



SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION'S *FREE AND EQUAL: AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS* PROJECT

Human Rights for NSW (**the Alliance**) welcomes the opportunity to make a submission to the Australian Human Rights Commission's (**AHRC**) project on human rights in Australia.

About the Human Rights for NSW Alliance

Human Rights for NSW is an alliance of community organisations working together to achieve stronger protection of human rights for everyone in New South Wales (**NSW**). The Alliance believes that having human rights set out in law will lead to a fairer society and ensure dignity, equality and respect for all within the community.

This submission was drafted by Amy Colquhoun and James Moryosef at the UNSW Human Rights Clinic on behalf of the Alliance.

This submission is endorsed by the following organisations:

Australian Lawyers for Human Rights
Human Rights Law Centre
NSW Council for Civil Liberties
Australian National Imams Council
NSW Bar Association
Youth Justice Coalition
Mums 4 Refugees
Women's Legal Service
Human Rights for All
Aboriginal Legal Service (NSW/ACT)
The Whitlam Institute
Physical Disability Council of NSW
Asylum Seekers Centre
Redfern Legal Centre
NSW Council of Social Services
Marrickville Legal Centre
Equality Australia

UNSW Human Rights Clinic
Community Legal Centres NSW
Public Interest Advocacy Centre
Australian Lawyers Alliance
The Refugee Council of Australia
The Shopfront Youth Legal Centre
Amnesty International Australia
Save the Children Australia
Parents for Trans Youth Equity
Jesuit Refugee Service Australia
Inner City Legal Centre
Tenants' Union of NSW
House of Welcome
People with Disabilities Australia
National Justice Project
NSW Young Lawyers



The Human Rights for NSW submission to the Australian Human Rights Commission's Free and Equal inquiry is endorsed by



Executive Summary

This submission specifically focuses on human rights protection within NSW. The Alliance also supports a Human Rights Act at the Federal level.

During the last 15 years, three Australian states and territories have enacted legislation specifically protecting human rights:

- *Human Rights Act 2004 (ACT) (ACT Act)*;¹
- *Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter)*;²
and
- *Human Rights Act 2019 (Qld) (Queensland Act)*.³

The Alliance recommends that the NSW Government undertake a parliamentary inquiry into the introduction of a Human Rights Act for NSW. This inquiry should include comprehensive community consultation to determine the best way to establish a Human Rights Act for NSW.

We have addressed the following consultation questions from the issues paper from this standpoint:

1. What human rights matter to you?
2. How should human rights be protected in NSW?
3. What are the barriers to the protection of human rights in NSW?
4. How should the Government address the situation where there is a conflict between different people's rights?
5. What should happen if someone's human rights are not respected?

Recommendations

The Alliance recommends that:

1. The NSW Parliament enact comprehensive human rights legislation to give full protection to all human rights in line with Australia's international legal obligations.
2. The NSW Government hold a parliamentary inquiry into the introduction of human rights legislation in NSW which includes comprehensive community consultation about the most effective model for, and the content of, a Human Rights Act for NSW.
3. A Human Rights Act for NSW sets out which rights are absolute, non-absolute and which are derogable and non-derogable.

¹ *Human Rights Act 2004 (ACT) ('ACT Act')*.

² *Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Charter')*.

³ *Human Rights Act 2019 (Qld) ('Queensland Act')*.

4. The NSW Government consider whether a Human Rights Act for NSW should include a clear general limitations clause.
5. In conducting a public consultation on a Human Rights Act for NSW, the NSW Government should consult on how to best balance competing rights while managing diverse interests. In considering how to best balance competing rights, the NSW Government should draw on existing international human rights jurisprudence.
6. The NSW Government consider legislating a Human Rights Act that allows for the commencement of legal action in an accessible tribunal such as a specialist human rights division in the NSW Civil and Administrative Tribunal or a newly constituted tribunal, in addition to the Supreme Court of NSW.
7. The NSW Government consider ensuring that a Human Rights Act provides access to effective remedies, including a stand-alone cause of action.
8. The NSW Government explore providing affordable access to the full range of remedies for individuals and groups in any Human Rights Act for NSW. Remedies could include internal complaint handling mechanisms within public authorities, declarations, injunctions, compensation and reparations noting that there is a human right to an effective remedy when human rights are violated.
9. The NSW Government consider whether a Human Rights Act for NSW should apply to non-government entities exercising public or private functions.

