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

Inquiry into Australia's Human Rights Framework: Parliamentary Joint Committee on Human Rights

I refer to your email dated 5 October 2023 and the request to respond to the following questions on notice.

From the Chair

1. Why are enforceable and effective remedies important? Can you explain the procedural and substantive components of the right to an effective remedy?

Why are enforceable and effective remedies important?

1.1 A right without an enforceable and effective remedy is no more than symbolism or words on paper.[1] The very nature of a right, particularly a legal right, is the ability to enforce that right and hold another person/organisation/government accountable when they fail to respect the right or discharge a duty or obligation. An enforceable and effective remedy is the means to achieving justice.[2]

1.2 The capacity to enforce a right and seek a remedy from an independent court or tribunal is a feature of our democracy, recognising the separation of powers and the rule of law.

1.3 Remedies are the means of holding a wrongdoer accountable and expressing approbation for the wrongdoing. A remedy is an acknowledgment of the failure to protect, respect and fulfil another person's human rights. Knowing that the

[1] See Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1st ed, 1999) 55; note the Latin phrase – *ubi jus ibi remedium* (for every violation of a right, there must be remedy): Australian Lawyers for Human Rights, Submission No 21 to Standing Committee on Law and Justice, *A NSW Bill of Rights* (30 March 2000) 39.

[2] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667: In *Baigent*, the New Zealand Court of Appeal was concerned about the absence of a remedial provision in the New Zealand Bill of Rights. It expressed concern this rendered the Bill of Rights 'empty' (at 702) or 'toothless' (at 676) if there was no remedy against the Crown for a breach of a person's rights.

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wrongdoer will be required to make redress should serve to deter others from engaging in wrongdoing. The community can see justice being done.

1.4 Depending on the circumstances, the remedy for one person may result in the recognition of the rights of other people similarly placed.

1.5 When a court or tribunal publishes the reasons for awarding a remedy, the reasons educate people about their rights. The reasons explain how particular human rights should be interpreted and applied. The court or tribunal's reasons create precedents and develop the law. A court or tribunal may also identify gaps in the law and policy.

1.6 Finally, Australia has obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**) to provide effective remedies when breaches of human rights occur.[3] The numerous complaints (communications) lodged with the United Nations treaty body committees have highlighted the absence of available or effective remedies for human rights breaches.[4] The absence of national Australian legal remedies for internationally recognized human rights is a gap in Australia's compliance with its international legal obligations.

Components

Substantive component

1.7 The substantive component of a remedy speaks to redress and restitution for the person/s whose rights have been impaired. A remedy should restore the victim as far as possible to the position they would have been in if the contravention of their rights had not occurred.

1.8 There are a wide range of remedies that can achieve restitution and restoration.[5] They include:

(a) compensation for past and future loss, economic and personal hurt or suffering; reimbursement of expenses or provision for the cost of future treatment or supports; an account of profit;

(b) injunctions to prevent breaches of human rights continuing;

(c) mandatory injunctions requiring a public authority to make reasonable adjustments;

(d) orders to repair or remediate property;

(e) orders to take a reasonable action to prevent future breaches of human rights, this could include undertaking training or further education;

(f) apologies and statements of regret;

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[3] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3).

[4] See Remedy Australia and its list of cases concerning effective remedies at [Cases - Remedy Australia]

[5] See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006) (**Van Boven Principles)** cl IX (15)–(24).

(g) habeas corpus to release a person from unlawful detention;

(h) declarations;

(i) orders such as mandamus, to require a public authority to perform its statutory duties;

(j) quashing unlawful decisions;

(k) imposing civil penalties;

(l) developing memorials, commemorations and tributes;

(m) implementing redress schemes;

(n) rehabilitation services with counselling supports.

1.9 If a human rights claim also involved an accrued or associated claims in a federal court[6] proceeding then remedies available through other causes of action may also serve as a substantive remedy.

Procedural component

1.10 There are two aspects of procedural rights. When the relevant human right requires certain procedures to be followed, then the rights will be respected when those procedures are built into decision making. Some examples from the ICCPR are:

(a) the right not to be deprived of one's liberty except on such grounds and in accordance with such procedure as are established by law (article 9(1));

(b) the right to be informed of the reasons for an arrest, at the time of the arrest (article 9(2));

(c) the right to be promptly informed of any charges laid against a person (article 9(2));

(d) the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power when arrested or detained (article 9(3));

(e) the right to a trial within a reasonable time or be released (article 9(3));

(f) a right to bail (article 9(3));

[6] The reference to 'federal court' is intended to refer to Federal Court of Australia and/or the Federal Circuit and Family Court of Australia.

