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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Contents

1 Introduction

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

In the first submission, the Commission supported the establishment of a new National Human Rights Framework and made ten recommendations for the key features of the new framework, built on the following five pillars:

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 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 purpose of this submission is to provide further information to complement the Commission's first submission.

In proposing key elements required to ensure that a future National Human Rights Framework is robust and achieves outcomes that improve the protection of human rights in Australia, this second submission:

- focuses on how promoting and protecting human rights in the light of a federal Human Rights Act will help build a culture of rights-mindedness
- illustrates how the Commission's proposed model for a Human Rights Act would work in practice
- identifies the ways in which a proposed federal Human Rights Act would address existing gaps in Australia's current framework for the protection of human rights
- offers case-studies across a range of areas such as freedom of speech, aged care and social security to support the case for a Human Rights Act

and consider improvements that can be made with the introduction of a Human Rights Act
- highlights key opportunities for reform within discrimination law for the protection of human rights in Australia.

We currently have an implementation gap between the human rights standards that Australia has agreed to internationally, and the actual protections in our laws, policies and processes of government.

Without comprehensive legal protection, education and other measures to promote an understanding of human rights and the processes for monitoring compliance with human rights, Australia is not fully meeting its obligations to make sure that the human rights of all Australians are respected, protected and fulfilled.

2 The importance of promoting a culture of rights

The need for a Human Rights Act can be summed up in one simple statement: people's human rights matter all of the time. Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all through the embedding of a human rights culture. In 2003, the United Kingdom's Joint Committee for Human Rights observed what such a culture looks like:

> A human rights culture is one that fosters basic respect for human rights and creates a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities … in which all our institutional policies and practices are influenced by these ideas … . The building of a human rights culture … [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields in fully informed by human rights considerations.[1]

The Commission notes that a primary benefit of a National Human Rights Framework is that it will foster a culture of respect for human rights throughout the whole of government and across the country. It would likely contribute to a better understanding and awareness of Australia's human rights obligations, increasing acceptance of them, and provide greater prominence to human rights through the demonstration of political will by the Government and Parliament.

Within Australia, there is evidence that points to the positive impact of having a robust Human Rights Framework and in particular, of having a Human Rights Act.

In 2012, the Human Rights Law Centre (HRLC) published a report into the Victorian Charter of Human Rights and Responsibilities' first five years of operation, highlighting case studies from that period.[2] It found that the Charter played a crucial preventative role in stopping human rights abuses (and the associated social and economic costs) before they occur. This was illustrated by its impacts on government policies and local council projects, and by providing clear rights to vulnerable individuals and groups. Rather than resulting in a 'lawyers picnic', the report concluded that the Charter's key impacts often lay outside formal court proceedings.[3] The Charter had

- required the Victorian Parliament to more fully consider and safeguard human rights in legislation
- enabled government departments and public authorities to undertake organisational and cultural change to embed its principles in their work – through early identification of potential human rights issues, providing a platform for effective advocacy on human rights issues, and an impetus for cultural change
- initiated human rights education programs to create a better awareness of Charter rights and empower people to take action
- provided a framework of language and ideas by which human rights could be more effectively articulated and realised without the need for litigation
- had a notably beneficial impact in the courtroom, where although seldom expressly employed, it had been used to challenge arbitrary or unjust policies and decisions.

The most recent review of the Victorian Charter was undertaken in 2015. It found that 'implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector'.[4] The reviewer concluded that it was 'clear that the Charter has helped to promote and protect human rights in Victoria'.[5]

An example of the Charter shaping policy and putting it into practice involved work undertaken by the Department of Human Services and Corrections Victoria, in collaboration with the Victorian Equal Opportunity and Human Rights Commission, to minimise the number of young people, particularly children, transferred from youth justice centres to adult prison. This followed the 2012 transfer of five children to adult prison, including a 16-year-old Aboriginal boy who was held at Port Philip Prison for several months. Following the review of

policy and operational documents and tailored human rights training for staff, there were no further transfers of children to adult prison.[6]

3 Further information about how the proposed Human Rights Act model would operate in practice

3.1 Human Rights Act model

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 help prevent breaches of human rights from occurring in the first place, and ensure the engagement of the community in matters that directly affect them.

Importantly, a Human Rights Act would ensure that there are consequences for failing to appropriately consider and protect human rights. By providing for enforceable consequences, a Human Rights Act would provide a greater incentive for human rights to be properly considered at an early stage, and would drive a culture of rights-mindedness. Early consideration of human rights in policy development, service design and decision making would reduce the need for individuals to seek remedies for breaches of their rights.

(a) Jurisdiction

A Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination. This reflects the fundamental principle that human rights are universal and apply equally to all human beings,[7] as articulated in article 1 of the Universal Declaration of Human Rights: 'all human beings are born free and equal in dignity and rights'.[8]

In light of Australia's federal system, overarching constitutional structure and the existing Human Rights Act instruments in some states and territories, the Commission proposes that a federal Human Rights Act should be restricted to federal laws and federal public authorities.

The Human Rights Acts in place in Victoria, Queensland and the ACT, should not be affected by a federal Human Rights Act. In fact, the model builds on the

existing Human Rights Act models, and the reviews of them. These Acts have existed in the Australian Capital Territory (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. Queensland introduced a Human Rights Act in 2019, applying from 1 January 2020. The remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act.

The proposed federal Human Rights Act is not intended to override state and territory laws. Section 109 of the Australian Constitution provides that where state laws are incompatible with federal laws, the law is invalid or inoperative to the extent of the inconsistency.[9] However, it is possible for federal laws to specifically provide that they are not intended to exclude or limit the operation of state and territory laws that are directed towards the same objects. This can be achieved through a concurrency provision.[10] A concurrency provision could operate in a similar way to existing concurrency provisions in federal discrimination laws.[11]

The practical effect of a federal Human Rights Act on uniform schemes and federal-state co-operative schemes could be dealt with on a case-by-case basis. For example, there could be agreements to adopt the Human Rights Act in application to those specific laws, or exemptions made.[12]

State authorities that exercise public functions on behalf of the Federal Government may fall under the jurisdiction of both federal and state human rights instruments. This, too, could be dealt with on a case-by-case basis, including through memorandums of understanding or the clarification of obligations through regulations. Any practical difficulties or inconsistencies between federal and state/territory laws and functions could be resolved during a transitional implementation period.

