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SUBMISSION TO THE INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Thank you for the opportunity to provide a submission to this inquiry.

We wanted to draw to your attention a study we are currently conducting on human rights dispute resolution in Australia.

This project has been funded by the Australian Research Council's Linkage Scheme.

The project partners are: the Australian Human Rights Commission; the Victorian Equal Opportunity and Human Rights Commission; the Queensland Human Rights Commission; the ACT Human Rights Commission; Canberra Community Law; and Caxton Legal Centre.

This project will be the first Australian study on human rights complaint mechanisms. We will collect and analyse qualitative and quantitative data from key stakeholders in human rights practice in each of the four Australian jurisdictions that have human rights legislation: Australian Capital Territory (ACT), Victoria, Queensland and the Commonwealth.

Data will be sourced through interviews with lawyers, human rights commission staff, complainants, and public entity respondents in human rights matters, and through triangulation with previously unpublished quantitative data on finalised human rights cases drawn from the internal databases of our partner organisations.

It is unfortunate, for the purpose of this inquiry, that our project has only just begun. We do not yet have any data that we can share with the committee to inform its deliberations. However, in what follows, we will provide further information on our study. We invite the committee to contact us with any inquiries in relation to this research, and its early findings.

Yours sincerely,

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ARC Linkage Project: Australian human rights complaints: Litigation, mediation or conciliation

Background

The fact that Australia has no federal Human Rights Act, and no option federally to litigate human rights complaints, has led scholars to describe Australia as having a 'reluctance about rights'.¹

There are some limited measures that aim to protect human rights at the federal level:

- The Commonwealth's *Human Rights (Parliamentary Scrutiny) Act 2011* creates mechanisms for assessing the compatibility of legislative instruments with human rights. However, it does not confer human rights protections on individuals.
- A limited mechanism for human rights protection exists under the *Australian Human Rights Commission Act 1986* (Cth). An individual can lodge a complaint with the Australian Human Rights Commission if they claim that the Commonwealth or one of its agencies has breached an international human rights obligation. The Commission can conduct an inquiry and attempt to conciliate the matter and, if that fails, it can prepare a public report which is tabled before Parliament. However, no enforceable rights are created for the individual.

In 2019, Queensland became the third Australian jurisdiction to adopt a Human Rights Act, joining the ACT and Victoria which have had these laws for over a decade. Each of these Acts is based on a 'dialogue model' of rights protection where each arm of government has a role in protecting human rights, but judicial remedies are limited to preserve parliamentary sovereignty.

Whilst each of the state/territory Human Rights Acts are similar in terms of content, different mechanisms are available to individuals who claim their human rights have been breached in each state/territory. In the ACT and Victoria, parties must initiate legal proceedings in order to have a human rights complaint resolved. In the ACT, an aggrieved person can complain directly to the Supreme Court of a human rights contravention. In Victoria and Queensland, human rights complaints cannot, on their own, be the subject of legal proceedings. Rather, an aggrieved person must 'piggy-back' a human rights claim onto another cause of action in legal proceedings. This means that if there is no other basis upon

¹ Charlesworth, H. (1993) 'The Australian reluctance about rights' 31 *Osgoode Hall Law Journal* 195. See also Kinley, D. & Martin, P. (2002) 'International human rights at home' 26 *Melbourne University Law Review* 466.



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which to litigate the matter (e.g. discrimination or application for judicial review), the person cannot initiate legal proceedings. The Victorian and Queensland Acts do not create new causes of action; the ACT Act does.

COVID-19 has forced governments and community members to reconsider the role human rights law could play in the resolution of novel legal problems. Responses to COVID-19 have necessarily led government decision-makers to place limitations on individuals' fundamental human rights.² The rights to freedom of movement, privacy and liberty have been balanced against the public interest in ensuring the health and safety of the community. Predictably, complaints to human rights bodies have substantially increased as a result.³ Having a federal human rights Act could have assisted us to articulate these competing interests, and could have equipped us to respond to the significant human rights challenges posed by COVID-19.

What is the best way of resolving human rights complaints?

Litigation is the most common method for resolving human rights complaints internationally.⁴ However, litigation in human rights matters is problematic. In many cases, where a breach of human rights is alleged, the aggrieved individual is a vulnerable person. Vulnerable people often lack both knowledge about the law and the means to enforce their legal rights. They generally do not have sufficient financial resources to obtain legal advice and assistance, and they are rarely able to successfully advocate for themselves in court proceedings. If they are able to access free legal advice and assistance – for example, from community legal centres – the lawyers who assist them may be reluctant to initiate legal proceedings because of the uncertainty as to outcome, and the risks of an adverse costs order.⁵ In human rights matters, the power imbalance between the parties is more problematic because respondents are public authorities with access to governmental resources including expert legal advice. Often, human rights lawyers rely on their capacity to negotiate, or mediate, a favourable outcome for their clients behind the scenes.⁶ This results in inconsistent and unpredictable outcomes for clients, and human rights protections that are secured for one client may not translate into benefits for others.