(g) the right to take proceedings before a court, so the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (article 9(4));

(h) the right to an enforceable right to compensation for anyone who is deprived of their liberty by unlawful arrest or unlawful detention (article 9(5));

(i) the right not to be imprisoned because of an inability to fulfil a contractual obligation (article 11);

(j) the right to a fair trial with the range of procedural rights to secure a fair trial (article 14);

(k) if convicted of a crime, a right of appeal or review of the conviction and sentence by a higher court, according to law (article 14(5)).

1.11 The second aspect is the pathway to secure the substantive remedies. The procedural components include:

(a) a right to equal and effective access to justice;[7]

(b) adequate, effective and prompt reparations for harm suffered;[8] and

(c) access to relevant information concerning human rights laws, including procedural laws, as well as remedies and reparations.[9]

1.12 The procedural component should address:

(a) cheap, quick and fair consideration and determination of allegations or complaints;

(b) access to advice and representation;

(c) commitment to investigate allegations and use independent authorities to conduct investigations, where appropriate; and

(d) appropriate referrals to appropriate agencies to access alternative remedies.

1.12 It is beyond the scope of this response, but the Committee may be assisted by examining the approaches taken in other jurisdictions to remedies.[10]

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[7] Van Boven Principles cl VII (11)(a).
[8] Van Boven Principles cl VII (11)(b).
[9] Van Boven Principles cl VII (11)(c). See also ICCPR art 2(3) and Human Rights Committee, *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant,* 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13.
[10] See European Court of Human Rights, *Guide on Article 13 of the Convention – Right to an effective remedy* (Guide, 31 August 2022); Scottish Human Rights Commission, *Adequate and Effective Remedies for Economic, Social and Cultural Rights* (Briefing paper, December 2020).

2. The AHRC has recommended that a breach of the HRA may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) – so that a judicial review claim could be brought (Position Paper p. 283). Do you think this is an appropriate approach? Or should a breach of the HRA be considered *alongside* a claim for judicial review but not be brought *under* the ADJR Act (see submission 61, pp. 7-8).

2.1 I agree judicial review should be one, but not the only, remedy. I raised such an option in my submission to the Brennan inquiry in 2009.[11]

2.2 The *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**) applies only to decisions made under an enactment or conduct in making the decision (see ss 5 and 6). This is not an avenue to obtain merits review or for a judge to substitute or change the decision under review.[12]

2.3 In the context of a public authority making a decision under a Human Rights Act (**HRA**), an aggrieved person could challenge the validity of a decision on grounds available in the ADJR Act or other forms of judicial review. For example, one could argue the public authority's decision should be set aside because the public authority:

- made an error of law;
- failed to take into account mandatory relevant considerations or had regard to irrelevant considerations;
- denied a person procedural fairness;
- was biased; or
- made an unreasonable decision.

2.4 This is likely to be an important avenue if a person seeks to have a decision that impairs a human right be quashed and reconsidered by the particular public authority. This is not an avenue to seek damages.[13]

2.6 I have read submission 61 and acknowledge the Hon Ms Pamela Tate AM KC and her significant contribution to human rights law, particularly in Victoria. As requested, I will address some of the points raised in the submission:

(a) Ms Tate recognises a claim could be brought that a public authority had failed to take into account a relevant consideration on the basis that it had breached its procedural obligation under the HRA. She says – '*The difficulty is that a much more stringent test applies to whether there has been a breach of the procedural obligation by a public authority than the*

[11] See Attorney General's Department, *National Human Rights Consultation* (Final Report, September 2009) 182, fn 19.
[12] *Byron Aged Care Limited v Aged Care Quality and Safety Commissioner* [2022] FCA 1060 at [60] ff for a helpful summary of the scope of relief/remedies and the approach a federal court will take.
[13] *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 645.

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test at common law (applicable in judicial review) for a failure to take account relevant considerations. This would be confusing for a court as to which test was applicable if a breach of the HRA was presented as a ground of judicial review. It would also be confusing for a court hearing a claim for a breach of the HRA alone as to whether they should apply general judicial review principles.' I agree with these comments but they are not a reason to exclude judicial review from the remedial options. In my view, this concern can be addressed by clear drafting in the HRA and/or ADJR Act.