(b) Positive duty

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 consider human rights when making decisions. This is also known as a ‘positive duty’ applying to public authorities. Compliance with this duty would be judicially reviewable.

The positive duty is at the centre of the Human Rights Act. The integration of human rights considerations into the processes of public authorities should

make officials more aware of the impacts of their decisions, and therefore help to prevent human rights breaches.[13]

If the Human Rights Act is working well, it has an upstream impact within the day-to-day processes of government, and the court has a less prominent role addressing downstream breaches, through the possibility of litigation. The positive duty would support decision makers to consider human rights in a way that is more appropriate to individual circumstances, rather than taking a blanket approach when making a decision that affects a person's rights and freedoms.

There are very many examples of 'dialogue model' Human Rights Acts having a preventative impact, and enabling non-human rights compliant behaviour to be addressed without the need for court action.

Under the Victorian Charter, for example, when making decisions about residential or disability care placements, a public authority may need to consider circumstances specific to the individual – such as whether they would be able to practise their religion in the care facility.[14] The proper consideration of an individual's human rights in decision making would help make public services more accessible and fairer for all.

(c) Cause of action

While the aim of increasing human rights awareness is to prevent breaches of human rights occurring, that will not always be possible. When an individual considers that their human rights have been breached by a public authority, a Human Rights Act should provide a cause of action, a complaints pathway and enforceable remedies.

The Commission's proposed rights are all amenable to investigation by complaints bodies and enforcement by the courts. An independent cause of action for every right in the Human Rights Act would provide clarity and consistency and enable enforcement of rights in accordance with Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR).[15]

A direct cause of action has been adopted in the United Kingdom (UK), ACT, New Zealand and Canada. The ACT Human Rights Act's cause of action is modelled on the UK provision.

The Human Rights Act should also enable the raising of Human Rights Act rights in the context of another legal proceeding. Human rights may be relevant to a

range of issues – including discrimination claims, tort claims, breach of privacy claims[16] and administrative decisions.

Human rights issues are often raised collaterally. This approach enables flexibility for litigants and reflects the practical reality that most cases are not 'pure' human rights cases. All Australian jurisdictions with Human Rights Acts enable human rights to be raised alongside other claims.

However, Queensland and Victoria are international outliers by *only* allowing human rights to be raised alongside other claims. In these jurisdictions, a person can only raise human rights before a court by 'piggybacking' a human rights claim on separate proceedings against a public authority. There is no principled reason for restricting human rights claims to 'piggybacking'. The 2015 Victorian Charter Review recommended that Victoria adopt a direct cause of action, modelled on the ACT approach.[17]

Litigation should not be the first port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed.

The availability of a complaints pathway and remedies would also result in preventative measures being taken to build a stronger human rights culture both in the community and in government.

With this in mind, the Commission's model for a Human Rights Act, as set out in the first submission, proposes an accessible complaints process (utilising alternative dispute resolution) that would reduce the impact of a Human Rights Act on the judicial system. The complaint-handling process would not seek to replace well established complaint-handling processes that exist in other areas of law. Like the existing process in relation to the federal discrimination laws, a complaint could be referred to another body if it could be more effectively or conveniently dealt with by that body. Similarly, if a complaint had already been adequately dealt with by another body, it could be finalised.

(d) Remedies

The Commission also considers that the remedies available under the federal Human Rights Act should replicate the remedies available through judicial and administrative pathways. Courts can quash government decisions made without adequate consultation, issue injunctions, damages or an order to carry out the consultation. In the discrimination context, it is broadly accepted that monetary damages are sometimes the appropriate response to breaches of rights, and the same reasoning can be applied to the Human Rights Act.

3.2 Inadequate human rights protections at the federal level

Laws are often passed that are not human rights compliant, and legislation may often override common law rights and freedoms. Sometimes this occurs without sufficient scrutiny or public debate. The scrutiny that may be undertaken is often not through the lens of a human rights proportionality analysis.[18]

In 2015, the Australian Law Reform Commission's (ALRC) report, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, identified many laws that engage and interfere with traditional common law rights, including freedom of speech, religion, movement, association and the right to a fair trial.[19]

Professor George Williams AO conducted his own survey of laws in 2016, identifying 350 examples of laws that 'arguably encroach upon rights and freedoms essential to the maintenance of a healthy democracy'.[20] He found that executive power had rapidly increased since the September 2001 terrorist attacks and 'since that time parliamentarians have been less willing to exercise self-restraint by not passing laws that undermine Australia's democratic system'.[21]

Some opponents of stronger legal protections for human rights suggest that robust parliamentary mechanisms provide sufficient protection.[22] However, this ignores political realities of lawmaking, and the role of all three branches of government in protecting human rights. Where Parliament makes laws for the mainstream voting public, socially excluded or under-represented groups may fall through the cracks in the law-making process.[23] These groups also lack legal recourse if their rights are subsequently infringed.[24]

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 was particularly evident during the COVID-19 pandemic, which highlighted the challenges and different approaches adopted between jurisdictions that have a Human Rights Act and those that do not. There have also been significant policy failures in areas such as immigration and social security that could have been mitigated had stronger human rights infrastructure been in place.

The following case studies illustrate how a Human Rights Act has made a positive difference to the protection of human rights in state jurisdictions, as well as in the comparable jurisdiction of the UK, that have introduced such legislation over the past 20 years.

The Commission's proposed model for a federal Human Rights Act builds on the successes and lessons from these existing models, while also taking into account the specific constitutional requirements of Australia. By learning from the lessons of other models, and building on existing domestic legislation that has informed our human rights landscape for close to four decades, the Commission's proposal for a Human Rights Act is an evolution, not a revolution.

A national Human Rights Act remains a crucial missing element. It would provide a level of accountability that would elevate the consideration of human rights, by explicitly 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 potential human rights breaches.

4 Case studies

4.1 COVID-19 across state and federal jurisdictions

The powers conferred on the Executive during periods of national emergency serve an important purpose in ensuring that the Commonwealth is able to quickly and effectively implement measures to respond to the emergency.