1. What Human Rights Matter to You?

A. Definitions of Human Rights

The United Nations Declaration on Human Rights (**UDHR**) provides that ‘All human beings are born free and equal in dignity and rights’,⁴ articulating a common standard for all peoples and all nations. The UDHR makes no distinction amongst different rights, nor does it establish any implicit hierarchy of rights. It establishes the fundamental principle that all human rights are universal, inalienable, independent and indivisible.⁵ These rights respect the dignity and worth of everyone and promote social progress and better standards of life and freedom.⁶ Contemporary human rights also include inherent rights such as rights in relation to data privacy.⁷

⁴ *Universal Declaration of Human Rights (UDHR)*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1.

⁵ *World Conference on Human Rights*, UN GAOR, A/CONF 157/23 (25 June 1993).

⁶ *Universal Declaration of Human Rights (UDHR)*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) preamble.

⁷ *Universal Declaration of Human Rights (UDHR)*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 2.

B. Human Rights Treaties

Australia was a founding member of the United Nations, and one of the eight nations that assisted in the drafting of the UDHR. Australia is a party to the seven-core international human rights treaties.⁸ These include the:

- *International Covenant on Civil and Political Rights (ICCPR)*;⁹
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;¹⁰
- *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*;¹¹
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*;¹²
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*;¹³
- *Convention on the Rights of the Child (CRC)*;¹⁴ and
- *Convention on the Rights of Persons with Disabilities (CRPD)*.¹⁵

The Australian Government also supports the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which is widely accepted as forming part of customary international law¹⁶ However because UNDRIP is a general assembly resolution, it is not a legally binding instrument under international law. As a result, despite Australia supporting the UNDRIP there are still unacceptable differences across health, life expectancy, education, and incarceration rates between the Aboriginal and Torres Strait Islander and non-Indigenous population.¹⁷ Australia is also a party to the:

⁸ Australian Government Attorney-General's Department, 'Human Rights and Anti-Discrimination', *International Human Rights System* (Web Page) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>>.

⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹² *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹³ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

¹⁷ Department of Prime Minister and Cabinet, *Closing the Gap* (Report, 2019).

- *Optional Protocol to the International Covenant on Civil and Political Rights*;¹⁸
- *Second Optional Protocol to the International Covenant on Civil and Political Rights*;¹⁹
- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*;²⁰
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;²¹
- *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*;²² and
- *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.²³

International human rights treaties provide an agreed set of standards and develop more comprehensive recognition and observance of the rights available to everyone. While these treaties create obligations for State parties, reliance upon treaties alone is not sufficient to provide meaningful human rights protections. States are required to incorporate their international human rights law obligations into domestic legislation and provide effective remedies. The NSW Government should exercise leadership by ensuring that human rights standards are brought into NSW law and a culture of respect for human rights is fostered in NSW. This requires establishing a Human Rights Act for NSW that will promote fundamental values and protect internationally recognised human rights standards.

C. What Rights Are Currently Protected and How?

Australia is the only developed Western democracy in the world without either a Bill of Rights or national Human Rights Act. In NSW there is some limited protection of rights provided by the *Australian Constitution*, Commonwealth and NSW legislation (most notably anti-discrimination legislation) and the common law.

¹⁸ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁹ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989 999 UNTS 414 (entered into force 11 July 1991).

²⁰ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002).

²¹ *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, open for signature 25 May 2000, 2171 UNTS 227 (entered into force 19 January 2002).

²² *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

²³ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2518 UNTS 283 (entered into force 3 May 2008).

a. Constitution

The *Australian Constitution* explicitly protects very few individual rights. The rights specifically protected are the following:

- Protection against the acquisition of property on unjust terms;²⁴
- Trial by jury for a federal indictable offence;²⁵
- Freedom from State adoption of religion;²⁶
- The prohibition of discrimination on the basis of State of residency;²⁷
- The right to judicial review in the High Court of government action;²⁸ and
- Freedom of interstate trade.²⁹

Although there is no absolute right to vote, the constitution provides that an adult may vote in Commonwealth elections if they would have had a right to vote in State elections at Federation.³⁰ However, this right to vote can be restricted.³¹

In addition, the High Court of Australia has implied further rights from the language and structure of the Constitution. These include the implied right to freedom of political communication, which the High Court found was necessary for our political democracy.³²

b. Current Australian Legislation

Federal, State and Territory legislation provide some protection for human rights. The ACT, Victoria and Queensland have each passed human rights specific legislation. All states and territories, as well as the Commonwealth have adopted some anti-discrimination legislation.