(b) I agree with Ms Tate when she says – '*There are important differences between judicial review and rights review. It would be unfortunate if the clarity of a distinct standalone statutory cause of action was obscured by an attempt to fit it within an existing framework that was not designed to deal with human rights principles*.' I agree this should not occur. This concern may be addressed by clear, concise and accurate information about the nature of this remedy.

(c) In response to Ms Tate's question – '*If a breach of the HRA was brought under the ADJR, would the 'victim' criterion for standing apply or the ordinary standing test for judicial review?*' In my view, the standing rules should be broad but not unlimited.[14] The international treaty bodies complaints mechanisms also confine the right to complaint to 'victims' of breaches.

(d) Ms Tate asks – '*How would an alleged breach of a public authority's substantive obligation be dealt with as a ground of judicial review where there is a need to consider the proportionality of the public authority's actions?*' In judicial review, a court considers whether the decision under a review has been made in accordance with law and this can include consideration of whether a limitation or restriction on rights has been determined appropriately, without being drawn into a merits review. The question for the court is how the decision was made. If the decision is flawed and needs to be reconsidered, the court's guidance on how proportionality should be determined will assist the decision maker when reconsidering the decision.

(e) Ms Tate says – '*This is not to say that a breach of the HRA could not be relied upon in the same proceeding alongside a claim for judicial review (governed by ordinary principles) but it would not be brought under the ADJR Act, as appears to be envisaged by the Commission. There would be two distinct causes of action governed by distinct principles and methodology*.' I agree. However, in practice it is unlikely an applicant would seek to maintain two distinct causes of action with different

[14] See definition of a 'person aggrieved' in *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(4) and some relevant case law - *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7 [152]; see further the discussion in *Process Minerals International Pty Ltd v Department of Mines and Petroleum* [2012] WASC 458 [22]–[30], including at [26]: 'It has been said that there has been a progressive widening of the law of standing and of the concept of a person aggrieved over the last century. However, the meaning of the term "person aggrieved" will always depend upon the particular statutory context'. See also *Australian National Imams Council Limited v Australian Communications and Media Authority* [2022] FCA 913 at [70] for a helpful summary of the relevant case law and considerations.

remedies. I question the utility of seeking judicial and merits review in one proceeding. In those circumstances judicial review may be superfluous and unnecessarily complicate proceedings. In my view, judicial review is appropriate for matters where merits review is not the appropriate remedy. This may be because of the operation of other laws.[15]

3. Can you explain what concerns you have with the AHRC's model for remedies for breach of human rights?

3.1 I support the AHRC's approach to remedies and remedial pathways set out in Chapter 11 of the *Free & Equal* Position Paper.[16] My concerns are with a few aspects of the model.

3.2 First, under the current proposed model, the public authorities will accountable if and when a victim makes a claim. It is 'responsive' model in the sense that it requires victims to take action to seek redress (see the model described at page 267). This is the model that presently works for 'unlawful discrimination' complaints made under the *Australian Human Rights Commission Act* 1986 (Cth). A victim initiated process requires the victim to make a complaint, participate in the complaints process (investigation and conciliation) and then to initiate a proceeding in a federal court or the Administrative Appeals Tribunal. This process places a heavy onus on victims. This one reason why I also suggest consideration be given to a Human Rights Ombudsman who may initiate claims on behalf of victims.

3.3 Second, the victims do not have direct access to court and the model requires them to complete a process through the Australian Human Rights Commission (**AHRC**) before commencing a proceeding (other than judicial review). While I very much support mediation and conciliation, the model presently used for discrimination claims, that often involve individual or corporate respondents, is not necessarily the best model for a human rights claim that is brought against a public authority. There is a significant power imbalance. Public authorities are far more likely to have more resources, experienced personnel and lawyers, a greater familiarity with the AHRC processes and information that will not be known to the complainant. The confidential nature of these processes operates as a shield for some public authorities. The process that requires the AHRC's processes to be completed before commencing a proceeding may be a barrier to accessing immediate relief, and may add to the cost and the trauma experienced by a victim.

3.4 Third, there are limited avenues for victims to seek redress without making a claim. For example, if there is an investigation, audit, inquiry or even a royal commission that recommends redress or restorative justice actions, there appears to be no avenue for a person to seek a remedy arising from the result of such inquiries or recommendations.

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[15] See *Fisher v Commonwealth of Australia* [2023] FCAFC 106.

[16] See Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 335–353.

3.5 Fourth, the remedies could include greater consideration of restorative justice models.

4 Can you explain how we get a system of remedies that doesn't just focus on individual experiences but examines systemic issues?