Australia's COVID-19 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 the measures that were implemented were not always necessary, reasonable and proportionate. For example, blanket approaches to border closures[25] and the vaccine roll out,[26] and the insufficient consideration for certain vulnerable and marginalised groups[27] throughout the COVID-19 response. A domestic Human Rights Act would have provided law and guidance that may have improved Australia's response in certain key respects.

The following case studies provide examples of how Human Rights Acts in other jurisdictions have helped protect rights and the overall community.

(a) Victoria: Hard lockdown of public housing towers[28]

In 2020, after COVID-19 cases began emerging in nine high-rise public housing towers in inner north Melbourne, the Victorian Government imposed, without notice to residents, an extremely hard lockdown, detaining around 3,000 people in nine public housing towers. Restrictions were eased in several days for most of the towers, however, 400 people in one tower remained in hard lockdown for

two weeks in total, unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise. People subjected to the lockdown complained to the Victorian Ombudsman which investigated whether the lockdown complied with the Victorian Charter.

Despite the obvious risk posed by COVID-19 in high-rise public housing towers, the Victorian Government had not prepared a COVID-19 outbreak management plan for the relevant public housing estates or for high-density public housing more broadly. When cases began emerging, senior health officials were worried about the situation and began discussing using public health powers to put the towers into quarantine with notice to the residents. Following a crisis cabinet meeting, the timeline for the quarantine was brought forward and no notice was proposed. The Deputy Chief Health Officer, who had the power to detain people in quarantine, was given 15 minutes before a press conference to consider the potential human rights impacts and sign the directions imposing the lockdown. The immediacy of the lockdown was not on her advice.

The Victorian Government had no contingency plans for the imposition of a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the Victorian community, let alone one imposed without notice late on a Saturday afternoon. When the lockdown was announced to the media, hundreds of police officers were immediately deployed to the public housing estates and directed people to remain in their homes. Chaos followed. People did not have access to food or medication. Urgent requests for medication were delayed or neglected. Information was confused, incomprehensible, or non-existent, especially for people from culturally diverse backgrounds. People did not know who was in charge. No access to fresh air and outdoor exercise was provided for over a week.

The Ombudsman concluded that while swift action to address the public health risk in the towers was necessary, the immediacy of the lockdown was not justified, was not based on the advice of public health officials and led to many of the problems in the treatment of the residents. By imposing the lockdown without notice, the Ombudsman concluded that the Victorian Government had breached the residents' right to humane treatment when deprived of liberty. The Ombudsman stated that proper consideration was not given to the residents' rights when imposing the restrictions, as required by the Charter.

The Ombudsman made recommendations including that the Victorian Government apologise to the residents and introduce greater detention review safeguards into public health legislation. While the Victorian Government refused to apologise, it did support amendments to public health legislation.

Inner Melbourne Community Legal provided legal support to residents of the towers during the hard lockdown and has monitored Victorian Government responses to subsequent outbreaks in the towers in 2021. It reports that, while the government's refusal to apologise continues to impede the rebuilding of trust required to respond to the pandemic, and accessible timely communication in community languages remains problematic, there have been significant improvements in the way government has responded to concerns about outbreaks in the last year. Notably, government has favoured a health response driven by community organisations and abandoned the heavy-handed police response that was a feature of the 2020 lockdown.

(b) Queensland: Quarantine exemption for picking up assistance dog[29]

A woman planned to visit Queensland from interstate to pick up her assistance dog, with her mother and her carer, during a period of COVID-19 border restrictions. She was granted an exemption to enter Queensland where she agreed to isolate for 14 days and then spend a week receiving placement of the dog. However, when they tried to arrange for accessible quarantine accommodation, they were told the woman's needs could not be met and her exemption approval was withdrawn. The assistance dog had been trained specifically for the woman's needs at substantial cost and they were concerned that she would lose the dog allocated to her if she was unable to visit Queensland. The complainant chose to have this matter dealt with under the Queensland Human Rights Act. Through early intervention, the complaint was successfully resolved for the woman. Her exemption application to enter Queensland was re-approved. Queensland Health organised suitable accommodation for her, her mother and her carer to complete 14-day hotel quarantine.

(c) New South Wales: Covid-19 and Trust in Policing in Western Sydney

The above cases occurred in parallel to the following case describing the treatment of people in Western Sydney during the pandemic. NSW does not have a Human Rights Act, and this example illustrates why adopting a human rights centred approach enables individuals and communities to trust that government decisions are made and applied fairly.

Western Sydney, an area with a high percentage of migrants and a high degree of socioeconomic disadvantage, had disproportionately high rates of COVID-19 deaths.[30] Sections of Western Sydney were given strict curfews and other restrictions, and experienced a heavy police and military presence.[31]

In the Western Sydney suburbs of Liverpool and Mount Druitt $2.5 million in COVID-19 fines were issued from June 2021 to June 2022.[32] The different rules and stricter police enforcement applying to Western Sydney led to a breakdown of trust, with community leaders pointing out these discrepancies, and residents stating that they felt 'scapegoated'.[33]

A human rights-based approach would have required the government and the police to transparently justify why stricter measures were being utilised in certain areas, and how human rights affects would be mitigated. Stricter measures in Western Sydney may well have been justified from a public health perspective in accordance with human rights principles – but it would have been necessary for government and police to show that the chosen response was proportionate and appropriately tailored to the public health risk; and to change tack if unnecessary or potentially discriminatory outcomes occurred. A human rights-based approach would also have required a recognition of cultural differences in the affected communities, and pointed to a need to directly engage with those communities, beyond an enforcement-focused approach.

The absence of this human rights-based process may have led to suspicion of government decisions that were ultimately intended to be in the public good, with potential negative implications for police legitimacy and social cohesion in Western Sydney.

How would a Federal Human Rights Act make a difference?

Human rights law provides a framework for making decisions in times of crisis.[34] 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.[35] 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. Measures 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 a legitimate aim including in light of other options, and no more than what is required to achieve the aim.
- Non-discriminatory and equitable.

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, the extent of the impact on other important rights, and the availability of alternative courses of action that could achieve the relevant aim in a way that is less restrictive of human 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.

4.2 Robodebt

The so-called 'Robodebt' scheme, implemented in 2017, resulted in thousands of welfare recipients being sent inaccurate Centrelink debt notices following the introduction by the Department of Human Services of a new online compliance intervention (OCI) system for raising and recovering debts.

