

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Inquiry into Australia's Human Rights Framework

Questions on notice to the Australian Human Rights Commission

On 5 October 2023, the Committee Secretary sent the Commission an email with five questions in writing from Senator Thorpe. The questions and the answers to those questions are set out below.

- 1. Fundamental to our legal system is the separation of powers. The AHRC model suggests a system that does not allow the judicature to exercise appropriate checks on the arbitrary use of power by the parliament or executive. The High Court has admitted that it has no basis in the Constitution that it can use to determine whether a law of the parliament which affects human rights is within the powers conferred on it by the Constitution, with over five high court cases confirming that they judiciary is unable to protect human rights unless they are enshrined in the constitution. Justice Michael McHugh in the case of *Al-Kateb v Godwin* stating, *"If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill."* Why did the AHRC choose not to advocate for the strongest form of human rights protection available, the only one that would give the High Court the power to prevent abuse of rights by a parliament or executive federal government?**

The model for a Human Rights Act proposed by the Commission provides for a strong judicial check against conduct by the executive that may be contrary to human rights, and important scrutiny of legislation passed by the Parliament to improve its human rights compliance.

A Human Rights Act would create an obligation for federal public authorities to act compatibly with each of the human rights expressed in the Human Rights Act and to give proper consideration to those human rights when making decisions. If a public authority failed to do so, a person who claimed that their human rights were breached would have standing to make a complaint and to have that complaint determined by a federal court. Under the Commission's model, the person would have a direct cause of action and would not have to attach their human rights claim to a different legal proceeding. The court hearing an

application would have a broad range of remedies available to it. This is a strong judicial check against executive action that may be contrary to human rights.

A range of provisions both in the proposed Human Rights Act and in other associated recommendations of the Commission would be effective in improving the human rights compliance of laws passed by Parliament. Chapter 13 of the Commission's Position Paper proposes a range of important reforms to the process of parliamentary scrutiny in relation to human rights (see also pages 83–84 of the Commission's first submission to the PJCHR). These include that:

- Bills should not be passed (or, potentially, given a second reading) until a final report of the PJCHR has been tabled, with limited exceptions for urgent matters.
- The PJCHR be given an own motion power to report on human rights issues.
- Statements of compatibility be required for legislative instruments.
- Statements of compatibility include details of consultations undertaken in accordance with the participation duty in the proposed Human Rights Act.
- Statements of compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Greater clarity be provided in relevant legislation on the content expected in statements of compatibility.
- A public sector human rights education program be introduced.
- Departments have designated human rights advisers.

Under the Human Rights Act, the courts would also play an important role in interpreting legislation. In the Commission's model, courts would be required (and empowered) to interpret all primary and subordinate Commonwealth legislation, so far as is reasonably possible, in a manner that is consistent with human rights. If a court made a finding that legislation could not be interpreted consistently with human rights, there would be an additional obligation on the Attorney-General to notify Parliament in order for Parliament to provide a response.

The Commission's model does not involve a constitutional Bill of Rights. It does not provide that courts can find that legislation is invalid on the basis that it is contrary to human rights. There are significant difficulties in achieving a change to the Constitution, with the last successful referendum occurring 46 years ago.

2. In light of the cases like *Kartinyeri v Commonwealth* [1998] how does the AHRC proposal intend to protect against legislation which extinguishes the cultural rights and heritage of First Nations people?

There are a number of ways in which cultural rights of First Nations peoples would be protected under the Commission's model for a Human Rights Act.

First, the Human Rights Act would include new, enforceable, cultural rights based on article 27 of the *International Covenant on Civil and Political Rights*. The Commission has proposed two separate rights in the following form:

Cultural rights – generally

All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

Cultural rights – First Nations peoples

- (1) First Nations peoples hold distinct cultural rights.
- (2) First Nations peoples must not be denied the right, with other members of their community—
 - (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
 - (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
 - (c) to enjoy, maintain, control, protect and develop their kinship ties; and
 - (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
 - (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
- (3) First Nations peoples have the right not to be subjected to forced assimilation or destruction of their culture.

The drafting of these rights is consistent with ss 27 and 28 of the *Human Rights Act 2019* (Qld).

