



Australian  
Human Rights  
Commission

# Inquiry into Australia's Human Rights Framework

Australian Human Rights Commission

Submission to the Parliamentary Joint Committee on Human Rights

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# **1 Executive Summary: A new National Human Rights Framework for Australia**

## **1.1 How well do we protect human rights in Australia?**

### **(a) Australia's Human Rights Framework 2010**

In April 2010, the Australian Government introduced Australia's Human Rights Framework (2010 Framework). This document responded to the 2009 report of the National Human Rights Consultation Committee, chaired by Father Frank Brennan SJ AO (Brennan Report), that recommended that the Government

develop a whole-of-government framework for ensuring that human rights – based either on Australia's international obligations or on a federal Human Rights Act, or both – are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally.<sup>1</sup>

The Australian Government chose not to pursue a Human Rights Act as part of the framework at that time, deferring consideration of introducing a Human Rights Act to a review of the operation of the 2010 Framework.

In reviewing the progress made under the Framework, the Commission has given consideration to the commitments made by the Government across three cycles of the Universal Periodic Review (UPR) process that focused on systemic improvements to the national approach to human rights implementation.

The Australian Human Rights Commission (Commission) considers that the 2010 Framework did not meet its objectives. The failure of the Framework was due to lack of implementation and lack of commitment from the Government at the time. A similar lack of progress has been made on implementing UPR commitments, where promising initiatives have not been sustained.

Many of the measures committed to under the 2010 Framework were not completed, or lapsed during or soon after the Framework ceased to exist. The Framework was also insubstantial in that it lacked:

- mechanisms to hold the Government to account such as self-reporting of progress by the Government or assessments of quality of actions by an independent agency
- regular independent monitoring
- engagement and buy-in from state and territory governments which made it vulnerable to being rendered inoperable without discussion with other governments.

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Actions under the 2010 Framework were funded only to a very limited degree. For example, the National Human Rights Action Plan had no funding attached to it, which limited the ability to achieve outcomes or even buy-in from federal government departments and state and territory governments.

The 2010 Framework and subsequent UPR voluntary pledges included actions that would adopt a more systemic approach to considering and addressing human rights at the national level. These commitments were aimed at addressing known and accepted deficiencies in the national system of protecting human rights.

These mechanisms have mostly fallen into disuse, with public-facing information being out of date and not maintained on a regular basis.

**(b) Current protections of human rights at the national level are inadequate**

Since the lapsing of the 2010 Framework, governments have **not** put into place adequate, alternative steps to protect human rights. The lapsing of the Framework constitutes a regression in the systems for protecting human rights at the national level.

In particular, since the 2010 Framework lapsed, there have not been:

- adequate processes for national priority setting on human rights issues such as through a national action plan or alternative measures
- regular consideration of reforms required to better protect human rights such as through the consolidation of discrimination laws and audit of existing laws
- appropriate investment and information to build human rights awareness – human rights education for public servants and the community
- rigorous, transparent accountability mechanisms for tracking progress on human rights – developing and implementing a national action plan; Standing National Mechanism; tabling of treaty body concluding observations in Parliament; rights tracking / implementation status of recommendations
- regular public engagement on human rights issues – NGO engagement; commitments to review reservations to treaties.

In the 2019 [Issues Paper](#) for the Free and Equal Project, the Commission described the overall status of the protection of human rights at the federal level at that time as follows:

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In short, we have **an implementation gap** between the human rights standards that Australian governments have committed to uphold over many years, and the actual protections in our laws, policies and processes of government.

Without comprehensive legal protection, educational and other measures to promote understanding of human rights and processes for monitoring compliance with human rights, our government is not fully meeting its obligations to make sure that the human rights of all Australians are respected, protected and fulfilled.<sup>2</sup>

In the Commission's report to the UN Human Rights Council for Australia's 3<sup>rd</sup> Universal Periodic Review in 2021, the Commission also stated:

Australia does not take a proactive approach to human rights. There are limited national targets and commitments to address known human rights challenges, and limited accountability for outcomes.<sup>3</sup>

The Commission stands by this assessment of the current approach to human rights at the federal level.

Despite the failures of the 2010 Framework, the Commission supports the establishment of a new National Human Rights Framework to ensure human rights are appropriately advanced at the national level. The details of a proposed framework are expanded in the final section of this submission.

### **(c) The Commission's Free and Equal project**

Since 2019, the Commission has conducted the project *Free and Equal: An Australian conversation on human rights* (Free and Equal). This project has sought to 'identify current limitations in the promotion and protection of human rights at the national level' and 'identify the key principles and elements of a human rights reform agenda to modernise our system of human rights protection'.

In the Terms of Reference for Free and Equal, the Commission identified the desirability of Australia having processes to:

- set national priorities on human rights
- educate the community about human rights
- incorporate human rights standards into domestic law, policy and practice
- consider the observations of human rights treaty body committees and UN special procedures about compliance with our human rights obligations.

Extensive consultation has been undertaken for this project, based on an Issues Paper and three Discussion Papers that were released in 2019. The project has attracted strong engagement from organisations, individuals, and public bodies

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at every stage. For example, the initial Discussion Papers prompted over 160 submissions most of which are published on the Commission's website. A total of more than 1,000 stakeholders were engaged throughout the development of the three discussion papers, inclusive of submissions, consultations, roundtables, and technical workshops with stakeholders from legal, business, NGO and public sectors, academia, and parliamentarians.

The level of public and stakeholder engagement with *Free and Equal* ensures that the recommendations developed are principled, pragmatic, evidence-based and grounded in a level of consensus built across the relevant sectors. The Commission anticipates strong community and stakeholder support for the final recommendations as a result of this process.

The project will culminate with the release of a Final Report in late 2023, coinciding with the 75<sup>th</sup> anniversary of the adoption by the United Nations (UN) of the Universal Declaration of Human Rights. The Final Report will reflect the Commission's contributions to the PJCHR Inquiry, collate the project findings and set out in detail the Commission's model for a future Human Rights Framework.

The Commission has published four significant papers that will provide guidance for the PJCHR's inquiry, namely:

- Position Paper on a federal Human Rights Act, *Free and Equal: A Human Rights Act for Australia* (March 2023)
- Position Paper on federal discrimination law reform, *Free and Equal: A reform agenda for federal discrimination laws* (December 2021)
- Report to the UN Human Rights Council for Australia's 3<sup>rd</sup> Universal Periodic Review (2020)
- [Workshop Report](#) on ensuring effective national accountability for human rights (October 2019).
- This submission also notes the broad range of human rights issues that the Commission has considered since the introduction of the 2010 Framework and that relate to a national approach to human rights protection.

**(d) Adequacy of response to the consideration of human rights issues in Australia by United Nations mechanisms**

The Commission regularly engages in the periodic reviews of Australia's human rights performance conducted by the UN treaty body committees.

Treaty body reviews are an important 'state of the nation' review of Australia's human rights performance in relation to specific human rights standards

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included in each treaty under review. They contribute to Australia's reputation among the community of nations and in its multilateral and bilateral relations.

The Commission has identified the following concerns about the way the findings of treaty bodies are considered by the Government:

- The absence of domestic mechanisms to implement and monitor Australia's human rights performance places disproportionate focus on these international processes.
- Often, issues raised by the treaty committees are not fully considered by governments in Australia. Parliament is not routinely informed of the outcomes of these processes. There is also no formal response required to concluding observations of the committees and there are limited national mechanisms to advance the consideration of the issues raised in a timely manner.
- This can result in the unsatisfactory situation where reviews conducted 5–6 years apart identify that previously raised concerns are unaddressed and continue to impair the human rights of people in Australia. For example, the Committee on the Rights of Persons with Disabilities has regularly expressed concerns about Australia's lack of progress in prohibiting the sterilisation of girls with disabilities, and the continued indefinite detention of persons with disability (particularly Indigenous persons with disability) who have been found unfit to plead.
- The Commission has a practice of providing recommendations to the Government on how to implement the recommendations of the treaty committees especially through its reporting to Parliament by the Aboriginal and Torres Strait Islander Social Justice Commissioner and National Children's Commissioner. These recommendations have also not been responded to or considered in an in-depth manner.

Individuals who claim that they have suffered a violation of their rights may, after exhausting domestic pathways to complain, also submit complaints (called 'individual communications') to the relevant treaty body where Australia has accepted the complaints jurisdiction. Australia is a party to the individual communications mechanism in relation to five of the human rights treaties.

Through the communications mechanism, committees can issue decisions determining whether there has been a breach of the treaty or not, and recommend remedies, including compensation to the aggrieved party and recommend changes to laws or policies to address the violation. While these recommendations are not legally binding, countries are under an obligation to give them considerable weight in deciding how they should act.



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In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction. However, the decisions of such bodies can, and have been, ignored.

Remedy Australia reports that Australia has met its obligations to remedy human rights breaches in only 12 per cent of individual communications decided against Australia by the Human Rights Committee.<sup>4</sup>

Where there is a finding by one of the human rights committees in response to individual communications, the Australian Government publishes responses on the website of the Attorney-General's Department. Government responses are also published in the human rights database of the Office of the High Commissioner for Human Rights.

This minimal approach limits awareness of the Government's approach on important human rights matters and does not ensure sufficient scrutiny or transparency of their response.

#### **(e) The role of existing thematic national frameworks**

While Australia does not have a national action plan for human rights, it does have multiple national action plans and national frameworks on a range of thematic issues. For example, national frameworks on matters such as the protection of children, family violence, closing the gap, and early childhood.

These frameworks are inter-governmental and involve commitments from all levels of government in Australia. They often have an overarching framework that is put into place for between 5–10 years, and then more frequently refreshed action plans that sit underneath these.

These frameworks are important as they:

- articulate the joint commitment of all Australian governments to address priority issues in the community, and elevate these issues as matters of importance
- regularly involve commitments to work to improve data collection that is national and comparable
- enjoy significant 'ownership' and invest responsibility for outcomes in particular Ministers and departments
- facilitate the basis for inter-governmental cooperation and funding on issues.

The Commission has noted some concerns about these frameworks are that they:

- do not adopt a human rights-based approach (such as through setting measurable targets to be achieved over the life of a framework) or explicitly reference relevant human rights standards
- are under-funded, making it difficult for them to achieve their stated purpose
- struggle to meet the commitment to co-design and ensure the full participation of affected groups
- struggle to address the intersectional nature of rights, and tend to be siloed to address the specific thematic issue that is the focus of the framework, without drawing connections with other issues that are integrally linked.

Existing national frameworks would be enhanced and complemented by a new National Human Rights Framework.

The Commission is currently funded to develop two potential new national frameworks – a national Anti-Racism Framework and a National Framework for Action on First Nations Gender Justice and Equality. The Commission has also advocated for a national implementation plan for the Convention on the Rights of the Child and the UN Declaration on the Rights of Indigenous Peoples, and a national action plan on business and human rights.

## **1.2 Looking forward: a new National Human Rights Framework for Australia**

The Commission supports the establishment of a new National Human Rights Framework. Such a framework is necessary to ensure that Australia has processes to:

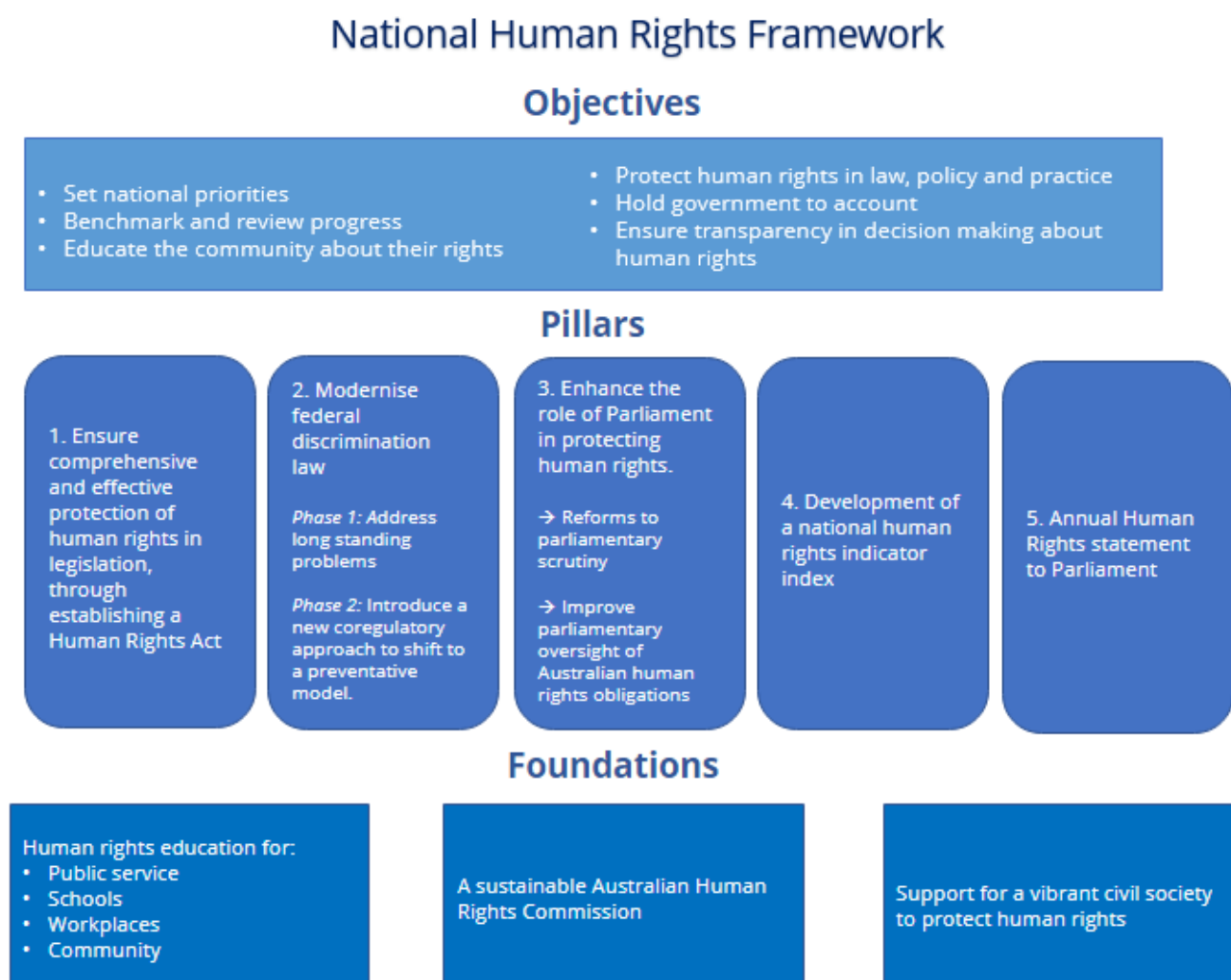
- set national priorities on human rights
- educate the community about human rights
- incorporate human rights standards into domestic law, policy and practice
- ensure transparency in relation to the actions taken to consider and implement the recommendations of human rights treaty body committees and UN special procedures about compliance with our human rights obligations
- ensure the engagement of people whose human rights are affected in the design of policy, programs and laws
- hold Government to account for the human rights impacts of its actions on people in Australia.

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The Commission encourages the Committee to explore with witnesses and submitters to the Inquiry the key features of a future National Human Rights Framework. We encourage the Committee to explore the key elements required to ensure that a future framework is robust and achieves outcomes that improve the protection of human rights in Australia.

The Commission makes 10 recommendations in this submission setting out the key features of a proposed new National Human Rights Framework. These are summarised in the table below.



The Commission's proposed National Human Rights Framework has five pillars as follows:

1. Comprehensive and effective protection of human rights in legislation through the introduction of a national Human Rights Act.
2. Federal discrimination laws to be modernised to ensure their effectiveness and to shift the focus from a reactive model that responds to

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discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place.

3. The role of Parliament in protecting human rights is strengthened, through reform to the processes for parliamentary scrutiny and the introduction of new oversight mechanisms for Australia's human rights obligations.
4. A national human rights indicator index is introduced to independently measure progress on human rights over time.
5. An annual statement to Parliament on human rights priorities is made by the Government.

The new National Human Rights Framework would also have the following foundations:

- A national human rights education program.
- A sustainable Australian Human Rights Commission.
- Support for vibrant and robust civil society organisations to protect human rights.

This suite of measures would meet the human rights obligations of the Government to respect, protect and fulfil human rights. Such a multi-dimensional approach is required for the Government to expansively and proactively meet its human rights obligations.



## RESPECT

### Own actions do not breach human rights

Cohesive legal protections for human rights through a domestic human rights act with remedies available

Positive duty in human rights act to prevent breaches, along with procedural duties to enhance participation and access to justice

Cohesive discrimination law regime through holistic discrimination law reform

Positive duty across all discrimination acts to prevent discrimination in public life

Strengthened Parliamentary scrutiny regime



## PROTECT

### Action taken by government to prevent others from breaching human rights and obligations on people and institutions across the community to respect human rights

Early consideration of human rights impacts in policy, law and decision-making

Private contractors providing public services on behalf of government bound by Human Rights Act - other private businesses may voluntarily opt-in to human rights obligations.

Positive duty on businesses to prevent discrimination

Education measures

Stronger regulatory powers for the AHRC to increase compliance with human rights and discrimination standards



## FULFIL

### Positive actions taken to advance human rights

Overarching human rights framework with long- and short-term priorities, with sufficient resourcing and in-built accountability mechanisms

Indicator framework – including tracking progressive realisation of rights

Domestic reporting requirements under the Human Rights Act, including by the AHRC

Processes to ensure better responsiveness to international mechanisms

Strengthening the role of civil society in advocating and educating on human rights

Strengthening institutional accountability and the development of a human rights culture across government

### (a) A national Human Rights Act for Australia

The centrepiece of the Commission's proposed National Human Rights Framework is a national Human Rights Act.

Throughout the Free and Equal project, the Commission has identified the importance of improving the upstream consideration of human rights by the Parliament and Government. This means considering human rights from the outset of policy development, service design and decision making. This would prevent the violation of human rights from occurring in the first place, and ensure the engagement of the community in matters that directly affect them.

Australia has taken many approaches to the protection of human rights over time, but structural weaknesses remain in how human rights are treated at the federal level. This has been particularly evident during the COVID-19 pandemic and with significant policy failures such as the Robodebt scheme.

The missing element is a national Human Rights Act. It would provide a level of accountability that would elevate the consideration of human rights, by explicitly

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naming Australia's human rights obligations in a domestic legal framework and by placing positive duties on public officials to fully consider human rights, providing leverage to improve human rights outcomes and to intervene early to prevent human rights breaches.

Importantly, a Human Rights Act would ensure that there are consequences for failing to appropriately consider and protect human rights. By ensuring this, it gives meaning and creates benefit to ensure the upstream consideration of human rights.

The Commission's [Position Paper](#) on this issue, released on 7 March 2023, sets out a model for a national Human Rights Act. The Commission commends this model to the Committee, noting the extensive research and consultation undertaken in its development and its calibration to address the specific legal context at the federal level in Australia.

The model set out in the Position Paper builds on the existing Human Rights Act models, and reviews of them, in the ACT, Victoria and Queensland. These Acts have existed in the ACT and Victoria since 2004 and 2008 respectively. They have clearly enhanced the protection of human rights and the quality of decision making by government more generally in those jurisdictions in that time.

The Commission's Position Paper sets out compelling reasoning for why a Human Rights Act should be given serious consideration, and provides a clear framework for a Bill that could be drafted.

**The Commission is strongly of the view that the next step in the development of a Human Rights Act is to develop a Draft Exposure Bill based on the Commission's model.**

Debates about Human Rights Acts have tended to get bogged down in ideological issues, with people 'shadow boxing' with theoretical concerns about such laws. The issues raised often bear little resemblance to what is proposed in model Human Rights Acts. This is unhelpful and usually far removed from the reality of what a Human Rights Act would contain and what it would achieve in the domains of community understanding, policy development, legislative drafting and decision-making by public authorities.