4.1 The AHRC's proposed model leans towards personal rather than systemic remedies. The personal or individual remedies tend to result in compensation for the individual's loss and damage.[17] If the federal discrimination model is an example, the individual victim is required to prove their loss and damage, including with evidence to substantiate their loss of dignity, humiliation and self-worth. The compensation awarded by the courts and tribunals in discrimination claims is generally modest.[18] Often, private and confidential settlements which result in higher damages being paid are reached on the condition there be non-disclosure, non-disparagement and confidentiality.[19]

4.2 One avenue for systemic remedies is the use of class actions. It is beyond the scope of this response to address in any detail how class actions/representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) have been used in more recent times to pursue systemic remedies, but there have been a number of claims, particularly for race discrimination, where class actions have proved a vehicle for achieving remedies which have had a systemic character.

4.3 In developing an approach to systemic remedies there are a number of matters to consider, including the procedural pathways, the substantive remedies and the need to ensure the court is not being asked to give an advisory opinion. Some the matters to consider include:

(a) what the AHRC should do if it is aware of multiple complaints arising against the same respondent, or concerning the same or substantially the same contravention. Should or could there be a mechanism for the AHRC to identify the complaints as a systemic complaint and join or consolidate the complaints;

(b) whether there should be an option for a complainant or representative body to identify the complaint as raising systemic issues and when the complaint is lodged identify if a systemic remedy is sought;

(c) whether the AHRC should refer a systemic complaint to the court;

(d) whether settlements that may include remedies that may have a systemic effect, should be open and not subject to blanket confidentiality conditions;

(e) whether the AHRC should publish a register of conciliated outcomes for matters that have a public interest or systemic impact;

[17] See *Kaplan v Victoria (No. 8)* [2023] FCA 1092.
[18] See Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study' (Report, 24 October 2022).
[19] Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) *Sydney Law Review* (advance).

(f) whether claims that raise systemic human rights issues should be conducted by a Human Rights Ombudsman rather than individual victims;

(g) how to educate and support legal practitioners to consider more innovative remedies and the ways of presenting evidence that might support more systemic remedies being awarded by a court.

5. How would a Human Rights Ombudsman work?

5.1. For human rights, a Human Rights Ombudsman could have a similar role to that of the Fair Work Ombudsman (**FWO**) in the regulation of workplaces and fair work laws.

5.2. Part 5-2 of the *Fair Work Act 2009* (Cth) (**FW Act**) provides for the establishment of the FWO (s 681) and sets out particular functions (s 682). The FWO's functions include:

- promoting harmonious, productive and cooperative workplace relations; and compliance with the FW Act and fair work instruments;
- providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- to monitor compliance with the FW Act and fair work instruments;
- to inquire into, and investigate, any act or practice that may be contrary to the FW Act;
- commence proceedings in a court, or to make applications to the Fair Work Commission (**FWC**), to enforce the FW Act, fair work instruments and safety net contractual entitlements; and
- to refer matters to relevant authorities.

5.3. The FWO is required to consult with the FWC in producing guidance material that relates to the functions of the FWC (s 682(2)).

5.4. The FW Act acknowledges the independence of the FWO. The FWO has inspectors with significant powers to investigate, obtain documents and enter premises (ss 706, 708). The FWO can use enforceable undertakings (s 715) and compliance orders (s 716) as regulatory tools.

5.5. The FWO's work, while not expressly identified by reference to human rights, is directed to protecting rights of a kind in article 7 of the *International Covenant on Economic Social and Cultural Rights* (**ICESCR**) [20] which are reflected in the FW Act. Article 7 recognises the right of everyone to the

[20] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**).

enjoyment of just and favourable conditions of work which ensure: remuneration that is fair, equal for work of equal value, and affords a decent living; safe and healthy working conditions; equal opportunity of employment; limitation of working hours and periodic holidays.

5.6. From a practical perspective, the FWO has significant experience and expertise in investigating breaches of the FW Act. It has a publicly available *Compliance and Enforcement Policy* which set out clear criteria for when the FWO will initiate proceedings in the public interest.

5.7. Applying a model similar to the FWO, a Human Rights Ombudsman could exercise the following functions:

- promoting a human rights dialogue, awareness and understanding of human rights;
- promoting compliance with a HRA;
- providing education, assistance and advice to public authorities and producing best practice guides to human rights, jointly or in cooperation with the AHRC;
- monitoring compliance of public authorities with a HRA;
- inquiring into, and investigate, any act or practice of a public authority that may be contrary to the HRA;
- commencing proceedings in a court to enforce the HRA;
- referring matters to relevant authorities, if there are more appropriate remedies.