According to a Senate Standing Committee on Community Affairs report, when the Centrelink Debt Program commenced operation, it became apparent that the 'averaged' data process was resulting in the generation of inaccurate debt notices.[36] This had a particular distressing impact on recipients who were already marginalised.[37]

The Royal Commission into the Robodebt Scheme concluded that the scheme had a 'deleterious impact on the well-being and morale of some of the employees who were involved in its implementation and operation'.[38]

A number of staff gave evidence to the Royal Commission about the trauma they suffered as a result of implementing the scheme and the failure of their attempts to warn senior departmental figures about its impact on vulnerable Australians.

In its 2017 report, the Senate Standing Committee on Community Affairs noted that it had received evidence of 'many personal accounts of the stress and distress' the Centrelink Debt Program had caused recipients.[39] The debt notices caused anguish and stress for many vulnerable and disadvantaged recipients (including people with mental illness and other disabilities) and led to a class action resulting in a record $1.8 billion settlement, as well as the $30 million Royal Commission.[40]

Media reports indicate that the debt notices may have contributed to the death by suicide of some recipients.[41] The Commonwealth Ombudsman found that, among other factors, a lack of consultation was key to the resulting failure:

> The project management team failed to ensure that key external stakeholders were effectively consulted during key planning stages. It also failed to effectively communicate with stakeholders after the full rollout of the OCI in September 2016, resulting in confusion and inaccuracy in public statements made by key non-government organisation stakeholders, journalists and individuals. Proper communication with key NGO stakeholders … could have ensured that better information about the OCI was more effectively communicated.[42]

(a) Other human rights concerns with automated decision-making systems

Automated decision-making systems can also engage a number of other human rights. A particular problem that can arise in this context is known as 'algorithmic bias'. Algorithmic bias has been identified in automated decision-making systems, leading to errors that unfairly disadvantage people by reference to their race, gender and other protected attributes.[43] This can amount to unlawful discrimination and interfere with a number of human rights protected in international and Australian law – most obviously, the right to equality and non-discrimination.[44]

How would a Human Rights Act make a difference?

A human rights-based approach would:

- safeguard procedural fairness in automated decision making by government
- highlight the importance of human oversight, including monitoring and evaluation of government use of automated decision-making systems
- promote accountability and transparency regarding automated decision making by government
- investigate, monitor and reduce the impact of Artificial Intelligence and related technologies on vulnerable and marginalised groups, particularly those already facing barriers to digital inclusion.[45]

Governments must ensure that eligibility criteria for social security benefits are 'reasonable, proportionate and transparent'.[46] Further, any 'withdrawal, reduction or suspension' of social security benefits should be circumscribed and 'based on grounds that are reasonable, subject to due process, and provided for in national law'.[47] Any system that arbitrarily interferes with people's social security entitlements will be likely to interfere impermissibly with the International Covenant on Economic, Social and Cultural Rights (ICESCR).

A human rights-based approach would improve trust in government decision making, due to guaranteed rights protections, and the increased transparency and accountability it would bring. Public trust enhances respect for the law, provides greater legitimacy for authorities and institutions, and deepens social cohesion.[48] Participation and consultation measures also enhance trust – being included in the democratic process has been found to increase ownership over outcomes and responsible citizenship.[49] As responses to COVID-19 have illustrated, public trust is essential for the widespread adoption of public policy initiatives designed to benefit the public at large.

The Human Rights Act's proposed participation duty is in line with recommendations from the Royal Commission's Report, including the consideration of the vulnerabilities affected by each compliance program, as well as need for consultation with peak advocacy bodies. The Royal Commission recommended that Services Australia 'incorporate a process ... to consider and document the categories of vulnerable recipients who may be affected by the program, and how those recipients will be dealt with'.[50] The Royal Commission also recommended 'Services Australia consult stakeholders

(including peak advocacy bodies) as part of this process to ensure that adequate provision is made to accommodate vulnerable recipients'.[51]

Additionally, a Human Rights Act would place a positive duty on public authorities to act compatibly with the human rights expressed in the Human Rights Act and to consider human rights when making decisions. This would encourage a level of oversight that could reduce the likelihood of individual and systemic failures of the scope that occurred during Robodebt scheme.

A number of recommendations[52] from the Royal Commission's report highlight the importance of public authorities designing policies and processes with emphasis on the people they are meant to serve. For example, 'avoiding language and conduct which reinforces feelings of stigma and shame associated with the receipt of government support when it is needed', and 'explaining processes in clear terms and plain language in communication to customers'.[53]

In line with a positive duty and equal access to justice, the Royal Commission's Recommendation 17.1 is concerned with 'Proposing legislative reform to introduce a consistent legal framework in which automation in government services can operate'.[54]

This means that where automated decision-making is implemented, '(t)here should be a clear path for those affected by decisions to seek review and measures in place to enable independent expert scrutiny'.[55]

Dealing with human rights breaches after the fact can give rise to vast consequences including unexpected costs from failing to consider human rights early. Robodebt led to a resulting class action, and prompted its own Royal Commission. Dealing with human rights issues early has obvious economic benefits.[56]

By considering the human rights impacts of a proposed law or policy upfront, there is also a reduced likelihood that decisions will breach human rights and therefore the risk and costs of court action are avoided.

4.3 Aged care and disability

The Royal Commission into Aged Care found that the aged care system fails to meet the needs of its older, vulnerable citizens. It does not deliver uniformly safe and quality care, is unkind and uncaring towards older people and, in too many instances, it neglects them.[57] This is especially of concern given that almost 88%

of people living in aged care facilities have a physical disability and 73% have a psychosocial disability.[58]

(a) Royal Commission into Aged Care Quality and Safety Final Report

During its hearings on residential aged care, with a focus on the care of people living with dementia, the Royal Commission examined the following key areas:

- the perspective and experience of people in residential aged care and people living with dementia, and their family and carers
- quality and safety in residential aged care, particularly for people living with dementia
- the use of restrictive practices in residential aged care
- the extent to which the current aged care system meets the needs of people in residential aged care
- good practice care for people living with dementia, particularly in the context of residential aged care.

The report presents a range of testimonies from witnesses whose experiences ranged from access to medical and dental care, and physiotherapy, to difficulties receiving the correct medication, difficulties with medication management, struggles with appropriate continence care, social isolation, bland food, and the use of chemical and physical restraints.[59] They described dismissive attitudes by staff to their experience of intense pain.[60]

How would a Human Rights Act make a difference?

