the tables are then used to determine whether a person is sufficiently impaired to qualify for the DSP.[71]

It is the experience of LACs that there are significant difficulties for people with serious medical conditions and limited or no capacity to work in meeting the eligibility criteria for DSP, or in being able to prove they meet the eligibility criteria for DSP. The complexity of the criteria and the assessment and review process create barriers for applicants, particularly for those from culturally and linguistically diverse backgrounds, with mental health conditions and those that experience other compounding disadvantage.

The UN Committee on Economic, Social and Cultural Rights has highlighted the importance of providing adequate income support to persons who "owing to disability or disability-related factors, have temporarily lost, or received a reduction in, their income have been denied

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[66] Parliamentary Budget Office, Parliament of Australia, *Disability Support Pension- Historical and projected trends* (Report no 01/2018, 20 February 2018) vi.
[67] Ibid.
[68] Luke Michael, 'Sharp Decline in People Accessing Disability Support Pension', *Probono Australia* (online, 21 February 2018) < https://probonoaustralia.com.au/news/2018/02/sharp-decline-people-accessing-disability-support-pension/>.
[69] *Social Security Act 1991* (Cth) s 94(5).
[70] Ibid ss 94(2)(aa), 94(3B).
[71] Ibid ss 94(1)(b), 94(3B).

employment opportunities or have a permanent disability".[72] The strict eligibility for the DSP is an issue that potentially infringes the right to social security given the requirement that eligibility criteria must be "reasonable, proportionate and transparent".[73]

Social Security Waiting Periods for New Migrants

An area of concern regarding Australia's compliance with the right to social security is the 'newly arrived resident waiting periods' (NARWP) under the *Social Security Act 1991* (Cth), which can operate to cause or exacerbate the financial hardship that new migrants experience.

Generally, for a person to be eligible for a pension, allowance or benefit they must be an 'Australian Resident'. To be an Australian Resident a person must reside in Australia and be either an Australian citizen, the holder of a permanent visa or a Special Category Visa (SCV) holder who is a protected SCV holder.[74] However, for certain payments 'Australian Residents' will also be subject to a NAWRP or a Qualifying Resident Period, or both. Whether a particular waiting period applies depends on the type of payment. For example, the NAWRP does not apply to the DSP or Age Pensions, but the Qualifying Resident Period does.

Newly arrived residents are now subject to waiting periods of up to 4 years before qualifying for most social security payments, including JobSeeker, Youth Allowance, Parenting Payment and Austudy.[75] The waiting periods for newly arrived residents have become much longer over the past 30 years.

Similarly, social security residency requirements that apply to New Zealand citizens who reside in Australia can lead to harsh outcomes. Prior to 26 February 2001 New Zealand citizens residing in Australia had access to a greater number of social security payments and allowances than they do today. Since 26 February 2001 only 'protected' SCV holders meet the definition of 'Australian Resident', which grants them access to a range of social security payments.[76]

The UN Committee on Economic, Social and Cultural Rights has expressed the view, in relation to access to social security payments by non-nationals, that 'any restrictions, including a qualification period, must be proportionate and reasonable'.[77] The gradual and repeated extending of the NARWP over the decades raises questions over whether the current waiting periods are either proportionate or reasonable.

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[72] Committee on Economic, Social and Cultural Rights, *General Comment No. 19 – Article 9 (The right to social security)*, UN Doc E/C.12/GC/19 (4 February 2008) [20].
[73] Ibid [24].
[74] *Social Security Act 1991* (Cth) s 7(2).
[75] We note that there are several exemptions to the application of NARWPs based on the type of visa the person holds or based on a person's particular circumstances. For example, NARWPs do not apply to refugees or their family members in relation to any payment type. While "Special Benefit" may be accessible if a newly arrived resident can satisfy Centrelink that there has been a "substantial change in circumstances beyond their control" and they are in financial hardship - [75] *Social Security Act 1991* (Cth) s 739A(7).
[76] Ibid s7(2A)-(2G). For a summary of who is deemed to be a "protected" special category visa holder, see - 'New Zealand Citizens', *Guides to Social Policy- Social Security Guide* (Web page, 4 January 2022) <https://guides.dss.gov.au/social-security-guide/9/1/3>.
[77] Committee on Economic, Social and Cultural Rights, *General Comment No. 19 – Article 9 (The right to social security)*, UN Doc E/C.12/GC/19 (4 February 2008) [37].

Asylum Seekers' Access to Social Security

NLA also notes that asylum seekers who are on bridging visas or who are permitted to remain in the community without a bridging visa while their protection visa application is being determined, are not eligible to receive Centrelink payments or allowances. For most, determination of a protection visa application takes a very long time. The average waiting time for an interview with the Department of Home Affairs, for the purpose of assessing the asylum claim, is 4 years. It is approximately a further 3 years in the event the applicant wishes to seek review of the Department's decision before the AAT.

Instead of being eligible for Centrelink, this cohort is eligible for Status Resolution Support Services (SRSS) payments, which are regular payments to assist with basic living costs while a person is waiting for their immigration status to be determined. The payments are less than JobSeeker, and eligibility for the payment is not automatic and is assessed by the organisations administering the payments. Unfortunately, the scheme is opaque and there is no merits review.

Some examples of the strictness with which SRSS payments are administered, include:

a. If a recipient transfers money overseas to family members, they will have their payment cancelled and will not be able to get back onto the payment.

b. If an asylum seeker is on a visa that has not yet expired, such as a visitor's visa, they will not be eligible for an SRSS payment until their existing visa expires and they are placed on a bridging visa that is associated with their protection visa application.

The UN Committee on Economic, Social and Cultural Rights has expressed the view that 'refugees, stateless persons and asylum seekers … should enjoy equal treatment in access to non-contributory social security schemes …'.[78] Furthermore, they say that 'all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalised groups, without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant'.[79] Article 2(2) of the ICESCR provides that the rights in the Covenant should be exercised without discrimination of any kind, including on the basis of national origin or birth status. Australia's use of SRSS payments, which are lower than JobSeeker and administered in a less transparent manner than payments from Centrelink, brings into question Australia's compliance with the right to social security for persons who are seeking asylum.

<u>Immigration</u>

NLA considers that a federal Human Rights Act could improve the operation of Australia's migration system, which is a federal responsibility and affects some of the most marginalised people in the community, including those who are escaping persecution in their home country.

Australia has attracted substantial criticism in recent decades over its treatment of asylum seekers and refugees. A Human Rights Act would undoubtedly make a difference in relation to many aspects of Australia's migration and visa framework.

Immigration Detention

The mandatory, prolonged and, in some cases, indefinite detention of persons in Australia has attracted substantial criticism. Most recently, the UN Special Rapporteur on Torture reported that

[78] Ibid [38].
[79] Ibid [23].

Australia has subjected persons to 'enduring degrading, inhuman or pyschological torture' in the context of detention environments and urged Australia to end the 'inhuman' policy,[80] citing Article 9 of the ICCPR, which provides for the right to liberty and freedom from arbitrary detention. The UN Human Rights Committee has said that while asylum seekers can be detained for an initial period of time to document their entry, record their claims and determine their identity, 'to detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual …'.[81] At present, while a person who is subject to indefinite detention can make a complaint to the AHRC regarding an alleged breach of their rights under the ICCPR, they are unable to enforce an alleged breach of the ICCPR in Court. The proposed Human Rights Act would provide such an option.

Mode of Arrival

Until recently, a person who arrived by boat faced additional hurdles to family reunification when compared to a person who arrived by plane. This policy was set out in Ministerial Direction 80 which dictated that the 'lowest priority' was to be given to visa applications from family members of refugees who had arrived in Australia by boat. Fortunately, in February 2023, Ministerial Direction 80 was revoked and replaced with Ministerial Direction 102.

The practical effect of Ministerial Direction 80 was that a person who arrived by boat would wait over 5 years for an application for family reunification to be processed, versus only a couple of years for a person who arrived by plane. While this inequity has now been resolved, such a direction could be made again at any time given it is up to the government of the day. The policy arguably engaged Article 17(1) of the ICCPR which provides that 'no one shall be subjected to arbitrary or unlawful interference with his family …'. Given the wilful delay in processing family reunification applications from family members of people who arrived by boat, Australia was arguably engaging in arbitrary interference with the family in breach of the ICCPR.

Open Justice

Open justice is required by international human rights frameworks, to which Australia is a signatory.