(i) Human Rights Legislation

As noted above, some states and territories have enacted their own human rights legislation. The *ACT Act*³³ commenced in 2004, Victoria's *Charter*³⁴ commenced in 2006 and earlier this year the *Queensland Act*³⁵ was passed and will commence in 2020. It is time for NSW to move forward with these jurisdictions and comprehensively protect human rights.

²⁴ *Ibid* s 51(xxxi).

²⁵ *Ibid* s 80; *R v Archdall & Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128.

²⁶ *Australian Constitution* s 116.

²⁷ *Ibid* s 117.

²⁸ *Ibid* s 75(v).

²⁹ *Ibid* s 92.

³⁰ *Ibid* s 41; *R v Pearson; ex parte Sipka* (1983) 152 CLR 254.

³¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

³² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³³ *ACT Act* (n 1).

³⁴ *Charter* (n 2).

³⁵ *Queensland Act* (n 3).

(ii) Other Legislation

Limited human rights protections are offered to NSW citizens through Commonwealth and State anti-discrimination legislation. This anti-discrimination legislation partially implements Australia's obligations to promote and respect the right to equality and non-discrimination in various contexts.³⁶ However these laws are inadequate as they are inconsistent, often have limited scope and are only applicable to particular types of discrimination occurring in particular circumstances. It should be noted, however, that anti-discrimination laws apply to the behaviour of individuals as well as both public and private entities.

Commonwealth Discrimination Laws

At the Federal level the different grounds of discrimination are dealt with by separate pieces of legislation which can make it difficult for complainants who experience intersectional discrimination to achieve appropriate redress. Legislation makes it unlawful to discriminate on the basis of specific protected criteria including age,³⁷ disability,³⁸ race,³⁹ sex, pregnancy, family responsibilities, gender identity or sexual orientation.⁴⁰ However, these protections are only available if the discrimination is experienced in certain areas of public life including employment, education, accommodation and provision of goods and services. There are exemptions that significantly limit the effectiveness of this legislation.⁴¹ Protections against discrimination in employment are also covered under the *Australian Human Rights Commission Act 1986* (Cth)⁴² and the *Fair Work Act 2009* (Cth).⁴³

NSW Level

The *Anti-Discrimination Act 1977* (NSW)⁴⁴ makes it unlawful to discriminate on the basis of sex, homosexuality, transgender status, disability, race, age, marital or domestic situation and carer's responsibilities. Similar to the Commonwealth legislation, the protections only cover discrimination in certain public areas including employment, accommodation, goods

³⁶ See, eg, ICCPR (n 9) arts 20, 26; ICESCR (n 10) art 2.

³⁷ *Age Discrimination Act 2004* (Cth).

³⁸ *Disability Discrimination Act 1992* (Cth).

³⁹ *Racial Discrimination Act 1975* (Cth).

⁴⁰ *Sex Discrimination Act 1984* (Cth).

⁴¹ Australian Government Attorney-General's Department, 'Australia's Anti-Discrimination Law' *Human Rights and Anti-Discrimination* (Web Page) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australias-Anti-Discrimination-Law.aspx>>.

⁴² *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act').

⁴³ *Fair Work Act 2009* (Cth). Note that the *Fair Work Act 2009* (Cth) protects against discrimination that is via an adverse action.

⁴⁴ *Anti-Discrimination Act 1977* (NSW).

and services, state education and registered clubs, noting again the existence of significant exemptions that limit the effectiveness of these protections.⁴⁵

Limitations of Legislative Protections

Multiple UN human rights treaty bodies in their most recent concluding observations on Australia have highlighted the limitations of our current laws as well as the need to comprehensively enact human rights legislation across Australia. In 2017, the UN Human Rights Committee (**UN-HRC**) observed that despite Australia maintaining the position that existing domestic laws adequately implement the ICCPR, in the view of the UN-HRC, significant gaps between the ICCPR and Australian domestic law remain.⁴⁶ The UN-HRC expressed concerns including:

- Ongoing racial, ethnic and cultural discrimination and vilification;⁴⁷
- That domestic violence continues to disproportionately impact Aboriginal and Torres Strait Islander women and women with a disability;⁴⁸ and
- The treatment and conditions experienced by prisoners including overcrowding, routine strip searches, use of solitary confinement and inadequate mental health care.⁴⁹