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the Royal Commission into Aged Care Quality and Safety reports have shown the serious consequences of private services not being held accountable to human rights standards.[61] The definition of 'public authorities' must therefore encompass private businesses, non-government organisations and contractors performing public functions.[62] The definition should be flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with a Human Rights Act.

Certainty is necessary for organisations as they will need to take steps to ensure they are compliant, and for individuals affected by the actions of public authorities – if they cannot easily determine whether an entity is covered by the Human Rights Act, they are unlikely to make a complaint about human rights breaches. This is especially the case for individuals with particular

vulnerabilities who will be prevented from pursuing a pathway if this is not clear.

A Human Rights Act would support decision makers to consider human rights in a way that is more appropriate to individual circumstances, rather than taking an inflexible, blanket approach to administration. It would protect against arbitrary or unfair decision making, and would provide a clear and accessible pathway for considering breaches of rights, for instance, where the use of restrictive practices has occurred or where specific religious and cultural needs have been ignored.[63]

Additionally, the Participation Duty would ensure that people with disability and their representative organisations participate in the co-design, or at the least be actively engaged in, decisions around design, development, and implementation of National Preventive Mechanisms (NPMs) across Australia.

It is vital that the voices, expertise, and experiences of people with disability are incorporated into NPMs – including in their standards, mechanisms, inspection teams and monitoring efforts. This requires significant consultation with the relevant bodies and people with disability, which to date has not meaningfully occurred.[64]

(b) Practical effect of the Human Rights Act 1998 (UK) (UK HRA) on aged and disability care in the UK

In the UK, there are a myriad of examples where the UK Human Rights Act has been raised directly with authorities and assisted campaign areas, including: equal marriage, the rights of children in deportation cases, privacy and the rise of data collection, tracking and artificial intelligence, and tackling abuse and neglect in health and care.

The UK HRA has been used to secure better treatment for people in care homes. This has largely been based on the prohibition on inhumane and degrading treatment, and respect for privacy, and has 'forge[d] a new set of obligations to the aged'.[65]

Practical changes have occurred through:

- human rights issues being raised early with public authorities and used as a tool to achieve changes to policies and practices without needing to go to court
- a human rights-based approach being adopted by the Care and Quality Commission, which regulates care homes

- case law setting important precedent
- systemic own-motion reports made by the Equality and Human Rights Commission that have brought attention to problematic practices.

Some examples of each are discussed below.

(c) Human rights raised outside of courts to change policies and practices

The following case studies were collated by the British Institute of Human Rights (BIHR).[66]

- An NHS nursing home in London had a practice of routinely placing residents in special 'tilt-back' wheelchairs, regardless of their mobility needs. As a consequence, residents who were able to walk unaided were stopped from doing so. This had a severe impact on their ability to make choices about everyday activities, as well as their capacity to feed themselves and use the bathroom. A consultant pointed out to staff that their failure to consider the different mobility needs of individual residents was contrary to human rights principles. She drew particular attention to the right to respect for private life,[67] which emphasises the importance of dignity and autonomy, and the right not to be treated in a degrading way.[68] The blanket practice was stopped as a result. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.
- A woman with a disability was told by her occupational therapy department that she needed a special ('profile') bed. She was unable to leave her bed and this new arrangement would allow carers to give her bed baths. She requested a double bed at home so that she could continue to sleep next to her husband. The authority refused her request, even though she offered to pay the difference in cost between a single and double bed. A stalemate ensued for 18 months until the woman was advised by the Disability Law Centre to invoke her right to respect for private and family life. Within three hours of putting this argument to the authority, it found enough money to buy the whole of her double profile bed. Writing to Disability Now, the woman explained that 'It has made a phenomenal difference to my life. If something similar happened in future, I would have no hesitation in using the [Human Rights Act] again'.
- A couple in the UK were living in an assessment centre so the Department of Social Services could examine their parenting skills. The couple both had learning disabilities. CCTV cameras had been installed, including in their bedroom. Social workers explained that the cameras were there to observe them performing their parental duties and for the protection of

their baby. With the help of an advocate, the couple used the UK HRA to challenge the use of the cameras. They said that the Department had not given proper consideration to their right to family and private life. The couple explained that they did not want their intimacy to be monitored. Besides, the baby slept in a separate nursery so it was not necessary to monitor the couple in their bedroom at night. As a result, the Department agreed to switch off the cameras during the night so that the couple could enjoy their evenings together in privacy.

- A physical disabilities team at a local authority had a policy of providing support to service users who wanted to participate in social activities. A gay man asked if a support worker could accompany him to a gay pub. His request was denied even though other heterosexual service users were regularly supported to attend pubs and clubs of their choice. During a BIHR training session, the man's advocate realised that the man could invoke his right to respect for private life and his right not to be discriminated against on grounds of sexual orientation to challenge this decision.

4.4 Indefinite detention

Australia's treatment of asylum seekers, including its mandatory detention regime[69] has been repeatedly found to breach international human rights obligations.[70] Mandatory detention can result in prolonged and/or indefinite detention that is often arbitrary. Asylum seekers held in offshore detention have been subject to unsafe and unsanitary conditions,[71] as well as physical and sexual abuse.[72] Asylum seekers in detention have extremely high rates of mental illness, and there have been many incidents of self-harm and suicide.[73] For example, in 2016, Omid Masoumali, a 23-year-old Iranian refugee, set himself on fire, shouting 'I cannot take it anymore'. He died of his injuries.[74] There is no domestic right to protection from arbitrary detention, and the regime has been found to be lawful by the High Court.[75]

That indefinite administrative detention is not unlawful under our existing laws suggests why our current protections, including the rule of statutory construction, known as the principle of legality, are just not enough.

There are relatively few parliamentary or judicial safeguards on the exercise of discretionary executive power, and this is particularly evident in the immigration law space.[76] The common law, the 'traditional check on executive abuse', can simply be overridden by the clear and unambiguous intention of Parliament.[77] Parliament routinely passes laws that expand upon executive power and grant broad ministerial discretion.