Article 10 of the Universal Declaration of Human Rights provides: 'Everyone is entitled in full equality to a fair and *public hearing* by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

Article 14(1) of the ICCPR also recognises the right to a fair trial and a public hearing by a competent, independent, and impartial tribunal established by law. We acknowledge there are some circumstances in which the principles of open justice could give way to interests of national security, however, NLA is concerned about reports of secret trials[82] occurring in NSW and other jurisdictions. This includes the trial of Witness J (AKA 'Alan Johns'), who was tried, convicted and sentenced to three years imprisonment, all in total secrecy.[83] We also note the case of S*DCV v*

[80] Most recently, see the comments from the UN Special Rapporteur on Torture- Charlotte Grieve, 'Limitless detention of refugees is inhumane and must end, says UN Torture watchdog, *The Sydney Morning Herald* (online, 18 May 2023) <Australia's lengthy detention of asylum seekers is inhumane, says United Nations torture watchdog (smh.com.au)>.
[81] Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [18].
[82] This is defined as legal proceedings in which either (i) certain elements cannot be reported by the press or (ii) some evidence is kept private from one party (usually the defence).
[83] *R v Johns (a pseudonym) (No 2)* [2023] ATCSC 83.

Director-General of Security [2021] FCAFC 51, in which the High Court of Australia held that it was constitutionally permissible for the Federal Court to have regard to 'closed' information, which was known to the court and the Government's lawyers, and was the subject of 'closed' submissions involving the judges and the Government's lawyers but was not disclosed to SDCV or his lawyers.

Commonwealth post sentence orders applications pursuant to Division 105A of the *Criminal Code Act 1995* (Cth), considered above, are not held entirely in secret, but there are regularly aspects of these proceedings which are subject to applications that material be kept secret from the defendant and sometimes defendants' lawyers.

We note there is provision in the Commonwealth legislation to deal with circumstances where neither the defendant nor their lawyer can view material, through the use of Special Advocates.[84] However, NLA suggests that there is insufficient openness or transparency in the use of Special Advocates. They are not known or identifiable to the person who is the subject of the application or their legal representative and the mechanism for appointment is unclear. Without appropriate safeguards these 'secret trials' risk breaching Australia's international human rights obligations. Due to the lack of a federal Human Rights Act, there are currently no remedies to address these human rights issues.

Checks and balances on post-sentence Orders for certain anti-terror matters

Division 105A of the *Criminal Code Act 1995* (Cth) (Division 105A) creates a scheme empowering state and territory supreme courts to order that a person who has been convicted of and served a sentence of imprisonment for a 'terrorism offence'[85] remain in detention in a prison (a continuing detention order (CDO))[86] or be subject to orders that restrict that person's freedom (an extended supervision order (ESO)). Applications for both CDOs and ESOs are made by the Australian Federal Police Minister,[87] and LAC lawyers, such as from the High-Risk Offender Unit at Legal Aid NSW, appear on behalf of respondents. NLA believes that a Human Rights Act would provide an important safeguard against the misuse of these powers and to ensure that they serve a legitimate purpose because, as the UN Human Rights Committee has noted, 'such detention presents severe risks of arbitrary deprivation of liberty.'[88]

The Australian Government has twin international obligations in relation to counter terrorism laws: as well as protecting the community from terrorism, Australia must ensure that the rights of people who are accused or convicted of terrorism offences are also protected.[89]

[84] *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.*
[85] As defined in s 100.1 of the *Criminal Code* (Cth).
[86] *Criminal Code* (Cth), s 105A.3(2).
[87] *Criminal Code* (Cth), s 105A.5(1). This is currently the Commonwealth Attorney General.
[88] Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [15].
[89] We note that the UN General Assembly has highlighted that the obligation to combat terrorism and the obligation to ensure an individual's human rights are protected are not 'conflicting goals, but complementary and mutually reinforcing': United Nations General Assembly, *Resolution 60/288 The United Nations Global Counter-Terrorism Strategy*, UN Doc A/RES/60/288 (2006), 9.

The UN Human Rights Committee has commented that while post-sentence detention is not necessarily in breach of Article 9(1) of the ICCPR, it will be if certain pre-conditions are not met.[90] Specifically, post-sentence detention 'must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future'.[91] Furthermore, 'states should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified'.[92]

NLA considers that there is potential for the CDO regime under Division 105A to amount to arbitrary detention, putting Australia in breach of its human rights obligations, on the basis that the legislation does not require the making of a CDO to be a last resort;[93] and because, in practice, offenders in custody on CDO's are treated almost entirely the same as convicted offenders serving a sentence.[94]

The significant – and in our view, overly broad – exceptions to section 105A.4(1) of the Code undermine this section's purported implementation of Article 10(2)(a) of the ICCPR, which provides: 'Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status'. As a result of the broad exceptions, persons detained under a CDO – a civil order – are placed in prison alongside persons who are serving a sentence of imprisonment, and remain subject to the same harsh rules, legislation, and regulations as though their own sentence continued. This is because the

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[90] Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [21]; International *Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

[91] Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [21].

[92] Ibid.

[93] We note that one of the key aspects of the regime when it was first introduced was the requirement that the court first form a view that there are no other less restrictive measures that could achieve the protective purpose of the legislation, thereby making CDOs a measure of last resort - Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [52]. However, we note that this requirement in s 105A.7(1)(c) was narrowed in a last-minute amendment to bill - Government amendment sheet PZ101, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, item 36, https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6593_amend_596687d1-4879-4e9a-b5f3-48d327209130/upload_pdf/PZ101.pdf;fileType=application%2Fpdf. As a result, supreme courts are now not authorised to consider any less restrictive alternative that is not an ESO or a control order. Further, control orders will be unavailable by the end of December 2023, meaning that an ESO will be the only "less restrictive alternative" available to be considered by a court. This amplifies the importance of the broadening of the consideration of less restrictive alternatives, given the extraordinary incursion on an individual provided by an ESO, particularly for terrorism offenders.

[94] NLA notes that concerns with Division 105A were shared by the UN Committee against Torture following their 2022 visit to Australia: Concluding observations on the sixth periodic report of Australia, United Nations Committee against Torture, 20. Further, the AHRC, and the fourth Independent National Security Legislation Monitor (INSLM), have both recommended that the power to make CDOs within Division 105A be repealed: Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, Submission to the INSLM, 4 February 2022, recommendation 26; Commonwealth of Australia, *Independent National Security Legislation Monitor Report into the operation, effectiveness and implications of Division 105A of the Criminal Code Act 1995 (Cth) and any other provision of that Code as far as it relates to that Division* 82. The INSLM recently found that CDOs were disproportionate to the threat of terrorism and therefore not necessary. He recommended that the power to make a CDO be abolished and that changes be made to the regime for making ESOs, including by amending the legislation to include, as express objects of Division 105A, rehabilitation and reintegration of the subjects of a post-sentence order back into the community. The INSLM pointed to multiple factors which lead them to form the opinion that the CDO scheme amounted to arbitrary detention.

Government has not provided any appropriate alternative place of detention. Due to the lack of a federal Human Rights Act there are currently no robust checks and balances on these powers.

3.3 ELEMENTS OF A FEDERAL HUMAN RIGHTS ACT

The following views on the elements of a federal human rights statute are preliminary, with NLA noting that, should the Australian Government decide to introduce a federal statute, there must be additional opportunity for stakeholders to provide views back to government at a granular level on the detail of that text, and for parliamentarians to hear from experts – including lived experience experts, such as people directly affected by relevant laws and systems – prior to voting on any bill.

Recommendation 3: The Australian Parliament enact a federal Human Rights Act for Australia, and that this process include the release of an exposure draft bill for public consultation, with adequate timeframes for expert stakeholders to respond.

Lessons from Existing State and Territory Legislation

NLA considers that important lessons for the Australian Parliament may be drawn from a close consideration of the effectiveness of the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Human Rights Act 2019* (Qld). In general, the position of NLA, drawing on the experiences of the relevant LACs, is that these instruments have brought about a gradual but noticeable improvement in the human rights culture of government in each of these jurisdictions, although improvements in each instrument remain possible.

As canvassed above, NLA notes that the state and territory instruments have produced significant results 'upstream', either by decision-makers proactively considering the human rights they might be engaging or by lawyers highlighting provisions of the legislation in the early stages of negotiation, meaning there are less issues that end up needing to proceed to litigation. It is clear, in the experiences of LACs, that raising human rights arguments does have an observable impact in terms of motivating actions on the part of government departments and agencies, to the advantage of clients, without necessitating a progression to formal legal proceedings. NLA also notes that concerns about an overly litigious human rights legal sector are also allayed by the general bar against legal practitioners commencing proceedings that are vexatious or unmeritorious.