As an alternative to litigation, 'individual complaint procedures', administered by several United Nations treaty bodies, have been introduced to resolve human rights complaints. However, these processes are adjudicative rather than conciliative, and involve separate parties making written submissions to the relevant committee. The committee then issues a

² Evans, K. & Petrie, N. (2020) 'COVID-19 and the Australian Human Rights Acts' 45(3) *Alternative Law Journal* 178.

³ See eg Queensland Human Rights Commission (2020), *Annual Report 2019/20*.

⁴ See further Duffy, H. (2018) *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart: Oxford), at 4.

⁵ Walsh, T. (2022) 'Social housing, homelessness and human rights' 45(2) *UNSW Law Journal* 688.

⁶ *Ibid.*



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written determination rather than conciliating the complaint.⁷ Regional human rights courts hear and adjudicate human rights complaints in Europe (European Court of Human Rights) and the Organisation of American States (Inter-American Court of Human Rights).

The Queensland Human Rights Act introduced an additional complaints mechanism in 2020: conciliation conferencing. In addition to 'piggy-backed' legal proceedings, an aggrieved person in Queensland can make a stand-alone complaint to the Queensland Human Rights Commission regarding an alleged breach of their human rights. The Queensland Human Rights Commission will attempt to resolve the complaint and it can hold a conciliation conference, which provides an opportunity for the parties to discuss the basis of the complaint and agree on an outcome that is amenable to both parties. If the complaint cannot be resolved, there is no option to bring legal proceedings (unless the human rights complaint can be 'piggy-backed' onto another cause of action, such as discrimination or an application for judicial review).

The Queensland approach is a novel way of addressing human rights complaints both in terms of the mechanism used (conciliation) and the role played by the relevant statutory human rights agency (in giving the agency a dispute resolution function under the Act). At time of writing, neither the ACT Human Rights Commission nor the Victorian Equal Opportunity and Human Rights Commission is empowered to resolve human rights complaints by conciliation, although it seems likely that a conciliation option will be introduced in the ACT. The Australian Human Rights Commission can hold a conciliation conference in matters which allege a breach of certain international human rights treaties but little is known about its processes because this method of conciliating human rights complaints has not been the subject of independent evaluation or research.

Conciliation conferencing is used successfully in other settings. Anti-discrimination commissions throughout Australia have conciliated discrimination complaints for decades and developed expertise in the area.⁸ The Fair Work Commission administers a voluntary conciliation process for workplace disputes, and most civil and administrative tribunals allow for both mandated and voluntary conciliation processes in certain matters. Conciliation has proven to be an effective and inexpensive mechanism for resolving such complaints, and these complaints bear strong similarities to human rights matters.

The benefits of conciliation include a less formal setting than a court, individualised remedies, quicker and less costly process than court. Parties on both sides report high levels of satisfaction with conciliation processes. However, there is a risk that conciliation processes can exacerbate existing power imbalances and that complainants may settle for

⁷ United Nations Office of the High Commissioner for Human Rights (2013), Individual Complaint Procedures Under the United Nations Human Rights Treaties (United Nations, New York and Geneva).

⁸ Allen, D. (2009) 'Behind the conciliation doors: Settling discrimination complaints in Victoria' 18(3) *Griffith Law Review* 776.



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something less than they are legally entitled to. Conciliation is burdensome – it is time consuming and expensive, for the complainant or the community legal service that provides assistance, and for the respondent. Conciliation may also be inappropriate for certain cohorts of complainants, including Indigenous people, for whom human rights abuses are of particular concern.⁹ A further concern about the use of conciliation in discrimination claims is that the process and outcomes are confidential so the broader community is not aware of the persistence of unlawful behaviour.¹⁰ If the only alternative is litigation, parties may choose not to pursue a complaint due to the costs involved. Litigation is expensive, and it can be traumatising (or retraumatising) for vulnerable individuals.¹¹

Respondents to human rights complaints include public authorities such as police officers, corrective services officers, social housing officers and education providers. Government departments are well resourced to defend human rights complaints, and often have dedicated legal officers undertaking this role. In theory, these officers should be acting as model litigants, but lawyers report that public authorities often take an adversarial approach in human rights matters, particularly if there is a threat of legal proceedings. It is important that human rights complaints mechanisms take account of the significant power imbalance between government respondents and vulnerable complainants in the interests of fairness and access to justice, as well as the ensuring the appropriate allocation of scarce government resources. Adequate funding to community legal centres to support complainants to enforce their human rights is critical to ensuring that individuals' rights are protected.

Who should have the 'final say' in the dialogue model?