Federal public authorities would have an obligation, under the Commission's Human Rights Act model, to act compatibly with these rights and to give proper consideration to these rights when making decisions. First Nations people would have the ability to make a complaint and bring legal proceedings alleging a breach of these rights by public authorities.

Secondly, the Human Rights Act would include a separate 'participation duty', embedding principles from UNDRIP. The participation duty would require public authorities to ensure the participation of First Nations peoples when they are developing policies or making decisions that directly or disproportionately affect the rights of First Nations peoples. This would be part of the duty to 'act compatibly' with human rights (including the specific cultural rights identified above).

Thirdly, as noted in the answer to question 1, statements of compatibility would be required to:

- include details of consultations undertaken in accordance with the participation duty in the proposed Human Rights Act
- include consideration of the extent to which the legislation complies with UNDRIP.

Fourthly, federal courts would be required to interpret all Commonwealth legislation, including legislation dealing with First Nations cultural heritage, so far as is reasonably possible, in a manner that is consistent with human rights, including the cultural rights identified above.

3. Further to this, in 1982, Canada adopted a Charter of Rights and Freedoms after experimenting with a national bill of rights in 1962 which was widely considered to be ineffectual. What were the main reasons the dialogue model was chosen by the AHRC as opposed to a more ambitious model that has both legislative and constitutional human rights protections as Canada does which has a similar system of government (federal political system and bicameral legislature) and competing issues with handling the sovereignty of First People?

The Commission drew on the successful experience of the United Kingdom, New Zealand, Victoria and the Australian Capital Territory, all of which have a statutory Human Rights Act. The Commission's model seeks to build on the best elements of each of these existing models in a way that is compatible with

Australia's constitutional system, while also introducing important innovations such as the participation duty.

As noted above, including a Bill of Rights in the Constitution would require a successful referendum which poses substantial barriers to the success of such a proposal.

- 4. I worry that the limitation of the AHRC commission proposal to not enshrine human rights in the Constitution and limit the remit of any Federal Act to commonwealth bodies and not courts, will result in a human rights postcode lottery and allow states and territories to, for example, keep their prison torture centres open and populist tough on crimes policy in place. Could you please address how the postcode lottery issue could be addressed under your framework?**

The Human Rights Act will apply uniformly throughout Australia to all conduct by federal public authorities. This includes the administrative functions of courts and judges, including things such as the issuing of warrants, determining matters of practice and procedure, and the hiring of staff. The Commission's model also includes an 'equal access to justice duty' (see pages 215–222 of the Position Paper) which would deal with issues such as access to legal representation, access to interpreters in court proceedings (including in First Nations languages), provision of supports including accessible court facilities, provision of procedural accommodations to ensure equal participation of persons with disability, provision of specialist children's advocates, and support for culturally safe legal services.

The Commission supports all States and Territories adopting equivalent human rights legislation in their jurisdictions based on the proposed federal model.

- 5. Can you explain how requiring public authorities to ensure the participation of First Nations peoples, children, and persons with disability in relation to policies and decisions that affect them would work in practice?**

- How are public authorities to determine when to seek participation?**

Public authorities would be required to seek participation of First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights.

The participation duty would form part of second limb of the positive duty on public authorities to 'give proper consideration to human rights' when making decisions affecting rights. Consultation would therefore be required prior to relevant decisions being made. If the participation duty had not been complied with in relation to relevant decisions, then those affected would have the ability to make a complaint and, ultimately, bring legal proceedings, alleging that relevant decisions had been made contrary to the positive duty because they had been made without proper consideration being given to human rights.

The Commission has set out overarching guidelines that it says should inform a proper participation process at page 184 of the Position Paper.

- **Whose participation would be sought?**

The participation duty would apply to decisions in relation to three groups people: First Nations peoples, children and persons with disability. This reflects Australia's commitment to the UNDRIP and its obligations under relevant international agreements, namely: articles 18 and 19 of the UNDRIP, article 12 of the *Convention on the Rights of the Child*, and article 4(3) of the *Convention on the Rights of Persons with Disabilities*.