However, areas of limitations in the existing instruments can generally be identified as including:

a. lack of a direct cause of action; or

b. where a direct cause of action is provided, lack of an accessible complaint pathway; and

c. lack of damages for breaches of human rights.

These limitations have, to a degree, impacted the use of human rights legislation in courts and tribunals. For example, the *Human Rights Act 2004* (ACT), despite having close to twenty years in operation, remains in the relatively early stages of jurisprudence. The fact there is no direct right of action to the ACAT (only to the ACT Supreme Court), nor the ability to complain to the ACT Human Rights Commission, and no entitlement to damages under the Act, has constrained the use of the Act. As the legislation has not been widely used in courts and tribunals, there is not a comprehensive body of case law interpreting the provisions of the legislation.

These lessons and considerations inform the following views of NLA in relation to specific elements that might be included in a federal Human Rights Act, and assessment of the strength of the AHRC's proposed model.

AHRC's Proposed Model

NLA considers that the AHRC's proposed model for a federal Human Rights Act, set out in its position paper, *Free & Equal: A Human Rights Act for Australia*, provides a strong foundation from which the Australian Government might begin drafting legislation.

NLA agrees broadly with the model being proposed by the AHRC, which includes the following elements, and we provide further detail in relation to our views under the separate headings below.

Recommendation 4: The Australian Human Rights Framework be based broadly on the model being proposed by the Australian Human Rights Commission.

Specific Rights for Inclusion

NLA supports a federal statute that sets out a list of protected rights drawn from the core international human rights treaties Australia has ratified, primarily the ICCPR and some of the areas identified in the ICESCR, which reflects the general approach taken to rights content in the ACT, Victoria, and Queensland.

The AHRC's proposal closely follows, in terms of the specific rights it lists for inclusion, the existing state and territory instruments. The jurisdictions are broadly similar in terms of rights content. As well as the core complement of civil and political rights, the AHRC proposes that a federal Human Rights Act implement the following rights that arise in at least one, but not all, of the state and territory instruments: the right to education, which both the ACT and Queensland, but not Victoria, include; the right to health services, which is included only in Queensland; and the right to work, which is included only in the ACT. In addition, the AHRC proposes that a federal Human Rights Act include three rights that are not presently in any of the state and territory instruments: the right to an adequate standard of living; the right to access social security; and the right to a healthy environment.

Interrelationship of rights

NLA emphasises its support for including economic, social and cultural rights in human rights legislation.[95] Australia generally has attached less significance to economic, social and cultural rights. For example, the AHRC can currently receive complaints in relation to alleged breaches of the ICCPR, but not of the ICESCR.[96] In addition, Australia has not ratified the Optional Protocol on Economic, Social and Cultural Rights which would give the Committee on Economic, Social and Cultural Rights jurisdiction to receive individual complaints regarding Australia's conduct. The inclusion of the ICESCR rights in the AHRC's proposed model rightly places these rights on an equal footing with the ICCPR rights and is in line with the Vienna Declaration of 1993 which made clear that 'all human rights are universal, indivisible and interdependent and interrelated'.[97] In our

[95] We note that the AHRC's proposed model includes such rights.
[96] *Australian Human Rights Commission Act 1986* (Cth) Sch 2.
[97] The World Conference on Human Rights, *Vienna Declaration and Programme of Action,* UN Doc A/CONF.157/23 (25 June 1993) [5].

view, it is especially important that such rights are included in a federal statute given the prominent role played by the federal government in relation to economic and social matters, including in the administration and funding of the NDIS and social security system, and funding of health care and housing.

Recommendation 1: Australia ratify the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* and the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* to ensure that individual complaints can be made under these treaties at the international level.

The interconnectedness of rights is particularly evident in relation to environmental matters. The UN High Commissioner for Human Rights has stated that "…the triple threat of climate change, pollution and biodiversity loss constitutes the single greatest challenge to human rights in our era".[98] Through our casework, we have observed firsthand the breadth of rights that can be affected by a disaster. A number of LACs have experience providing legal services in response to disasters such as bushfires and floods.[99]

The experience of LACs includes providing advice in the immediate aftermath of disasters through having a presence at disaster recovery centres, as well as in the months following a disaster as people who are impacted by disaster attempt to piece their lives back together. Disasters contribute to an increase in legal need, both directly and indirectly, in areas as diverse as housing, insurance, social security, consumer credit, employment and family violence. While it is commonly said that "disasters do not discriminate", our case work experience shows that those who experience existing vulnerabilities bare the greatest impact of disasters.

For these reasons, NLA is particularly supportive of the inclusion of the right to an adequate standard of living and the right to a healthy environment in the AHRC's proposed Human Rights Act. The proposed right to an adequate standard of living encompasses the right to adequate housing. The need for adequate housing is relevant to both disaster resilience in those areas that are at increased risk of experiencing disasters but is also relevant to the rights of people whose homes are destroyed or uninhabitable following a disaster.

The case work experience of Legal Aid NSW clearly demonstrates the relationship between disasters and housing. For example, following the floods in Lismore in 2022, Legal Aid NSW provided advice to people whose homes were destroyed or uninhabitable, and as a result were being relocated to live in "pods" in temporary housing villages established by Resilience NSW. Following flooding events in recent years in Western Sydney, the Central Coast, the Mid North-Coast and the Northern Rivers region, Legal Aid NSW have also provided advice to residents of caravan parks, which are commonly built on areas that are at increased risk of flooding.[100]

[98] Michelle Bachelet, 'Statement by UN High Commissioner for Human Rights Michelle Bachelet on COP-26 meeting" (Media Statement, 28 October 2021).
[99] For example, Legal Aid NSW has established a dedicated Disaster Response Legal Service within their Civil Law Division.
[100] Luisa Rubbo and Emma Rennie, 'Fears caravan park residents could be left homeless if NSW Flood Inquiry recommendation is implemented' *ABC News* (online, 3 September 2022) <https://www.abc.net.au/news/2022-09-03/caravan-park-residents-ban-nsw-flood-inquiry-recommendation/101347782>.

We observed the lack of protections afforded to residents in the temporary "pods" due to the fact that residential tenancy legislation did not apply to them. We also observed that residents in caravan parks have limited rights compared to tenants subject to residential tenancy legislation.[101] A Human Rights Act will hopefully lead to upstream decision making that is more conscious of the interrelationship between disasters and rights, and its relevance to disaster prevention and disaster resilience in the context of the right to an adequate standard of living. It will also provide a direct cause of action in circumstances where the decisions and actions of the Commonwealth government can be sufficiently linked to disasters that have impacted on someone's right to an adequate standard of living.

In relation to the right to a health environment, while we are supportive of the inclusion of the right, we would welcome the opportunity for further consultation regarding the content of the right. The AHRC proposed right states that "[e]very person has the right not to be subject to *unlawful* pollution of air, water and soil" (emphasis added). We believe that the inclusion of the word "unlawful" unduly limits the right and its ability to act as a tool to inform government legislation.

Economic and social rights

We acknowledge there are challenges in ensuring that the ICESCR rights are justiciable given the concepts that underlie the treaty, specifically the following two phrases contained in Article 2(2) of the Covenant: 'maximum of its available resources'; and 'achieving progressively the full realisation of the rights'. However, we note that South Africa has such economic and social rights in its Constitutional Bill of Rights and its courts have taken a pragmatic approach to adjudicating such matters. For example, they have said they will be 'slow to interfere' with political decisions regarding budgetary matters and that their role in such matters will be 'rather a restrained and focused role'.[102]

Taking into account these challenges, the AHRC states that it 'has designed its proposals for ICESCR implementation with the aim of ensuring compliance with Australia's Constitution', and 'therefore proposes articulation of ICESCR rights that are somewhat narrower than the full expression of those rights contained in the ICESCR'.[103] The AHRC notes that it has followed the example of the state and territory jurisdictions in this respect.[104] Specifically, it 'has chosen not to require progressive realisation principles to be considered by the courts'.[105] The proposed model envisages separate roles for the judiciary, legislature and executive, and preserves legislative supremacy. Under this model, the full range and full articulation of the ICESCR rights could still be an 'upstream consideration' able to inform statements of compatibility and education and advocacy functions.[106] As the AHRC has noted, the concept of 'progressive realisation' of ICESCR rights is particularly relevant to the role of the parliament and the executive government.[107] However, in terms of the expression of economic and social rights that are directly enforceable under the Human Rights Act, at this time we agree with the AHRC proposed approach that such

[101] Caravan parks and manufactured home estates are regulated by the *Residential (Land Lease) Communities Act 2013* (NSW). The *Residential Tenancies Act 2010* (NSW) does not apply.
[102] *Soobramoney v Minister of Health KwaZulu Natal* (1997) ZACC 17, [29].
[103] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 128.
[104] Ibid 129.
[105] Ibid 128.
[106] Ibid.
[107] Ibid 19.

rights will need to be expressed in a more prescriptive manner than they are under the ICESCR to ensure there is clarity in their application and that such provisions are constitutionally sound.[108]

Procedural duties

NLA also considers it crucial that a federal Human Rights Act include the 'procedural duties' of a 'participation duty' and 'equal access to justice duty', as proposed by the AHRC. This would link the ICCPR and ICESCR rights articulated in the federal Human Rights Act, and the obligations on the executive government and its public authorities, to broader principles that underlie 'thematic' international human rights instruments, including the United Nations Declaration on the Rights of Indigenous People (UNDRIP), CRPD and CRC, such as the principle of self-determination. This is considered in further detail below.

