

14 September 2023

Parliament Joint Committee on Human Rights
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Parliament House
Canberra ACT 2600

By email only: human.rights@aph.gov.au

Dear Committee,

**Responses to Questions Taken on Notice – Human Rights Inquiry Melbourne Hearing,
25 August 2023**

Thank you for this opportunity to provide further comments to the Committee.

Please find here our responses to questions taken on notice during the Melbourne hearing of the Inquiry on Friday 25 August 2023.

Question 1 (from the Chair):

(Chair) My question goes to this demarcation between state and federal governments in our jurisdictions. If someone was to be protesting in the streets, it wouldn't be federal police turning up; it would be state based police, because the state based laws have jurisdiction. How would a federal enshrinement of the right to protest assist with—and many of the examples that we've seen recently have been state based—either changes to the law or state based responses to a particular incident?

1. There are two ways a Federal Human Rights framework could improve approaches to protest laws in States and Territories: firstly, in relation to existing and proposed State protest laws, and secondly, in the way that they are enforced.

How laws are made

2. Section 109 of the Constitution provides that, to the extent that State and Commonwealth laws are inconsistent, the Commonwealth law shall prevail and the State law shall, to the extent of the inconsistency, be invalid. Section 109 only applies to 'laws', which include Acts of Parliament, subordinate or delegated legislation (such as regulations) and other instruments given effect to by legislation (such as industrial awards); it does not include common law.

3. One of the main issues that we have raised in our written submission in relation to protest laws is the wave of recent amendments to State laws which disproportionately and inconsistently criminalise environmental protest. A Federal Human Rights framework would mean that State laws that were inconsistent with fundamental human rights protected in that Act would be invalid to the extent of that inconsistency. Currently, the avenue available to challenge State protest laws would be under the implied freedom of political communication in the Australian Constitution. Even in States and Territories with existing human rights frameworks, a Federal Human Rights Act would deliver an important layer of protection. For example, in Victoria, the Supreme Court has the power to declare that a law or provision is inconsistent with human rights, however the declaration does not affect the validity of the law. The function, rather, is to identify the infringement of human rights, so that Parliament can decide *whether* it should be rectified.
4. Further, the Statement of Compatibility required to be introduced with a Bill under s 28 of the *Charter of Human Rights Act 2006* (Vic) does not confer any binding or positive obligations on Parliament to amend legislation that may violate human rights in the Charter, nor does a failure to comply with s 28 affect the validity, operation or enforcement of the Bill if it subsequently becomes an Act.¹
5. As noted in our written submission, recent amendments to protest laws in Australian States have sought to disproportionately criminalise those engaged in environmental and climate protest. Industrial action “carve outs” have been implemented in some States to explicitly exclude union activity from harsh protest laws and this has the effect of unfairly discriminating against protest not captured by these exemptions, including climate and environmental activism.
6. Industrial action carve-outs have been regarded as a response to industry pressure on State governments. A Federal Human Rights framework could be developed, and apply, free from this influence.

How laws are enforced

7. Different approaches have been recommended to the Committee to resolve the issue of how State and Federal Human Rights frameworks would, or should, interact and the intended scope of their application. As a starting point, it seems uncontested that the Federal Charter should not override State Human Rights Charters.
8. The Australian Human Rights Commission (**AHRC**) suggests that the two frameworks could coexist neatly, similar to the current national anti-discrimination legislative framework, with the Federal Act binding Commonwealth public authorities and State/Territory Acts binding State/Territory public authorities. The AHRC also suggests that this could be dealt with on a case-by-case basis and practical difficulties could be resolved during a transitional implementation period.
9. The Human Rights Law Centre (**HRLC**) advocates for a broader application of a Federal framework to cover services which receive federal funding to perform a public function, for example, disability care, schools and hospitals. Under this approach, aspects of

¹ *Charter of Human Rights Act 2006* (Vic), s 29.

government decision-making which impact people's human rights will remain within the domain of state governments.