Grounding the next stage of consideration of a Human Rights Act in an Exposure Draft Bill will significantly lift the quality of debate and engagement – including within the forum of Parliament – and ensure that a Human Rights Act is tailored to the federal legal system in which it would operate.

**(b) Modernising federal discrimination laws**

The reform of federal discrimination laws is long overdue. The failure to reform these laws continues to create inefficiencies for business, impede access to justice, and means that there are ineffective protections against discrimination at the national level.

Comprehensive reform proposals to improve federal discrimination laws have sat largely unaddressed for nearly 20 years, for example, with the recommendations of the Senate Legal and Constitutional Committee's reforms of the Sex Discrimination Act 1984 (Cth) (Sex Discrimination Act) in 2008<sup>5</sup> and earlier reform recommendations for the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act).<sup>6</sup>

Multiple reports and reviews have identified what needs to be done to modernise federal discrimination laws. The most comprehensive and recent of these is the Commission's 2021 Position Paper.<sup>7</sup>

There are currently some discrimination law reform matters under consideration by the Australian Government, including:

- The Australian Law Reform Commission's inquiry on religious exemptions under the Sex Discrimination Act – to conclude in December 2023.
- Consideration of a Religious Discrimination Act.
- The Attorney-General's Department's review of costs in federal anti-discrimination laws – in response to the recommendation in the Respect@Work report and the Free and Equal Position Paper.
- The new positive duty to prevent sexual harassment, and the Commission's functions to ensure compliance, in implementation of recommendations in the Commission's Respect@Work report, is due to be reviewed after it has been in operation for 2 years (in 2025). In its Position Paper on discrimination law reform, the Commission recommends that this positive duty also apply across all other protected attributes in federal discrimination law, and that there be an expanded co-regulatory approach to its operation.

**Accordingly, the Commission encourages the PJCHR to consider proposing including a staged approach to federal discrimination law** into a new human rights framework that can:

- address these immediate priorities that are already underway (to be completed in year 1 of the new framework)
- address urgent technical fixes to federal discrimination laws that would improve their operation (such as addressing the impact of decisions in

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*Sklavos v Australian College of Dermatologists* on the scope of protections under the Disability Discrimination Act) (to be completed in year 1 of the new framework)

- commit to undertaking a broader reform of federal discrimination laws to shift the model and introduce new co-regulatory approaches once the positive duty under the Sex Discrimination Act has been reviewed (to be completed in years 2 and 3 of the new framework).

**(c) Strengthening the role of Parliament in protecting human rights**

**(i) Parliamentary scrutiny and the PJCHR**

The Commission's Position Paper on a national Human Rights Act includes a review of the effectiveness of the parliamentary scrutiny of human rights at the federal level, with a particular emphasis on the role of the Parliamentary Joint Committee on Human Rights (PJCHR).

The Commission considers that the PJCHR has established itself as a valuable scrutiny and accountability mechanism for human rights at the federal level. The Position Paper makes 8 recommendations to further enhance the effectiveness of the PJCHR.

The Commission notes that the work of the PJCHR is inherently constrained by the limited legal protection of human rights in Australian law. The single biggest change that can improve the effectiveness of the PJCHR's is for its work to occur in conjunction with a Human Rights Act. This would provide:

- stronger accountability measures for public servants to fully consider human rights (in accordance with the proposed positive duty)
- ensure that laws, policies and programs are developed with the full engagement of affected communities (in accordance with the proposed participation duty and the role of the PJCHR to assess the adequacy of this participation)
- ensure there is domestic guidance on human rights standards and obligations over time that can assist in the quality of consideration of human rights issues
- increase the weight that public servants and parliamentarians attach to human rights considerations, due to the possibility of people whose rights are restricted having a cause of action to have those impacts addressed.

**These proposed reforms to the parliamentary review of human rights are complementary to the need for a Human Rights Act. They are not a**



**substitute for a Human Rights Act. Likewise, a Human Rights Act is not a substitute for these reforms being undertaken.**

**(ii) Treaty body processes**

The Commission has concerns about the limited engagement that occurs in relation to the concluding observations of human rights treaty committees and in relation to individual communications that have been considered by these committees.

*Concluding observations*

Under each human rights treaty, the Australian Government is obliged to promote awareness of the treaty and disseminate the outcomes of periodic reviews by the human rights treaty committees.

It is unacceptable that the Australian Government does not routinely table concluding observations made by UN treaty committees in Parliament, thereby bringing directly to the attention of the Parliament important scrutiny of the country's performance on human rights matters.

This can be remedied simply by reinstating the requirement that the Attorney-General table concluding observations in both houses of Parliament.

Concluding observations will often relate to matters that are complex, that involve longstanding challenges, cross government departments and for which responsibility may exist at different levels of government.

The Commission accepts that responding to concluding observations can be a complex task. However, this complexity is not a reason not to respond to the observations at all. The Commission therefore considers that the Australian Government should maintain publicly available and up to date information about the concluding observations made by each UN treaty committee and their status. This would include:

- the Department at which level of Government is responsible for each recommendation
- proposed actions to implement recommendations
- timeframes and measurable outcomes for implementation and responses.

Such a database would require the above elements to ensure it provides robust, measurable information for which Government can be accountable. To date, public information has tended to indicate who in Government is responsible for

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implementation of recommendations but has not set out proposed actions, timeframes and outcomes.

*Individual communications*

Likewise, there is presently inadequate accountability for responding to individual communications that arise from the human rights treaty system. Responses to communications are published on the website of the Attorney-General's Department, but otherwise not disseminated.

It is critical to recall that the only circumstances in which people can take individual communications to the UN human rights committees is where there are no domestically available processes to remedy human rights breaches. It is intended as a process of last resort.

It can be anticipated that fewer communications would progress to UN committees if Australia had domestic processes to consider human rights breaches in the first place.

It is unacceptable that the Australian Government does not routinely inform the Parliament of the outcomes of individual communications.

Mandating parliamentary oversight of individual communications should be considered. The Commission proposes that this take the form of:

- requiring the Attorney-General to table information about individual communications in Parliament on an annual basis, along with the Australian Government's response to these
- empowering the Parliamentary Joint Committee on Human Rights to review the adequacy of the Australian Government's response to individual communications and / or concluding observations from time to time.

*Reservations and interpretive declarations*

The Commission also notes that the Australian Government has committed to review existing reservations and interpretive declarations to human rights treaties at various times, such as through the acceptance of UPR recommendations.

It is unsatisfactory that there has been no formalised approach to reviewing reservations and interpretive declarations on a periodic basis to ensure their relevance to modern Australian life.

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A reservation or interpretive declaration has the effect of removing or limiting the obligation on all Australian governments to comply with human rights. This can constrain protections by removing the applicability of the relevant human rights when developing laws, policy and practice. It sends a message to the Australian community and internationally that Australia does not intend to fully meet that human rights standard.

The Australian Government should ultimately strive to ensure that it can meet all human rights standards to the fullest extent, and be open to scrutiny for how it is seeking to do so. Reservations and interpretive declarations work against this outcome and should only be maintained for the shortest time necessary and in the narrowest form possible.

The Commission therefore considers it appropriate that an inquiry be referred to the Joint Standing Committee on Treaties to undertake a review of all existing reservations and interpretive declarations as an action under a new national framework on human rights.

**(d) A national human rights indicator index that can measure progress on human rights over time**

A key question for the Commission in this Inquiry is whether to recommend that the Australian Government commit to a new National Human Rights Action Plan.

The Commission has concerns about the National Human Rights Action Plan that was introduced under the 2010 Framework and earlier national action plans.

For this reason, the Commission considers that a different approach should be taken by the Australian Government to that adopted in the 2010 Framework, with a stronger emphasis on indicators and robust monitoring processes.

The Commission recommends that the Australian Government commit to the development of a national human rights indicator index. Such an index should be developed by the Commission as an independent statutory agency, in conjunction with data and social policy experts.

The Commission considers that indicators should be adopted under a new National Human Rights Framework that can meet the following objectives:

- enable the measurement of human rights in an objective manner, and over time
- ensure independent monitoring to provide robust analysis of the progress or otherwise on human rights issues

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- provide accessible avenues for the community to engagement in policy and program design
- ensure design is participatory, to reflect the key human rights issues as identified by the community
- reflect an intersectional, 'whole of life' view of human rights that focuses on building people's capability and ensuring that they have an equal chance to thrive
- provide a basis for the Australian Government to periodically identify priority actions for human rights protection and advancement, knowing that there will be data to hold them to account for progress over time.

The Commission considers that the *Is Britain Fairer?* model, administered by the Equality and Human Rights Commission of the United Kingdom (UK Commission) is a constructive example of an indicator index.<sup>8</sup>

This national framework is required under section 12 of the *Equality Act 2006* (UK), which provides for the UK Commission to monitor social outcomes from an equality and human rights perspective, by developing indicators and reporting on progress. Reports are traditionally done on a 3-year cycle.

The development of an indicator index would be a significant undertaking, involving specialist research and consultation across all Australian governments and the community. The Commission considers that the index would take approximately 3–4 years to fully be developed.

**(e) An annual statement to Parliament on human rights**

A national human rights indicator index would provide the evidence base for the Australian Government to periodically identify priority actions for human rights protection and advancement at the national level. But it will not provide the basis on which the Australian Government commits to these priority actions.

Accordingly, the Commission recommends that the Australian Government also introduce a new mechanism by which it announces key human rights priorities on an annual basis through a statement to Parliament.

Such a statement would provide a basis for the Australian Government to identify its priorities both within Australia and internationally for the protection of human rights, and to identify and celebrate the progress that it has made over the course of each year.

**The combination of a national human rights indicator index and an annual statement to Parliament committing to key human rights priorities on**

**would significantly shift the current approach to human rights at the federal level.** It would also play a significant role in educating the community and building awareness of human rights, and form a basis for community and parliamentary debate on human rights.

**(f) Human rights education**

Human rights education is critical to building awareness and understanding of human rights. The 2010 Framework included mandatory human rights training for all federal public servants, with the Commission also hosting a network of human rights officers and regular awareness raising and networking events.

For public servants, such training is essential to support them in meeting their obligations to develop Statements of Compatibility for new legislation and legislative instruments, as well as to adopt human rights-based approaches in policy design and implementation.

For the community generally, greater knowledge and awareness of human rights empowers people to stand up for their own rights, hold Government and duty bearers to account and to better understand their responsibilities to respect the rights of others.

For school students, at the primary and secondary levels, awareness contributes to engaged citizenship and the development of respectful behaviours.

For the business community and in workplace settings, awareness can prevent workplace discrimination and harassment, ensure suitable internal response mechanisms to complaints of discrimination or harassment, and build employees' confidence to stand up for their rights and respect the rights of others. In an interconnected global market, awareness can lead to responsible business practices which ensure Australians are not inadvertently contributing to human rights violations and abuses in other countries.

**Human rights education will be vital to support the implementation of a Human Rights Act and to support compliance with, and understanding of, updated discrimination laws.**

**(g) A sustainable Australian Human Rights Commission**

The Commission is a longstanding, small independent statutory agency, established in 1981 and put on a permanent footing in 1986. It regularly faces funding challenges. Key challenges for the Commission have included:

- Funding for statutory Commissioners not being sufficient to appropriately fulfill their mandates.

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- Funding for complaint handling under federal discrimination laws and the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) not keeping pace with public demand, with the result that the Commission's complaint-handling service operates with a significant backlog.
- Efficiency dividends and budget savings disproportionately impacting the Commission, as a small agency, over time.
- Difficulties in achieving new budget funding on a regular basis, other than for specified project work. This is due in part to the small size of the Commission, meaning budget proposals are too small to be considered through regular budget processes. However, **the provision of funding tied to particular activities has the potential to limit the Commission's ability to independently and strategically set its key activities**, especially when it becomes dependent on new funding to have sufficient resources to operate.

The Commission considers that it is currently facing the following ongoing funding challenges:

- The current core funding for the Commission is well below the level that the Commission has benchmarked as necessary to fully discharge its statutory functions.
- This shortfall of funding is assessed against the Commission's functions and roles as they currently exist under its operating legislation. It does not include estimated funding for new statutory functions or activities as proposed in this submission.
- There continues to be a necessity to rely on externally-funded partnerships to fully implement comprehensive work programs for Commissioners.

**A sustainable Commission is critical to deliver on the proposed approach to a new National Human Rights Framework, and to achieve significant improvements in the protection of human rights in Australia.**

**(h) Support for vibrant and robust civil society organisations to protect human rights**

Everyone in the community has a role to play in achieving respect for human rights. The Terms of Reference for the Free and Equal project note the importance of having in place measures that ensure:

- the community understands human rights and is able to protect them (for themselves and others)

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- communities are resilient and a protective factor against human rights violations
- robust institutions exist to promote and protect human rights
- government and the community can work together to fully realise human rights – understanding the respective role of each other.

The Commission considers that consideration should be given by Government to measures that will support a vibrant and robust civil society engagement with human rights issues.

The Commission supports measures that related to such engagement in the 2010 Framework, namely:

- processes for regular dialogue between the Government and NGOs on human rights – such as through human rights forums
- funding support for NGOs to conduct activities relating to human rights education and the promotion of human rights.

This extends to practices that have been supported by the Government to variable degrees since 2010, including:

- support for the independent participation of NGOs in the UN human rights mechanisms
- support for disability peoples' organisations and Indigenous peoples' organisations in UN engagement through dedicated participation programs.

### **1.3 Recommendations**

The Commission has made ten recommendations in this submission to guide the development of a new Framework.

**Recommendation 1:** That the Australian Government develop a new National Human Rights Framework. (See further: section 5.1, page 75).

**Recommendation 2:** That the Australian Government introduce a national Human Rights Act. To advance this, the Commission recommends that the Australian Government develop a Draft Exposure Bill based on the Commission's Free and Equal model. (See further: section 5.2, page 79).

**Recommendation 3:** That the Australian Government modernise federal discrimination laws to ensure their effectiveness and shift the focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place.

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Consideration should be given to undertaking these reforms in two stages:

**Stage one:** addressing immediate priorities and fixing longstanding problems in the operation of federal discrimination law (year 1)

**Stage two:** introducing a new co-regulatory model that broadens and expands on the positive duty under the Sex Discrimination Act (years 2–3). (See further: section 5.2, page 81).

**Recommendation 4:** That the Australian Government strengthen the parliamentary scrutiny of human rights, as set out in the Commission's Free and Equal Position Paper (2023). (See further: section 5.3, page 83).

**Recommendation 5:** That parliamentary oversight and awareness of Australia's international human rights obligations be enhanced by:

- Reintroducing the requirement that the Attorney-General table in Parliament concluding observations of human rights treaty committees in a timely manner, as well as to make publicly available (and update annually) the Government's response to the recommendations contained in the concluding observations.
- Requiring the Attorney-General to table in Parliament an annual statement indicating all individual communications decided by human rights treaty committees and the Government's response to these communications.
- Empowering the Parliamentary Joint Committee on Human Rights to inquire into the adequacy of the Government's response to both concluding observations and individual communications on a periodic basis.
- Refer to the Joint Standing Committee on Treaties an inquiry into the status of all reservations and interpretative statements under human rights treaties to determine their ongoing necessity. (See further: section 5.3, page 85).

**Recommendation 6:** That a national human rights education program be introduced targeted to the Australian Public Service, primary and secondary schools, workplaces and the general community. (See further: section 5.4, page 87).

**Recommendation 7:** That the Australian Government commit to a national human rights indicator index that can measure progress on human rights over time. (See further: section 5.5, page 89).

**Recommendation 8:** That the Australian Government commit to an annual statement to Parliament on human rights. (See further: section 5.3, page 91).



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**Recommendation 9:** That the Australian Government ensure the Australian Human Rights Commission is appropriately and sustainably resourced to perform its functions, in accordance with the Paris Principles. (See further: section 5.6, page 92).

**Recommendation 10:** That the Australian Government support measures that invest in and build community capacity to realise human rights and freedoms, including by:

- instituting regular forums for dialogue with the NGO sector on human rights
- providing funding support for NGOs to advance human rights protection
- supporting the independent participation of NGOs in UN human rights processes
- maintaining and re-establishing programs that build capacity and support the participation of Indigenous peoples and persons with disability in UN human rights mechanisms. (See further: section 5.7, page 94).

## 2 Introduction

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Human Rights (PJCHR) for its Inquiry into Australia's Human Rights Framework.

This is the first submission that the Commission will provide to this inquiry. The Commission also intends to provide further information to the PJCHR at a later date.

The submission provides the Commission's proposal for a new National Human Rights Framework, based on the extensive consideration it has given to this issue through its [Free and Equal project](#).

Since 2019, Free and Equal has sought to 'identify current limitations in the promotion and protection of human rights at the national level' and 'identify the key principles and elements of a human rights reform agenda to modernize our system of human rights protection'.<sup>9</sup>

In undertaking the project, the Commission identified in its Terms of Reference the desirability of Australia having processes to:

- set national priorities on human rights
- educate the community about human rights
- incorporate human rights standards into domestic law, policy and practice
- consider the observations of human rights treaty body committees and UN special procedures about compliance with human rights obligations.<sup>10</sup>

Extensive consultation was undertaken for Free and Equal, based on an Issues Paper and three Discussion Papers that were released in 2019. The Commission commends these preliminary papers to the Committee, as they provide basic, foundational information on human rights and how they are currently protected in Australia.<sup>11</sup>

The Commission has since published 4 significant papers that will provide guidance for the PJCHR's inquiry, namely:

- Position Paper on a federal Human Rights Act, *Free and Equal: A Human Rights Act for Australia* (March 2023)
- Position Paper on federal discrimination law reform, *Free and Equal: A reform agenda for federal discrimination laws* (December 2021)
- [Report to the UN Human Rights Council for Australia's 3<sup>rd</sup> Universal Periodic Review](#) (2020)

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- [Workshop Report](#) on ensuring effective national accountability for human rights (October 2019).
- The Free and Equal Final Report, due to be finalised in late 2023, will reflect the Commission's contributions to this Inquiry and present reform aspirations as Australia's National Human Rights Institution.

In addition to providing an overview of the key findings of the Free and Equal project to date, the submission also provides a summary of other work by the Commission of relevance to the Inquiry, and commentary on the operation of Australia's Human Rights Framework that was introduced in 2010.

## **3 Australia's Human Rights Framework (2010)**

### **3.1 Background**

In November 2008, the Rudd Government established a National Human Rights Consultation Committee (NHRCC), chaired by Father Frank Brennan SJ AO, to undertake consultation and report by 30 September 2009.<sup>12</sup>

In 2009, the NHRCC conducted the largest ever nationwide consultation on human rights protections. The consultations involved 35,014 written responses and 66 community roundtables with 6,000 people, which were held in 52 locations around Australia.<sup>13</sup> The NHRCC held three days of public hearings in Canberra, with over 70 speakers taking part in discussions.<sup>14</sup>

The comprehensive NHRCC final report was released on 8 October 2009.<sup>15</sup> The NHRCC made 31 recommendations about the fulfilment of human rights in Australia, including:

- that education be the highest priority for improving and promoting human rights in Australia
- that Australia adopt a federal Human Rights Act, based on the legislative dialogue model incorporating rights from the international treaties to which Australia is party, primarily the International Covenant on Civil and Political Rights
- that a statement of compatibility with Australia's human rights obligations should be required for all bills and legislative instruments
- that a joint committee on human rights be established to review all bills and relevant legislative instruments for compliance with Australia's human rights obligations
- that the functions of the Australian Human Rights Commission be expanded to include examination of any bill at the request of the

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proposed joint committee on human rights, for the purpose of ascertaining if any provisions of the relevant bill are inconsistent with Australia's human rights obligations.