Recourse to International Materials to Assist Interpretation

The AHRC's proposed model includes a provision that would provide guidance on how human rights should be interpreted and would direct courts, tribunals, and public authorities to international material to assist.

NLA supports this proposal given the substantial jurisprudence and commentary that exists from the United Nations, and the European Court of Human Rights, as well as from domestic courts in Europe that are tasked with interpreting the European Convention on Human Rights. Treaties at the international and regional level include rights broadly similar to those included in the AHRC's proposed model. An interpretive provision promoting recourse to international materials has the potential to be particularly beneficial in relation to economic and social rights, which are a less familiar concept for Australian courts, as mentioned above.

Duty on Public Authorities

NLA supports a two-part positive duty being placed on public authorities to comply with human rights and to give proper consideration to human rights when making decisions. This reflects the two-part positive duty in the ACT, Victoria and Queensland[109] and is central to the overarching impact of these acts as canvassed above.

The requirement for public authorities to give proper consideration to human rights when making decisions assists in preventing human rights breaches and will also provide an opportunity for people who believe their rights have been breached as a result of a public authority's decision to seek judicial or merits review.

NLA supports the AHRC's proposal for the definition of a 'public authority' to extend to 'functional' public authorities, which are private businesses, non-government organisations and contractors that have functions of a public nature and are exercising those functions on behalf of government. Private entities are playing an increasing role in areas in which the government has previously been the sole or primary operator. This includes in relation to social services where they are in contact with, and making decisions about, some of the most marginalised people in the community. For example, NDIS service providers, aged care operators and job service providers.

[108] Ibid 128.
[109] *Human Rights Act 2004* (ACT) s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2019* (Qld) s 58(1).

We also consider that a 'function of a public nature' should be defined sufficiently broadly to reduce the likelihood of private organisations, particularly in the social services domain, attempting to argue that human rights legislation does not apply to them when carrying out what are plainly public functions.

NLA notes that the AHRC proposes the executive have the power to declare in regulations that certain entities are not public authorities and therefore are not captured by the Human Rights Act. The AHRC provides examples of public authorities that will be excluded, such as the Parliament of Australia (except for when it is acting in an administrative capacity) and the courts (except when acting in an administrative capacity). While these two examples are uncontroversial, NLA is concerned that additional public authorities could simply be declared by the government of the day without much oversight. We therefore propose that some additional transparency measure be included, such as a requirement that the relevant Minister publicly issue reasons for their decision.

The AHRC also proposes including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with a federal Human Rights Act. In principle, we support this, but note that it is common for such clauses to go underutilised in practice.[110]

Participation Duty

As foreshadowed above, NLA broadly supports the AHRC's proposed participation duty on public authorities. This will require public authorities to engage with Aboriginal and Torres Strait Islander peoples, children, and people with a disability, on policies and decisions that "directly or disproportionately affect their rights" and may provide an avenue to seek judicial review where consultation has not adequately occurred.[111] This duty will also feed into the duty on public authorities to give proper consideration to human rights when making decisions or developing policies, and therefore a failure to properly consult may also result lead to a direct cause of action in relation to a failure by the executive to properly consider human rights. Most importantly, we consider that properly consulting with Aboriginal and Torres Strait Islander people, children, and people with disability, during any decision-making process that affects their rights, will lead to better decisions, and reduce the likelihood of human rights breaches occurring. We are concerned that the requirement to consult with Aboriginal and Torres Strait Islander people, children and people with a disability only when decisions and policies "directly or disproportionately affect their rights" unnecessarily limits the duty to consult with these groups and is not necessarily consistent with international human rights obligations. For example:

a. The UNDRIP provides that "[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".[112]

[110] The ACT's opt-in clause, for example, has only been taken up by seven organisations, and none in the last decade: ACT Legislation Register, Human Rights Act 2004, Regulations and Instruments, Notifiable instruments under section 40D.
[111] We note the need to consider the definition of 'consultation' in line with the principle of self-determination, as well as best practice related to meaningful engagement and partnering with people with lived experience.
[112] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 19.

b. The CRC requires state parties to ensure that children who are capable of forming their own views, are given the right to express those views "in all matters affecting the child".[113] The right to be heard includes the right to be heard on matters personal to the individual child, as well as to children collectively.[114]

In neither instance does the instrument confine the right to be heard to matters that "directly or disproportionately" affect the rights of these groups and the right can be presumed to extend to matters that indirectly or proportionately affect their rights. Such an approach is also consistent with the proposed power of the Voice which, if established, will have the power to make representations to parliament and the executive on "matters relating to Aboriginal and Torres Strait Islander peoples".

If a federal Human Rights Act is implemented, careful consideration should be given to how children, people with disability, but especially Aboriginal and Torres Strait Islander communities, are consulted as part of the parliament and executive's participatory duty. As the AHRC suggests, a Voice to Parliament is one such way that this may be achieved.[115] Consideration should also be given to the best way to ensure collective consultation with children and with people with a disability, and whether additional resources for advocacy organisations would be required to achieve this aim.

Recommendation 10: Ensure collective consultation, engagement and partnership with communities that experience structural disadvantage and, in relation to this, supporting First Nations communities' self-determination in response to Voice, Treaty and Truth.

Further, the procedural duties may provide an opportunity to develop an established process of reporting and training from the relevant AHRC Commissioners to the Executive Government and its public authorities, these being the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Children's Commissioner, and the Disability Discrimination Commissioner.

Recommendation 8: Develop an established oversight process of reporting and training on the implementation of these 'procedural duties' (the 'participation duty' and 'equal access to justice duty'), from the relevant Australian Human Rights Commission Commissioners to the Government and its public authorities.

NLA also suggests that links between procedural duties included in any federal Human Rights Act and the commitments, priority actions and implementation strategies in train under existing policy frameworks, such as the National Closing the Gap Framework, should be made explicit in the directions and action plans of government departments and agencies, with public sector staff educated on the content of these duties as they spring from international human rights instruments.

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[113] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
[114] Children Rights Committee, *General Comment No 5: General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003) [12].
[115] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 133.

Recommendation 9: Develop guidance materials for the public sector and Australian Public Service on the relevance of these 'procedural duties' (the 'participation duty' and 'equal access to justice duty') within existing and proposed policy frameworks, priority actions and implementation strategies.

Equal Access to Justice Duty

NLA supports the proposed 'equal access to justice duty', which 'would mean that public authorities have a positive duty to realise access to justice principles'.[116] The AHRC explains that 'the purpose of this duty is not only to codify, but to strengthen and support key principles established by common law courts', creating 'an obligation to meet minimum requirements associated with the right to a fair hearing, overlayed by non-discrimination principles that require the provision of certain key supports and services within the justice system … for those who face particular barriers' to equal access to justice.[117]

Recommendation 11: Consideration of whether a correlative right to participate directly and autonomously in legal proceedings may enhance the efficacy of the 'equal access to justice duty'.

The AHRC appropriately focuses on the content of the duty upon public authorities to ensure that resources are provided for accommodations within the justice system to enable participation of all in the justice system.

Much of this content is drawn from the common law and rule of law tradition, as well as the rights of several international instruments, such as the ICCPR, CRC and CRPD, which respectively provide for obligations on state parties to ensure, for example:

a. that any person charged with a criminal offence have legal assistance assigned to them, including without payment if they do not have sufficient means to pay for it;
b. that children may be individually represented, such as occurs through the provision of specialist children's lawyers;
c. provision of interpreters; and
d. accessible court facilities and accessible court procedures for people with disability to participate directly in legal proceedings.