5.8. Unlike the FWO, the AHRC's functions are directed to conciliating complaints and having no standing to commence proceedings. The FWO does not conciliate complaints, it investigates. The conciliation function is undertaken by FWC. A Human Rights Ombudsman would have standing to commence proceedings. Importantly, like the FWO, a Human Rights Ombudsman's functions should not depend on a complaint being lodged by an individual before any action is taken.

5.9. With respect to promoting awareness and understanding of human rights under an HRA, consideration could be given to developing Human Rights Standards based on a HRA that set out how public authorities should comply with relevant human rights. I refer to the way Disability Standards have been developed under the *Disability Discrimination Act* 1992 (Cth). A Human Rights Ombudsman could have a role in regulating compliance with Human Rights Standards.

5.10. The AHRC does not have such a function with respect to the Disability Standards. However, I note from 12 December 2023 the AHRC will be able to exercise powers with respect to investigations and compliance notices for a failure of persons conducting a business or undertaking to take measures to

prevent sex discrimination and sexual harassment arising from s 47C of the *Sex Discrimination Act* 1984 (Cth).[21]

6. The *Fair Work Act 2009* has civil penalties for certain breaches. How could civil penalty orders for a breach of human rights work? Would this help the public service develop a culture of human rights?

6.1. Developing a culture of human rights in the public service and public authorities will take time and education. Imposing civil penalties for breaches of human rights would shine a light on a public authority's actions and be a means of holding a public authority accountable. The option of a civil penalty as one remedy in the suite of remedies would reflect the seriousness of breaches. Like the FW Act, imposing a civil penalty should deter public authorities from engaging in unlawful conduct.

6.2. Civil penalties are commonplace in Commonwealth statutory regimes to protect consumer rights, health and safety and environmental rights.[22] As the AHRC explains in the *Free and equal: A reform agenda for federal discrimination laws* (Position Paper) there are range of regulatory approaches and tools.[23] Sanctions and the risk of a sanction in the form of a civil penalty is one element to support a sound and effective regulatory scheme.

7. How important is it to have a shift in the onus of proof and costs? How would that work?

Costs

7.1. The costs arrangements require careful consideration. It is not as simple as either a 'no costs' model or 'costs follow the event'. The following considerations are relevant:

(a) most respondents in a HRA claim will be well-resourced public authorities being government agencies. The victim-survivors are very unlikely to have the same level of resources to conduct court proceedings or the capacity to pay their own costs or the governments' costs if their claim is unsuccessful;

(b) the cost of litigation should not be a deterrent to seeking a remedy or provide a public authority a shield;

(c) likewise the inability for a successful claimant to recover their costs, be it personally or the lead applicant in a class action, may also be a deterrent to bringing claims. It may be more difficult to secure legal representation for complex claims and accessing legal representation, if there is no ability to recover legal costs even when the claim succeeds;

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[21] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2 pt 2 div 2.
[22] See for example *Competition and Consumer Act 2010* (Cth) sch 2 ch 5 pt 5-2 (the Australian Consumer Law); *Work Health and Safety Act 2011* (Cth) pt 10; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 17 div 15.
[23] See Australian Human Rights Commission, *Free and equal: A reform agenda for federal discrimination laws* (Position Paper, December 2021) 96–97.

(d) it is likely the public authority will be legally represented and a fair trial may require the applicant victim to legal representation.

7.2 A federal court has a discretion in how costs are determined, with particular considerations for public interest litigation.[24] I am note previous inquiries including the Australian Law Reform Commission (**ALRC**) in *Cost Shifting – who pays for Litigation*, Report No 75, 1995.

Onus of proof

7.3 The question of who bears the onus of proof also requires careful consideration. A scheme like s 361 in the FW Act would be a useful model in a HRA. An applicant would have to establish how their rights have been impaired and that the particular human right is engaged. The onus then shifts to the public authority. Applying an approach like s 361, it means the breach of human rights will be substantiated unless the public authority can prove either (a) the breach did not occur; and (b) there was a permissible limitation on the applicant's enjoyment of the human right. The public authority will have all the relevant documents and the knowledge of the decision making or action to explain its actions, so there is no unfairness in imposing an evidentiary and legal burden of proof on the public authority.

8. How important is it to have direct access to the courts? What are the concerns with having to have AHRC conciliation first?

