

Just.Equal – Answers to questions on notice from Senator Thorpe

1. You support a constitutional mode which is the strongest and most effective way to protect human rights. Over half the Australian population support a human rights act or think we already have one. Do you think this means the country could support a referendum to enshrine human rights that would protect them all or at least be given that choice?

Yes, it is possible that a majority of voters in a majority of states would support a Constitutional referendum to enshrine basic rights in the Constitution. However, certain circumstances would probably need to apply. There would need to be a pre-existing, long-term, grass-roots campaign to educate Australians about the need for the reform and a strong, well-resourced response to the inevitable misinformation campaign opposing such a reform. The fatalistic view that referenda that touch on human rights are doomed would also need to be challenged. We strongly believe Australians should be given the choice to enshrine human rights in the Constitution. However, this should not be misconstrued as a choice between constitutional and legislated human rights. They can exist side-by-side as they do in Canada.

2. Your submission states the proposed AHRC model might be weaker than the existing state models. Could you elaborate on this and how it sacrifices LGBTQI+ and others whose rights are most often breached including First Peoples?

The proposed AHRC model for a national human rights Act (NHRA) provides weaker protection than existing state and territory human rights charters. It does so in at least two ways. First, unlike existing charters, the proposed NHRA would not allow judges to provide Parliament with a formal 'Declaration of Incompatibility' in relation to federal laws that breach international human rights law. Declarations of Incompatibility (DOI) are the 'engine' of the dialogue model of human rights acts that have been adopted in Victoria, Queensland, and the ACT, as well as in the United Kingdom and New Zealand. In the absence of a power to issue a DOI, a judge who finds that a federal law breaches human rights law is not able to do anything. A finding that a federal law breaches human rights law would sit in a void, most likely unnoticed and without any formal effect. Secondly, the proposed NHRA does not include the clear and unqualified right to nondiscrimination found in articles 2 and 26 of the ICCPR. Instead, the AHRC's Position Paper: a Human Rights Act for Australia uses a magician's 'sight-of-hand' to make it look like the right to be free from discrimination is included without actually including it. How does the proposal do this? Step 1: part 5.2 on page 110 of the Position Paper provides a "List of rights for inclusion". The first listed right is "Recognition and equality before the law; and Freedom from discrimination". So far so good. Step 2: section (4) on page 110 states that: 'Every person has the right to equal and effective protection against discrimination'. This still looks good. Step 3: the word 'discrimination' in section (4) is defined in section (6) to have the same meaning as the word 'discrimination' in federal discrimination laws. This is a problem because the scope of the right to protection against discrimination in section (4) is to be determined by cross-reference to federal discrimination laws that may exist from time to time. Cross referencing of this kind is not found in existing human rights charters and for good reasons. Human rights acts are designed to provide 'umbrella' protection in relation to all federal laws, without carve-outs. Furthermore, human rights are 'indivisible, inter-related and inter-dependent' and so removing an important right like freedom from discrimination creates a lopsidedness in the protection the proposed NHRA would offer. What is the impact of this slight-of-hand? There are two obvious consequences. 2 First, the cross-reference to federal discrimination law in section (6) preserves the broad exemptions for religious organisations in the Sex Discrimination Act, 1984. These existing exemptions allow religious organisations to discriminate in ways not permitted by international human rights law. Secondly, section (6) would also remove the possibility of bringing a complaint under the

proposed NHRA for future changes to federal discrimination law that might be incompatible with international human rights law. For example, if at some future time a Parliament removed s 18C from the Racial Discrimination Act, 1975 the NHRA would provide no basis for a complaint. Finally, as per our submission, we are concerned that the NHRA proposal for religious freedom does not sufficiently balance that right with other rights. We would like to see balancing provisions from Article 18 of the ICCPR incorporated into any legislated right to religious freedom in Australia. General limiting provisions are not sufficient.