While international instruments such as the ICCPR focus on access to public legal assistance for criminal trials, the AHRC appropriately acknowledges that such access underpins the manifestation of all human rights in practice, which have application across criminal, family and civil areas of law.

Indeed, under the AHRC's proposed model of a federal Human Rights Act, the direct cause of action would attach to all the human rights articulated in the act and allow for the commencement of a civil legal proceeding. Similarly, judicial review is a civil application, and applications for merits review are generally carried out by civil practices within the LACs.

[116] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 215.
[117] Ibid.

NLA highlights that the AHRC's position paper accordingly focuses on the need for the Executive Government to adequately fund legal assistance services, i.e., LACs, CLCs, ATSILS, and FVPLS across criminal, family and civil areas with a view to the long-term social benefits.[118] As the AHRC states:

> *The Australian Government already recognises the importance of Legal Aid in criminal matters, as well as some civil and family matters. However, despite this, limited funding undermines the effectiveness of the Legal Aid system. As the Law Council's 2018 Justice Project highlighted, legal assistance services are critically lacking in funds across the board. …*
>
> *Legal Aid in civil and family matters is not a right guaranteed by the ICCPR or other treaties to which Australia is a party, but it is often essential for the realisation of a person's human rights. …*
>
> *The limited availability of Legal Aid funding in Australia has resulted in a lack of ability for disadvantaged Australians to exercise their legal rights. A number of reports have highlighted the shortfall of legal assistance funding for these kinds of matters in Australia, with the Productivity Commission recommending an immediate injection of $200 million for civil legal assistance services in 2014. The lack of civil legal assistance funding is short-sighted, noting the role of legal assistance in preventing the escalation of legal problems, which can spiral into social, health, criminal and economic problems, with associated government spending.*[119]

Recommendation 5: Adequate funding of the legal assistance sector across criminal, family, and civil areas of law to support equal access to justice.

NLA notes that the content of the equal access to justice duty, interpreted with reference to the international instruments, may extend to procedural accommodations and to promoting appropriate training for those working in the field of administration of justice (for example, Article 13 of the CRPD).

It is NLA's hope that such a duty on public authorities might provide the impetus for much needed law reform and greater legal protections relating to the capacity and direct participation of clients, as experienced in practice by LACs.

For example, as raised by NLA in our recent submission to the federal administrative review,[120] this duty on public authorities to ensure equal access to justice could provide an avenue to improve processes in the AAT, which currently does not have the power to appoint a litigation guardian. This is particularly problematic given the AAT's role in reviewing decisions of the NDIA. It is not uncommon for people who are seeking to have decisions reviewed to experience an impairment that means they are unable to actively participate in proceedings or provide competent instructions to their representative. Legal Aid NSW notes that its lawyers have also encountered this issue in visa cancellation cases and protection visa matters. The lack of power for the AAT to appoint a *guardian ad litem* contrasts with the NSW Civil and Administrative

[118] Ibid, 218-219.
[119] Ibid 219.
[120] For more, see: https://www.nationallegalaid.org/resources/nla-submissions/

Tribunal (NCAT) which has such a statutory power.[121] NCAT has also published guidelines and factsheets on the appointment of a *guardian ad litem*.[122]

Legal Aid Queensland raises the same issue in the inverse manner, noting the effectiveness of its advocacy can be hampered if the legal settings do not provide sufficient clarity relating to a client's right to instruct their lawyer and directly participate in proceedings. Legal Aid Queensland lawyers have experienced this in proceedings on behalf of clients whose capacity and very right to participate and make decisions on their own behalf in the justice process is called into question and challenged, sometimes by respondents in the proceeding. The reasoning in the case of *BA, DC, FE v State of Queensland* [2022] QCAT 232 reflects the lack of legislative guidance available to the Queensland Civil and Administrative Tribunal, which without this guidance decided that two of the children concerned had demonstrated capacity to the requisite standard to participate directly in the proceeding without a litigation guardian.

In the absence of legislative change, the equal access to justice duty would likely require public authorities to at least develop resources to assist people with a disability, their families and their legal representatives to understand how cases concerning a party who lacks capacity should be handled.

Legislation to be Interpreted Consistently with Human Rights

The AHRC's proposed model includes an interpretive clause requiring courts to interpret legislation, where possible, in a way that is consistent with the rights contained in the federal human right act. At the same time, the interpretive clause would require courts to respect the parliamentary intention underlying the statute – noting that, as the proposed model is a dialogue model, parliamentary intention will prevail due to the preserved supremacy of parliament. NLA acknowledges that potential constitutional law issues would arise if the proposed federal Human Rights Act were to include a power for courts to declare acts of parliament invalid on the basis that they are incompatible with human rights.[123] We support the AHRC's proposal not to include such a power in the Act.

NLA supports the proposal for legislation to be interpreted in light of the rights contained in the federal Human Rights Act.

We note that the High Court has said, in relation to the common law principle of legality, that the presumption that a statute should be read in a manner that is consistent with fundamental rights, should only be rebutted when an alternative interpretation 'is necessary to prevent the statutory provisions from becoming inoperative or meaningless'.[124] However, in practice, the emphasis placed on the principle of legality varies depending on the decision maker, and what are considered fundamental rights under the common law do not necessarily align with Australia's international human rights law obligations and the rights that would be enunciated in the proposed Human Rights Act. For this reason, we share the view of the AHRC that 'an interpretive

[121] *Civil and Administrative Tribunal Act 2013* (NSW) s 45(4).
[122] NSW Civil and Administrative Tribunal, *NCAT Guideline 2: Representatives for people who cannot represent themselves (GALs)* https://www.ncat.nsw.gov.au/ncat/how-ncat-works/prepare-for-your-hearing/representation.html
[123] See *Momcilovic v The Queen* (2011) 245 CLR 1 for a discussion of the potential issues.
[124] *Coco v The Queen* (1994) 179 CLR 427, 436, 438.

clause under a Human Rights Act should be viewed as conceptually distinct from the principle of legality'.[125]

NLA supports the AHRC's proposal for courts to make a 'declaration of incompatibility' in the event they are unable to interpret a law in a manner that is consistent with rights contained in the federal Human Rights Act. For the reasons outlined above, we appreciate that this model is preferable to one where courts could invalidate laws, which would likely be subject to constitutional challenge.

Direct Cause of Action

NLA notes that the call for a direct cause of action has been a consistent refrain whenever the detail of any proposal for a human rights instrument has been considered, both federally and at the state and territory level.

A comprehensive review of the Victorian Charter after eight years of operation in 2015 recommended the adoption of a direct cause of action, which has remained unheeded.[126] During Queensland's parliamentary consultation process in 2016, leading to the introduction of its human rights legislation, Legal Aid Queensland advocated for a direct cause of action provision, citing the 2015 Victorian recommendation.[127] Such a provision was not, however, included in the final statute, meaning that, today, the ACT is the only Australian jurisdiction with a human rights instrument containing a direct cause of action. This is included at section 40C(2)(a) of the *Human Rights Act 2004* (ACT), which allows a person alleging that a public authority has contravened one of the human rights duties in section 40B to commence a proceeding in the Supreme Court against the public authority.

Legal Aid Queensland has provided detailed views on the practical shortcomings of 'piggy back' provisions, as opposed to a standalone cause of action under a human rights instrument, noting that often where allegations of a breach under the *Human Rights Act 2019* (Qld) are raised – piggybacked onto some other cause, typically a discrimination complaint – the experience is that little thought or effort is put into responding to that part of the complaint by the respondent. This is reflected, for instance, in the correspondence, pleadings and written submissions of the respondent party, which might deal with the allegations of human rights breaches in one or two paragraphs with a perfunctory denial that a breach occurred, and typically little if any engagement with the specific questions of the rights engaged, their scope, the particular concerns of the complainant, or any substantive engagement with the issue of proportionality.[128]

At the same time, Legal Aid ACT raises the importance of the direct cause of action being practically accessible, as opposed to merely technically available under a statute. For marginalised groups in the ACT, commencing proceedings in the Supreme Court may be overwhelming, intimidating and involve a large degree of financial risk in the form of adverse cost orders. For this reason, Legal Aid ACT strongly supports extending the direct cause of action available under the *Human Rights Act 2004* (ACT) to applications to the ACAT, as set out in its submission to the ACT's

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[125] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 250.
[126] Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) PP_No_77_-_From_Commitment_to_Culture_-_with_ordered_to_published_WTdv3DmC.pdf (parliament.vic.gov.au)
[127] Legal Aid Queensland, Submission to Parliamentary Inquiry: A Human Rights Act for Queensland (2016) 11.
[128] For further engagement with this issue, see Victoria Legal Aid's *Free and Equal* submission (*Op Cit)*, 16.

recent 'Inquiry into Petition 32-21 (No Rights Without Remedy)'[129] Regarding a federal Act, promoting the accessibility of a direct cause of action may extend to providing the conciliatory and enforceability pathways necessary for an effective complaints process and implementing an equal access costs model for litigation proceedings, as discussed below.