The UN Committee on Economic, Social and Cultural Rights (**UN-CESCR**) has noted that, despite previous recommendations, Australia is yet to fully incorporate all provisions of the ICESCR into its domestic legislation, resulting in these provisions not being justiciable in Australia's courts.⁵⁰ The UN-CESCR also expressed concerns regarding the significant disadvantage experienced by Australia's Aboriginal and Torres Strait Islander population,⁵¹ ongoing inequality between men and women in areas of health, education and employment⁵² and inadequate measures to address homelessness, poverty and domestic violence.⁵³

The UN Committee on the Elimination of Discrimination Against Women (**UN-CEDAW**) expressed ongoing concerns regarding women's rights including a lack of harmonization of

⁴⁵ *Anti-Discrimination Act 1977* (NSW); Anti-Discrimination Board of New South Wales, 'Discrimination and the Anti-Discrimination Board of NSW' (Factsheet, October 2018) <http://www.antidiscrimination.justice.nsw.gov.au/Documents/Disc+adb_Oct2018.pdf>.

⁴⁶ UN Human Rights Committee, *Concluding Observations Australia* (1 December 2017) CCPR/C/AUS/CO/6, para 5.

⁴⁷ *Ibid* para 19.

⁴⁸ *Ibid* para 21.

⁴⁹ *Ibid* para 41.

⁵⁰ Committee on Economic, Social and Cultural Rights *Concluding Observations Australia* (11 July 2017) E/C.12/AUS/CO/5, para 5.

⁵¹ *Ibid* para 15.

⁵² *Ibid* paras 21–26

⁵³ *Ibid* paras 33–34, 39–42.

anti-discrimination legislation across Australia's different jurisdictions⁵⁴ as well as a specific concern for Aboriginal and Torres Strait Islander women's rights.⁵⁵

The UN-HRC recommended that Australia adopt comprehensive legislation giving full legal effect to the ICCPR across all state and territory jurisdictions.⁵⁶ The UN-CESCR recommended that Australia adopt a federal charter of rights to give full protection to all economic, social and cultural rights.⁵⁷ The UN-CEDAW recommended Australia adopt a federal charter of rights, which includes a guarantee of equality between women and men, in order to fully incorporate the CEDAW into our national law.⁵⁸

The range of human rights concerns raised by the UN human rights treaty bodies demonstrates the need for NSW to enact a comprehensive Human Rights Act to give full protection to all human rights in line with Australia's international obligations.

c. Common Law

The common law protects some human rights, including the following:

- The right against self-incrimination;⁵⁹
- The right to sue for false imprisonment;⁶⁰
- Presumption of innocence in criminal trials;⁶¹
- Presumption that the standard of proof in criminal cases is that of beyond reasonable doubt;⁶²
- Right to a fair trial;⁶³
- Client legal privilege;⁶⁴
- Right to access legal counsel when accused of a serious crime;⁶⁵ and
- Aboriginal and Torres Strait Islander native title rights in Australia.⁶⁶

⁵⁴ Committee on the Elimination of Discrimination Against Women *Concluding Observations Australia* (25 July 2018) C/AUS/CO/8, para 11(a).

⁵⁵ *Ibid* para 11(b).

⁵⁶ *Ibid* para 6.

⁵⁷ Committee on Economic, Social and Cultural Rights *Concluding Observations Australia* (11 July 2017) E/C.12/AUS/CO/5, para 5.

⁵⁸ *Ibid* para 12(a).

⁵⁹ *Reid v Howard* (1995) 184 CLR 1, 11–12; *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

⁶⁰ *Ruddock v Taylor* (2005) 222 CLR 612 [140] (Kirby J).

⁶¹ *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

⁶² *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [54] (French CJ).

⁶³ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

⁶⁴ *Baker v Campbell* (1983) 153 CLR 52, 120 (Deane J).

⁶⁵ *Dietrich v The Queen* (1992) 177 CLR 292, 317 (Mason CJ and McHugh J).

⁶⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J).