The identity of those required to be consulted would depend on the nature of the decision being made and the rights being affected. Where the decision involves an individual in one of these groups, that person would need to be consulted. Where the decision affects the rights of people in a particular group, then consultation with that group would be required. For decision with a broad impact, engagement should occur through representative organisations.

- **Who determines who is a representative group? (p 173 Position Paper)**

Initially, it will be for the decision maker to identify which groups are affected and who should be consulted. The relevant public authority should be in a position to identify who it has engaged in consultations, why that was appropriate in the circumstances and how the consultation is connected to and impacts on the reform in question.

However, it would be open to a person or group affected by a relevant decision to make a complaint alleging that they were not properly consulted. In the first instance, such disputes would be addressed through conciliation. If conciliation was unsuccessful it would be possible to bring a legal proceeding alleging that proper consultation had not occurred and that issue would be determined by a court.

- **What happens when measures are urgent and there is no time for consultation, and how would this interact with UNDRIP which demands engagement along principles of free prior and informed consent?**

As with all the human rights protected in the Human Rights Act, the rights conferred by the participation duty will be affected by the limitations clause, which means that rights can be balanced against important public interests and the human rights of others.

In cases of urgency, it may be that consultation is truncated, for example by reducing timeframes. In extreme cases, decisions may be required without consultation. However, this must be justified through the application of proportionality criteria. A claim of urgency based on administrative convenience will not be sufficient. Further, a claim of urgency will not be sufficient if the impact on rights of proceeding without consultation is disproportionate to the other claimed objectives. In making this assessment, it would be necessary to recognise that consultation is the default position and departures from it must be closely scrutinised. The Commission has provided a description of the key principles involved in the participation duty and the limitations on the duty at pages 184–185 of the Position Paper.

This proportionality assessment described above is consistent with the principle of free, prior and informed consent in UNDRIP. For example, drafters of UNDRIP and international institutions applying it have indicated that the principle does not operate as a ‘veto’ in all cases, but the importance of the principle increases with the importance of the decision for the rights of Indigenous Peoples. For more information about how the principle operates in practice, see: Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No.3 – We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith* (July 2013), at https://humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf.

- **How would it be binding? (p 161 Position Paper)**

The participation duty would form part of the second limb of the positive duty on public authorities to ‘give proper consideration to human rights’ when making decisions affecting rights. Breach of the positive duty gives rise to a direct cause of action.

- **How would the PJCHR scrutinise whether proponents of legislation had facilitated participation during the law-making process? (p 161 of Position Paper)**

One of the functions of the PJCHR is to examine Bills and legislative instruments that come before either House of the Parliament for compatibility with human rights and to report to both Houses of Parliament on that issue (*Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7(a)). This scrutiny of legislation is done by reference to the text of the Bills and legislative instruments, and by reference to the Statements of Compatibility with Human Rights that accompany those instruments (as required by *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 8 and 9).

The Commission's model proposes that Statements of Compatibility be required to include a section identifying the consultation that has taken place in the development of the Bill or legislative instrument in compliance with the participation duty (see page 186 of the Position Paper). This will allow the PJCHR to scrutinise whether proponents of Bill and legislative instruments had facilitated participation during the law-making process.

The Commission's model also envisages that the PJCHR could receive public submissions about whether consultation has occurred properly (in a similar way to the submissions received by the Victorian Scrutiny of Acts and Regulations Committee), and that these submissions could also be taken into account in the PJCHR's assessment of whether consultation had been adequate.

- **What remedies should be available for breach of the proposed Human Rights Act? (p. 52 of submission)**

As set out on page 52 of the submission (and further at pages 268–275 of the Position Paper), the Commission proposes that the Human Rights Act provide courts with a broad discretion to grant remedies that are just and appropriate in the circumstances, noting the range of different kinds of human rights claims and the importance of flexibility.

Available remedies may include injunctions, orders requiring action, declaratory relief, monetary damages, and administrative law remedies such as setting aside decisions and referring decisions back to the decision maker for reconsideration according to law.

- **Could you clarify if there will be stand alone cause of action for breach of failure to participation duty.**

The participation duty would form part of second limb of the positive duty on public authorities to 'give proper consideration to human rights' when making decisions affecting rights. Breach of the positive duty gives rise to a direct cause of action.