In the context of immigration powers, the High Court has held that 'what is in the national interest is largely a political question'.[78] Decisions made in the 'national interest' can incorporate decisions made to pursue 'national security, defence, economy, environment, society and culture'.[79] The Law Council submitted that: '[w]hile such [national interest] provisions may be justifiable with respect to nationally significant decisions which are subject to public scrutiny and stringent parliamentary accountability, unease is caused where they are increasingly attached to decisions which are unlikely to attract such attention, are geared primarily towards individuals, are privately exercised and lack accountability'.[80]

Executive power should not be so broad as to extend to arbitrary action – particularly where people's rights and freedoms are affected by discretionary decisions. However, in practice, there are relatively few parliamentary or judicial safeguards on the exercise of discretionary executive power.[81] The introduction of a Human Rights Act would provide more robust checks on executive power by placing a duty on public authorities to make decisions and act in accordance with human rights, and promote human rights considerations in executive decision making. Non-human rights compliant decisions could be reviewed and set aside by a court. This would help to strengthen accountability over executive decisions, and create an important recourse for people subject to arbitrary decisions that breach their human rights.

Al-Kateb v Godwin[82]

In the 2004 case of Al-Kateb v Godwin, the High Court of Australia was asked to decide whether the *Migration Act 1958* (Cth) (Migration Act) authorises the indefinite detention of an unlawful non-citizen when there is no real prospect of his removal from Australia. The Court found that a law that resulted in a person being held in immigration detention indefinitely was constitutionally valid.

Mr Al-Kateb was twenty-four when he arrived in Australia by fishing boat, without a valid visa. He was taken to Curtin Immigration Detention Centre in the Western Australian desert. Mr Al-Kateb's application for a protection visa to stay in Australia was rejected. The Department of Immigration tried to remove Mr Al-Kateb without success. Mr Al-Kateb was held in immigration detention for years, with no idea when he would be freed.

In the High Court, Mr Al-Kateb argued that the Migration Act should be interpreted consistently with Australia's obligations under the ICCPR, which protects the right to liberty and prohibits arbitrary detention.[83]

The majority of the High Court found that the words of the Migration Act clearly required Mr Al-Kateb to be detained until he could be removed from Australia, regardless of the fact that there was no reasonable prospect of this happening in the foreseeable future. Because the majority decided the words were unambiguous, they did not consider whether the human rights of Mr Al-Kateb and others held in immigration detention could affect the interpretation of the Migration Act. Justice McHugh said:

> It is not for courts … to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.[84]

According to Justice McHugh, the case illustrated that a judge 'may be called upon to reach legal conclusions that are applied with "tragic" consequences'.[85] This observation could also be made about other cases – in the same year as the Al-Kateb case, the High Court also upheld the legality of the long-term detention of children and confirmed that immigration detention remains lawful even if the conditions are harsh or inhumane.[86]

5 Ten ways a Human Rights Act would make a difference

Ways a national Human Rights Act would make a difference to people in Australia

1. **There is a better understanding of human rights:** A lesson from Human Rights Acts in other jurisdictions is that over time they result in increased human rights literacy among Parliamentarians, public officials and the general community.
2. **'Rights-mindedness' leads to better decision making:** The combination of measures contained in the Human Rights Act encourage the early consideration of human rights impacts in developing laws, policy and programs. A Human Rights Act builds a mindset that is focused on preventing violations of human rights in the first place. It encourages understanding how different processes will impact particular groups of people and to consider how to protect their rights in these circumstances.

3. **There is increased transparency and accountability about the impact of decision making on human rights.** A Human Rights Act sets out criteria for the balancing of rights and how to appropriate limit human rights (so that the chosen option for law, policy or programs has the least restrictive impact on people's human rights, and is appropriately tailored to the circumstances).
4. **The focus of decision makers will be on ensuring law and policy causes the least harm to people's human rights.** Where laws and policies negatively impact people's human rights, it will be incumbent on public officials to demonstrate how the approach proposed is the least restrictive option, how it is necessary, and how such restriction will be for the minimal period required. The Human Rights Act embeds a 'do no harm' principle in decision making processes.
5. **Engagement with the community on proposed laws and policies will be improved.** The combination of a positive duty on public servants to fully consider human rights and enhanced parliamentary focus on human rights will require better engagement with the community in the development of laws and policies, especially if they propose to negatively impact on people's rights. A failure to ensure such engagement could breach the proposed positive duties, and be considered in remedial processes.
6. **The views of persons with disability, Aboriginal and Torres Strait Islander peoples and children will matter** under a Human Rights Act. Multiple provisions in the Commission's model Human Rights Act ensure that engagement and participation is central to all stages of the decision-making process. Government would be obliged to seek out and fully consider the views of these groups on laws, policies and programs that disproportionately or directly impact them.
7. **The proposed participation duty will improve individualised decision making.** The Human Rights Act would embed the requirement to ensure the participation of persons with a disability at an individual level by ensuring that supported decision-making processes are adopted in all decisions that directly affect an individual.
8. **There are pathways for addressing breaches of people's rights:** The range of mechanisms proposed in the Human Rights Act (from the informal conciliation process of the AHRC, to review of decisions through to court action) will ensure that people have a pathway to address breaches of their rights.

9. **The remedial framework under a Human Rights Act is accessible to the most vulnerable in the community.** Through the availability of conciliation at the AHRC, administrative review and access to courts, those most affected by human rights breaches will have the ability to hold government to account for breaching their rights.
10. **The requirement of reasonable adjustment is built into the administration of justice.** This is through the operation of the proposed equal access to justice duty. This would ensure that persons with a disability, Aboriginal and Torres Strait Islander peoples, and people from culturally and linguistically diverse communities, among others, have equal treatment in the operation of the civil and criminal justice systems, and administrative review.

6 Priorities for federal discrimination law reform

Australia has enacted four discrimination laws at the federal level which prohibit discrimination in respect of particular attributes such as race, colour, national or ethnic origin and immigration status, sex, disability, age, and sexual orientation, gender identity and intersex status.[87] These laws operate in key areas of public life – including employment, education and the provision of goods and services – and implement many of Australia's non-discrimination obligations under international human rights treaties including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[88] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[89] and the Convention on the Rights of Persons with Disabilities (CRPD).