AHRC Complaint Pathway

The AHRC explains in its position paper that the inclusion of an enforceable cause of action would not only provide a pathway to adjudication through the AHRC to the Federal Court of Australia but may also provide an incentive for the public authority respondent to reach a conciliated outcome, thus avoiding the need for court proceedings altogether.

NLA supports this view, drawing on the experiences of the LACs. Legal Aid Queensland, for example, has advised and represented clients through the present complaints process of the Queensland Human Rights Commission under the *Human Rights Act 2019* (Qld), which does not include an enforceable cause of action for complainants for breach of their human rights under the Act for a breach of their human rights under the Act. The observation made by Legal Aid Queensland in these circumstances is that respondents seem less proactive or motivated in presenting possible solutions or areas for compromise as they would be in jurisdictions where there is an enforceable cause of action.

NLA emphasises, however, that for the conciliation process to be meaningful it is necessary for the AHRC to be adequately funded. For example, Legal Aid NSW lawyers have noticed a change in the AHRC's approach to conciliations over recent years. Previously the AHRC wrote to the respondent in the lead up to the conciliation to ask specific questions regarding the complaint. This would narrow the issues in dispute, allow the respondent to prepare for the conciliation, and, in the experience of Legal Aid NSW, increased the prospects of settlement. However, lawyers have observed that the AHRC no longer does this, and respondents have been less prepared at the outset of the conciliation. NLA suggests this is likely due to the long-term under-resourcing and funding of the AHRC, leaving a backlog of complaints and staff with less time to afford to each individual complaint process, as noted at section 4.3 below.

Administrative Review Pathway

NLA supports the proposal that administrative law actions and remedies would apply as usual in relation to review of decisions affecting human rights. As noted above, NLA sees no issue with the content of human rights being informed by the international materials. We note that the *National Disability Insurance Scheme Act 2013* (Cth) is an example of an act that requires international treaty obligations to be considered when decisions are made under that legislation, by both the NDIA and AAT.[130]

Recommendation 6: Administrative law actions and remedies to apply as usual in relation to review of decisions affecting human rights.

Remedies, including Damages

[129] See Legislative Assembly for the Australian Capital Territory Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (Report 7, 10th Assembly, June 2022).
[130] *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a), (i).

In the NLA's view, there is no reason to limit the remedies available to complainants under a federal Human Rights Act. The AHRC's position paper recommends flexible and broad remedies including monetary damages. NLA supports this recommendation. We note the likelihood that in many cases by the time a human rights matter reaches conciliation or hearing, any non-monetary relief that may have been suitable at the time of breach will have lost currency. For example, a child improperly detained in a watchhouse for a period may have since been released or moved to a suitable detention facility by the time of conciliation or hearing, meaning an order they be released or moved will no longer be necessary. Nonetheless, a substantial wrong has been committed, and Federal Courts should have the ability to award monetary damages, both to recognise the significant status of human rights and give effect to Australia's international obligation to offer effective remedy for their breach, and to effectively deter future wrongdoing of a similar nature by the public authority. For this reason, we note that it is particularly important that nominal damages be available given there are many instances where a person's human rights may have been breached, but they are unable to evidence any resulting injury, loss or damage. Common examples of where this might occur are in relation to privacy breach matters, as well as matters concerning the unauthorised use of restrictive practices in disability and aged care settings.

Costs Orders

NLA recommends that there should be protection against adverse costs orders for individuals who wish to pursue a direct cause of action under the federal Human Rights Act. As discussed in section 4.2 of this submission below, NLA supports the equal access costs model in discrimination matters. We would also support the extension of such a costs model to direct causes of action brought under a federal Human Rights Act.

Standing

NLA recommends that the AHRC's existing powers to intervene and make submissions in cases concerning human rights,[131] and for Commissioners to act as amicus curiae in certain proceedings,[132] be extended to proceedings brought under the federal Human Rights Act. These powers should also extend to any proceedings that concern the interpretation and application of rights in the federal Human Rights Act, including administrative law proceedings and 'piggyback' proceedings.

Recommendation 7: Extension of the Australian Human Rights Commission's powers to intervene and act as amicus curiae to proceedings brought under the Human Rights Act and to proceedings involving the interpretation and application of the human rights in the Act.

Jurisdiction and Scope

The AHRC's proposed model would protect all people within Australia's territory and all people subject to Australia's jurisdiction. It would also include individuals under Australia's 'effective control' overseas. Such an approach is consistent with the notion of human rights set out in the

[131] *Australian Human Rights Commission Act 1986* (Cth) s 11(o).
[132] Ibid s 46PV.

Universal Declaration of Human Rights, that being that human rights are universal and inalienable.[133]

NLA is particularly supportive of the proposal for a federal Human Rights Act to extend to individuals who are under Australia's 'effective control' overseas. This is consistent with the UN Human Rights Committee's view that the ICCPR applies to individuals who are under the 'effective control' of a state party.[134] In the Australian context, this is particularly important given the treatment of asylum seekers and refugees who have been subjected to offshore processing and who are not within Australian territory but are subject to Australia's 'effective control'.

National Consistency

As noted earlier in the submission, NLA agrees with the AHRC that a federal Human Rights Act may provide an impetus and blueprint for the remaining states and territories to implement human rights legislation. Legal Aid NSW supports the adoption in NSW of human rights legislation that would apply to NSW laws and NSW public authorities. Similarly, Northern Territory Legal Aid continues to recommend that the Northern Territory enact a Human Rights Act to 'enhance protection of Territorians, who are some of the most disadvantaged in Australia, in their dealings with government and individuals performing public functions'.[135]

4. FEDERAL HUMAN RIGHTS FRAMEWORK

4.1 PARLIAMENTARY SCRUTINY MECHANISM

As noted above at section 2.3 of this submission, NLA considers that the lack of influence of the parliamentary scrutiny mechanism is predominantly a result of Australia's lack of a federal Human Rights Act, rather than overwhelming deficiencies in the parliamentary scrutiny mechanism itself.

The PJCHR was established in response to recommendations of the 2009 National Human Rights Consultation Committee, which also recommended that a federal Human Rights Act be passed. It was envisaged that the PJCHR and a Human Rights Act would work alongside each other and that the PJCHR would be able to notify parliament of any risk that legislation would not be consistent with Australia's Human Rights Act, creating an impetus for a bill to be amended or not passed at all. At present, while the PJCHR can advise Parliament of the incompatibility of a bill with Australia's international human rights law obligations, there is less of an impetus for Parliament to amend or not pass a bill in response to human rights concerns, given there are less avenues for individuals to enforce breaches of their rights domestically.

To improve the federal human rights framework, a federal Human Rights Act ought to be enacted by the Australian Parliament and made the central reference point of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), with scrutiny and statements of compatibility required to consider legislation and bills in light of this domestic instrument, as well as the international human rights instruments.

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[133] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) preamble.
[134] See, for example, Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/Rev.1/Add.13 (29 March 2004) [8].
[135] Northern Territory Legal Aid Commission, *Feedback to the Department of Attorney-General and Justice on the Anti-Discrimination Amendment Bill 2022 (Exposure Draft Bill)* (August 2022) 9.

NLA recommends that amendments be introduced to broaden the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For example, the PJCHR ought to have reporting functions in relation to the UNDRIP, which is the authoritative international standard on the minimum content of the human rights of indigenous peoples across the globe, and which was formally supported by Australia in 2009.[136]

Recommendation 12: The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) be amended to, assuming a Human Rights Act is enacted, include the Human Rights Act within the definition of "human rights" in section 3. In any event, broaden the definition of 'human rights' in this statute to include the United Nations Declaration on the Rights of Indigenous People.

NLA also supports the AHRC proposal to amend House and Senate Standing orders to require that bills not be passed until a final report of the PJCHR has been tabled in Parliament.[137] We agree that there will need to be limited exceptions provided to this rule, to account for the passing of bills on urgent matters. However, even where a bill is passed without scrutiny, there should be a rule requiring scrutiny at a later date.