Australia's approach to human rights protections was strongly influenced by British constitutional law. The Westminster system's emphasis on parliamentary sovereignty was adopted in Australia and, along with common law rights, parliament was relied upon to protect fundamental rights and freedoms instead of a Bill of Rights. However, unlike Australia, the UK has been influenced by regional human rights developments and in 1998, the European Convention on Human Rights was incorporated into UK law under the *Human Rights Act 1998* (UK).

In Australia, Parliament has the 'final say' in the human rights dialogue. However, in the UK, the rulings of the European Court of Human Rights are binding. In the context of Brexit, there is now debate in UK about whether or not the European Court of Human Rights should

⁹ Moreton-Robinson, A. (2005), 'Patriarchal Whiteness, Self Determination and Indigenous Women: The Invisibility of Structural Privilege and the Visibility of Oppression' in Hocking, B (ed) *Unfinished Constitutional Business: Re-thinking Indigenous Self-Determination* (Aboriginal Studies Press), at 69.

¹⁰ Allen, D. (2009) 'Behind the conciliation doors: Settling discrimination complaints in Victoria' 18(3) *Griffith Law Review* 776.

¹¹ Mitchell, B. (2019) 'Practising law under the Human Rights Act 2019' 25 *James Cook University Law Review* 1.



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retain jurisdiction over UK human rights matters, and what changes to human rights dispute resolution could result.

In Australia, human rights commissions have several functions, including receiving complaints, investigating human rights breaches, providing dispute resolution services, educating the community, advising Parliament, intervening in legal proceedings, and lobbying government. In the UK, human rights commissions provide complainants with legal assistance, and conduct investigations when there is an allegation of a human rights breach.

Our project will use the UK example to consider the effectiveness of litigation and mediation in resolving human rights disputes, and the differing roles and functions of human rights commissions.

What is required for an effective human rights system?

In the course of our project planning, we have considered what 'effectiveness' in human rights law means, and what a Human Rights Act should achieve. Drawing on the objects provisions and preambles of the ACT, Victorian and Queensland Human Rights Acts, we contend that an effective human rights system should ensure that:

- human rights are promoted and protected;
- a rights-compliant culture is built amongst the public service so that public authorities act and make decisions in a manner that is compatible with human rights;
- a dialogue is maintained between the three arms of government about the protection of human rights;
- an appropriate balance is struck between individuals' rights;
- complaints processes are accessible to all cohorts of complainants; and
- the special importance that human rights hold for vulnerable people, particularly Aboriginal and Torres Strait Islander peoples, is recognised.

An effective human rights dispute resolution framework should ensure the timely management of complaints, positive outcomes for complainants, and cultural change within public entities. Individual rights should be protected and appropriately balanced against one another; a dialogue should be maintained between all arms of government on human rights protections; and vulnerable groups, including Indigenous people, should have equal access to complaint resolution mechanisms. Effective human rights processes encourage the development of a human rights culture within the public service, and improve transparency and accountability in decision-making.

Within this framework, it is also important to consider the Australian Human Rights Commission's role in protecting and promoting human rights. The Australian Human Rights



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Commission is responsible for educating the community about human rights (along with conciliating the limited human rights complaints it can receive). This is a significant role and will be even more important in the event that federal human rights legislation is enacted. As our national human rights institution, the Australian Human Rights Commission's educative role will be key to community acceptance and understanding of human rights and to embedding a human rights culture within the community, the public service and the parliament. To fulfill its mandate, it is essential that the Australian Human Rights Commission is given adequate funding and resources to perform its statutory duties, and so it can maintain its independence from government.

Our project

Since no studies – in Australia or internationally – have yet examined whether or not conciliation is an appropriate method of resolving human rights complaints, it is unclear whether conciliation is an appropriate dispute resolution mechanism for these matters. We will investigate this issue by undertaking a cross-jurisdictional, mixed methods study. Using doctrinal, empirical and comparative methodologies, we will develop a robust, evidence-based model for resolving human rights complaints which will situate Australian research at the forefront of these developments.

Our project will consider the role that human rights commissions should play in resolving complaints, including whether or not human rights commissions should be empowered to adjudicate human rights disputes (to prevent the need for costly Supreme Court litigation),¹² how public accountability of human rights commissions' processes can be achieved, and what role human rights commissions play in the 'dialogue model' underpinning Human Rights Acts in Australia.¹³

Our project will generate new knowledge on human rights complaints, key stakeholders' views on the effectiveness of existing human rights dispute resolution mechanisms, and the best model for human rights dispute resolution in an Australian context. Further information about the project, publications and findings will be available on the project website - <https://www.monash.edu/business/blt/our-research/showcase/labour-and-human-rights/human-rights-complaints>

We look forward to working with the committee as its inquiry progresses.

¹² Whilst bearing in mind the decision of the court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹³ See further Allen, D. (2010) 'Voices in the human rights dialogue: The individual victim and the Australian Human Rights Commission' 35(3) *Alternative Law Journal* 159.