In April 2010, the Australian Government responded to the NHRCC report by introducing *Australia's Human Rights Framework*.<sup>16</sup> This document reflected the NHRCC recommendation that the Government:

develop a whole-of-government framework for ensuring that human rights – based either on Australia's international obligations or on a federal Human Rights Act, or both – are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally.<sup>17</sup>

The Australian Government chose not to pursue a Human Rights Act as part of the framework, although noting at the time that the possibility of introducing a Human Rights Act would be considered when reviewing the operation of the Framework.<sup>18</sup>

At the time, the Commission welcomed the announcement of the Framework, but expressed disappointment that the Human Rights Act recommendation would not be pursued. The Hon Catherine Branson AC KC, the then President of the Commission, noted that the measures included in the 2010 Framework, for example human rights education, would be difficult to deliver 'while human rights protections in Australia remain an incomplete patchwork'.<sup>19</sup>

In its 2010 election policy, *The Coalition's Plan for Real Action for Australia's Future*, the Coalition parties pledged to 'discontinue the Australian Human Rights Framework', as part of its projected expenditure savings.<sup>20</sup> The Framework was subsequently abandoned.

### **3.2 Key elements of the 2010 Framework**

The 2010 Framework was based on five key principles: to educate, engage, protect, respect and reaffirm human rights. The Australian Government committed to providing \$18.3 million over four years towards implementing the measures in the Framework.<sup>21</sup> Key elements of the Framework are discussed below.

#### **(a) National Human Rights Action Plan**

The 2010 Framework committed to the development of a National Human Rights Action Plan to outline future action for the promotion and protection of human rights.

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In 2012, the Australian Government adopted the *3rd National Human Rights Action Plan*.<sup>22</sup> The 2010 Framework explained that the Plan was intended to

demonstrate Australia's on-going commitment to its international human rights obligations, as well as encouraging other countries to achieve higher standards of human rights. The National Action Plan will reflect activity across the Commonwealth, State and Territory governments.<sup>23</sup>

The National Human Rights Action Plan was developed in consultation with state and territory governments. The Plan was informed by a Baseline Study identifying priority areas, including international human rights commitments; access to justice; legal protections; workers' rights; climate change, and poverty, and specific population groups such as First Nations peoples, women, children and young people, LGBTIQ+ people, and carers.<sup>24</sup>

The Plan's key priority areas included: establishing a National Disability Insurance Scheme (NDIS); establishing and commencing the position of National Children's Commissioner at the Australian Human Rights Commission; ratifying the Optional Protocol to the Convention Against Torture; strengthening the protection of rights of people with mental illness in the justice system; reviewing Australia's reservations under international human rights treaties; introducing the 'Living Longer Living Better' aged care reform; acknowledging the unique and special place of Australia's First Peoples and implementing the National Anti-Racism Strategy.

The National Human Rights Action Plan was intended to be accessible to every Australian, provide a broad overview of policies and practices to protect human rights, accord equal priority to all human rights, and set out strategic priorities for future action.

The Action Plan was discontinued when there was a change of government, and there has been no national action plan or substituted alternative since.

The Commission's national workshop on accountability mechanisms for human rights in 2019 considered the effectiveness of the National Human Rights Action Plan. It noted that there has been no adequate/comprehensive evaluation of the efficacy of these plans in Australia, and then noted some general issues in relation to previous national action plans:

- they have listed existing government initiatives rather than genuinely setting priorities for the future
- they have lacked dedicated funding to advance human rights priorities
- some plans have lacked community engagement to build consensus and partnerships for key human rights priorities

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- federal relations have tended to make the plans complex and require long timeframes for their development – plans that have been finalised have not, however, had key features of other national frameworks in terms of commitments from state and territory governments (including of resources) to their implementation
- monitoring processes for these plans have been lacking or deficient.

On this basis, the Commission concluded that

consideration must be given to whether it is the concept of a national action plan that is challenging or if the deficiencies of past plans were the result of poor implementation by the government.

In developing any subsequent plan, attention must be given to avoiding any mistakes that resulted in these plans falling into disuse. Whether a 'national action plan' is an effective model must also be considered.<sup>25</sup>

Whether a National Action Plan or alternative model is adopted in the future, the focus should be on ensuring that it has the key elements in place to be effective.

**(b) Parliamentary scrutiny**

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) came into force on 4 January 2012. The human rights scrutiny processes established under the Act are designed to encourage early and ongoing consideration of human rights issues in policy and legislative development. The Act provided for:

- the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR), which was established on 13 March 2012<sup>26</sup>
- the requirement that all government and non-government Bills and disallowable legislative instruments must be accompanied by a Statement of Compatibility.<sup>27</sup>

The PJCHR has three functions as set out in section 7 of the Act:

- (a) to examine Bills and legislative instruments coming before the Parliament for compatibility with human rights
- (b) to examine current Acts for compatibility with human rights
- (c) to inquire into any matter relating to human rights that is referred to the Committee by the Attorney-General.

The Statement of Compatibility must contain an assessment of the Bill or legislative instrument's compatibility with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified.<sup>28</sup>

The PJCHR seeks to determine whether identified limitations on rights are justifiable through a limitation assessment, including that of necessity and proportionality.

The effectiveness of the PJCHR and its functions have not been formally reviewed by Parliament or government since it began operating a decade ago. The Commission's Position Paper on a Human Rights Act for Australia includes an analysis of the effectiveness of the PJCHR and makes recommendations to improve its operation (see further below in **section 5.3** for discussion of the recommendations).

### **(c) Human rights education**

Under the 2010 Framework, the Government committed to enhancing support for human rights education, including:

- providing \$2 million over four years to non-government organisations for the development and delivery of community education and education programs
- providing \$6.6 million over four years to the Australian Human Rights Commission for community education
- investing \$3.8 million in an education and training program for the Commonwealth public sector, including the development of a human rights toolkit and guidance materials for public sector policy development and implementation of Government programs.

Funding for the above education initiatives was not continued at the end of the four years of the Framework.

With the funding provided to it, the Commission established a community education team which led its activities under the Framework. These activities included:

- engaging with the Attorney-General's Department as it developed mandatory human rights training for all federal public servants (as well as fact sheets on human rights to assist with the development of Statements of Compatibility with human rights for legislative proposals)
- engaging with the Australian Curriculum, Assessment and Reporting Authority (ACARA) to consider options for human rights to be reflected in the national school curriculum that was also being introduced at that time
- developing resources for primary and secondary school children and teachers under the national curriculum, as well as resources targeted to

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early childhood education services and for the vocational education and training system

- developing resources for the business sector, primarily on the operation of federal discrimination law
- research and partnerships with the business community, such as through the Australian Global Compact, to build awareness and understanding of the UN principles on business and human rights
- establishing and convening a Human Rights Network for federal public servants – which took the form of regular panel sessions convened in Canberra on contemporary human rights issues and networking events to build relationships across government departments among public servants tasked with undertaking Statements of Compatibility
- undertaking a program of work on violence, harassment and bullying, including the highly successful [Back Me Up campaign](#) on countering cyber-bullying
- undertaking community education on human rights through the expansion of the Commission's [Face the Facts](#) resources, as well as two digital engagement resources: the *Something in Common* website and *Tell Me Something I Don't Know* micro-site.<sup>29</sup>

#### **(d) Review of legislation and policy**

The Australian Government committed to reviewing legislation, policies and practices for compliance with the seven core UN human rights treaties to which Australia is a party.

The Commission is not aware that this action was undertaken. However, it notes that the Baseline Study for the National Human Rights Action Plan did involve some identification of human rights challenges in federal legislation.

#### **(e) Consolidation of federal discrimination laws**

The 2010 Framework involved a commitment to consolidate Australia's existing discrimination laws into one national law. This would update the protections across all discrimination laws and standardise them, where appropriate, with the objectives of removing unnecessary regulatory overlap, addressing inconsistencies across laws and making the system more user-friendly.<sup>30</sup>

Such a process was seen as a precursor to potentially harmonising discrimination laws across the federal, state and territory levels.



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A Draft Exposure Bill consolidating federal anti-discrimination laws was released in November 2012.<sup>31</sup> While there were many positive features to the Bill, a number of changes were recommended by a parliamentary committee inquiry. The Australian Government announced that it would not seek to address these prior to the next federal election, and would instead deal with the discrete issue of including new protections against discrimination on the basis of sexual orientation, intersex status and gender identity into the Sex Discrimination Act.

The then Government lost the subsequent election in 2013, and as the new Government did not support the Bill, the broader reforms to federal discrimination law did not occur.

The Commission's Position Paper on federal discrimination law released in 2021 provides an extensive review of the current status of these laws and highlights the pressing and long overdue need for reform. This is discussed further below in **section 5.4**.

#### **(f) Other commitments**

The 2010 Framework also committed to NGO Forums on Human Rights hosted by the Attorney-General and the Minister for Foreign Affairs. The forums would provide a comprehensive consultation mechanism for discussion about domestic and international human rights issues. At least one joint NGO Forum was held before this new practice was discontinued.

The Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) had a longstanding practice of convening separate annual human rights forums. While DFAT has regularly maintained this and other engagement ahead of each session of the UN Human Rights Council, the conduct of NGO forums by the AGD has been more sporadic.

The 2010 Framework also committed to including the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council. This occurred until the Administrative Review Council was discontinued in 2015, with its functions consolidated into the Attorney General's Department.

### **3.3 Voluntary pledges in the Universal Periodic Review process**

Around the same time as the introduction of the 2010 Framework, new processes for human rights were introduced at the United Nations level. The key change was the creation of the Human Rights Council as a high-level expert body

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on human rights (replacing the lower-level Commission on Human Rights). A key new accountability mechanism was introduced with the creation of the Human Rights Council in 2006, namely, the Universal Periodic Review (UPR) process.<sup>32</sup>

The UPR process involves a periodic review of the human rights records of all 193 UN Member States, over a cycle that lasts approximately 4.5 years. Australia first appeared in the UPR in January 2011, soon after the 2010 Framework was put into place.

The purpose of the UPR is described in its title: a **universal** (i.e. applies to all Member States of the UN, across all human rights standards regardless of whether a country has ratified human rights treaties or not), **periodic** (i.e. occurring every 4.5 years), **review** of their performance on human rights.

The review is conducted by all other member states of the UN (i.e. by every other government in the world) which distinguishes it from the reviews that occur under human rights treaties (which are conducted by independent, expert UN committees elected by those governments who have ratified the relevant treaty).

In the UPR process, countries traditionally make 'voluntary pledges' of actions that they will take to improve human rights. These voluntary pledges are important opportunities for governments to commit to key actions to advance human rights in their countries.

The Commission considers that the PJCHR should consider in this Inquiry the voluntary commitments that were made in the first three cycles of the UPR by the Australian Government. This is because the commitments:

- are important diplomatically, being commitments made to every other country in the world on how Australia will advance human rights
- constitute the main process by which the Australian Government has formally made commitments of action to protect human rights in the period from 2010–2023 (particularly in the absence of a National Human Rights Action Plan).

At Australia's first UPR appearance in 2011, 53 countries asked Australia about its human rights record, and made 145 recommendations. The Australian Government accepted, in full or in part, over 90% of recommendations made.

The Australian Government also made a number of voluntary commitments during the dialogue, including:

- establishing a full-time Race Discrimination Commissioner in the Australian Human Rights Commission

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- tabling in Parliament the concluding observations of human rights treaty bodies and UPR recommendations
- establishing a systematic process for the regular review of Australia's reservations in international human rights treaties
- increasing funding for the Office of the High Commissioner for Human Rights and the Asia-Pacific Forum of National Human Rights Institutions
- establishing a public online database of recommendations from the UN human rights system
- commitment to use the UPR recommendations accepted by the government to inform the development of Australia's National Human Rights Action Plan.

At the second UPR in 2015, 110 countries provided 291 recommendations. 150 recommendations were accepted, 50 were noted to consider further, and 90 were noted.<sup>33</sup> The Australian Government made the following voluntary commitments:

- **Constitutional recognition of Aboriginal & Torres Strait Islander Peoples:** The Government of Australia committed to holding a referendum to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution in the next term of Parliament.
- **Humanitarian support for the Syrian conflict:** Australia committed to resettling 12,000 refugees fleeing conflict in Syria and Iraq.
- **Family violence:** The Australian Government committed to a \$100 million package of measures to provide a safety net for women and children at high risk of experiencing violence.
- **People with cognitive impairment in the criminal justice system:** Australia committed to improving the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment with a national effort to analyse existing data and develop best practice resources for our jurisdictions.
- **Death penalty:** Australia committed to taking further steps to strengthen advocacy for the worldwide abolition of the death penalty.
- **Older people:** Australia committed to promoting and protecting the rights of older people internationally by modelling and advocating better use of existing UN human rights reporting mechanisms.
- **Discrimination against LGBTI people:** The Government committed to removing exemptions for Australian state and territory laws from the operation of Australia's national anti-discrimination laws, to take effect from 31 July 2016.

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- **Foreign aid and development:** Australia committed to supporting the protection and promotion of human rights through its foreign aid program by promoting prosperity, reducing poverty and enhancing stability.
- **UPR implementation:** The Government committed to work with the Australian Human Rights Commission, to develop a public and accessible process for monitoring progress against universal periodic review recommendations, including a periodic statement on progress against the recommendations on behalf of the Government.
- **UN engagement:** Australia will designate a standing national mechanism to strengthen its overall engagement with United Nations human rights reporting; undertake a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights; and move to withdraw its reservation to the Convention on the Elimination of Discrimination Against Women (CEDAW) relating to the exclusion of women from combat roles, including repealing the related exemption from Australian antidiscrimination legislation.<sup>34</sup>

At the third UPR in 2021, the Australian Government made the following voluntary commitments:

- development of a National Disability Strategy 2021–2030
- support for older persons to access aged care support in the home
- commitment to develop a new national plan to address family violence experienced by women and children
- commitment to work in partnership with Aboriginal and Torres Strait Islander Australians on decisions that affect them, and specifically committed to 'embedding this partnership approach through the joint design of options and models for an indigenous voice and sharing decision-making on closing the gap through a partnership agreement with the coalition of Aboriginal and Torres Strait Islander community-controlled peak organizations'
- commitment to conduct a referendum to recognise Aboriginal and Torres Strait Islanders in the Constitution.<sup>35</sup>

### **3.4 Effectiveness of the 2010 Framework and status of UPR voluntary commitments**




This section provides the Commission's consideration on the effectiveness of the 2010 Framework and implementation of voluntary pledges under the UPR process.

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The Commission notes that there was not a formal review undertaken of the 2010 Framework during the time of its operation (2010–2014). This is despite such a review being envisaged at the time and committed to in the Framework itself.

The Commission welcomes the review by the PJCHR in lieu of a review during the operation of the 2010 Framework. The Commission notes the focus in the PJCHR's Terms of Reference for this Inquiry on proposing future actions and the desirability or otherwise of there being a National Human Rights Framework into the future.





The below table summarises the status of key elements of the 2010 Framework and arising from the UPR process, and notes whether each element or commitment was fulfilled (green tick), partially fulfilled (yellow exclamation mark), or not fulfilled (red x).

Measure	Status	Commentary
<b>Australia's Human Rights Framework (2010)</b>		
<b>Human rights education</b>		Funding from the 2010 Framework lapsed, including: <ul style="list-style-type: none"> <li>Mandatory training for federal public servants lapsed under the Framework, despite ongoing legal obligations to prepare Statements of Compatibility with all federal legislation</li> <li>NGO community education initiatives lapsed with change of government</li> <li>Australian Human Rights Commission (AHRC) funding for dedicated community education on human rights unable to be maintained due to lack of funding.</li> </ul>
<b>Parliamentary scrutiny of human rights</b>		PJCHR and Statements of Compatibility continue to operate. AHRC recommendations to improve operation have been made in Free and Equal process.
<b>National Human Rights Action Plan</b>		A preliminary Baseline Study and a finalised National Human Rights Action Plan (NHRAP) were introduced under the Framework. The NHRAP also incorporated accepted recommendations from the UPR 1 <sup>st</sup> cycle in 2011.



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		With change of government the NHRAP was not committed to and status was uncertain, prior to lapsing.
<b>Audit of federal laws for human rights compliance</b>		Baseline Study for NHRAP considered some legislative reform needs, although unclear that this was sufficient to meet commitment in the Framework.
<b>Consolidation of federal discrimination law</b>		Draft Exposure Bill released for public consultation under the Framework. Was not progressed to a bill.  Need for federal discrimination law reform remains urgent and pressing.
<b>NGO consultations on human rights</b>		Joint NGO forums lapsed under framework. <ul style="list-style-type: none"> <li>• DFAT maintains regular consultations for each Human Rights Council session and an annual NGO forum. These are internationally focused.</li> <li>• AGD has been sporadic in conducting NGO forums, although does conduct some consultations with NGOs for UPR and treaty body appearances. AGD NGO forums were domestically focused.</li> </ul>
<b>Administrative Review Council</b>		The Australian Government met its commitment to include the President of the AHRC on the ARC, until the Council was discontinued in 2015.
<b>Universal Periodic Review – Voluntary pledges</b>		
<b>UPR recommendations included in NAP on Human Rights</b>		The Government's voluntary pledge to incorporate all accepted recommendations from the first UPR cycle in 2011 in the NHRAP was met at the time. This lapsed with the NHRAP.
<b>Tabling of concluding observations of human rights treaties in Parliament</b>		The Australian Government's voluntary pledge at the first UPR in 2011 to table concluding observations was initially met from 2012 and then discontinued.  Governments are obliged to disseminate concluding observations from treaty committees and must justify how they have done so each time they appear before a treaty committee.

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<b>Systemic review of reservations to human rights treaties</b>		The Australian Government's voluntary pledge in the first UPR cycle in 2011 to establish a systematic process for the regular review of Australia's reservations in international human rights treaties has been partially met, with consideration and then removal of some reservations under the CEDAW. To the Commission's knowledge there is no process for reviewing existing reservations, particularly any process that involves consultation with the Commission or the public.
<b>Treaty body recommendations database</b>		The Australian Government's commitment to establish a <a href="#">public online database</a> of recommendations from the UN human rights system has been met, located on the AGD's website, but has not been updated since 2015. <sup>36</sup> An overview of recommendations is maintained for internal government use through the Standing National Mechanism on Human Rights (see further below) and so this action could readily be met by the Australian Government by publishing up to date data that it holds.
<b>Constitutional recognition of Aboriginal and Torres Strait Islander peoples</b>		This commitment was made in the second and the third cycle of the UPR in 2016 and 2021. It was not met in the term of government in which it was committed to in 2016. The current Referendum process on the Voice will meet this commitment from the 3 <sup>rd</sup> UPR cycle.
<b>People with cognitive impairment in the criminal justice system</b>		<a href="#">National Principles</a> on people unfit to plead were adopted by all Australian Governments (except South Australia) in 2015. <sup>37</sup> The Australian Government committed to reviewing the standards in 2020, which has not happened to the Commission's knowledge. Concerns have been expressed repeatedly by UN treaty committees (in concluding observations and individual communications) about people being detained indefinitely due to their unfitness to plead/stand trial. There has been a limited response to the specific cases

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		<p>raised through individual communications and AHRC Act complaints by the Commission.</p> <p>The Australian Law Reform Commission has raised concerns in this area, and undertook a review of equal recognition before the law and legal capacity for people with disability in 2014.<sup>38</sup></p>
<b>Standing National Mechanism on Human Rights</b>		<p>The Australian Government's voluntary pledge to create the Standing National Mechanism was met following the second UPR appearance in 2016. However, it has met irregularly in the past 5 years and when it does, focuses solely on coordination of government preparation for UPR and treaty body appearances rather than a broader remit for human rights promotion.</p>
<b>UPR monitoring tool</b>		<p>The Australian Government met its commitment to introduce a <a href="#">tracking tool for recommendations</a> from the UPR process at its second UPR cycle appearance in 2016.<sup>39</sup> However, the publicly reported database has not been updated for the third cycle.</p>

As the above table indicates, many of the measures committed to under the 2010 Framework were not completed or lapsed during or soon after the Framework ceased to exist.

**It is difficult to evaluate the success of those measures that were completed as they were not evaluated at the time, and/or lapsed shortly after their commencement.**

The Commission considers that the primary failure of the 2010 Framework was due to lack of implementation and lack of commitment from the Government at the time.