In addition, the common law protects human rights indirectly through two key principles of statutory interpretation. Firstly, the principle of legality ensures that courts will construe legislation so as not to curtail fundamental rights unless the Parliament's intention to do so is manifested by 'unmistakable and unambiguous language'.⁶⁷ Secondly, if there is ambiguity, the principle is that the courts should favour a construction of a statute which accords with the obligations of Australia under a relevant international treaty.⁶⁸

Despite the application of these principles, the common law does not provide adequate protection for human rights in Australia as governments can override the common law through demonstrating a clear intention to override common law rights in the passing of new legislation.⁶⁹ Further, the development of common law rights is limited to cases brought before courts, which are confined by the doctrine of precedent.

d. International Human Rights System

The relationship between Australian law and international law can be described as being dualist. Although Australia may ratify a treaty, a legislative act is required to be passed to incorporate the obligations into Australian law.⁷⁰ Australian courts have not accepted attempts by complainants to rely on breaches of international treaty provisions for their cause of action. Instead, complainants must find a basis for their claim in Australian law.⁷¹ Given the piecemeal protections of human rights described above, this can be difficult and leaves Australians and people in NSW exposed to violations of their human rights without access to an effective remedy or accountability mechanism.

D. Whose Rights Should Be Protected?

A Human Rights Act for NSW should protect the rights of all people living in NSW or subject to NSW's jurisdiction, whether they are citizens or not. Although rights protection should be equal for all people, particular rights may be limited for non-citizens, for example the right to vote. Although human rights are often seen as individual rights, many rights, especially those guaranteed under the ICESCR are collective rights and are also applicable to groups.

⁶⁷ *Coco v The Queen* (1994) 179 CLR 427, 435-437 (Mason CJ and Brennan, Gaudron and McHugh JJ).

⁶⁸ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

⁶⁹ Australian Human Rights Commission, 'Human Rights - What do I Need to Know?' (Web Page, 2008) <<https://www.humanrights.gov.au/our-work/human-rights-what-do-i-need-know-2008>>.

⁷⁰ *R v Burgess* (1936) 55 CLR 608, 644 (Latham CJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ and Deane J).

⁷¹ *Minogue v Williams* (2000) 60 ALD 366, 371.

E. What Rights?

Human rights belong to everyone, and as there is no hierarchy of human rights, it is important that the indivisibility and independence of human rights be recognised in any human rights framework. Each right contributes to the realisation of other rights. A NSW human rights Act should comprehensively protect all of the rights set out in the ICCPR and ICESCR, including those creating progressive realisation obligations. There is an opportunity for the NSW government to lead the nation and establish a truly comprehensive human rights Act.

A number of human rights that many citizens take for granted, including the right to vote, the right to be free from torture, and equality before the law, are not comprehensively protected by existing NSW legislation and are therefore in danger of being eroded. Having a NSW human rights Act which protects civil and political rights, as well as economic, social and rights, will provide a safeguard to ensure that politicians do not overlook human rights when making laws, but rather draft laws within a human rights framework, and will thus serve to protect the freedom and dignity of all people.

Any decision as to which rights should be protected in a human rights act for NSW should be informed by both reference to Australia's binding international human rights law obligations and extensive community consultation via the proposed NSW inquiry into a human rights Act.

The Alliance submits that at a minimum the NSW Government should enact human rights protections following a similar structure to the human rights legislation in the ACT, Victoria or Queensland.

Human rights legislation in the ACT, Victoria and Queensland broadly cover similar rights and focus on a combination of civil and political rights as well as some limited social, economic and cultural rights. The three human rights instruments provide that the rights listed do not override rights under other laws, and that human rights may be subject to 'reasonable limits' that are 'justified in a free and democratic society'.⁷² An overview of the rights which are protected under these instruments is provided in the following table:

⁷² ACT Act (n 1) s 28(1); Charter (n 2) s 7(2); Queensland Act (n 3) s 13(1).

Right	ACT Act (section)	Victorian Act (section)	Queensland Act (section)
Recognition and equality before the law	8	8	15
Right to life	9	9	16
Protection from torture and cruel, inhuman or degrading treatment	10	10	17
Freedom from forced work	26	11	18
Freedom of movement	13	12	19
Privacy and Reputation	12	13	25
Freedom of thought, conscience, religion and belief	14	14	20
Freedom of expression	16	15	21
Peaceful assembly and freedom of association	15	16	22
Protection of families and children	11	17	26
Taking part in public life	17	18	23
Cultural rights	-	19	27
Property rights	-	20	24
Right to liberty and security of a person	18	21	29
Humane treatment when deprived of liberty	19	22	30
Children in the criminal process	20	23	33
Fair hearing/trial	21	24	31
Rights in criminal proceedings	22	25	32
Right not to be tried or punished more than once	24	26	34
Retrospective criminal laws	25	27	35
Compensation for wrongful conviction	23	-	-
Cultural and other rights of Aboriginal and Torres Strait Islander Peoples	27	19	28
Right to education	27A	-	36
Right to health services	-	-	37