Recommendation 13: The House and Senate standing orders be amended to require that Bills not be passed until the Parliamentary Joint Committee on Human Rights has opportunity to consider and report, with only limited exceptions to account for certain urgent matters. In the event a Bill needs to be urgently passed, the standing orders should require the Parliamentary Joint Committee on Human Rights to conduct a review of the Bill as soon as practicable thereafter.

4.2 FEDERAL ANTI-DISCRIMINATION LAWS

NLA notes that Australia's anti-discrimination law framework has long been viewed as an integral part of its broader human rights framework, and that both government and civil society have recognised the need for significant reform federally of this area.

LACs see daily the impact of discrimination, sexual harassment, victimisation and vilification on people's health, wellbeing, and life opportunities. We have extensive experience assisting victims of discrimination and sexual harassment and advocating for systemic changes to improve safety and access to justice in Australia. Our lawyers have specialist knowledge of sexual harassment and discrimination law and a strong commitment to helping people resolve their legal problems and get a fair outcome. We support reforms to update and simplify federal anti-discrimination laws to promote consistency, effectiveness, and accessibility. Based on our collective experience practising discrimination law in a range of jurisdictions, we recommend that federal discrimination laws be amended to achieve the following three goals:

a. Consolidation, simplification and modernisation;

b. Increased access to justice; and

c. Better prevention and enforcement.

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[136] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007).

[137] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 250.

Recommendation 14: The federal discrimination law framework be amended to achieve consolidation, simplification and modernisation, increased access to justice, and better prevention and enforcement.

Consolidation, Simplification and Modernisation

Federal anti-discrimination laws should be updated, simplified, and amalgamated to remove inconsistencies and unnecessary complexity to make it easier for duty holders to understand their obligations and for clients to understand their rights.

Removing Comparator Tests

The test for direct discrimination should be simplified by removing the comparator test. This test is unnecessarily confusing, restrictive and operates as a significant barrier to our clients utilising the protection provided by these laws. In many cases a hypothetical comparison is not possible. Forcing applicants to prove that someone else in their circumstances would have been treated better if they didn't have a disability or were younger is artificial and fails to adequately address the cause of the discrimination. Victoria's *Equal Opportunity Act 2010* (Vic) (EOA) and the ACT's *Discrimination Act 1991* (ACT) provide useful examples of legislative tests for direct discrimination that do not rely on a comparator.

Updating Attributes

Currently, federal anti-discrimination legislation fails to adequately protect against discrimination on many grounds that are covered by state and territory anti-discrimination laws and the *Fair Work Act 2009* (Cth) (FWA). The law should be broadened to cover additional protected attributes and improve the available protection for some protected attributes. In addition to existing grounds, federal anti-discrimination laws should protect against discrimination on grounds of physical features, lawful sexual activity, status as a parent or carer, religious belief, political belief or activity, industrial activity, nationality, irrelevant criminal record, being a victim of violent crime, being a victim of family violence, homelessness, and socio-economic status.

This recommendation reflects practice experience which shows that:

a. Many LAC clients have had contact with the criminal justice system and have a criminal record as a result.[138] These clients find it difficult to rehabilitate or reintegrate after serving a prison sentence because of discrimination in employment, housing, and other services on the basis of their criminal record. This discrimination regularly occurs even where the past criminal activity has no relevance to the job or service sought.

b. LAC clients who are victims of rape and who have disclosed this to employers and education providers have been branded as 'overly sensitive', 'troublesome' and requiring 'special treatment'. Likewise, family law practitioners report that victims of family violence are indirectly discriminated against by employers who fail to provide flexible work conditions.

[138] Our clients also disproportionately experience factors that are social determinants of incarceration, such as having been in out of home care, being Indigenous, having unsupported mental health and cognitive disability, and structural racism and inequality experienced by First Nations peoples and people with disability. See Ruth McCausland and Eileen Baldry, *The social determinants of justice: 8 factors that increase your risk of imprisonment* (theconversation.com), 17 April 2023.

Moreover, clients have reported a reluctance to report family violence to their employers for fear of embarrassment or being treated differently.

c. Many clients are refused for private rental properties because they receive Centrelink benefits, even where they can afford the rent. Discrimination in rental accommodation is even more acute where an individual has had a period of homelessness and is unable to account for periods where they were not in stable accommodation.

Further, the protected attribute of intersex status in the *Sex Discrimination Act 1984* (Cth) should be replaced with 'sex characteristics' based on the definition in the 'Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles'.[139]

Modern Approach to Protecting Religious Belief

As indicated above, discrimination on the grounds of religious belief or activity should be prohibited by federal anti-discrimination laws. This protection should not diminish the right to equality and protection against discrimination of others, including women, LGBTI people, single parents, people in de facto relationships, divorced people, and people with disability. To this end, the general religious exceptions in the Sex Discrimination Act 1984 (Cth) ('SDA') – section 38, and subsection 37(1)(d) – should be repealed as they permit unjustifiable discrimination against others.

Any exceptions to discrimination on the basis of religious belief should be narrow. For example, Tasmania's Anti-Discrimination Act 1998 (Tas) allows discrimination on the basis of religious belief in the following circumstances only:

a. against employees where it is a genuine occupational requirement for the role

b. against students at the time of enrolment only and 'in relation to admission… as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion'.[140]

Victoria and the ACT anti-discrimination legislation contains similar provisions,[141] and in 2022, the Queensland Human Rights Commissioner recommended Queensland reform religious exceptions to discrimination in a way that mirrors Tasmania, ACT and Victoria.[142] Federal anti-discrimination laws should be brought into line with legislative developments at a state level. Such an approach balances the rights of religious institutions and communities to practice religious beliefs and practices against the rights of others to be protected from discrimination on the basis of irrelevant attributes.

Amending Reasonable Adjustment Provisions and Extending to Pregnancy

The reasonable adjustments provisions in the *Disability Discrimination Act 1992* (Cth) (DDA) are intended to establish a stand-alone duty to advance substantive equality. However, the Full

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[139] As adopted on 10 November 2017, Geneva, https://yogyakartaprinciples.org/wpcontent/uploads/2017/11/A5_yogyakartaWEB-2.pdf accessed 4 November 2019. For further discussion, see PIAC, *Submission Free and Equal Anti-Discrimination Law Reform* (8 November 2019) 9-10.
[140] Anti-Discrimination Act 1998 (Tas) ss 51(1) and 51A.
[141] Discrimination Act 1991 (ACT) s 32; Equal Opportunity Act 2010 (Vic) ss 82A, 83A.
[142] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (July 2022) recommendations 39, 40.

Federal Court decision in *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 significantly undermines that intention by necessitating a causal link between the person's disability and the reason why a reasonable adjustment was not made. Addressing this requires urgent legislative amendment that makes it unlawful not to make, or propose not to make, reasonable adjustments for a person who, because of their disability, requires adjustments.[143]

There should also be a positive obligation on employers to grant reasonable accommodations for pregnant workers, similar to the 'reasonable adjustments' provisions in the DDA. Our practice experience mirrors the findings of Allan and Orifici that 'pregnant employees seeking to informally negotiate necessary adjustments with employers can face invidious choices and outcomes.'[144]

Increased Access to Justice

Amending the Onus of Proof

Once a complainant establishes a *prima facie* case of discrimination, the respondent should bear the onus of proving that the action was not unlawful. In our practice experience, many people are deterred from taking legal action due to difficulties proving the conduct, including due to lack of access to documents and other information held by the respondent.

This change is consistent with section 361 of the FWA, which provides that the alleged reason for an action is to be presumed, unless proved otherwise.[145] This is also consistent with provisions in the *Age Discrimination Act 2004* (Cth) (ADA), SDA and DDA that the respondent bears the onus of proving reasonableness in complaints of indirect discrimination. Such a provision would address the difficulties of proof faced by complainants, which in our experience deter people from exercising their rights under anti-discrimination law.

Expanding Coverage to Any Area of Public Life

In our experience, discrimination is often systemic and multifaceted and can occur within a range of institutions and areas of public life. We consider that anti-discrimination laws should provide broad protection against discrimination by prohibiting discrimination in any field of public life, as is the case under section 9 of the *Racial Discrimination Act 1975* (Cth) (RDA). We recommend a non-exhaustive list of areas that are protected, which reflects those areas already covered by the RDA, SDA, DDA and ADA. In addition, we recommend that this list expressly include law enforcement, corrections, and child protection authorities. These agencies and service providers exercise considerable power within our community, and this power should be exercised as much as possible in a manner that respects every individual's right to equality.