10. Ultimately, the HRLC concludes that, while the situation is undesirable, this is a "justifiable "cautious first step" to achieve greater respect for human rights in Australia".²
11. We agree that a Federal framework should, at a minimum, apply to State authorities when they are performing a Federal function or exercising a Federal power. For example, State and Territory police are vested with arrest powers and powers to execute warrants for Commonwealth offences under the *Crimes Act 1914* (Cth)³ and those interactions would likely not be captured by any State or Territory Human Rights Acts.⁴
12. Under the models proposed, it is unlikely that a Federal Human Rights Charter would apply to Victorian police officers interacting with protesters and enforcing State protest laws, however the emergence of national jurisprudence on the interpretation of rights that are repeated in a Federal Charter (for example, freedom of assembly, movement and expression) would be instructive and advance consistency.
13. It is noted, however, that officers other than police are empowered to enforce protest laws in some contexts and Victorian residents engaged in protest activities may interact with Commonwealth public officers in certain circumstances.
14. For example, recent amendments to the *Sustainable Forests (Timber) Act 2004* (Vic) (the **SFT Act**) have increased maximum penalties for offences including entering or remaining in 'safety zones' surrounding logging coupes and hindering or obstructing logging operations. Broader search and seizure powers for authorised officers have also been introduced, as well as powers to issue notices banning people from entering specified forest areas.
15. 'Authorised officers' are vested with powers necessary to enforce the SFT Act. 'Authorised officer' in the SFT Act has the same meaning as it does in the *Conservation, Lands and Forests Act 1987* (Vic), which provides that the Secretary may appoint as authorised officers "any specified employee or a specified class of employees employed by the Secretary, or in the Department or in the Public Service or (with the consent of the Minister administering that Department) in any Department of the Government of the Commonwealth, a State or a Territory"⁵. Under this framework, the Secretary could appoint a Commonwealth public servant as an authorised officer who would be vested with all necessary powers to enforce the SFT Act.
16. Finally, clause 5 of the Victorian Charter of Human Rights provides that the Charter does not limit any right or freedom that is not included in the Charter. The Explanatory Memorandum states that the purpose of this provision is to ensure that the Charter is not misused by limiting a right a person may have under any other law (including under

² Submission of Human Rights Law Centre

³ *Crimes Act 1914* (Cth), ss 3J, 3W and Parts IAAB. Section 3 defines "constable" to include a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4.

⁵ *Conservation, Lands and Forests Act 1987* (Vic), ss 3 and 83(1)(a).

international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) on the basis that the right is either not recognised in the Charter or recognised to a lesser extent in the Charter. For example, if a right under an international treaty is a relevant consideration for the purpose of administrative decision-making, the Charter does not operate to make that right irrelevant because it is not expressed in the Charter.⁶

17. For States and Territories without existing human rights frameworks, an “opt-in” clause may be considered to allow for the application of the Federal Human Rights Act to cover the field and apply to those State or Territory public authorities performing State or Territory public functions.
18. As raised by Victorian Equal Opportunity and Human Rights Commission and other submitters at the Inquiry Hearing, the introduction of a Federal Human Rights framework is also about fostering a strong human rights culture in Australia which impacts both lawmaking and the enforcement of laws.

Question 2 (from Ms Murphy):

Have other jurisdictions implemented Aarhus Convention style participation rights across other human rights, beyond the right to a clean, safe, healthy and sustainable environment? Would that be a development in human rights law that Australia would be a leader in if we took that approach?