The 2010 Framework was also insubstantial in that it lacked transparency mechanisms to hold the Australian Government to account (such as self-reporting of progress by the government or assessments of quality of actions by an independent agency), lacked regular independent monitoring, and did not enjoy engagement and buy-in from state and territory governments (which also made it fragile and capable of being rendered inoperable without any discussion with other governments).

Actions under the 2010 Framework were only funded to a very limited degree. For example, the National Human Rights Action Plan had no funding attached to



it, which limited the ability to achieve outcomes or even buy-in from federal government departments and state and territory governments.

The 2010 Framework and subsequent UPR voluntary commitments included actions that would adopt a more systemic approach to considering and addressing human rights at the national level. These commitments were aimed at addressing known and accepted deficiencies in the national system of protecting human rights.

**These systemic mechanisms have mostly fallen into disuse, with public facing information being out of date and not maintained on a regular basis.**

In the absence of a national framework, governments over the past decade have **not** put into place adequate, alternative steps to protect human rights. **The lapsing of the 2010 Framework should therefore be seen as a regression in the systems for protecting human rights at the national level.**

In particular, since the 2010 Framework lapsed, there have not been:

- adequate processes for national priority setting on human rights issues – such as through a national action plan or alternative measures
- regular identification or consideration of the need for reforms to better protect human rights – such as through the consolidation of discrimination laws and audit of laws
- appropriate investment and information to build human rights awareness – human rights education for public servants and the community
- rigorous, transparent accountability mechanisms for human rights – national action plan; Standing National Mechanism; tabling of treaty body concluding observations in Parliament; rights tracking / implementation status of recommendations
- regular public engagement on human rights issues – NGO engagement; commitments to review reservations to treaties.

In the 2019 [Issues Paper](#) for the Free and Equal Project, the Commission described the overall status of the protection of human rights at the federal level over the past decade as follows:

In short, we have **an implementation gap** between the human rights standards that Australian governments have committed to uphold over many years, and the actual protections in our laws, policies and processes of government.

Without comprehensive legal protection, educational and other measures to promote understanding of human rights and processes for monitoring compliance with human rights, our government is not fully meeting its

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obligations to make sure that the human rights of all Australians are respected, protected and fulfilled.<sup>40</sup>

In the Commission's report to the UN Human Rights Council for Australia's 3<sup>rd</sup> UPR, the Commission also stated:

Australia does not take a proactive approach to human rights. There are limited national targets and commitments to address known human rights challenges, and limited accountability for outcomes.<sup>41</sup>

The Commission stands by this assessment of the current approach to human rights at the federal level.

Despite the failures of the 2010 Framework, the Commission supports the establishment of a new National Human Rights Framework to ensure human rights are appropriately advanced at the national level – one that is designed to be effective, addressing the weaknesses and failings of the 2010 Framework.

The next section of this submission provides an overview of the Free and Equal project and the key actions recommended to date to reform the national approach to human rights protection in Australia.

**Section 6** then provides the Commission's proposed approach to introducing a new National Human Rights Framework.

## 4 Free and Equal project

### 4.1 Overview

On 10 December 2018, the Commission announced that it was undertaking a major project: *Free and Equal: An Australian conversation on human rights*, with work commencing in 2019.<sup>42</sup>

The Commission's Free and Equal project seeks to identify what an effective system of human rights protection for 21<sup>st</sup> century Australia would look like, and what steps Australia needs to take to get there. The project outlines the actions necessary for Governments to meet their obligations to respect, protect and fulfil human rights, and sets out the Commission's proposed reform agenda for the better protection of human rights at the national level in Australia.

The Terms of Reference for the project identified the scope of the project as follows:

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1. The national conversation on human rights will consider possible actions to ensure that:

- a.) the community understands human rights and is able to protect them (for themselves and others)
- b.) communities are resilient and a protective factor against human rights violations
- c.) law and policy makers explicitly consider the impact on human rights of their decisions and are accountable for this impact
- d.) robust institutions exist to promote and protect human rights
- e.) government and the community can work together to fully realise human rights – understanding the respective role of each other
- f.) public servants, and contracted service providers, see the protection of human rights as core business in exercising their functions
- g.) other issues that are identified as priorities for human rights protection by the Australian community are addressed.

2. The national conversation on human rights will:

- a.) Promote awareness of the importance of human rights to 21<sup>st</sup> century Australia
- b.) Identify current limitations in the promotion and protection of human rights at the national level
- c.) Identify the key principles and elements of a human rights reform agenda to modernise our system of human rights protection
- d.) Build partnerships and consensus on the future actions required to better protect and promote human rights across the Parliament, government and the community.

To date, the project has included:

- the release of an Issues Paper describing human rights, providing an overview of the Australian system for protecting rights and setting out consultation questions for the national conversation<sup>43</sup>
- the release of three technical discussion papers (each of which included a public submission process) on federal discrimination law reform, the positive framing of rights, and accountability mechanisms for human rights at the national level<sup>44</sup>
- national consultations, as well as technical workshops, on the three discussion papers
- the Free and Equal national conference on human rights
- a visit and conduct of sector-based workshops with the United Nations High Commissioner for Human Rights, Dr Michelle Bachelet

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- a series of roundtables with Professor Manfred Nowak, and regional launch of his landmark United Nations Global Study on Children Deprived of Liberty
- the release of two Position Papers on key reform priorities: federal discrimination laws, and a model Human Rights Act (which also includes recommended reforms for parliamentary scrutiny of human rights).<sup>45</sup>

The project has attracted strong engagement from organisations, individuals, and public bodies at every stage. For example, the initial discussion papers prompted over 160 submissions – most of which are published on the Commission's website.<sup>46</sup> A total of more than 1,000 stakeholders were engaged throughout the development of the three discussion papers, inclusive of submissions, consultations, roundtables, and technical workshops with stakeholders from legal, business, NGO and public sectors, academia, and parliamentarians.

The level of public and stakeholder engagement with Free and Equal ensures that the recommendations developed are principled, pragmatic, evidence-based and grounded in a level of consensus built across the relevant sectors. The Commission anticipates strong community and stakeholder support for the final recommendations as a result of this process – a critical process outcome for the initiative.

The project will culminate with the release of a Final Report in late 2023 – coinciding with the 75<sup>th</sup> anniversary of the Universal Declaration of Human Rights. The Final Report will collate findings from the two Position Papers and set out in detail the Commission's model for a National Human Rights Framework to implement human rights legal reform, track progress on human rights, strengthen accountability mechanisms, improve responsiveness to international bodies, and educate the community about human rights.

## **4.2 A national Human Rights Act for Australia**

Following a submissions process in 2019–2020, from May to July 2021, the Commission conducted a series of technical workshops and consultations on mechanisms to ensure the proactive consideration of human rights by government with government officials, state and territory human rights commissions, academics, the legal sector and NGOs. Stakeholders were concerned about the weak and piecemeal human rights protections afforded to Australians, and welcomed the Commission's efforts to develop a model for a Human Rights Act as a necessary means of ensuring comprehensive rights coverage.

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On 7 March 2023, the Commission released its [Position Paper](#) on a national Human Rights Act setting out the case for the introduction of a federal Human Rights Act in Australia and outlined the Commission's proposed model.<sup>47</sup> The Commission has also released an [summary report](#) and [2 page guide](#) to the model, and commends these to the Committee.

**A Human Rights Act is a central missing piece of government accountability. It will increase transparency and trust in government by holding public authorities to account and requiring them to fully consider human rights in their decisions, laws, and policies.**

The Commission's proposed Human Rights Act model is a legislative dialogue model. It incorporates rights contained in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and key principles from thematic treaties. It would also codify common law rights and freedoms, and is designed to complement protections against discrimination and deal with issues that discrimination laws are not capable of addressing.

The Human Rights Act Position Paper:

- identifies the gaps in Australia's current framework and makes the case for a federal Human Rights Act (Chapters 2 and 3)
- outlines the Commission's proposed model for a Human Rights Act (Chapters 4 to 12)
- considers existing parliamentary scrutiny mechanisms and improvements that can be made with the introduction of a Human Rights Act (in Chapter 13)
- focuses on the role of Commission and the enhanced contributions the Commission can make to promoting and protecting human rights in the light of a federal Human Rights Act (Chapter 14).

**(a) Why Australia needs a Human Rights Act**

**(i) *Australia does not currently adequately protect human rights***

Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law.

The Australian Constitution offers only limited protection for a small number of discrete human rights. This includes the implied right to freedom of political communication; and a prohibition on making federal laws that establish a

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religion, impose a religious observance or prohibit the free exercise of any religion. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution. The Constitution does not act to confer rights on individuals, but acts as a restraint on the legislative power of the Commonwealth.

The common law protects human rights indirectly through statutory interpretation principles such as the 'principle of legality', which presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'. However, common law protections are fragile, as Parliament can pass a law that overrides them at any time.

While Parliamentary scrutiny measures enable some consideration of human rights during the law-making process, these measures alone have not resulted in an embedded human rights culture within Parliament. Parliament routinely passes laws that are not human rights compliant.

While discrimination laws implement key aspects of the international treaties Australia has ratified, they are only a partial implementation of them, with many key international rights finding no corresponding federal protections.

The Commission's ability to resolve human rights complaints can be very limited. Unlike complaints alleging unlawful discrimination, if the Commission cannot conciliate a human rights complaint, the person cannot then bring court proceedings, nor obtain any enforceable remedies.

UN treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system. Many of Australia's commitments to human rights are confined to rhetoric without corresponding domestic protections.

The current rights framework is not easily explainable, or readily comprehensible, to all people in Australia.

The above patchwork of rights is difficult to explain to everyday Australians, whose rights are meant to be protected.

Not only should the law afford appropriate protection to the people of Australia, it should also be capable of being understood by all.

**(ii) *A Human Rights Act for Australia is an evolution not a revolution***

Human Rights Acts have been passed in three states and territories in Australia and been in operation since 2004. The Position Paper provides case studies of how a Human Rights Act has made a positive difference to the protection of

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human rights in these jurisdictions, as well as in the multiple countries that have introduced such legislation over the past 20 years.

The proposed model for a federal Human Rights Act builds on the success and lessons from these existing models, while also tailoring a Human Rights Act to the specific constitutional requirements of Australia.

The proposed model also seeks to build on the lessons from the Commission having administered a human rights complaints-handling stream since 1981 and an ILO 111 complaints-handling stream since 1986. There are deficiencies in how these complaint processes operate, which limit their effectiveness. In the Commission's model, these existing human rights complaint streams would be replaced with a much clearer set of rights.

**By learning from the lessons of other models, and building on the legacy of the AHRC Act processes that have been in domestic law for 36 years, the Commission's proposal for a Human Rights Act is an evolution, not a revolution.**

## People's rights matter, all of the time



The impact of laws, policy and practice on people's human rights should always be considered.



Parliament, governments and public officials should be held to account for how they consider human rights impacts in their decision-making.



This reflects: our commitment to democratic principles, and 'Australian values' that respect civil liberties, rights and fundamental freedoms.

### It means that:



### The legal framework should:

- **Protect** human rights.
- **Prevent** violations of human rights.
- **Provide** effective relief for breaches of human rights.





**(b) The Commission's proposed model**

The Commission's model draws on comparative international models, international instruments and the recommendations of previous inquiries.

At present, the Australian government is not obliged to consider human rights in their policy-making or decision-making. A national Human Rights Act would embed transparent, human rights-based decisions as part of public culture, which could prevent breaches of human rights from occurring.

The model includes a duty on federal public authorities to consider human rights when making decisions, and to act compatibly with human rights. It outlines how human rights may be limited, in appropriate cases, and how courts should interpret legislation in light of a Human Rights Act.

The key elements of the Commission's model for a Human Rights Act are summarised below.

**(i) *Positive duty on public authorities***

A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to give proper consideration to human rights when making decisions and implementing legislation and policy. This is also known as a 'positive duty' applying to public authorities.

Compliance with the positive duty would be reviewable by courts (and possibly by tribunals). The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

The scope of public authorities with obligations to comply with the positive duty includes 'core' executive bodies, such as government departments, agencies and offices, and the police. It also includes '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. An example of a functional public authority would be a private service provider delivering services through the NDIS.

The Commission also proposes including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act.

**(ii) Interpretive clause**

The Position Paper proposes the inclusion of an interpretive clause in the Human Rights Act stating that courts are to prefer an interpretation that is compatible with human rights, provided that this is consistent with the intention of Parliament, as expressed through the statute under analysis.

This approach is consistent with, and builds on, the 'principle of legality', a common law principle of statutory interpretation that presumes Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'.<sup>48</sup>

**(iii) Participation duty**

The participation duty would require public authorities to ensure the participation of First Nations peoples, children, and persons with disability in relation to policies and decisions that directly or disproportionately affect their rights. This duty addresses a fundamental problem in the development of federal policies and decisions — inadequate engagement with the very people to whom those decisions directly apply.

The duty will apply differently to each of the above groups, as defined by the relevant international instruments. However, the same underlying requirement applies — when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions. Participation encompasses consultation with representative organisations, or spokespeople, where a decision will have an impact on the rights of multiple individuals within a specific group. For example, representative disability organisations should be consulted in policy, lawmaking and regulatory processes that will have an impact upon the rights of persons with disability in Australia, such as NDIS policy.

**(iv) Equal access to justice**

In addition to an overarching participation duty, the Commission proposes a complementary 'equal access to justice duty' for public authorities.

This duty would mean that public authorities have a positive duty to realise access to justice principles – and would require active steps by public authorities to ensure the provision of key elements of a functioning justice system. Specifically, it would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.

This duty would create 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 to protect equality before the law. This is a principle of equal access, in order to overcome current barriers to access faced by particular groups.

**(v) *Limitations clause***

A limitations clause describes the circumstances in which human rights may be permissibly limited.

For example, it might be necessary to balance the right to freedom of expression with the right to privacy, or the right to access information with national security interests.

When deciding whether to pass a new law that limits human rights, Parliament would have to consider whether the proposed limitation is *proportionate*. For example, any limitation on individual rights would need to be reasonable and necessary to achieve an important public interest and be put in place for the shortest time possible. Justification for the limitation as proportionate would also need to be provided in the Statement of Compatibility for the legislation and considered by the PJCHR in its scrutiny role.

**(vi) *Cause of action***

The Commission's proposed rights are all amenable to enforcement by complaints bodies and courts. Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action.

The Human Rights Act should also allow for Human Rights Act rights to be raised in the context of another legal proceeding (for example, in a judicial review proceeding or as part of a bail application) and in administrative review processes.

**(vii) *Complaints***

Individuals who consider that their human rights have been breached would have the option of making a complaint to the Australian Human Rights Commission. The Commission's existing unlawful discrimination jurisdiction could be suitably adapted to human rights complaints.

The Commission proposes implementing a Human Rights Act complaint system that mirrors the discrimination law jurisdiction. This would mean that there would be a requirement for complainants to first bring a complaint to the

Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then make an application to a court for adjudication.

If a complaint about human rights cannot be resolved through conciliation, then the individual would have the option of taking the complaint to the relevant federal court.

#### **(viii) Remedies**

The Commission proposes that the Human Rights Act give courts discretion over the range of remedies available, noting the range of different kinds of human rights claims and the importance of flexibility. Available remedies may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.

### **4.3 Reforms to improve the effectiveness of parliamentary scrutiny of human rights and the PJCHR**

In the Position Paper on a Human Rights Act, the Commission proposes reforms to strengthen the parliamentary scrutiny of human rights through the operation of the PJCHR. This is to ensure early consideration of human rights in the development of legislation and embedding human rights in primary legislation against which the scrutiny is conducted.

The proposed Human Rights Act would also become the centrepiece for human rights scrutiny by the PJCHR. The Commission advocates that the PJCHR also continue a wider scrutiny role, referable to all the international treaty obligations.

The Commission makes the following recommendations in the Position Paper to strengthen the operation of the PJCHR and improve the parliamentary scrutiny process:

- The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.
- The Commission recommends that section 7 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) be amended, along the lines of the power of the UK Human Rights Committee, to allow it to 'make special

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reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases). The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.

- The Commission recommends that section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) be amended to require statements of compatibility for all legislative instruments.
- The Commission recommends that the range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken in accordance with the participation duty proposed in the Commission's model for a Human Rights Act.
- The Commission recommends that Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.
- The Commission recommends that with the introduction of a Human Rights Act, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) could be amended, or an accompanying legislative instrument drafted, to provide greater clarity on expectations in statements of compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.
- The Commission recommends that a public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.
- The Commission recommends that consideration be given to having designated human rights advisers in Departments.

#### **4.4 A reform agenda for federal discrimination law**

In December 2021 the Commission released the [Position Paper](#) on federal discrimination law reform.<sup>49</sup>

The Paper outlines the pressing need to shift the focus of the federal discrimination law system to a more preventative approach, and towards actions that better support the fulfilment of rights.

It complements the Commission's work in the *Respect@Work* report,<sup>50</sup> and provides detailed consideration of a positive duty across all of the federal discrimination laws.

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There are gaps in the protection offered by these laws, as well as significant questions as to how accessible the discrimination law system is – particularly for marginalised or disadvantaged groups. This suggests that federal discrimination law could be more effective in meeting the obligations to respect and protect rights.

In the Position Paper the Commission sets out four integrated sets of reforms to improve the effectiveness of federal discrimination laws:

**(a) Major reform 1: building a preventative culture**

The first set of reforms seek to refocus federal discrimination law so that it encourages, and indeed expects, action to prevent discrimination from occurring in the first place.

The Commission proposes that existing protections against discrimination in each of the federal discrimination laws should be complemented by the inclusion of a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination, along with harassment and victimisation.

**(b) Major reform 2: modernising the regulatory framework**

The powers of the Commission in unlawful discrimination matters are almost entirely based on persuasion, reliant on education and awareness raising and, where disputes arise, alternative dispute resolution. It is difficult to think of any other area of law in the federal arena where a regulatory agency operates solely on the basis of such limited powers. This is not an effective regulatory model.

The second set of reforms are required to modernise the regulatory framework and shift to a more effective compliance model.

The Commission concludes that its effectiveness as a regulatory agency can be enhanced by shifting from the current reliance solely on conciliation and persuasion, to a broader suite of regulatory approaches, including co-regulatory powers and inquiry powers.

**(c) Major reform 3: enhancing access to justice**

Alternative dispute resolution is often an effective tool for generating positive outcomes for rights-holders in unlawful discrimination matters. However, not all complaints resolve at conciliation. If a matter does not resolve at conciliation, then a complainant may bring an action to the Federal Circuit Court or the Federal Court. Proceeding to court can be extremely resource- and time-

intensive. A number of meritorious complainants may decide not to pursue their claims because of this.

This set of reforms consider how to improve access to justice for complainants who fail to reach a suitable outcome at the conciliation phase, yet who have a meritorious case. Key recommendations relate to costs; onus of proof; standing provisions and timeframes.

**(d) Major reform 4: improving the practical operation of the laws**

Australia's discrimination laws are complex and include some operational quirks; have gaps in their coverage; and, in some cases, have been limited or further complicated by judicial decisions. Recommendations seek to enhance the operation of discrimination laws as they currently are, but also pave the way for further consideration of long term and substantial reforms.

\*\*\*\*

There are a total of 38 proposed reforms to improve the operation of federal discrimination laws across these four areas (see **Appendix**). The Commission's proposals are principled and practical, building on past reform exercises and lessons learned.

The proposed reforms will require:

- amendments to existing provisions in federal discrimination (and related) laws
- insertion of new provisions in federal discrimination laws
- new regulatory powers (inserted into the AHRC Act and/or federal Discrimination Acts) and an associated support package
- educational outreach, community engagement and preparation of guidance materials
- further review processes into some issues.

Since 2021, consideration has been given to some of these proposals through amendments to the Sex Discrimination Act resulting from the Respect@Work report. Some technical amendments have been made across all federal discrimination laws, in line with the recommendations in the Commission's Free and Equal Position Paper.

A proposed approach to considering the reform agenda set out in this Position Paper is discussed further below in **section 5.2** of this submission.

## 4.5 Ensuring accountability for human rights

A major theme considered during the Free and Equal project has been accountability mechanisms for the advancement of human rights at the national level.

