

Dear Secretary, Parliamentary Joint Committee on Human Rights

Inquiry into Australia's Human Rights Framework

Thank you again for the earlier opportunity to give evidence at the Melbourne public hearing on 25 August 2023.

Question on notice

Thank you also to Senator Thorpe for the question on notice following the hearing. The question was:

Your submission touches on Article 2(3) of the ICCPR which provides that access to effective dispute resolution mechanisms is an essential component of an effective regime that endeavours to protect the human rights of its people. This touches on other rights that the Australian Human Rights Commission advocated for including equal access to justice duty. While an independent cause of action is obviously a very important part of achieving this, could the onus be reserved so government bears the responsibility of proving compliance with human rights?

Response

It is possible for the onus to be reserved so the State bears responsibility for proving compatibility with human rights under a federal Human Rights Act. This would be regardless of whether or not an independent cause of action is enacted. This would reflect the current position in caselaw under, for example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

First, the Victorian courts have taken the approach that the onus of proof to establish that a human right is limited rests on the claimant. As the Victorian Court of Appeal said in *Thompson v Minogue* ('*Thompson*')

The onus of establishing that a human right has been limited is on the person alleging the limitation. The evidence that will be required to discharge the onus will depend upon a number of factors, including the nature and scope of the human right that is said to be limited and the nature and availability of information that may inform that question.¹

Second, if this is established, the onus of proof to demonstrate that a limitation on human rights is lawful and proportionate under the s 7(2) general limitations clause, and therefore compatible with human rights, rests on the State. In *Thompson*, the Court said:

Once it has been established that a human right has been limited, the onus is on the public authority to establish that the limitation is lawful, reasonable and can be demonstrably justified within the terms of s 7(2)

¹ (2021) 67 VR 301, 316 [47].

of the Charter.² Because of the requirement that the limitation be demonstrably justified, the public authority will ordinarily need to adduce evidence that is sufficient to satisfy that standard of justification. ...³

The standard required for the State to discharge this second onus is ‘high’;⁴ ‘a measure of stringency is involved’.⁵

This approach is broadly consistent with international human rights law jurisprudence. A federal Human Rights Act could potentially codify the above in statute. However, it is likely that federal courts would adopt this approach in any event, in light of the existing jurisprudence.

I hope this is of assistance.

Kind regards,
Dr Bruce Chen

15 September 2023

² *Momcilovic v The Queen* (2011) 245 CLR 1, 247–8 [678]; *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 448–9 [147]–[148]; *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *PJB* (2011) 39 VR 373, 441 [310]; *Certain Children [No 2]* (2017) 52 VR 441, 498 [175].

³ (2021) 67 VR 301, 321 [74].

⁴ *Loiello v Giles* (2020) 63 VR 1, 66 [246] citing *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [147].

⁵ (2021) 67 VR 301, 321 [72] citing *PJB* (2011) 39 VR 373, 441 [310]; *Bare v IBAC* (2015) 48 VR 129, 203 [235], 226 [299].