19. By extending participation rights enshrined in the Aarhus Convention to other human rights, Australia would be considered a leader by its international counterparts in the protection of participation in human rights. However, to the extent that there are already some participation rights articulated within Australian domestic law and in other international instruments, it would not be entirely novel nor unprecedented to implement these procedural rights.
20. The Australian Human Right Commission (**AHRC**) address this question in their position paper, starting with the assertion that the ‘principle of participation is at the core of democratic systems’.⁷ They note that international human rights law recognises participation in public life as a human right protected by article 25 of the *International Covenant on Civil and Political Rights*.⁸ They also acknowledge the role of public participation as both a principle underpinning the human rights framework and as a means of realising substantive human rights. We endorse the AHRC’s statements on the importance and universality of the right to participate in public life.
21. Participation rights were articulated in detail by international human rights law in relation to the right to a healthy environment, originally as a pathway to securing substantive environmental rights prior to its recognition as a stand-alone human right.⁹ These were

⁶ Explanatory Memorandum.

⁷ AHRC Position Paper, 162. See also 176-181 for discussion of other jurisdictions that have legislated participation duties in relation to human rights.

⁸ International Covenant on Civil and Political Rights, art 25.

⁹ Victoria Lambropoulos, ‘What can Australia learn from the Europeans about public participation? Article 6 of the Aarhus Convention and environmental impact statements’ (2010) 27(4) *Environmental and Planning Law Journal* 272, 273.

set out in the *Aarhus Convention*.¹⁰ The three key principles of the Aarhus Convention are:

- Access to information: the public must be able to request and be provided with information about the environment from public authorities. Public authorities are obliged to collect and publish environmental information of public interest.
- Public participation: the public should be able to participate in public authority decision making, particularly for those interested in or affected by a decision. There should also be public participation in the creation of laws and policy.
- Access to justice: public participation must occur without obstruction. Rights to access information and to participate must be enforceable and there must be access to seek review of decisions made by public authorities.

22. The principles of the *Aarhus Convention* are not unfamiliar to existing legal principles in Australia. The access to information principle is similar to the emphasis on government transparency that underpins existing Freedom of Information laws in several Australian jurisdictions.¹¹ Likewise, participation rights for people affected by or interested in a decision made by government reflect the common law duty of procedural fairness. This concept is codified in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and recognised in some Australian environmental laws as third-party review and enforcement rights.¹²
23. To that extent, embedding those principles across all rights recognised in a Federal Human Rights Act would not be novel.
24. Several other jurisdictions have embedded similar principles in their human rights frameworks, albeit not specifically referencing the Aarhus pillars. South Africa's constitution contains a bill of rights and also principles governing public administration including that 'the public must be encouraged to participate in policy-making' and 'transparency must be fostered by providing the public with timely, accessible and accurate information'.¹³ UK courts have developed the 'Gunning principles' which provide for a duty on public authorities to consult with those affected by a decision where a failure to do so could result in denial of fairness or natural justice.¹⁴ This duty is not generalised and is not directed specifically to the protection of human rights, but it does provide an example of a broadly applicable participation right in a comparable jurisdiction.
25. Extending a participation duty across the human rights in a Federal Human Rights Act would ensure that participation rights, which are fundamental to the realisation of

¹⁰ *Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters* (Aarhus Convention).

¹¹ See, eg, *Freedom of Information Act 1982* (Vic), *Freedom of Information Act 1982* (Cth), *Government Information (Public Access) Act 2009* (NSW) and *Freedom of Information Act 1992* (WA).

¹² See, for eg, *Environment Protection Act 2017* (Vic) s 434 and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487.

¹³ *Constitution of the Republic of South Africa 1996*, s 195.

¹⁴ ARHC Position Paper, 176.

substantive human rights, are consistently and uniformly applied across the suite of protected human rights. It would also emphasize the obligations of public authorities and law makers to ensure genuine avenues for public engagement with, and influence over, the decisions and laws that affect them.

26. To be clear, as stated in our submission, we also support the insertion of additional, tailored participation duties in relation to First Nations peoples in Australia, such as the right to free, prior and informed consent, to remedy historical and ongoing exclusion from government decision making. These should be supplementary to a generalised participation right.

Yours faithfully

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