The Commission has commented on this publicly in a variety of ways during the project:

- In 2021, the Commission conducted a national workshop on accountability mechanisms for human rights and published a discussion paper (including the report of the workshop) to inform the Free and Equal project.
- The Commission has regularly engaged in UN human rights review processes of Australia and made recommendations to improve accountability mechanisms for human rights. This includes through submissions to the UN Human Rights Council for the universal periodic review in 2021, and submissions to various UN human rights treaty committees (as discussed further in **section 5.6** below).
- In 2023, the Commission provided an extensive submission to the Department of Treasury's *Measuring What Matters* inquiry to identify how to adopt a human rights-based approach to wellbeing reporting.

The Commission's final report for the Free and Equal project (at the end of 2023) will set out a comprehensive proposal for a new approach to measuring human rights performance at the national level.

The Free and Equal Discussion Paper, [Ensuring Effective National Accountability for Human Rights](#), laid out the existing processes to monitor and hold Australia to account for progress in realising human rights.<sup>51</sup> It outlined how a comprehensive domestic monitoring process could help increase accountability for human rights outcomes and what the key considerations would be for developing such a process.

The workshop and discussion paper considered that Australia currently does not have a robust system for prioritising human rights issues at the national level, nor for holding government to account for progress in advancing and protecting human rights.

For example, Australia does not have a current National Human Rights Action Plan, nor a national human rights indicator framework and does not respond publicly or comprehensively to the concluding observations of UN human rights treaty body committees.



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What Australia does have is a variety of thematic, sector and issues based national action plans and national frameworks – for example, on closing the gap, protecting Australia's children, eliminating family violence and on disability. These plans and frameworks are significant tools to advance human rights – although they are generally not created or based around human rights considerations.

The workshop had identified that to be effective these plans should include clear and measurable indicators, be adequately funded, monitored on an ongoing basis, and enjoy strong political, bureaucratic, and community commitment to the implementation of their goals.

Reviews of Australia's performance by UN human rights treaty committees and engagement in the Universal Periodic Review provide some internationally based and focused processes to review progress. However, these are not a substitute for domestic, government-led processes for identifying priorities and measuring progress in advancing and protecting human rights.

The Commission envisions that the legal foundations in a Human Rights Act would need to be complemented by a national set of measurable indicators assessing human rights performance over time.<sup>52</sup>

Translating human rights from standard setting to effective implementation depends heavily on the access to appropriate tools for policy design and evaluation.<sup>53</sup> Indicators are one important tool in this regard. Indicators provide concrete and practical ways to measure the realisation of human rights and track progress on implementation.

Indicators can be used as part of a broader process of systematic work to implement, monitor and fulfil human rights obligations. Indicator-based measurement frameworks are useful tools for turning complex concepts and standards into tangible and measurable outcomes. They can help law and policy makers more easily to identify where gaps in implementation are occurring and help advocates for human rights to use the language of technical measurement and science to ground their feedback to governments.<sup>54</sup>

There is extensive international guidance on what makes an effective human rights indicator framework. The Commission's workshop considered some international examples, such as the *Is Britain Fairer?* model, which is led by the Equality and Human Rights Commission in the United Kingdom (the equivalent NHRI to the Australian Human Rights Commission).

Other examples from New Zealand include the National Action Plan model and, more recently, the 2019 National Child and Youth Wellbeing Strategy.

### Is Britain Fairer?

Under the *Equality Act 2006* (UK), the UK Equality and Human Rights Commission (UK Commission) has a statutory duty to monitor equality and human rights in Britain by developing indicators and reporting regularly on progress to Parliament. The UK Commission uses the Measurement Framework for Equality and Human Rights (Measurement Framework), which covers six domains that 'reflect the things or areas in life that are important to people and enable them to flourish'.<sup>55</sup> These are: **education, work, living standards, health, justice and personal security, and participation.**

Each domain contains three 'core' indicators and some have additional 'supplementary' indicators. The indicators have been chosen, among other reasons, for their relevance for human rights, equality and non-discrimination and for their relevance for duty-bearers. The indicators are also specific, measurable, relevant over the long term, flexible, and the best possible options in each given domain.

The Measurement Framework draws on the best available qualitative and quantitative evidence to examine the structures (what the standards actually say), processes (how the standards are implemented) and outcomes (what people actually experience) that make up each indicator. This evidence is then disaggregated based on five components. These are: **protected characteristics (such as age, sex, race and disability), socio-economic group, geographical location, people at higher risk of harm, abuse, discrimination or disadvantage and intersectionality.** The data that is collected then informs reports to Parliament, including the [Is Britain Fairer?](#) report. Data is compared with previous years, so that change can be monitored over time.

### Human Rights Measurement Initiative's Rights Tracker

Created by the Human Rights Measurement Initiative (HRMI), the Rights Tracker is a global project to systematically track the human rights performance of countries.<sup>56</sup> The Rights Tracker measures the performance of each country by producing metrics that cover a range of human rights from the ICESCR and ICCPR, and refers to related treaties such as the Convention on Torture, and General Comments of treaty bodies. HRMI is working towards measuring all human rights that are contained in the international human rights framework.

Measurements are quantified in order to track progress and deterioration over time, and the methodologies provide scores that are comparable between countries, and over time.

It has been developed using two different measurement methodologies for economic and social rights, and civil and political rights. There are five economic and social human rights metrics, which are constructed from publicly-available data, such as statistics on infant mortality and school enrolment. Measurement methodology shows progress relative to what is feasible for the country's level of economic resources, and examines disparity in rights fulfilment between regions, or between racial, ethnic, gender, and other population sub-groups. There are eight civil and political human rights metrics, using peer-reviewed methodology to collect information directly from human rights practitioners monitoring the human rights situations in each country.

#### New Zealand initiatives

New Zealand's first Child and Youth Wellbeing Strategy, in 2019, has six wellbeing outcomes, and indicators for measuring progress that are embedded into the core work of government agencies.<sup>57</sup> It is one of the first countries not only to include wellbeing measurement, but to integrate this into its budget and policy-making processes.

It is underpinned by the *Child Poverty Reduction Act 2018* and amendments to the *Children's Act 2014*. Accompanying the Strategy is a Programme of Action, which sets out the Government's policies and actions, including significant new investments from its first 'Wellbeing Budget' in 2019, to help achieve the vision and outcomes.

An annual Child Poverty Budget report, released alongside the May 2020 Budget, provides a summary of the initiatives taken by the Government to reduce child poverty and mitigate the impacts of socio-economic disadvantage.

In January 2022, the Commission provided a submission to the Department of Treasury's *Measuring What Matters* inquiry.<sup>58</sup> The Inquiry sought submissions on the application of the OECD indicators framework to Australia. In its submission, the Commission supported Australia implementing a national framework or centralised set of indicators, and urged the Department of Treasury to consider that the process adopt a human rights-based approach.

The Commission's submission focused on some key considerations when developing an indicator framework, rather than an individual critique on each

indicator, or suggestions for additional ones. The Commission recommended the following:

- a human rights-based approach should underpin all aspects of the framework
- specific child wellbeing indicators should be included, incorporating the child perspective and grounded in our obligations under the UN Convention on the Rights of the Child
- data disaggregation in the indicators should be utilised to create a more nuanced picture
- data practices that are integrated, culturally safe and respectful of data sovereignty should be used
- participatory methods of data collection should be utilised, including qualitative data collection, to ensure that the right questions are being asked and to inform data conclusions.<sup>59</sup>

#### **4.6 Key national priorities for human rights identified by the Commission since 2010**

One of the terms of reference for this inquiry is to consider key developments in human rights since 2010.

The Free and Equal project has focused on the key elements of a national human rights reform agenda, with a particular focus on the key systemic issues to improve the consideration of human rights.

In addition to this, since 2010 the Commission has undertaken hundreds of research, consultation and policy projects led by its seven statutory portfolio Commissioners and President; hundreds of submissions to parliamentary inquiries; as well as conducting interventions in court proceedings, issuing guidelines under the four discrimination laws and advocating for human rights reforms through public engagement.

This work has traversed a significant span of issues including:

- Elder abuse and reform to powers of attorney
- Age stereotyping
- Inter-generational cooperation
- Tackling discrimination and stigma in employment against older workers, persons with a disability and women
- Access to transport and education for persons with a disability

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- Sexual harassment in Australian workplaces (including the federal Parliament)
- Economic security of women at all stages of the life cycle
- The risk of homelessness for older women
- Women in leadership
- The treatment of women in male dominated industries
- Cultural reform in security related agencies (the Defence Forces, Australian Federal Police and Border Force) and in national sporting codes
- The over-representation of Aboriginal and Torres Strait Islander peoples and persons with disability in criminal justice processes
- National representative mechanisms for Aboriginal and Torres Strait Islander peoples
- Measures to close the gap in Aboriginal and Torres Strait Islander disadvantage
- Elevating the voices of Aboriginal and Torres Strait Islander women and girls
- Reform to native title, land rights and heritage protection laws
- Experiences of discrimination faced by Muslim and African communities in Australia
- The adequacy of national mechanisms to protect against racism
- The protection of children's human rights through family law, care and protection, and juvenile justice mechanisms
- Addressing cyber bullying experienced by children
- Tackling mental health and self-harming behaviours among children
- Instituting adequate protections and oversight mechanisms for cruel, inhuman and degrading treatment in institutional settings (including through OPCAT implementation)
- Conditions of detention in immigration detention in Australia and offshore, including the treatment of children
- The removal from federal laws of discriminatory treatment experienced by LGBTIQ+ communities, and the introduction of protections against such discrimination in federal discrimination law
- The challenges to freedom of religion in Australia, and the need for protection against discrimination on this basis
- Guidance on surgical procedures undertaken on children with variations in their sex characteristics

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- Disproportionate limitations on people's freedoms through national security laws
- Restrictions on freedom of speech and press freedom
- The need for reform to address the implications of new technologies on human rights, particularly artificial intelligence based decision making, the use of facial recognition technologies and issues of accessibility of technology to the general community.

Each of these issues warrants attention in their own right.

In this section, the Commission highlights some key thematic issues that have been identified by the Commission since 2010 on the adequacy of the protection of human rights at the national level.

**(a) The protection of human rights during the COVID-19 pandemic**

Human rights law provides a framework for making decisions in times of crisis.<sup>60</sup> It provides a mechanism that can ensure that the usual rule of law principles and political norms are not secondary when responding efficiently and effectively to emergencies. Human rights not only provide an important check on executive power; they *help* us make emergency decisions that are rational, balance multiple factors, minimise human cost, and prioritise human life.

In the case of COVID-19, the human rights framework enables unprecedented measures to protect human life. The right to life is absolute and the right to health requires government to ensure access to healthcare and to prevent the spread of epidemics. In some cases, this will mean that important rights are justifiably limited in order to protect public health – for example, freedom of association and freedom of movement.

Wherever rights are balanced against each other or limited, the human rights framework provides guidance on how to approach the assessment. All limitations on rights must be:

- Lawful, namely prescribed by law and accessible to the public.
- In pursuit of a legitimate aim, such as the promotion of other human rights and public interests (for example, public health).
- Reasonable, necessary and proportionate. This means that interferences with rights must be
  - A rational means of achieving the legitimate aim
  - Necessary to achieve the aim (including in light of other options)
  - Proportionate to the aim (no more than what is required to achieve the aim, and the least intrusive option possible).

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- All measures taken must also be non-discriminatory.

When applying these criteria to COVID-19 measures such as lockdowns, we can come to conclusions about appropriate courses of action that align with human rights. Each measure must be lawful and clearly communicated to the public. COVID-19 measures are in pursuit of public health outcomes, and therefore have a legitimate aim. Whether a measure is reasonable, necessary and proportionate depends on the circumstances, including the level of risk to health (which changes over time), the necessity of the measure to addressing the health risk, and the extent of the impact on other important rights.

For example, restrictions on the right to protest may be justified when the population is unvaccinated and COVID-19 is prevalent in the community, but may be less justifiable when there are high vaccination rates and precautionary measures are taken by the protest organisers to mitigate COVID-19 risks. The implementation must also be proportionate – for example, excessive or criminal sanctions for peaceful protesting would be unnecessary to realising the goal of the restrictions – protecting health.

The human rights framework also requires safeguards such as time constraints and reviews on any steps taken to limit human rights. If the measures are no longer necessary, they should cease. It has been noted that ‘infrastructure deployed as a temporary measure tends to persist after crises’. This must be avoided.

Additionally, measures taken must be equitable and should not discriminate; for example, a person's nationality should not affect their access to social security and health services during a pandemic.

Australia's COVID response was relatively effective in protecting rights to life and to health, compared to many other nations. However, there were key failures which resulted in human rights breaches, and insufficient consideration for certain vulnerable and marginalised groups throughout the COVID response. A domestic Human Rights Act would have provided law and guidance that may have improved Australia's response in certain key respects.

The Senate Select Committee on COVID 19 released its final report in April 2022. It made the following key recommendation:

All Australian Governments ensure that restrictions enacted to combat the COVID-19 pandemic are proportionate, the minimum necessary intrusion on rights at all times and are removed fully as soon as the public emergency is over.<sup>61</sup>

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If a Human Rights Act had been in place at the federal level at the time of the COVID-19 outbreak, these recommendations would have been *built into* the decision-making responses of the Australian Government from the *outset* of the pandemic.

During the course of the COVID-19 pandemic, the Commission received 2,598 complaints that were related to COVID-19 (in addition to 13,964 enquiries). This is a very significant number of complaints and represents the most notable single issue to impact on complaint numbers and subject matter in the Commission's history.

Of the 2,598 complaints received, 1,459 were complaints under the Disability Discrimination Act (primarily relating to mask wearing requirements and vaccinations) and 745 complaints alleging breaches of human rights, particularly in relation to international travel restrictions.

These international travel complaints were brought under the human rights complaints pathway under the AHRC Act. The Commission seeks to resolve these complaints through conciliation. However, unlike the regular unlawful discrimination laws, there is no recourse to enforceable remedies through the courts if matters do not resolve.

This left hundreds if not thousands of Australians with no access to remedies when they were stranded overseas and locked out of their home country during the COVID pandemic. The Commission handled a significant number of these complaints, with very little responsiveness and action from government about the concerns being raised – including for people seeking to be reunited with dying relatives or in need of critical medical support back home. This lack of respect to our own citizens should never be repeated.

**(b) Scrutiny of Australia's human rights performance under human rights treaties at the United Nations level**

Australia has voluntarily committed to meet the human rights standards set out in seven international human rights treaties.<sup>62</sup> This is first and foremost a commitment to all people in Australia that they will be treated in accordance with human rights standards. It is, secondarily, a commitment to every other nation in the world about the values and standards that Australia is committed to.

**(i) UN treaty body reviews**

The Commission regularly engages in the periodic reviews of Australia's human rights performance conducted by the UN treaty body committees. The



Commission does so as Australia's A status National Human Rights Institution (NHRI).<sup>63</sup> Engagement of a NHRI in these processes is standard practice for the more than 100 countries that now have an NHRI.

Each human rights treaty committee conducts a comprehensive review of Australia's compliance with the treaty obligations under the relevant treaty. Most treaty committees now also identify urgent issues to which they request Australia to report back to the Committee within 12 months to two years, to demonstrate its consideration and progress in addressing human rights concerns.

Treaty body reviews are an important 'state of the nation' review of Australia's human rights performance in relation to specific human rights standards included in each treaty under review. They contribute to Australia's reputation among the community of nations and in our multilateral and bilateral relations.

The Commission has identified the following concerns about the way the findings of treaty bodies are considered by the government:

- The absence of domestic mechanisms to implement and monitor Australia's human rights performance places disproportionate focus on these international processes.
- Often, issues raised by the treaty committees are not fully considered by governments in Australia. Parliament is not routinely informed of the outcomes of these processes. There is also no formal response required to concluding observations of the committees and there are limited national mechanisms to advance the consideration of the issues raised in a timely manner.
- This can result in the unsatisfactory situation where reviews conducted 5-6 years apart identify that previously raised concerns are unaddressed and continue to impair the human rights of people in Australia. For example, the Committee on the Rights of Persons with Disabilities has regularly expressed concerns about Australia's lack of progress in prohibiting the sterilisation of girls with disabilities, and the continued indefinite detention of persons with disability (particularly Indigenous people with disability) who have been found unfit to plead.
- The Commission has a practice of providing recommendations to the government on how to implement the recommendations of the treaty committees – especially through its reporting to Parliament by the Social Justice Commissioner and National Children's Commissioner. These recommendations have also not been responded to or considered in an in-depth manner.

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The following table lists the most recent consideration of Australia by each of the treaty committees and also notes the input provided by the Commission.

Treaty body and most recent concluding observations of periodic review of Australia	Most recent engagement in periodic review process by AHRC
<p><b>Committee against Torture</b></p> <p><b>Latest periodic review:</b> December 2022</p> <p><a href="#">Concluding observations on the sixth periodic report of Australia</a></p>	<p><b><a href="#">Submission</a>, October 2022:</b></p> <p>In the submission, for the most recent periodic review under the treaty, the Commission put forward recommendations with respect to the following areas:</p> <ul style="list-style-type: none"> <li>• Legislative and institutional rights protections, including the role of the Commission;</li> <li>• Role of the Parliamentary Joint Committee on Human Rights;</li> <li>• The implementation of OPCAT;</li> <li>• And steps towards achieving best practice in: the criminal justice system including youth justice, as well as the immigration detention system, violence against women and children, trafficking, counter-terrorism legislation, people with disability, older persons, and gender identity.</li> </ul> <p>In particular, the Commission addressed in the submission four areas of critical importance:</p> <ul style="list-style-type: none"> <li>• The length of time that people are held in immigration detention</li> <li>• The need to ensure compliance with obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)</li> <li>• Non-fulfilment of the principle of non-refoulement</li> <li>• Cruel treatment of children and young people in youth justice centres</li> </ul>
<p><b>Committee on the Elimination of Discrimination Against Women</b></p> <p><b>Last periodic review:</b> July 2018</p>	<p><b><a href="#">Submission on List of issues Prior to Reporting stage</a>, January 2023:</b></p> <p>Ahead of Australia's next periodic review, the Commission addressed the existing gaps/challenges in the following key areas:</p> <ul style="list-style-type: none"> <li>• Current Human Rights Framework</li> <li>• Violence against women and girls</li> <li>• Women and girls with disability</li> <li>• People born with variations in sex characteristics</li> </ul>

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<p><a href="#">Concluding observations on the eighth periodic report of Australia</a></p>	<ul style="list-style-type: none"> <li>• Women and work</li> <li>• First Nations women and girls</li> <li>• Women in rural, regional and remote areas</li> <li>• Older women and homelessness</li> <li>• Women from culturally and linguistically diverse backgrounds</li> <li>• Poverty and social security</li> <li>• Trafficking and modern slavery</li> <li>• Immigration and citizenship</li> </ul> <p>Additionally, the Commission raised concerns about Australia's reservation of Art 11(2) and presented information on how to withdraw this reservation.</p>
<p><b>Committee on the Rights of the Child</b></p> <p><b>Last periodic review:</b> November 2019</p> <p><a href="#">Concluding observations on the combined fifth and sixth periodic reports of Australia</a></p>	<p><b><a href="#">National Children's Report, 2019</a> and <a href="#">submission 2018</a>:</b></p> <p>The Commission's submission discussed a range of issues pertaining to children's rights in Australia, with emphasis on vulnerable groups who are overrepresented in juvenile justice systems including Indigenous children, children with disability and children who have been the subject of child protection intervention. The submission reiterated recommendations of expanding the availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs, and raising the age of criminal responsibility in Australia.</p>
<p><b>Committee on the Rights of Persons with Disability</b></p> <p><b>Last periodic review:</b> October 2019</p> <p><a href="#">Concluding observations on the combined second and third periodic reports of Australia</a></p>	<p><b><a href="#">Submission, July 2019</a>:</b></p> <p>The Commission's submission drew attention to three areas of critical importance:</p> <ul style="list-style-type: none"> <li>• The need to introduce a legal framework that recognises the equal legal capacity of people with disability and enables and facilitates the creation and implementation of various supports for the exercise of legal capacity</li> <li>• The need to accelerate action to ensure people with disability are not unlawfully or arbitrarily deprived of their liberty on the basis of disability, including in the criminal justice system The need to prohibit the practice of sterilisation of children with disability, and adults with disability without their free, prior and informed consent</li> </ul>
<p><b>Committee on the Elimination of Racial Discrimination</b></p>	<p><b><a href="#">Submission, October 2017</a>:</b></p> <p>This submission provides information concerning racial discrimination experienced by key population groups in</p>