The NSW Government has the option of introducing a Human Rights Act which will apply to both public and private actors. Traditionally, human rights have acted as a protection from government action, rather than as between private actors. The increasing privatisation of government entities and the corresponding exercise of what has been considered public power by large corporations means that it may now be appropriate to hold both government and non-government entities accountable for human rights breaches. For example, the growing privatisation of Australian prisons⁷³ and utilities⁷⁴ highlights the pressing need to establish protective mechanisms to ensure that individuals have access to effective remedies when their rights are breached by non-government entities. In its public consultations for a Human Rights Act for NSW, the NSW Government should consider whether a Human Rights Act should apply to non-government entities, especially those exercising public functions.

2. How Should Human Rights be Protected in NSW?

The Alliance submits that human rights should be protected in NSW by the NSW Government enacting a human rights Act for NSW.

According to the Law Council of Australia, a Human Rights Act would promote a culture of respect and enable decision-makers to be held accountable for the human rights implications of their decisions.⁷⁵

Australia's strong democratic institutions comprising the *Constitution*, representative democracy, separation of powers and responsible government have the ability to promote and protect human rights. However, currently these institutions do not in all cases ensure that human rights are meaningfully considered before the passage of legislation and fail to ensure that the rights of minority groups are protected. In the current human rights framework, there are gaps that would be filled by a comprehensive statement of the fundamental rights and freedoms of all residents.

A. Different Models of Human Rights Frameworks

A concern with establishing a Human Rights Act for NSW is what role courts should play in interpreting human rights. There are three human rights frameworks NSW can choose from:

⁷³ Elise Potaka, 'Inside Parklea: The Deadly Consequences of Australia's Private Prison Boom', *SBS* (Web Page, 20 November 2018) <<https://www.sbs.com.au/news/the-feed/inside-parklea-the-deadly-consequences-of-australia-s-private-prison-boom>>.

⁷⁴ John Quiggin, 'The Case for Renationalising Australia's Electricity Grid', *The Conversation* (Web Page, 6 March 2017) <<http://theconversation.com/the-case-for-renationalising-australias-electricity-grid-73951>>.

⁷⁵ Law Council of Australia, *A Charter: Protecting the Rights of All Australians*, Law Council of Australia's Submission to the National Consultation on Human Rights (6 May 2009) 28.

a. Constitutional Model

The constitutional model would require the human rights protections to be enshrined in the NSW Constitution, similar to the Canadian model.⁷⁶ This model empowers the courts to invalidate legislation for inconsistency with a Human Rights Act.

b. Dialogue Model

The dialogue model provides that each of the three arms of government has a role to play in relation to human rights protection.⁷⁷ This is characterised by a shared responsibility for courts and parliament to interpret and enforce human rights and parallels statutory models adopted in the UK as well as domestically in the ACT, Victoria and Queensland.⁷⁸ It is argued that this model 'promotes constructive and educative exchanges ... and produces a more complete understanding of the competing values, interests and concerns at stake'.⁷⁹ The dialogue model is comprised of the following four essential characteristics:

- The articulation of a list of protected human rights;
- The imposition of obligations on the executive arm of government;
- The interpretation of other laws compatible with protected rights; and
- The enhancement of Parliamentary scrutiny in respect of human rights.⁸⁰

This model requires parliament to prepare statements of compatibility with human rights when proposing laws and requires the judiciary to interpret legislation in line with human rights. In addition, the courts may issue declarations of incompatibility which require the relevant minister to respond to specific laws which are incompatible with human rights.⁸¹ This declaration does not however affect the validity of the law but serves an important function in facilitating a constructive dialogue between the courts and the parliament about whether laws are consistent with human rights. In this way, the dialogue model 'restricts the power of the courts while ultimately giving parliament the final say',⁸² and thus preserves the supremacy of parliament and enables parliamentarians to pass laws that do not comply with human rights.

⁷⁶ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

⁷⁷ Edward Santow, 'The Act That Dares Not Speak Its Name: The National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33(1) *UNSW Law Journal* 8,13.

⁷⁸ Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(16) *Australian International Law Journal* 219, 219.

⁷⁹ Julie Debeljak, 'Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 35.

⁸⁰ Santow (n 79) 14.

⁸¹ Kolodizner (n 80) 222.