Experience with these discrimination laws over many years has revealed areas where they can be improved. The Commission's first Free & Equal Position Paper, A reform agenda for federal discrimination laws, closely analysed the Australian discrimination law regime, and made 38 recommendations for reform, framed through four outcome pillars:

- building a preventative culture;
- modernising the regulatory framework;
- improving the practical operation of laws;
- and enhancing access to justice.[90]

These recommendations were summarised in the Appendix to the Commission's first submission to this Committee. A key recommendation aimed at building a

preventative culture was to introduce a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination.

This was also a key recommendation of the Commission's Respect@Work report and was introduced into the *Sex Discrimination Act 1984* (Cth) (SDA) in December 2022. The Commission is currently preparing guidelines to assist duty holders in complying with the new duty which will be published soon. At the end of this year, a related set of amendments will commence that will give the Commission the ability to conduct inquiries into, and enforce compliance with, the positive duty. There will be a review of the operation of the positive duty in 2026 which will be an opportunity to see how it has worked in practice. If not done earlier, this may also be an opportunity to consider whether the positive duty should also apply to other areas of discrimination law, as recommended by the Commission.

A number of the other 38 recommendations from the Commission's original Position Paper on reforms to federal discrimination law have been implemented in whole or in part in the legislative responses to the Respect@Work report. These include:

- producing guidance on the appropriate use of non-disclosure agreements
- providing the Commission with the function of conducting systemic inquiries into unlawful discrimination
- permitting representative bodies to make applications to federal courts alleging unlawful discrimination against a group or class of people that they represent
- standardising the timeframe for lodging complaints with the Commission
- confirming that allegations of victimisation can be brought to the Court as civil proceedings if they cannot be resolved through conciliation
- confirming that the selection process for Commissioners must be merit based and involve public advertising.

The Commission welcomes these important reforms to discrimination law that have occurred since its initial Position Paper was published in December 2021.[91]

Of the remainder of the recommendations for discrimination law reform, the Commission has identified an initial tranche that could be implemented relatively easily while maintaining the existing structure of federal discrimination law. These are amendments to extend existing protections for vulnerable groups, to protect other important attributes, to address anomalies created by caselaw and to make important technical amendments. The Commission anticipates that these changes could be implemented in the short term – within the next 12 months. These reforms are:

a) Extend existing protections for vulnerable groups:
    - extend the new protections for volunteers and interns against sexual harassment introduced in response to Respect@Work, so that they are also protected against sex discrimination and other kinds of discrimination
    - extend the existing protection in the SDA against discrimination on the ground of family and carer responsibilities, so that the protection is not limited to direct discrimination in the workplace.

b) Protect other important attributes:
    - introduce enforceable protections against discrimination on the ground of religious belief or activity that are equivalent to other discrimination law protections.

c) Address problematic case law:
    - clarify that the meaning of 'special measures' in the *Racial Discrimination Act 1975* (Cth) (RDA) is to be interpreted in a way that is consistent with international law, to overcome the findings in *Maloney v The Queen*[92]
    - introduce a 'standalone' requirement in the *Disability Discrimination Act 1992* (Cth)to provide reasonable adjustments (unless it would cause unjustifiable hardship) in order to avoid the problem created by *Sklavos v Australasian College of Dermatologists*[93] that a person claiming that reasonable adjustments were not provided must also establish that they were not provided *because* the person has a disability.

d) Introduce important technical fixes:
    - include a definition of 'human rights' in the AHRC Act that includes all of Australia's human rights obligations
    - include a reference in the objects of the AHRC Act to the Principles Relating to the Status of National Human Rights Institutions (the 'Paris Principles')[94]
    - introduce a fairer costs model for discrimination law cases in federal courts – this is the subject of a current review being conducted by the Attorney-General's Department
    - amend the secrecy provision in s 49 of the AHRC Act to confirm that de-identified complaints information can be used for educative purposes, and to clarify its operation – Commonwealth secrecy provisions are currently being reviewed by the Attorney-General's Department

  - repeal s 46PF(7)(c) of the AHRC Act so that the Commission is not required to notify people who are not parties to a complaint, merely because there has been an adverse allegation made against them
  - amend s 106 of the SDA to confirm, consistently with other federal discrimination law, that a person can be vicariously liable for acts of victimisation by their employees or agents.

The balance of the Commission's reform agenda for discrimination law is likely to require more substantive and holistic changes to legislation, potentially by way of consolidation of discrimination laws. The Commission considers that these are reforms that could be implemented in the medium term, over the next 2 to 3 years. Key elements of this future reform program include:

- simplify the test for direct discrimination by removing the 'comparator test'
- simplify the test for indirect discrimination
- amend the evidentiary burden for matters particularly within the knowledge of respondents
- review permanent exemptions to discrimination in existing laws
- clarify the operation of 'intersectional' discrimination on grounds currently covered by different Acts
- extend or introduce co-regulatory mechanisms to promote compliance with discrimination law
- reintroduce an intermediate adjudicative process between the Commission and the courts
- make 'irrelevant criminal record' an enforceable ground of discrimination.

The Commission's recommendations for discrimination law reform are concerned with modernising 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.

The following table summarises the priority to be given to each of the 38 recommendations made in the Commission's 2021 Position Paper:

- Already implemented in whole or in part (highlighted in green).
- Stage one (highlighted in orange): addressing immediate priorities and fixing longstanding problems in the operation of federal discrimination law (year 1).
- Stage two (highlighted in red): introducing reforms that require more substantive and holistic changes to legislation (years 2–3).

The Commission encourages the Committee to make specific recommendations in relation to the immediate stage one priorities.

Table: Reforms to Federal Discrimination Law Implementation Table

No	Reform	Status
1-4	Positive duty (currently SDA only)	Introduced into the SDA in December 2022 by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (Second Respect@Work Act). Review to be conducted in 2026.
5	Secrecy provisions	AGD is currently conducting a Review of Secrecy Provisions. To report to Government by 31 August 2023.
6	Data on trends in complaints	Second stage proposal.
7	Non-disclosure agreements	In December 2022, the Respect@Work Council published Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints in response to recommendation 38 of the Respect@Work report.
8	Guidelines funding	Second stage proposal.
9-13	Other co-regulatory mechanisms	Second stage proposal.
14	Own motion inquiry into systemic unlawful discrimination	Div 4B of Part II of the AHRC Act (ss 35L–35Q) now gives the Commission the function of inquiring into any matter that may relate to systemic unlawful discrimination.