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<p><b>Last periodic review:</b> December 2017</p> <p><a href="#">Concluding observations on the eighteenth to twentieth periodic reports of Australia</a></p>	<p>Australia and other thematic issues and areas of concern relating to racial discrimination.</p> <p>The Commission highlights three areas of particular importance:</p> <ul style="list-style-type: none"> <li>• The collection of comprehensive data in relation to racial discrimination, cultural diversity, racially motivated crimes and multiculturalism generally.</li> <li>• Consideration and implementation of relevant recommendations, once released, of the Royal Commission into the Protection and Detention of Children in the Northern Territory.</li> </ul> <p>Training of police in cultural competency and anti-racism; compliance of police practices with international human rights law.</p>
<p><b>Human Rights Committee</b> (Monitors implementation of the International Covenant on Civil and Political Rights)</p> <p><b>Last periodic review:</b> December 2017</p> <p><a href="#">Concluding observations on the sixth periodic report of Australia</a></p>	<p><b><a href="#">Submission, 2017:</a></b></p> <p>This submission provides information concerning the civil and political rights of key population groups in Australia and other thematic issues engaging civil and political rights.</p> <p>The Commission highlights five areas of particular importance:</p> <ul style="list-style-type: none"> <li>• The Australian Government's ratification of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by December 2017 and progressive implementation immediately thereafter.</li> <li>• The Australian Government's commitment to adopt national justice targets to reduce the rates of imprisonment of Aboriginal and Torres Strait Islander adults and juveniles, and to resource a national strategy to achieve this.</li> <li>• The Australian Government's immigration policy (especially as it relates to refugees and asylum seekers).</li> <li>• All Australian governments' compliance with, and implementation of, the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.</li> </ul> <p>The Australian Government's review of counter-terrorism laws to ensure any limitation on human rights is clearly expressed, necessary for the pursuit of a legitimate purpose, reasonable and proportionate.</p>

<p><b>Committee on Economic, Social and Cultural Rights</b></p> <p><b>Last periodic review:</b> July 2017</p> <p><a href="#">Concluding observations on the fifth periodic report of Australia</a></p>	<p><b><a href="#">List of issues prior to submission of the sixth periodic report of Australia, April 2022:</a></b></p> <p>Some of the issues flagged for reporting include:</p> <ul style="list-style-type: none"> <li>• the introduction of a federal charter of rights guaranteeing the full range of economic, social and cultural rights;</li> <li>• the steps taken to provide for constitutional recognition of indigenous peoples and to incorporate the principle of free, prior and informed consent in the Native Title Act and other relevant legislation;</li> <li>• the progress made in reforming the Native Title Act, as recommended by the Committee;</li> <li>• the proportion of the population living below the nationally defined poverty line, before and after taxes and transfers and the levels of inequality.</li> </ul>
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The Australian Government publishes information about treaty body periodic reviews [on the website](#) of the Attorney-General's Department. It does not formally respond to the treaty body recommendations or publish information about which government department or which level of government is responsible for the implementation or consideration of these recommendations, and any actions taken as a result.

## **(ii) Individual communications to UN treaty bodies**

Each of the seven human rights treaties to which Australia is a Party has a committee (or 'treaty body') that monitors compliance with its treaty obligations.

Individuals who claim that they have suffered a violation of their rights may submit complaints/individual communications to the relevant treaty body where Australia has accepted the complaints jurisdiction. To be subject to the complaint mechanism, the jurisdiction of the committee must be accepted through either becoming party to the Optional Protocol that establishes the mechanism, or by agreeing to a mechanism contained within the treaty itself.<sup>64</sup> Australia is a party to the complaints (or 'individual communications') mechanisms in relation to 5 of the human rights treaties.<sup>65</sup>

Through the individual communications mechanism, committees can issue decisions determining whether there has been a breach of the treaty or not, and recommend remedies, including compensation to the aggrieved party and recommend changes to laws or policies to address the violation. While these

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recommendations are not legally binding, countries are under an obligation to give them considerable weight in deciding how they should act.

An increasing number of people have resorted to making human rights complaints to UN treaty bodies. In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction.<sup>66</sup> However, the decisions of such bodies can, and have been, ignored by government.

Remedy Australia reports that Australia has met its obligations to remedy human rights breaches in only 12% of individual communications decided against Australia by the Human Rights Committee.

Notably, some matters proceed to the individual communications stage after they have been considered by the Commission. For example, the Commission considered the situation of persons with disability found unfit to plead who were indefinitely detained. Due to the lack of remedy and response to this issue, the matter was considered at the individual communication stage – such as in the example case study below.

Noble v Australia (2016)

On 23 September 2016, the UN Committee on the Rights of Persons with Disabilities found that Australia had breached its obligations under the UN Convention on the Rights of Persons with Disabilities for the indefinite imprisonment of Marlon Noble, an Aboriginal man with an intellectual disability who had been found unfit to plead under the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) – renamed the *Criminal Law (Mentally Impaired Accused) Act 1996* (CLMIA Act).<sup>67</sup>

Mr Noble was imprisoned in Western Australia in 2001 without trial. After 10 years and 7 months in prison (including 17 months on remand), he was released on restrictive conditions of unlimited duration, with no avenue of appeal to have them lifted. Mr Noble was imprisoned for a far greater period of time than he would have been had he been found guilty of the original charges. According to Remedy Australia, court statistics suggest that, had he been tried and convicted, Mr Noble's sentence would have likely been between 2 and 3 years, with time spent on remand deducted from the sentence.<sup>68</sup>

The UN Committee on the Rights of Persons with Disabilities found that Australia failed to fulfil its obligations under articles 5(1) and (2), 12(2) and (3), 13(1), 14(1)(b) and 15 of the Convention.

In response, the Australian Government admitted some failures, but did not agree that it had violated Mr Noble's rights. The Western Australian Government committed to providing Mr Noble with supports to help him live independently in the community, as well as to review the CLMIA Act and undertake training of the judiciary. In April 2023, the Western Australian Government [passed](#) the Criminal Law (Mental Impairment) Bill 2022 to make some amendments to the CLMIA Act.

The Australian Government publishes responses to individual communications where there is a finding by a UN Committee [on the website](#) of the AGD. Government responses are also published in the human rights database of the Office of the High Commissioner for Human Rights.

In the Commission's view, this minimal approach limits awareness of the Government's approach on important human rights matters and does not ensure sufficient scrutiny or transparency for their response. Mechanisms to address this are discussed in section 6 below.

**(c) The protection of human rights through various national frameworks and national action plans**

While Australia does not have a current National Human Rights Action Plan, it does have multiple national action plans and national frameworks on a range of thematic issues. For example, national frameworks on the protection of children, family violence, closing the gap, early childhood etc.

These frameworks are inter-governmental and involve commitments from all levels of government in Australia. They often have an overarching framework that is put into place for between 5–10 years, and then more frequently refreshed action plans that sit underneath these.

The Commission's workshop on human rights indicators and accountability mechanisms, considered the extent to which these national frameworks and action plans protect human rights.

These frameworks are important as they:

- articulate the joint commitment of all Australian governments to address priority issues in the community, and elevate these issues as matters of importance
- often involve commitments to work to improve data collection that is national and comparable

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- enjoy significant 'ownership' and invest responsibility for outcomes in particular Ministers and departments
- facilitate the basis for inter-governmental cooperation and funding on issues.

Frequent concerns expressed about these frameworks are that they:

- do not adopt a human rights-based approach (such as through setting measurable targets to be achieved over the life of a framework) or explicitly reference relevant human rights standards
- are under-funded, making it difficult for them to achieve their stated purpose
- commit to co-design and full participation of affected groups, but in practice governments struggle to meet these commitments
- often struggle to address inter-sectional issues, and tend to be siloed to address the specific thematic issue that is the focus of the framework without drawing connections with other issues that are integrally linked.

Despite these concerns, they are highly significant programs that advance important human rights issues in the community – and can be improved.

The Commission has also been funded from 2022 by the Department of Social Services to lead child engagement processes under the National Framework for Protecting Australia's Children and the National Framework on Early Childhood Development.

In 2022, the Australian Government also funded the National Children's Commissioner to develop an integrated child engagement strategy to be implemented over four years across five national frameworks. This project is intended to provide a process to ensure the co-design and effective participation of children, especially those who are marginalised, in the design and implementation of policy and services that affect them.

The Commission considers the role of these frameworks in working with a national approach to human rights measurement in section 6 of the submission.

The Commission has also promoted the establishment of additional national frameworks to provide an implementation framework for the United Nations Declaration on the Rights of Indigenous Peoples and for the Convention on the Rights of the Child, and on business and human rights.

The Commission has also advocated for the following two frameworks, and has been funded by Government to advance consideration of them.



**(i) National Anti-Racism Framework**

In March 2021, the Commission released a proposal for a National Anti-Racism Framework in response to enduring community calls for national action after heightened experiences of racism and racial inequality in recent years, particularly during the COVID-19 pandemic.<sup>69</sup> The proposal contained guiding principles, outcomes and strategies to begin a national conversation about anti-racism action.

In December 2022, the Commission launched an initial scoping report for a National Anti-Racism Framework. This report provides an initial evidence-based summary of what the Commission heard about a national anti-racism framework from communities, sector organisations, government, scholars, and expert knowledge holders to date. It draws from significant community consultations from March 2021 to April 2022, including more than 100 consultations in 48 locations across Australia and 164 public submissions.

As the culmination of these consultations and submissions, the scoping report identifies key considerations for the principles that should underpin a framework, the cross-cutting themes consistently raised by participants, and the sector-specific priority areas to guide this work moving forward.

The Australian Government provided initial funding for the Commission to continue to scope a national framework and to conduct relevant research on key issues. This commitment of funding to a National Anti-Racism Strategy will allow for further comprehensive consultations and co-design processes in advancing a National Anti-Racism Framework.

**(ii) Framework for Action on First Nations Gender Justice and Equality**

Led by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Wiyi Yani U Thangani* (Women's Voices) is a multi-year initiative set out to capture what Aboriginal and Torres Strait Islander women and girls consider to be their strengths, challenges and aspirations for change.

Informed by findings from engagements and submissions, the *Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future* report was published in December 2020.<sup>70</sup> The report is an extensive whole-of-life report that captures the needs of Aboriginal and Torres Strait Islander women and girls, the principles they think ought to be enshrined in the design of policy and programs, and the measures they recommend ought to be taken to effectively promote the enjoyment of their human rights in the future.

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Following the report, the *Wiyi Yani U Thangani Implementation Framework* was developed, through a series of dialogue papers, workbooks and roundtables, to provide guidance for translating the substantial findings of the report into meaningful action.<sup>71</sup> The Implementation Framework takes a gender-responsive, systems-change approach across four thematic areas to progress First Nations gender justice and equality.

A national summit for this project was held from 8–12 May 2023, and will lay the foundation for a national Framework for Action on First Nations Gender Justice and Equality for consideration by the Australian Government in the near future.

#### **(d) Prevalence research**

The Commission also periodically conducts prevalence research on issues of major concern.

##### **(i) Sexual harassment**

In 2022, the Commission conducted the fifth national survey to investigate the prevalence, nature and reporting of sexual harassment in Australian workplaces. For the first time, the survey also asked about workers' views on the actions taken by their employer's action to address workplace sexual harassment. The report, titled *Time for Respect*, was released in November 2022.<sup>72</sup>

The survey provides vital information about the scale of workplace sexual harassment and the need for prevention and response initiatives. The survey was conducted with over 10,000 people aged 15 years or over, using a sample that is representative of the Australian population in terms of gender, age and geographic location. The Commission conducted and reported on similar sexual harassment surveys in 2003, 2008, 2012 and 2018.

The 2018 prevalence study was conducted in conjunction with the Respect@Work national inquiry into sexual harassment.

The Commission also led prevalence studies on sexual harassment in particular settings: in the retail sector, and universities.

##### **(ii) Age discrimination in the workplace**

In 2015, the Commission released its first report on the national prevalence survey of age discrimination in the workplace.<sup>73</sup> The objectives of this survey were to quantify the prevalence, nature and impact of workplace age discrimination amongst those aged 50 years and older.

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The results showed that over a quarter of Australians aged 50 years and over reported that they had experienced some form of age discrimination in the previous two years. When managers were asked if they factored age into their decision making, a third responded that they did.

This research was intended to become the benchmark against which we can measure future gains in addressing age discrimination.

Research on the employment climate for older workers and the shift in perceptions around Australia's ageing workforce have been conducted by the Australian HR Institute, in partnership with the Commission, in 2014, 2018, 2021, and most recently in 2023, with the release of the *Employing and Retaining Older Workers* report.<sup>74</sup>

The most recent survey data found that one in six organisations will not consider hiring people aged 65 and above, while only a quarter are open to hiring those aged 65 and above 'to a large extent'.

## **5 Looking forward: How to effectively protect human rights in Australia**

This submission has set out concerns about the operation of the 2010 Framework and the existing national systems for protecting human rights in Australia. It has also provided an overview of key Commission proposals for addressing these.

In this section, the Commission provides recommendations to the PJCHR on how to ensure an effective system of human rights protection in Australia into the future. Most of these recommendations relate to the content of a future National Human Rights Framework. Some other recommendations are also included that could be quickly implemented to improve the protection of human rights at the federal level and improve the accountability for human rights by the Government.

### **5.1 There is a need for a National Human Rights Framework**

**Recommendation 1: That the Australian Government develop a new National Human Rights Framework**

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The Commission supports the establishment of a National Human Rights Framework. Such a framework is necessary to ensure that Australia has processes to:

- set national priorities on human rights
- educate the community about human rights
- incorporate human rights standards into domestic law, policy and practice
- ensure transparency in relation to the actions taken to consider and implement the recommendations of human rights treaty body committees and UN special procedures about compliance with our human rights obligations
- ensure the engagement of people whose human rights are affected in the design of policy, programs and laws
- hold Government to account for the human rights impacts of its actions on people in Australia.

The Commission encourages the PJCHR to explore with witnesses and submitters to the Inquiry the key features of a future National Human Rights Framework, and the key elements required to ensure that a future framework is robust and achieves outcomes that improve the protection of human rights in Australia, embedding elements to ensure its effectiveness.

The subsequent sections in this submission describe the Commission's proposed key features of a future National Human Rights Framework.

The Commission's recommended National Human Rights Framework can be summarised in the following diagram.

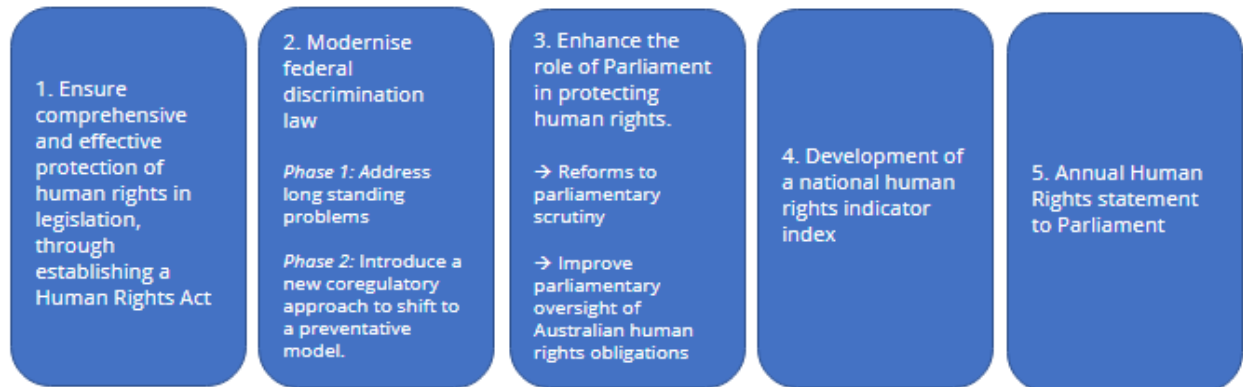
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## National Human Rights Framework

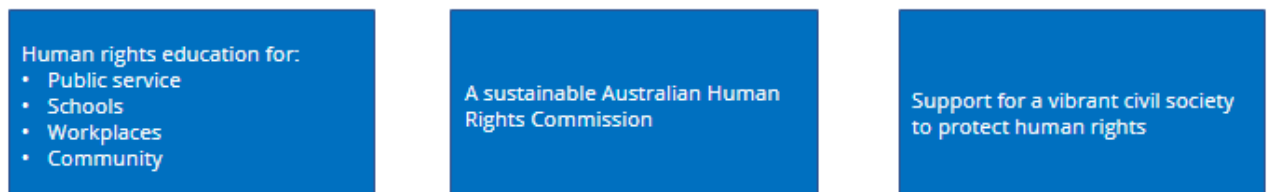
### Objectives

- Set national priorities
- Benchmark and review progress
- Educate the community about their rights
- Protect human rights in law, policy and practice
- Hold government to account
- Ensure transparency in decision making about human rights

### Pillars



### Foundations



The following diagram compares the Commission's proposals to the key measures contained in the 2010 Framework. This shows how a future framework should differ from the previous Framework.

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<b>How does it compare?</b>  <b>The Australian Human Rights Commission's proposed model and the 2010 Australia's Human Rights Framework.</b>		
Measure	Australia's Human Rights Framework	Australian Human Rights Commission model
Human Rights Act	✗	✓
Discrimination law reform	✓ <i>(With a focus on consolidation)</i>	✓ <i>(With a focus on modernisation)</i>
National Human Rights Action Plan	✓	✗
National Human Rights Indicator index	✗	✓
Annual statement of human rights to Parliament	✗	✓
Human rights education	✓	✓
Parliamentary scrutiny	✓	✓ <i>(Improvements to model)</i>
Parliamentary oversight of Australia's Human Rights obligations	✓	✓ <i>(Strengthened public engagement)</i>
Sustainability resourced Australian Human Rights Commission	<i>(Focus on capacity to deliver human rights education only)</i>	✓
Support for robust civil society organisations	✓	✓

This final diagram also shows how the measures proposed by the Commission would meet the human rights obligations of the Government to respect, protect and fulfil human rights. Such a multi-dimensional approach is required for the Government to expansively and proactively meet its human rights obligations.



## RESPECT

### Own actions do not breach human rights

Cohesive legal protections for human rights through a domestic human rights act with remedies available

Positive duty in human rights act to prevent breaches, along with procedural duties to enhance participation and access to justice

Cohesive discrimination law regime through holistic discrimination law reform

Positive duty across all discrimination acts to prevent discrimination in public life

Strengthened Parliamentary scrutiny regime



## PROTECT

### Action taken by government to prevent others from breaching human rights and obligations on people and institutions across the community to respect human rights

Early consideration of human rights impacts in policy, law and decision-making

Private contractors providing public services on behalf of government bound by Human Rights Act - other private businesses may voluntarily opt-in to human rights obligations.

Positive duty on businesses to prevent discrimination

Education measures

Stronger regulatory powers for the AHRC to increase compliance with human rights and discrimination standards



## FULFIL

### Positive actions taken to advance human rights

Overarching human rights framework with long- and short-term priorities, with sufficient resourcing and in-built accountability mechanisms

Indicator framework - including tracking progressive realisation of rights

Domestic reporting requirements under the Human Rights Act, including by the AHRC

Processes to ensure better responsiveness to international mechanisms

Strengthening the role of civil society in advocating and educating on human rights

Strengthening institutional accountability and the development of a human rights culture across government

## 5.2 Comprehensive and effective protection of human rights in legislation is required

The Commission has released two Position Papers that examine the adequacy of the protection of human rights at the national level and which propose pathways to improve this protection.