Applying Vilification Protections to Other Protected Attributes

There is a lack of comprehensive protection for vilification in the existing anti-discrimination framework, which is limited to select attributes. Section 18C of the RDA provides this protection and allows for a complex balancing act between freedom of speech and freedom from vilification.

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[143] For further detail see Public Interest Advocacy Centre, Submission to AHRC Free & Equal Anti-Discrimination Law Reform Discussion Paper (8 November 2019) online < Microsoft Word - 19.11.08 PIAC Submission Free and Equal Anti-Discrimination Law Reform.docx> 4-5.

[144] Adriana Orifici, Dominique Allen, 'Expecting More: Rethinking the Rights and Protections Available to Pregnant Workers under the Fair Work Act 2009 (Cth)' 50(4) *Federal Law Review* 504 (2022) 525.

[145] The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) outlines that this section "recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason".

We submit that consideration should be given to extending the protection provided with respect to racial vilification to all other protected attributes, including at a minimum, sex, disability, sexual orientation, gender identity and sex characteristics (intersex status). Recent public anti-trans and anti-LGBTIQ+ rhetoric highlights the imperative of expanding vilification protections more broadly.[146]

Equal Access Approach to Costs

A major barrier to justice for people who have experienced discrimination and sexual harassment is the risk of having to pay the legal costs of the respondent or their employer should they lose. Equally, they must be able to recover their own legal costs if they win to ensure that they are not left out of pocket, and that legal representation is financially viable and accessible. These risks stop people from pursuing their rights. This is especially true for diverse and disproportionately affected communities, for people who are low paid and in insecure work, and when people are up against an organisation with large resources such as many employers.

An equal access costs model for all discrimination matters addresses this barrier and mitigates this risk. This would allow people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law.

In summary, an equal access costs model would provide that:

a. An applicant with a claim under federal discrimination laws will not be liable for adverse costs except where:
    i. the applicant instituted the proceedings vexatiously or without reasonable cause; or
    ii. the applicant's unreasonable conduct caused the other party to incur the costs. The fact that an offer of settlement is put by a respondent and then the applicant loses or succeeds but is awarded less than the offer of settlement, does not entitle the respondent to costs.
b. Where an applicant is successful, the respondent is liable to pay the applicant's costs.[147]

Trauma-Informed Systems and Processes

While financial and practical outcomes are significant, we hear from our clients that it is also important that their experience is acknowledged, they are listened to and believed, the respondent is held accountable, and the behaviour stops and does not happen to anyone else. This practice experience aligns strongly with existing research about what people who have experienced sexual harassment, discrimination and other forms of harm seek from justice processes.[148]

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[146] See more at: Fair and accessible anti-vilification protections for all Victorians: Submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections [online].
[147] National Legal Aid, Submission to Commonwealth Attorney Generals Department, *Review into an appropriate cost model for Commonwealth anti-discrimination laws* (14 April 2023) 3 https://www.nationallegalaid.org/resources/nla-submissions/
[148] For a good summary of this research, see Centre for Innovative Justice, *Submission to the Victorian Ministerial Taskforce on Workplace Sexual Harassment* (August 2021, online) 3.

Meaningful reform to federal discrimination law must consider how the process for discrimination complaints can better achieve these outcomes and be more trauma-informed and tailored to a broader range of justice needs. This could include consideration of how restorative justice approaches or principles could be more effectively applied by workplaces, human rights commissions, and the federal courts.[149] An intermediate adjudicative process that bridges the gap between voluntary conciliation and federal court litigation should also be considered, as recommended by the AHRC.[150]

Better Prevention and Enforcement

In addition to the legislative improvements outlined above, Australia's discrimination law framework requires strong and well-resourced enforcement architecture to be effective and a positive duty to eliminate discrimination on the grounds of all protected attributes.

The AHRC has jurisdiction to consider complaints based on human rights instruments scheduled to, or declared for the purposes of, the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). However, as the AHRC notes 'the Commission's ability to resolve human rights complaints can be very limited'.[151] This is because many of Australia's international human rights instruments have not been introduced into domestic law.

The AHRC can inquire into and attempt to conciliate complaints of unlawful discrimination,[152] and other breaches of human rights,[153] and can hold public inquiries and undertake research and education to promote human rights. It can also make recommendations to the government regarding human rights,[154] and Australia's compliance with its international human rights obligations.[155] However, the AHRC has a limited ability to resolve human rights complaints unless they relate to unlawful discrimination. If conciliation fails in matters involving rights other than unlawful discrimination, the aggrieved person cannot bring court proceedings because those human rights have not been enacted into Australia's domestic laws. Instead, if the AHRC finds a breach of human rights it can report it and make recommendations to the Attorney-General.[156] These recommendations are neither binding or enforceable and the government is not required to respond. NLA considers that this process, and the AHRC's lack of power to resolve human rights complaints, is clearly inadequate. Enacting a federal Human Rights Act, which would ratify human rights into domestic law, would significantly strengthen the AHRC's effectiveness.

If a federal Human Rights Act is not implemented, we support permitting complaints made under the five instruments provided for in Schedules 1-5 of the AHRC Act, to also be enforceable in the Federal Court and Federal Circuit and Family Court of Australia.

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[149] See for example, Centre for Innovative Justice, Open Circle 'What is Restorative Justice' (accessed 7 June 2023) <https://cij.org.au/opencircle/what-is-restorative-justice/>

[150] Australian Human Rights Commission, *Inquiry into Australia's Human Rights Framework: Submission to the Parliamentary Joint Committee on Human Rights* (May 2023) 102.

[151] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 58.

[152] *Australian Human Rights Commission Act 1986* (Cth) ss 11(a) and (aa). Such claims arise under Australia's anti-discrimination legislation, which includes the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

[153] *Australian Human Rights Commission Act 1986* (Cth) s 11(f), sch 1-5.

[154] Ibid s 11(1)(j).

[155] Ibid s 11(1)(k).

[156] Ibid s 20A.

The AHRC should also be adequately resourced to resume the pre-conciliation process outlined above, of putting a series of questions to the respondent prior to a conciliation to narrow the issues in dispute and best prepare the parties to reach settlement.

In general, the AHRC must be resourced to perform the functions required of it under statute, and to retain its accreditation as compliant with the minimum standards of competence and independence required of national human rights institutions under the international Paris Principles.[157]

AHRC Enforcement Mechanisms and Positive Duty

We strongly support broadening of the AHRC's functions to enable voluntary audits and inquiries into systemic issues. This must be accompanied by expanding the introduction of a positive duty beyond the SDA, so that duty holders must proactively take measures to eliminate unlawful discrimination and harassment and advance equality in relation to all protected attributes.

Accordingly, anti-discrimination laws should be amended to:

a. Expand the positive duty beyond the SDA to eliminate, as far as possible, discrimination in relation to all protected attributes.

b. Supplement this broad duty with specific procedural duties to clarify what is required by the positive duty and facilitate enforcement.

c. Empower the AHRC to make guidelines for compliance which must be taken into account by Courts when applying the law and must be reviewed regularly.

d. Enable the positive duty to be enforced by the AHRC with a suite of powers, including:

    i. Ensuring the AHRC has the power to investigate of their own motion acts or practices that may be inconsistent with anti-discrimination law, without additional procedural requirements (such as those present under s 127 of the EOA).

    ii. Enable the AHRC to enforce compliance with anti-discrimination law following an investigation, including entering into enforceable undertakings with respondents and employers and issuing compliance notices.

In addition, we support the recommendations made by the Public Interest Advocacy Centre that there needs to be a reporting framework to monitor compliance with discrimination laws by the insurance industry.[158]

Increased Funding of the AHRC

Enforcement powers and any positive duties must be accompanied by increased resourcing to the AHRC to make these powers and responsibilities meaningful and increase its ability to undertake its public education and enquiries functions.

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[157] *Principles Relating to the Status of National Institutions* ('Paris Principles'), GA Res 48/134 (20 December 1993).
[158] Public Interest Advocacy Centre, Submission to AHRC Free & Equal Anti-Discrimination Law Reform Discussion Paper (8 November 2019) online <Microsoft Word - 19.11.08 PIAC Submission Free and Equal Anti-Discrimination Law Reform.docx> 5-8.

The AHRC must also be adequately funded to undertake its other functions. In particular, increased funding is required to ensure that the AHRC's dispute resolution functions can be performed in manner that is both timely and trauma informed.

Recommendation 15: The Australian Human Rights Commission be adequately resourced to perform the functions required of it under statute and to remain compliant with international minimum standards for national human rights institutions.

Conclusion

Thank you for the opportunity to provide a submission on this Bill.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,

John Boersig
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