⁸² *Ibid* 227.

c. Status Quo Model

This is the current model in NSW, involving a combination of very limited rights recognised in constitutional law, common law and legislation. This framework means that the courts have a narrow role to play in the enforcement of human rights, largely through the interpretation of anti-discrimination legislation and the application of common law principles of statutory interpretation.

B. Current Protection Mechanisms

Traditionally, there has been a large gap between the rights afforded to individuals under international law and the state-based ability to enforce these rights.⁸³ The current protection mechanisms in NSW and federally in Australia are insufficient and do not provide comprehensive protection of human rights nor do they ensure access to effective remedies for those whose human rights have been violated.

a. AHRC Human Rights Complaints Process

The AHRC can investigate and resolve complaints about breaches of human rights in specific circumstances.⁸⁴ The complainant must be alleging the Commonwealth, or any agency of the Commonwealth, breached one or more of the following human rights instruments:

- The ICCPR;
- The CRC;
- The CRPD; and
- The *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*.⁸⁵

The general process of AHRC complaints can be described as follows:⁸⁶

- An employee, customer or any other person who has experienced human rights abuse may submit a written complaint;⁸⁷

⁸³ Alexandra R Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties' [2012] 22(153) *Duke Journal of Comparative & International Law* 153, 153.

⁸⁴ *AHRC Act* (n 43) s 20.

⁸⁵ *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, GA Res 36/55, UN Doc A/RES/42/97 (7 December 1987, adopted 25 November 1981).

⁸⁶ 'Information For People Making Complaints', *Australian Human Rights Commission* (Web Page) <https://www.humanrights.gov.au/sites/default/files/content/complaints_information/download/CHS_Info_HR_ILO_complainants.pdf>.

⁸⁷ *AHRC Act* (n 43) s 20(1)(b).

- The AHRC may contact the complainant to request more information and document support;
- The AHRC may provide an opportunity for the respondent to respond to the complaint;
- The AHRC may decide not to investigate and provide reasons for its decision;
- The AHRC may hold a conciliation conference to openly discuss issues and settle matters which may include an apology, change of policy or compensation;
- If conciliation fails and the AHRC President is of the opinion that a breach of human rights has occurred, they will report the matter to the Federal Attorney-General;⁸⁸ and
- The report may include recommendations as to how the breach should be remedied, and the report must be tabled in Parliament. These recommendations are not enforceable and are often ignored by government.

This protection mechanism has played an important role in Australia in the absence of human rights specific legislation, however, it is limited in its ability to provide an effective avenue to address breaches of human rights. The AHRC does not function as an advocate for the complainant or respondent and does not have the authority to legally determine human rights violations as it is not a court of the state. As the recommendations made by the AHRC are not enforceable, this avenue often fails to provide complainants with access to an effective remedy where a breach of human rights has been established.

b. Complaints About Discrimination

Currently there are remedies available to NSW residents for unlawful discrimination under either Commonwealth or State anti-discrimination legislation. Under Commonwealth law individuals who have been subject to unlawful discrimination can lodge a complaint with the AHRC,⁸⁹ or with the Fair Work Commission (**FWC**) if the discrimination was linked to an adverse action in the workplace.⁹⁰ Like complaints about human rights breaches, discrimination complaints to the AHRC are resolved via conciliation and the non-enforceable outcomes can include an apology, compensation, reinstatement to a job, or changes to or development of a new policy.⁹¹ In particular circumstances the AHRC may terminate a complaint⁹² and the complainant can make an application to the Federal Court or the Federal Circuit Court.⁹³ Complaints to the FWC are usually resolved through conciliation and

⁸⁸ Ibid s 29.

⁸⁹ Ibid s 46P.

⁹⁰ *Fair Work Act 2009* (Cth) ss 340, 342, 351.

⁹¹ Australian Human Rights Commission, 'Complaints' (Web Page) <<https://www.humanrights.gov.au/complaints>>.

⁹² *AHRC Act* (n 43) ss 46PE, 46PF(1)(b), 46PH.