**Recommendation 2: That the Australian Government introduce a national Human Rights Act. To advance this, the Commission recommends that the Australian Government develop a Draft Exposure Bill based on the Commission's Free and Equal model.**

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The Commission's Position Paper on this issue sets out a model for a national Human Rights Act. The Commission commends this model to the PJCHR, noting the extensive research and consultation undertaken in its development and its calibration to address the specific legal context at the federal level in Australia.

The model builds on the existing Human Rights Act models, and reviews of them, in the ACT, Victoria and Queensland. These Acts have existed in the ACT and Victoria since 2004 and 2008 respectively, and have clearly enhanced the protection of human rights and the quality of decision making by government more generally in those jurisdictions in that time.

The Commission's Position Paper sets out compelling reasoning for why a Human Rights Act should be given serious consideration, and provides a clear framework for how a Bill could be drafted.

The Commission encourages the PJCHR to identify practical steps for the Government to be able to define the scope of a Human Rights Act in order to draft it in a timely manner.

The Position Paper has deliberately been developed to address challenges in the potential wording of clauses in a Human Rights Act, and can readily be translated into a Bill.

The Commission is strongly of the view that the next step in the development of a Human Rights Act is to develop a Draft Exposure Bill based on the Commission's model. This model builds from the work done successively by the Brennan Report, and through the operation of the ACT, Victorian and Queensland Human Rights Acts.

Debates about Human Rights Acts have tended to get bogged down in ideological issues with people 'shadow boxing' with theoretical concerns about such laws. The issues raised often bear little resemblance to what is proposed in model Human Rights Acts. This is unhelpful and usually far removed from the reality of what a Human Rights Act would contain and what it would achieve in the domains of community understanding, policy development, legislative drafting and decision-making by public authorities.

Grounding the next stage of consideration of a Human Rights Act in an actual drafted bill will significantly lift the quality of debate and engagement – and within the forum of parliament – and ensure that a Human Rights Act is tailored to the federal legal system in which it would operate.

**Recommendation 3: That the Australian Government modernise federal discrimination laws to ensure their effectiveness and shift the focus from**



**a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place.**

**Consideration should be given to undertaking these reforms in two stages:**

**Stage one: addressing immediate priorities and fixing longstanding problems in the operation of federal discrimination law (year 1)**

**Stage two: introducing a new co-regulatory model that broadens and expands on the positive duty under the SDA (years 2–3).**

The Commission's Position Paper on federal discrimination law sets out a comprehensive agenda for reforming these laws.

The Commission notes that reform of these laws is long overdue, creating inefficiencies for business, impeding access to justice and meaning that there are ineffective protections against discrimination at the national level.

Comprehensive reform proposals to improve the Sex Discrimination Act were recommended by the Senate Legal and Constitutional committee as far back as 2006. The Australian Government sought to address these reforms through the process to consolidate federal discrimination laws under the 2010 Framework in 2012. That process did not result in reforms being achieved, meaning that reforms to the Sex Discrimination Act initially proposed in 2006 have sat largely unaddressed for nearly 20 years.

There are multiple other examples of reforms that have been identified as of great importance that also remain unaddressed – for example, the impact of the *Skavos* decision in limiting the capacity of the Disability Discrimination Act to address discrimination in employment for persons with a disability.

Multiple reports and reviews have identified what needs to be done to modernise federal discrimination law prior to and since the commitment to do so through the 2010 Australia's Human Rights Framework.

The most comprehensive and recent of these is the Commission's Position Paper.

Since the release of the Position Paper in 2021, the federal Parliament has passed amendments to the Sex Discrimination Act introducing a positive duty to prevent sexual harassment, as well as some other procedural amendments that

were identified in the Respect@Work report and the Commission's Position Paper.

There are currently some discrimination law reform matters under consideration by the Government, including:

- The Australian Law Reform Commission inquiry on religious exemptions under the SDA to conclude in December 2023
- Consideration of a Religious Discrimination Act
- Consideration of the scope and wording of the SOGII protections in the SDA, to modernise this terminology
- The Attorney-General's Department's review of costs under the SDA (in response to the recommendation in the Respect@Work report and the Free and Equal Position paper)
- The introduction of a new positive duty to prevent sexual harassment, and the Commission's functions to ensure compliance, in implementation of recommendations in the Commission's Respect@Work report, is due to be reviewed after it has been in operation for 2 years (in 2025). The Commission has recommended that this positive duty also apply across all other protected attributes in federal discrimination law, and that there be an expanded co-regulatory approach to its operation.

Accordingly, the Commission encourages the PJCHR to consider proposing a staged approach to federal discrimination law that can:

- address these immediate priorities that are already underway (to be completed in year 1 of the new framework)
- address urgent technical fixes to federal discrimination laws that would improve their operation (such as addressing the *Skavos* issue under the Disability Discrimination Act) (to be completed in year 1 of the new framework)
- commit to undertaking a broader reform of federal discrimination law to shift the model and introduce new co-regulatory approaches once the positive duty under the Sex Discrimination Act has been reviewed (to be completed in years 2 and 3 of the new framework).

### 5.3 Parliament's role in protecting human rights should be enhanced

**Recommendation 4: That the Australian Government strengthen the parliamentary scrutiny of human rights, as set out in the Commission's Free and Equal Position Paper.**

The Commission's Position Paper on a Human Rights Act includes a review of the effectiveness of the parliamentary scrutiny of human rights at the federal level, with a particular emphasis on the role of the Parliamentary Joint Committee on Human Rights.<sup>75</sup>

The Commission considers that the Committee has established itself as a valuable scrutiny and accountability mechanism for human rights at the federal level.

The Position Paper makes 8 recommendations to further enhance the effectiveness of the Committee as follows:

- The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.
- The Commission recommends that section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended, along the lines of the power of the UK Human Rights Committee, to allow it to 'make special reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases). The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.
- The Commission recommends that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to require statements of compatibility for all legislative instruments.
- The Commission recommends that the range of matters to be addressed in a statement of compatibility should include consideration of consultations undertaken in accordance with the participation duty proposed in the Commission's model for a Human Rights Act.

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- The Commission recommends that Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.
- The Commission recommends that with the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could be amended, or an accompanying legislative instrument drafted, to provide greater clarity on expectations in statements of compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.
- The Commission recommends that a public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.
- The Commission recommends that consideration be given to having designated human rights advisers in Departments.

The Commission notes that the work of the committee is inherently limited due to the limited legal protection of human rights in Australian law. The single biggest change that can improve the effectiveness of the committee's work is for its work to occur in conjunction with a Human Rights Act. This would:

- provide stronger accountability measures for public servants to fully consider human rights (in accordance with the proposed positive duty)
- ensure that laws, policies and programs are developed with the full engagement of affected communities (in accordance with the proposed participation duty and the role of the PJCHR to assess the adequacy of this participation)
- ensure there is domestic guidance on human rights standards and obligations over time that can assist in the quality of consideration of human rights issues
- increase the weight that public servants and parliamentarians attach to human rights considerations due to the possibility of people whose rights are restricted having a cause of action to have those impacts addressed.

These proposed reforms to the parliamentary review of human rights are complementary to the need for a Human Rights Act. They are not a substitute for a Human Rights Act. Likewise, a Human Rights Act is not a substitute for these reforms also being undertaken.

**Recommendation 5: That parliamentary oversight and awareness of Australia's international human rights obligations be enhanced by:**

- **Reintroducing the requirement that the Attorney-General table in Parliament concluding observations of human rights treaty committees in a timely manner, as well as to make publicly available (and update annually) the Government's response to the recommendations contained in the concluding observations**
- **Requiring the Attorney-General to table in Parliament an annual statement indicating all individual communications decided by human rights treaty committees and the Government's response to these communications.**
- **Empowering the Parliamentary Joint Committee on Human Rights to inquire into the adequacy of the Government's response to both concluding observations and individual communications on a periodic basis.**
- **Refer to the Joint Standing Committee on Treaties an inquiry into the status of all reservations and interpretative statements under human rights treaties to determine their ongoing necessity**

The Commission has concerns about the limited engagement that occurs in relation to the concluding observations of human rights treaty committees and in relation to individual communications that have been considered by these committees.

Under each human rights treaty, the Government is obliged to promote awareness of the treaty and disseminate the outcomes of periodic reviews by the human rights treaty commitments.

It is unacceptable that the Government does not routinely table concluding observations in Parliament, thereby bringing directly to the attention of the Parliament important scrutiny of the country's performance on human rights matters.

This can be remedied simply by reinstating the requirement that the Attorney-General table concluding observations in both houses of Parliament.

Concluding observations will often relate to matters that are complex, that involve longstanding challenges, cross government departments and for which responsibility may exist at different levels of government.

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The Commission accepts that responding to these observations can be a complex task. However, this complexity is not a reason not to respond to the observations at all. The Commission therefore considers that the Government should also maintain publicly-available information about the concluding observations and their status. This would include:

- who in government is responsible for each recommendation
- proposed actions to respond to recommendations
- timeframes and measurable outcomes for responses.

Some of this information has been maintained through a treaty body recommendations database on the website of the Attorney-General's Department. This practice should be re-committed to and maintained on an ongoing basis.

The existing database would require some enhancement to ensure it provides robust, measurable information for which Government can be accountable. To date, public information has tended to indicate who in Government is responsible for recommendations but has not set out proposed actions, timeframes and outcomes for recommendations.

Likewise, there is presently inadequate accountability for responding to individual communications that arise from the human rights treaty system.

It is critical to recall that the only circumstances in which people can take individual communications to the UN human rights committees is where there are no domestically available processes to remedy to human rights breaches. It is intended as a process of last resort.

It can be anticipated that fewer communications would progress to the UN if Australia had domestic processes to consider human rights breaches in the first place.

It is unacceptable that the Australian Government does not routinely inform the Parliament of the outcomes of individual communications.

Mandating parliamentary oversight of individual communications should be considered. The Commission proposes that this take the form of:

- requiring the Attorney-General to table information about individual communications in Parliament on an annual basis, along with the Government's response to these

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- empowering the Parliamentary Joint Committee on Human Rights to review the adequacy of the Government's response to individual communications and / or concluding observations from time to time.

The Commission also notes that the Government has committed to review existing reservations and interpretive statements to human rights treaties at various times – such as in the 2010 Australia's Human Rights Framework, through the Universal Periodic Review process and in its engagement with human rights treaty committees.

The Commission is concerned that any such reviews that have been completed are internal departmental 'desk top' reviews with no public engagement and no transparency. It is unsatisfactory that there has been no formalised approach to reviewing reservations and interpretive on a periodic basis to ensure their relevance to modern Australian life.

A reservation or interpretive statement has the effect of removing or limiting the obligation on all Australian governments to comply with human rights. This can constrain policy development processes by removing the applicability of the relevant human rights when developing laws, policy and practice. It sends a message to the community and internationally that Australia does not intend to fully meet that human rights standard.

The Government should ultimately strive to ensure that it can meet all human rights standards to the fullest extent, and be open to scrutiny for how it is seeking to do so. Reservations and interpretive statements militate against this outcome and should only be maintained for the shortest time necessary and in the narrowest form possible.

The Commission therefore considers it appropriate that an inquiry be referred to the Joint Standing Committee on Treaties to formally undertake a review of all existing reservations and interpretive statement as an action under a new National Human Rights Framework.

## **5.4 Education and training are critical to build a human rights culture**

**Recommendation 6: That a national human rights education program be introduced targeted to the Australian Public Service, primary and secondary schools, workplaces and the general community.**

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Human rights education is critical to building awareness and understanding of human rights.

For public servants, it is essential to support them in meeting their obligations to develop Statements of Compatibility for new legislation and legislative instruments, as well as to adopt human rights-based approaches in policy design and implementation.

For the community generally, greater knowledge and awareness of human rights can empower people to stand up for their own rights and to better understand their responsibilities to respect the rights of others.

For school students, at the primary and secondary levels, it contributes to engaged citizenship and the development of respectful behaviours.

For the business community and workplace settings, it can prevent workplace discrimination and harassment, ensure suitable internal response mechanisms to complaints of discrimination or harassment, and building employees' confidence to stand up for their rights and respect the rights of others.

Human rights education encompasses:

- Education about human rights: what human rights are, why they matter, and how they are protected.
- Education through human rights: education delivered in a way that respects the rights of educators and learners.
- Education for human rights: empowering learners to enjoy and exercise their rights, to respect and uphold the rights of others.<sup>76</sup>

There was significant focus on the development of human rights educational resources under the 2010 Framework. Lessons from the activities under the Framework are:

- To ensure the accessibility and reach of resources and outreach. This includes accessibility to the range of assistive technologies used by people with disabilities, as well as accessibility to the needs of different learner groups. Materials should be tailored for Aboriginal and Torres Strait Islander communities and for culturally and linguistically diverse communities, including provision of translated resources where relevant.
- To ensure resourcing enables the ongoing maintenance of resources, training materials, and websites to ensure longevity of the materials.



Human rights education will be vital to support the implementation of a Human Rights Act and to support compliance and understanding for updated discrimination laws.

## **5.5 A national human rights indicator index should guide priority setting and measure progress over time**

**Recommendation 7: The Australian Government commit to a national human rights indicator index that can measure progress on human rights over time.**

A key issue for the Commission in this Inquiry is whether to recommend that the Australian Government commit to a new National Human Rights Action Plan.

As noted earlier, the Commission has concerns about the Plan that was introduced under the 2010 Framework. In particular because it:

- lacked funding to implement commitments made in the plan, leaving the plan with little action
- was time consuming to develop, with limited buy in from states and territories
- lacked measurable targets and indicators, and lacked appropriate oversight and monitoring processes.

The National Human Rights Action Plan was in fact the third attempt at such an action plan since the 1990s – all of which have been considered problematic for similar reasons and considered to have achieved limited outcomes.

Earlier action plans have also been criticised for amounting to a statement of existing government policy rather than providing a frank assessment of progress in meeting human rights obligations.

For this reason, the Commission considers that a different approach should be taken by the Australian Government to that adopted in the 2010 Framework.

The Commission considers that alternative measures should be adopted under a new National Human Rights Framework that can meet the following objectives:

- enable the measurement of human rights in an objective manner, and over time
- ensure independent monitoring to provide robust analysis of the progress or otherwise on human rights issues

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- provide accessible avenues to the community to inform their engagement in policy and program design
- ensure its design is participatory, to reflect the key human rights issues as identified by the community
- reflect an intersectional, 'whole of life' view of human rights that focuses on building people's capability and ensuring that they have an equal life chance to thrive
- provide a basis for the Government to periodically identify priority actions for human rights protection and advancement, knowing that there will be data to hold them account for progress over time.

Accordingly, the Commission recommends that the Government commit to the development of a national human rights indicator index. Such an index should be developed by the Commission as an independent statutory agency, in conjunction with data and social policy experts.

The Commission considers that the *Is Britain Fairer?* model, administered by the Equality and Human Rights Commission of the United Kingdom, provides a constructive example of what such an indicator index should look like.

This national framework is required under section 12 of the *Equality Act 2006*, which provides that the Commission should monitor social outcomes from an equality and human rights perspective, by developing indicators and reporting on progress. Reports are traditionally done on a 3-year cycle.

This model evolved from separate measurement frameworks previously administered by separate equality commissions in the UK on equality for adults, children, good relations and human rights. It is informed by the capability approach first developed by Amartya Sen, and which has informed World Development Reports and other significant policy processes globally over the past 20 years.

The *Is Britain Fairer?* reporting framework adopts a human rights perspective through which to look at equality in Britain. The report and associated data is widely used across parliamentary committees, government departments, statutory bodies and policy makers, economists, statisticians, social researchers and academics, media, charities, third-sector organisations and campaign groups, non-governmental organisations (NGOs) and by National Human Rights Institutions and National Equality Bodies in other countries.

The Commission notes that there are other models that should also be considered in the design of an Australian national human rights indicator index. These include the New Zealand National Action Plan model (administered by the

New Zealand Human Rights Commission), the Human Rights Measurement Initiative's Rights Tracker tool, as well as human rights indicator frameworks developed in other countries, specifically in relation to guide implementation of the United Nations Sustainable Development Goals, and the significant guidance provided by the Office of the High Commissioner for Human Rights on human rights indicators.<sup>77</sup>

The development of such a framework would be a significant undertaking, involving complex research and consultation across all Australian governments and the community. The Commission considers that a framework would take approximately 3–4 years to fully implement from scratch.

**Recommendation 8: The Australian Government commit to an annual statement to Parliament on human rights.**

A national human rights indicator index will be capable of meeting most of the objectives set out on the previous page.

It will provide the evidence base for the Government to periodically identify priority actions for human rights protection and advancement at the national level. But it will not provide the basis on which the Government commits to these priority actions on a regular basis.

Accordingly, the Commission recommends that the Government also introduce a new mechanism by which it announces key human rights priorities on an annual basis through a statement to Parliament.

Such a statement would provide a basis for the Government to identify its priorities both within Australia and internationally for the protection of human rights, and to identify and celebrate the progress that it has made over the course of each year. This would mirror the approach currently taken in the Parliament with the annual Closing the Gap report and statement, usually done in the early sittings of each calendar year, and which identifies progress and priorities for closing the gap in Indigenous disadvantage.

Such a statement might appropriately be made to coincide with Human Rights Day in December each year.

The combination of a national human rights indicator index and a simplified process for the Government to commit to key human rights priorities on a regular basis would significantly shift the current approach to human rights at the federal level. It would also play a significant role in educating the community

and building awareness of human rights, and form a basis for community debate on human rights.

## **5.6 The Australian Human Rights Commission should be strengthened as the independent monitor of human rights for Australia**

**Recommendation 9: The Australian Government should ensure that the Australian Human Rights Commission is appropriately and sustainably resourced to perform its functions, in accordance with the Paris Principles**

The Australian Human Rights Commission was established in 1981 and put on a permanent footing in 1986. As a longstanding, small independent statutory commission, it has periodically faced funding challenges over its history.

Key challenges for the Commission have included:

- Funding for statutory Commissioners not being sufficient to appropriately support their roles.
- Funding for complaint handling under federal discrimination law and the AHRC Act not keeping pace with public demand, with the result that the Commission's complaint handling service operates with a significant backlog.
- Efficiency dividends and budget savings disproportionately impacting the Commission, as a small agency, over time. For example, statutory commissioners currently account for more than 20% of the Commission's total budget. The only variable cost over which the Commission has significant financial control is its core staffing level, which is impacted by budget savings.
- Difficulties in achieving new budget funding on a regular basis, other than for specified project work. This is due largely to the small size of the Commission meaning budget proposals are too small to be considered. The provision of funding tied to particular activities also limits the Commission's ability to independently set its key activities, especially when it becomes dependent on new funding to have sufficient resources to operate.

The Commission considers that it is currently facing the following ongoing funding challenges:

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- The current core funding for the Commission is well below the level that the Commission has benchmarked is necessary to fully discharge its functions. The current core appropriation funds approximately 100ASL staff, including statutory commissioners. The Commission has estimated that the base model that it needs to operate effectively would require approximately 145ASL staff. This is a shortfall of approximately \$7.4million per annum, or \$24.7million over four years.
- This shortfall of funding is to undertake its functions and roles as they currently exist under its operating legislation. It does not include estimated funding for new functions or activities as proposed in this submission.
- There continues to be a necessity to rely on externally-funded partnerships to fully implement a work program for Commissioners.

These issues also raise challenges for the Commission in meeting the Paris Principles. National Human Rights Institutions (NHRIs) such as the Commission, play a critical role in promoting and monitoring the effective implementation of international human rights standards at the national level. To operate with the necessary level of institutional independence and credibility, NHRIs are rated against the Principles relating to the Status of National Institutions (The Paris Principles).<sup>78</sup>

The Commission underwent its 5-yearly accreditation review as an 'A status' NHRI in March 2022. On 29 March 2022, the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA) deferred its review of the Commission for 18 months on the basis of concerns with the operation of the Commission that may not be Paris Principles compliant.

The Commission will now have its second review in October 2023.