8.1. It is critical a person has access to seek a remedy in a court. I support alternative dispute resolution pathways including conciliation and mediation but it should not be assumed that conciliation and mediation are appropriate in all claims. There may be a need for a prompt resolution of claim in a court, particularly where a remedy such an interim or permanent injunction is sought. At present the AHRC's handling of discrimination complaints is slow and it can take a number of years before a complaint makes its way through the AHRC and then to a federal court and results in a final decision.

8.2. I refer to my comments above about accountability and transparency. There needs to be open and transparent processes when the decisions or conduct of public authorities is in issue. If claims are settled and resolved through conciliation with non-disclosure agreements, this may work against accountability and open justice.

8.3. Further, conciliation with a government agency will not always be appropriate or best practice from a trauma-informed perspective. There should be an option of commencing in the court, just like other areas concerning a person's rights e.g. defamation or judicial review.

8.4. I refer to the evidence of the Queensland Human Rights Commissioner, Mr Scott McDougall, at the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, about Queensland's experiences with

[24] See *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 107 [92] and the subsequent case law considering costs in public interest litigation.

conciliation.[25] He explained the limitations of conciliation in the Queensland model and the limitation on enforcing rights because of the absence of a direct cause of action.

9. Do you think there should be a broader standing clause to bring action for breach of human rights? Are there any constitutional concerns with this?

9.1. While there should be broad standing provisions to enable representative bodies to make complaints or commence proceedings,[26] there should also be clarity and certainty in who will have standing to make a complaint or commence judicial proceedings. Arguments and disputes about who has standing should not be an additional barrier to seeking an effective remedy. I note the work done by the ALRC in *Beyond the door-keeper – Standing to sue for public remedies*, Report No 78, 1996.[27]

9.2. The need for certainty arises because courts must exercise judicial power consistently with Chapter III of the Constitution.[28] The federal courts cannot give advisory opinions and the exercise of judicial power must be directed to the 'matter' where the judicial power will be exercised to quell or determine a dispute between parties.

<u>From Senator Thorpe</u>

10. What would be the best way to ensure a proper duty to co-design with communities i.e., in contrast to the weaker AHRC proposed participation duty does not prioritise upstream decision and co-design as being central to human rights protection?

10.1. The AHRC's proposed participation duty is an important development. It appears to draw on the duty to consult in the UK *Equality Act 2010*. The approach taken in the UK may be a model to consider for building a procedural right with respect to participation and implementing co-design processes.

10.2. As to other models, I also refer to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report, Volume 4, Chapter 3, Part 3.5 which addresses such an obligation for the purpose of a Disability Rights Act and note the evidence presented on Day 4 at Public hearing 31 of the Royal Commission in embedded lived experience and co-design in government policy development.[29]

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[25] Transcript, Scott McDougall, Public hearing 33 – Violence, abuse, neglect and deprivation of human rights; Kaleb and Jonathon (a case study), 8 May 2023, P-64 [13]–P-70 [20].

[26] See for example *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313; [2007] FCA 615.

[27] See also E Fisher & J Kirk, "Still Standing: An Argument for Open Standing in Australia and England" (1997) 71 ALJ 370

[28] *In Re The Judiciary Act 1903-1920 and In Re The Navigation Act 1912-1920* (1921) CLR 25, *Australian Conservation Foundation Incorporated v The Commonwealth* (1980) 146 CLR 493; *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 and recently *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCAFC 135

[29] Public hearing 31 - Day 4 | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

11. The respondents to our current human rights/anti-discrimination law are most often large employers, or the Australian Government and its agencies. You call the AHRC model cautious, would constitutional enshrinement be the best way to ensure systemic issues within the Australian Government as and its agencies are addressed?

11.1. The protection of human rights in the constitution as a charter of rights, like the models in Canada or South Africa, would provide the strongest human rights protections. A constitutional model would empower the High Court to declare laws (as opposed to action/conduct) are invalid if the law operates inconsistently with human rights. Given the difficulties of achieving any form of constitutional reform, proposing a constitutional model would have no realistic prospect of occurring.

11.2. A further caveat on a constitutional model is ensuring it will stand the test of time. There are also concerns about the importance of human rights evolving and responding to new issues. There is a risk of entrenching rights with limited capacity to respond to future issues or make amendments.[30]

11.3. Finally, constitutional remedies are significantly more limited than the types of remedies that may be included in a HRA.

Please let me know if you have any questions or require any further clarification of the matters contained in this response.

Your sincerely

Kate Eastman

[30] Justin Gleeson, 'A Federal Human Rights Act – What Implications for the States and Territories?' (2010) 33(1) *UNSW Law Journal* 110.