15	Enforcement powers	Second stage proposal.
16	Costs	AGD is currently conducting a Review into an appropriate cost model for Commonwealth anti-discrimination laws in response to recommendation 25 of the Respect@Work report.
17-19	Evidentiary issues	Second stage proposal.
20	Representative actions	New ss 46POA and 46POB were inserted into the AHRC Act in December 2022 by the Second Respect@Work Act. These provisions permit a representative application to be made to a federal court alleging unlawful discrimination.
21	Timeframe for lodging complaints	Section 46PH(1)(b) of the AHRC Act was amended in December 2022 by the Second Respect@Work Act to standardise the discretionary termination ground and provide that any complaint of unlawful discrimination may be terminated if lodged more than 24 months after the alleged conduct occurred.
22-23	Intermediate adjudicative process	Second stage proposal.
24	Volunteers and interns	Volunteers and interns were provided with protection against sexual harassment through changes to the SDA in September 2021 made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (First Respect@Work Act). This was done through applying the protections against sexual harassment to 'workers' and applying the prohibitions to 'persons conducting a business or

		undertaking' (PCBUs). These changes should also apply to sex discrimination and be rolled out to each of the other discrimination Acts.
25	Family and carer responsibilities	Extend protections against family and carer responsibility discrimination to: • indirect as well as direct discrimination • all areas of public life, not just in the area of work.
26	Religious discrimination protections	This is part of Government's current agenda – for example, see the terms of reference for the current ALRC inquiry.
27-28	Irrelevant criminal record	Second stage proposal.
29	Review of permanent exemptions	Second stage proposal.
30	Comparator test	Second stage proposal.
31	Reasonable adjustments	Include a 'standalone' requirement to provide reasonable adjustments (unless this would cause unjustifiable hardship), in order to avoid the problem created by *Sklavos* that a person claiming that reasonable adjustments were not provided must also establish that they were not provided *because* the person has a disability.
32	Indirect discrimination test	Second stage proposal.
33	Victimisation	The ability to bring civil proceedings alleging victimisation was confirmed through both First Respect@Work Act (in relation to the SDA) and

		the Second Respect@Work Act (in relation to the other federal discrimination laws).
34	Special measures	Amend the RDA to overcome the decision in *Maloney* and require that 'special measures' for the purposes of the RDA take into account the understanding given to article 1(4) of ICERD by the CERD Committee.
35	Intersectional discrimination	Second stage proposal.
36	Notification obligations	Amend s 46PF(7)(c) to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.
37	Paris Principles	Still to implement: • include a definition of 'human rights' in the AHRC Act that includes all of Australia's international human rights obligations • refer to Paris Principles in objects clause of the AHRC Act • regular re-baselining of Commission's funding.
38	Further review	Review of reforms after 5 years.

7 Endnotes

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[4] Victorian Legal Aid, *Submission, Free & Equal Inquiry*.
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[6] Michael Brett Young, *From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015) p.4.
[7] UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (July 1994) 5.
[8] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).
[9] Bruce Stone and Nicholas Barry, 'Constitutional Design and Australian Exceptionalism in the Adoption of a National Bill of Rights' (2014) 47(4) *Canadian Journal of Political Science* 677, 778.
[10] Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009) p.306.
[11] See, eg, *Racial Discrimination Act 1975* (Cth) s 6A.
[12] Frank Brennan et al, Attorney General's Department, *National Human Rights Consultation Committee Report* (September 2009) p.307.
[13] Australian Human Rights Commission, *Submission to the National Human Rights Consultation Committee* (2009); Law Council of Australia, Submission 166, *Free & Equal Inquiry*.
[14] See eg, case study 74 in Human Rights Law Centre, *Charters of Human Rights make our lives Better: 101 Cases showing how* (2022) p.49.
[15] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12, 4(2).
[16] Noting a review of the Privacy Act is underway, the Commission seeks to review the intersections of the proposed Human Rights Act with the recommendations that are made as a result.
[17] Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).
[18] See, eg, Law Council of Australia, 'Rushed encryption laws create risk of unintended consequences and overreach' (Press Release, 7 December 2018) <https://lawcouncil.au/media/media-releases/rushed-encryption-laws-create-risk-of-unintended-consequences-and-overreach->.
[19] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, 2015).
[20] George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *QUT Law Review* 19, 23.
[21] George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *QUT Law Review* 19.
[22] See, eg, James Allan, *Siren Songs and Myths in the Bill of Rights Debate* (Papers on Parliament No 49, August 2008) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop49/billofrightsdebate>.
[23] Jim McGinty, 'A Human Rights Act for Australia' (2010) 12(1) *University of Notre Dame Australia Law Review* 25; Law Council of Australia, Submission 166, *Free & Equal Inquiry.*
[24] David Reid, Submission 18, *Free & Equal Inquiry*; Julian Gardner, Submission 79, *Free & Equal Inquiry*; Uniting Church of Australia, Submission 91, *Free & Equal Inquiry*; Australian Lawyers for Human Rights, Submission 128, *Free & Equal Inquiry*.

[25] See, eg, Elias Visontay, 'More than 45,000 Australians stranded overseas registered for government help' *The Guardian* (Online) 21 September 2021 <https://www.theguardian.com/business/2021/sep/21/more-than-45000-australians-stranded-overseas-registered-for-government-help>.
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[30] Sara Rahman, *Breaches of COVID-19 public health orders in NSW* (NSW Bureau of Crime Statistics and Research, Bureau Brief No 157, October 2021) p.2 <https://www.bocsar.nsw.gov.au/Publications/BB/2021-Report-COVID-breaches-BB157.pdf>; Josh Nicholas, 'Most disadvantaged areas of Sydney suffer twice as many Covid cases as rest of city' *The Guardian* (online) 4 August 2021 <https://www.theguardian.com/news/datablog/2021/aug/04/most-disadvantaged-areas-of-sydney-suffer-twice-as-many-covid-cases-as-rest-of-city>.
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[34] See, eg, discussion in Sarah Joseph, 'COVID-19, risk and rights: the 'wicked' balancing act for governments' *The Conversation* (Online) 16 September 2020 <https://theconversation.com/covid-19-risk-and-rights-the-wicked-balancing-act-for-governments-146014>.
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