The principal concern in the accreditation process was that the Commissioner appointment process did not comply with the Paris Principles. This was due to an absence of publicly advertised, merit based selection processes over time.

On 27 July 2022, the Attorney-General introduced the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022.<sup>79</sup> The Bill was passed on 27 October 2022, amending the *Australian Human Rights Commission Act 1986* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).

The amendments address the SCA's concerns about the rigour of the selection and appointment process, and require that President and Commissioner

appointments are made through a merit-based and transparent process that is publicly advertised, and removing the possibility of direct appointments.

The appointment and selection process had previously been conducted in accordance with the Australian Public Service Commission's Government's Merit and Transparency Policy.<sup>80</sup> This process allows for appointments to be made without publicly advertised processes in 'special circumstances'.<sup>81</sup> This did not meet the Paris Principles standard in relation to appointments.

The Government has also committed to the introduction of a specific appointments guideline for the Commission that does not contain the ability to appoint without merit-based processes in special circumstances. Those guidelines are currently being finalised by the Attorney-General's Department and will form important evidence in the accreditation review of the Commission later in 2023.

In addition to the selection and appointment process, the Sub-Committee on Accreditation also noted the Commission's funding as an issue of concern. The SCA emphasised that

to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.<sup>82</sup>

The SCA encouraged the Commission to continue to advocate for an appropriate level of funding, to ensure the sustainability of the Commission's funding base in carrying out its mandate.

## **5.7 Partnerships with civil society organisations should be strengthened to better protect human rights**

**Recommendation 10: That the Australian Government support measures that invest in and build community capacity to realise human rights and freedoms, including by:**

- **instituting regular forums for dialogue with the NGO sector on human rights**
- **providing funding support for NGOs to advance human rights protection**

- **supporting the independent participation of NGOs in UN human rights processes**
- **maintaining and re-establishing programs that build capacity and support the participation of Indigenous peoples and persons with disability in UN human rights mechanisms.**

In the Issues Paper that commenced the Free and Equal Project, the Commission noted that it would seek to identify options to invest in and build community capacity to realise human rights and freedoms.

This recognises that everyone in the community has a role to play in achieving respect for human rights.

The Terms of Reference for the Free and Equal project noted the importance of having in place measures that ensure:

- the community understands human rights and is able to protect them (for themselves and others)
- communities are resilient and a protective factor against human rights violations
- robust institutions exist to promote and protect human rights
- government and the community can work together to fully realise human rights – understanding the respective role of each other.<sup>83</sup>

The various measures identified in this submission as forming the key elements of a new national human rights framework will contribute to these objectives. For example, by ensuring there is broad based human rights education for the community, through the operation of modernised discrimination laws focused on preventing discriminatory treatment and requiring proactive community approaches to such prevention, and through the data that a national human rights indicator index would provide to guide public awareness and policy development processes to advance human rights protection.

The Commission considers that consideration should be given by Government to other measures that will support a vibrant and robust civil society engagement with human rights issues.

The Commission supports measures that related to such engagement in the Australian Human Rights Framework in 2010, namely:

- processes for regular dialogue between the government and NGOs on human rights – such as through human rights forums

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- funding support for NGOs to conduct activities relating to human rights education and the promotion of human rights.

This extends to practices that have been supported by the Government to variable degrees since 2010, including:

- support for the independent participation of NGOs in the UN human rights mechanisms, such as attendance at the UN Human Rights Council and to coordinate domestic engagement on, and participation at the UN, in treaty review processes
- support for disability peoples' organisations and Indigenous peoples' organisations in UN engagement through dedicated participation programs (such as the existing program for persons with disability that is supported through the Department of Social Services and Australian Human Rights Commission, 84 and which was modelled on a previous program that had applied to indigenous peoples).<sup>85</sup>

The Commission notes that concurrent to the development of the 2010 Framework, the Government committed to the development of a national compact with the third sector, which committed Government and civil society organisations:

to work together to improve social, cultural, civic, economic and environmental outcomes, building on the strengths of individuals and communities. This collaboration will contribute to improved community wellbeing and a more inclusive Australian society with better quality of life for all.

The National Compact included priorities including:

- protect the sector's right to advocacy irrespective of any funding relationship that might exist
- recognise sector diversity in consultation processes and sector development initiatives.<sup>86</sup>

Whether these priorities have been addressed fully or remain to be implemented is a matter for the NGO sector. The Commission encourages the PJCHR to have dialogue on these issues with NGOs.

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## 6 Appendix: Discrimination law reform recommendations

**Note:** Since the release of the Position Paper in 2021,<sup>87</sup> some technical amendments have been made across all federal discrimination laws. For example, the federal Parliament has passed amendments to the Sex Discrimination Act introducing a positive duty to prevent sexual harassment,<sup>88</sup> as well as some other procedural amendments that were identified in the Respect@Work report<sup>89</sup> and the Commission's Position Paper.

### Major reform 1: building a preventative culture

#### **Introduce a positive duty**

1. Existing protections against discrimination in each of the federal discrimination laws should be supplemented by the inclusion of a positive duty on all duty bearers to take reasonable and proportionate measures to eliminate unlawful discrimination. The positive duty should include a non-exclusive list of factors that should be considered in determining whether a measure is 'reasonable and proportionate', including:

- a. the size of the person's business or operations
- b. the nature and circumstances of the person's business or operations
- c. the person's resources
- d. the person's business and operational priorities
- e. the practicality and the cost of the measures
- f. all other relevant facts and circumstances.

#### **Resource significant community and business sector outreach**

2. A positive duty should be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies to be able to provide clear and accessible guidance about the positive duty.

#### **Stagger introduction of the positive duty to support awareness and compliance readiness**

3. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to

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assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12-month grace period before it came into legal effect.

### **Introduce regulatory mechanisms to enforce the positive duty**

4. In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty with new functions for the Commission such as the ability to conduct voluntary audits.

However, on its own, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture, such as the ability for the issuance of compliance notices and enforceable undertakings. Enforcement mechanisms are discussed in Chapter 3, sections 5 and 6.

### Major reform 2: modernising the regulatory framework

#### **Alternative dispute resolution – data**

5. Consideration be given to review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted, or whether s 49 should be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.

6. Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis about trends in complaints on a periodic basis.

#### **Use of non-disclosure agreements and confidentiality clauses**

7. Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters. The preparation of such guidance has been committed to by the Government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.

#### **Broader range of guidance materials to be prepared**

8. Dedicated funding for undertaking the preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting all regulatory options in federal discrimination law. The Commission should also adopt methods for

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engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

## **Action plans**

9. The capacity to develop and lodge action plans under the Disability Discrimination Act should be expanded as a measure available across all federal discrimination laws. The following reforms to the action plan process should also be introduced:

- Clarify that the Commission may provide advice on the development and implementation of action plans.
- Clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements.
- Introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

## **Voluntary audits**

10. New powers should be introduced enabling the Commission to conduct reviews of policies or programs of a person or body, upon request to the Commission, in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

## **Special measures certifications**

11. The *Australian Human Rights Commission Act 1986* (Cth) should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, and time limited. The Commission should be empowered to consult relevant stakeholders when deliberating on whether to certify a special measure.

## **Disability Standards**

12. An independent review of the existing Disability Standards should be conducted to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards.

13. Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.

### **Own-motion inquiries into systemic instances of discrimination**

14. The Commission should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination, of a systemic nature, with enforcement mechanisms attached. This inquiry power should include:

- The capacity to undertake systemic inquiries – such as in circumstances where there is a pattern of discrimination or suspected compliance issues becomes known to the Commission.
- Compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to inquire where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation. This function should be independently exercised by the Commission.

15. Consideration should be given to the introduction of compliance notices and attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function as enforcement tools:

- enforceable undertakings under Part 6 of the Act
- the ability to seek civil penalty orders in the courts under Part 4 of the Act
- a broader suite of injunctive powers, than the existing AHRC Act provisions, as set out in Part 7 of the Act.

### **Major reform 3: enhancing access to justice**

#### **Costs**

16. The Commission considers that the default position should be that parties bear their own costs. The AHRC Act should include mandatory criteria to be considered by the courts in determining whether costs should be varied. The list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one, which is as follows:

- (a) the financial circumstances of each of the parties to the proceedings
- (b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)

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(c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)

(d) whether any party to the proceedings has been wholly unsuccessful in the proceedings

(e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer

(f) any other matters that the court considers relevant.

### **Evidentiary issues**

17. The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts. The Commission supports the approach taken in the Human Rights and Anti-Discrimination Bill 2012 as setting the appropriate threshold, rather than that in s 361 of the Fair Work Act.

18. The Commission develop guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.

19. The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the Evidence Act 1995 (Cth) s140.

### **Representative actions**

20. The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the Commission.

### **Timeframe for termination of complaints**

21. The Commission recommends that a consistent approach should be taken across the four Discrimination Acts in relation to the timeframe for the President's discretion to terminate a complaint. With the amendment to the AHRC Act in August 2021 to introduce a 24-month discretionary termination period for complaints made under the Sex Discrimination Act the Commission recommends that this apply across the four Discrimination Acts. The Commission supports the provision of guidance in relation to the kinds of factors relevant to the exercise of the President's discretion.

## **Intermediate adjudicative process**

22. The Commission recommends that the Government give serious consideration to reintroducing an intermediate adjudicative process into the federal discrimination system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.

23. The Commission suggests that this could take the form of

- a tribunal-like body
- the restoration of hearing and determination functions of the Commission
- the creation of an arbitral process.

### Major reform 4: improving the practical operation of the laws.

## **Coverage of the discrimination laws**

24. The Commission recommends that volunteers and interns be protected across all discrimination laws.

25. The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/ carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life.

## **New unlawful discrimination protected attributes**

26. The Commission recommends that thought, conscience or religion be included as a new protected attribute; not be limited to employment; and have full access to judicial remedies.

27. The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws.

28. Subject to irrelevant criminal record in employment and the right to freedom of thought, conscience and religion being included as protected attributes in the 'unlawful discrimination' jurisdiction of the Commission, the ILO complaints jurisdiction of the Commission should be repealed.

## **Review of exemptions**

29. The Commission recommends that all permanent exemptions under federal discrimination law be reviewed on a periodic basis to ensure they remain appropriate. Particular focus should be given to exemptions relating to insurance, religion and domestic workers.

## **Definition of discrimination**

30. The Commission recommends that the test for direct discrimination be simplified by removing the 'comparator test'.

31. The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to clarify that the obligation is a standalone one. The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered.

32. The Commission recommends that the definition of indirect discrimination be amended 'to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply'. The Commission also recommends that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.

33. The Commission recommends that the AHRC Act be amended to make explicit that any conduct that amounts to victimisation can form the basis of a civil action for unlawful discrimination, across all federal Discrimination Acts.

34. The Commission recommends that the provisions concerning 'special measures' for people with a protected attribute should be clarified so that the interpretation of what amounts to a 'special measure' be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.

35. The Commission proposes a new provision be included across all federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four discrimination acts

## **Technical fixes to federal discrimination laws**

36. Amend s 46PF(7)(c) of the AHRC Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.

### **Harmonisation and standardisation of discrimination law provisions across jurisdiction**

37. Amend the AHRC Act as a matter of priority to ensure the Paris Principles compliance of the Commission, as follows:

- Specify that all commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.
- Specify that all Commission functions may be exercised independently of government authorisation – at present, the Commission's function to intervene in court matters is not completely unfettered. The Commission also recommends that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions.

38. The Commission concludes that the major focus at this time should be on embedding the structural reforms that are proposed in this paper. Once these reforms are implemented, they should be reviewed after 5 years to consider their effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.



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- <sup>1</sup> Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009) Recommendation xiii.
- <sup>2</sup> Australian Human Rights Commission, *Free and Equal Issues Paper: An Australian conversation on human rights* (February 2019) p.20 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-australian-conversation-human-rights-2019>>.
- <sup>3</sup> Australian Human Rights Commission, *Submission to Australia's Third Universal Periodic Review* (2020) p.6 <<https://humanrights.gov.au/our-work/legal/submission/australias-third-universal-periodic-review>>.
- <sup>4</sup> Remedy Australia, *Cases* (Web Page) <<https://remedy.org.au/cases>>.
- <sup>5</sup> In June 2008, the Senate referred an inquiry to the Standing Committee on Legal and Constitutional Affairs into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality. See: Parliament of Australia, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2008-10/sex\\_discrim/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/sex_discrim/report/index)>.
- <sup>6</sup> In 2004, the Productivity Commission released its report on the inquiry into the *Disability Discrimination Act 1992* (Cth). See: Australian Government, Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) <<https://www.pc.gov.au/inquiries/completed/disability-discrimination/report>>.
- <sup>7</sup> Australian Human Rights Commission, *Free and Equal Position Paper: A reform agenda for federal discrimination laws* (December 2021) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.
- <sup>8</sup> See: Equality and Human Rights Commission, *Is Britain Fairer?* (Web Page) <<https://www.equalityhumanrights.com/en/britain-fairer>>. For information on the measurement framework that underpins this reporting, see further: Equality and Human Rights Commission, *How do we measure equality and human rights?* (Web Page) <<https://www.equalityhumanrights.com/en/how-do-we-measure-equality-and-human-rights>>.
- <sup>9</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights Terms of Reference*, paras 2(b) and 2(c).
- <sup>10</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights Terms of Reference*, para 1.
- <sup>11</sup> See for example, Australian Human Rights Commission, *Free and Equal Issues Paper: An Australian Conversation on Human Rights* (April 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-australian-conversation-human-rights-2019>> Section 2: Understanding human rights in Australia and section 3: What makes an effective system of human rights protection for 21st century Australia?
- <sup>12</sup> Parliamentary Library, *Parliament and the Protection of Human Rights* (Web Page) <[https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/briefingbook43p/humanrightsprotection](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/briefingbook43p/humanrightsprotection)>.
- <sup>13</sup> Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009) Recommendation xiii.
- <sup>14</sup> Australian Human Rights Commission, *President Speech: The National Human Rights Consultation: Outcomes* (Web Page) <<https://humanrights.gov.au/about/news/speeches/president-speech-national-human-rights-consultation-outcomes>>.
- <sup>15</sup> Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009).

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- <sup>16</sup> Attorney-General's Department, *Australia's Human Rights Framework* (April 2010) <<https://nswbar.asn.au/circulars/2010/april/hr.pdf>>.
- <sup>17</sup> Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009) Recommendation xiii.
- <sup>18</sup> This is referenced in a generalised manner on page 11 of Australia's Human Rights Framework, that notes that 'The changes in this Framework are intended to have broad effect and to enhance the understanding of and respect for human rights in Australia. It is appropriate to review their effectiveness after a period in operation and look at whether other or additional measures are required.'
- <sup>19</sup> Australian Human Rights Commission, *President Speech: The National Human Rights Consultation: Outcomes* (Web Page) <<https://humanrights.gov.au/about/news/speeches/president-speech-national-human-rights-consultation-outcomes>>.
- <sup>20</sup> WHK Horwath, *Coalition Election Policy* (August 2010) <<http://media.news.com.au/multimedia/2010/08/election/coalitioncostings.pdf>>.
- <sup>21</sup> Attorney-General's Department, *Australia's Human Rights Framework* (April 2010) p.4 <<https://nswbar.asn.au/circulars/2010/april/hr.pdf>>.
- <sup>22</sup> Commonwealth of Australia, *Australia's National Human Rights Action Plan* (2012) <<http://web.archive.org/web/20130328074804/http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>>.
- <sup>23</sup> Attorney-General's Department, *Australia's Human Rights Framework* (April 2010) p.7 <<https://nswbar.asn.au/circulars/2010/april/hr.pdf>>.
- <sup>24</sup> Commonwealth of Australia, *Australia's National Human Rights Action Plan* (2012) p.5 <<http://web.archive.org/web/20130328074804/http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>>.
- <sup>25</sup> Australian Human Rights Commission, *Free and Equal Discussion Paper: Ensuring effective national accountability for human rights* (October 2019) p.12 <[https://humanrights.gov.au/sites/default/files/19.10.14\\_discussion\\_paper-ensuring\\_effective\\_national\\_accountability\\_final.pdf](https://humanrights.gov.au/sites/default/files/19.10.14_discussion_paper-ensuring_effective_national_accountability_final.pdf)>.
- <sup>26</sup> Parliament of Australia, *Parliamentary Joint Committee on Human Rights* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights)>.
- <sup>27</sup> Australian Government, Attorney-General's Department, *Human rights scrutiny* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny>>.
- <sup>28</sup> Australian Government, Attorney-General's Department, *Statements of Compatibility* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>>.
- <sup>29</sup> These web resources were discontinued when funding was not continued and are no longer online. An evaluation of the resources was conducted by the Commission.
- <sup>30</sup> Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/index)>.
- <sup>31</sup> Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/info/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/info/index)>.
- <sup>32</sup> United Nations Human Rights Council, *Universal Periodic Review* (Web Page) <<https://www.ohchr.org/en/hr-bodies/upr/upr-main>>.

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- <sup>33</sup> Australian Government, Attorney-General's Department, *Universal Periodic Review – Australia's response to UPR recommendations* (2016) <<https://www.ag.gov.au/rights-and-protections/publications/universal-periodic-review-australias-response-upr-recommendations-2016>>.
- <sup>34</sup> Australian Government, Attorney-General's Department, *National Report of Australia - Universal Periodic Review 2021 Annex 2* <<https://www.ag.gov.au/sites/default/files/2020-12/annex-2-upr-2021.pdf>>.
- <sup>35</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Australia Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (June 2021) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/122/33/PDF/G2112233.pdf?OpenElement>>.
- <sup>36</sup> Australian Government, Attorney-General's Department, *United Nations human rights recommendations database* (Web Page) <<https://www.ag.gov.au/rights-and-protections/publications/united-nations-human-rights-recommendations-database>>.
- <sup>37</sup> Australian Government, Attorney-General's Department, *National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment>>.
- <sup>38</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (November 2014) <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>>.
- <sup>39</sup> Australian Government, Attorney-General's Department, *United Nations human rights recommendations database* (Web Page) <<https://www.ag.gov.au/rights-and-protections/publications/united-nations-human-rights-recommendations-database>>.
- <sup>40</sup> Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (Issues Paper, February 2019) p.20 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-australian-conversation-human-rights-2019>>.
- <sup>41</sup> Australian Human Rights Commission, *Submission to Australia's Third Universal Periodic Review* (2020) p.6 <<https://humanrights.gov.au/our-work/legal/submission/australias-third-universal-periodic-review>>.
- <sup>42</sup> Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (Web Page) <<https://humanrights.gov.au/free-and-equal>>.
- <sup>43</sup> Australian Human Rights Commission, *Free and Equal Issues Paper: An Australian conversation on human rights* (February 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-australian-conversation-human-rights-2019>>.
- <sup>44</sup> Australian Human Rights Commission, *Free and Equal Discussion Paper: Priorities for federal discrimination law reform* (August 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>>; Australian Human Rights Commission, *Free and Equal Discussion Paper: A model for positive human rights reform* (August 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform-2019>>; Australian Human Rights Commission, *Free and Equal Discussion Paper: Ensuring effective national accountability for human rights* (October 2019) <[https://humanrights.gov.au/sites/default/files/19.10.14\\_discussion\\_paper-ensuring\\_effective\\_national\\_accountability\\_final.pdf](https://humanrights.gov.au/sites/default/files/19.10.14_discussion_paper-ensuring_effective_national_accountability_final.pdf)>.

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- <sup>63</sup> 'A status' refers to a formal accreditation process that occurs every 5 years to assess whether national human rights institutions such as the Commission are operating in compliance with a set of principles indicating the key elements of a robust, truly independent human rights commission (the 'Paris Principles'). A status institutions are fully compliant and enjoy full, independent participation rights in UN human rights processes. For further information on the Paris Principles see: Asia Pacific Form, *Paris Principles* (Web Page)  
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- <sup>65</sup> *International Covenant on Civil and Political Rights* (ICCPR); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), *Convention on the Rights of Persons with Disabilities* (CRPD).
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