⁹³ Ibid 46PO.

the remedies the FWC can order are job reinstatement, compensation or non-financial remedies including a statement of service.⁹⁴

Alternatively, a complaint regarding unlawful discrimination in NSW may be made to the Anti-Discrimination Board of NSW (**ADB NSW**).⁹⁵ Again complaints are usually resolved through conciliation,⁹⁶ however if this is unsuccessful the complainant may pursue the matter in the NSW Civil and Administrative Tribunal.⁹⁷ As with the AHRC, the outcomes that can be reached at conciliation at the Anti-Discrimination Board of NSW are flexible and include obtaining what the complainant was refused previously, an apology, changes to policies and education programs or compensation.⁹⁸ Outcomes achieved through conciliation in the AHRC, ADB NSW and FWC may be enforceable if the parties enter a Deed. However, in circumstances where the Deed is not complied with, it can be challenging for parties to enforce the Deed.

c. Complaints to UN Treaty Bodies

Once all domestic remedies have been exhausted, individuals can also make a complaint to the United Nations Committees for violations against international covenants on human rights.⁹⁹ The core UN human rights treaty bodies that receive complaints under the human rights treaties that Australia is a party to include:

- Human Rights Committee (**UN-HRC**);¹⁰⁰
- Committee on the Elimination of Racial Discrimination (**UN-CERD**);¹⁰¹
- Committee on the Elimination of Discrimination Against Women (**UN-CEDAW**);¹⁰²
- Committee Against Torture (**UN-CAT**);¹⁰³ and
- Committee on the Rights of Persons with Disabilities (**UN-CRPD**).¹⁰⁴

⁹⁴ *Fair Work Act 2009* (Cth) ss 390-393.

⁹⁵ *Anti-Discrimination Act 1977* (NSW) pt 9 div 2.

⁹⁶ *Ibid* s 91A.

⁹⁷ *Ibid* ss 93A–93C.

⁹⁸ Anti-Discrimination Board of New South Wales, 'Complaining to the Anti-Discrimination Board of NSW' (Factsheet, August 2018)

<https://www.antidiscrimination.justice.nsw.gov.au/Documents/Complaining_to_ADB_Aug2018.pdf>.

⁹⁹ Kolodizner (n 80) 221.

¹⁰⁰ *Optional Protocol to the Convention on the Rights of the Child of the Involvement of Children in Armed Conflict*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁰¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 14.

¹⁰² *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

¹⁰³ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 22.

¹⁰⁴ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2518 UNTS 283 (entered into force 3 May 2008).

The individual's ability to bring a complaint depends on whether the State alleged to have committed the violation is a State party to the individual complaint mechanism. Once this hurdle is cleared, 'the individual then must satisfy the standing and justiciability requirements contained in the text of the instrument creating the individual complaint mechanism'.¹⁰⁵ The fact that in Australia an author of a complaint must exhaust all domestic remedies before bringing a complaint before an international treaty body is a significant barrier to rights protection.

Further, treaty body decisions are not enforceable, unlike decisions made in domestic courts.¹⁰⁶ The treaty body may issue a decision that there has been a violation and condemn the practice that gave rise to the breach. However, the enforcement of the decisions largely depends upon the attitude of the State parties themselves. Some states 'have been far more amenable in bringing the findings of treaty committee into the realm of domestic legal influence'.¹⁰⁷

C. Inadequacies of Existing Parliamentary Scrutiny Process

a. Parliamentary Joint Committee on Human Rights (Federal)

A central aim of the Parliamentary scrutiny process is to improve the deliberation within Parliament on bills and legislative instruments in accordance with human rights. This requires Ministers to justify legislation from a human rights perspective and encourages parliamentarians to discuss and debate human rights issues on a regular basis.¹⁰⁸ The Parliamentary scrutiny process is responsible for the preparation and tabling of statements of compatibility (**SOC**) which assess whether Bills, Acts or legislative materials are compatible with any of the core seven international instruments to which Australia is a party.¹⁰⁹ The proposed law and its accompanying statement are then subject to review by the Parliamentary Joint Committee on Human Rights (**PJCHR**) which makes a determination as to whether the proposed law is compatible with human rights. However, SOCs are 'not binding on any court or tribunal' and a failure to prepare a SOC 'does not affect the validity, operation or enforcement' of any legislative provision.¹¹⁰ It is also common practice for SOCs to state that the relevant legislation 'has regard to' human rights which are clearly breached by the legislation in question.

¹⁰⁵ Harrington (n 85) 157.

¹⁰⁶ Ibid 158.

¹⁰⁷ Ibid.

¹⁰⁸ George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 473.

¹⁰⁹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(1).

¹¹⁰ Ibid s 8(5).

There is evidence to suggest that in recent years there have been ‘extraordinarily high numbers of rights infringing Bills being passed into law’.¹¹¹ This casts doubt on the capacity of the PJCHR to engage in meaningful and comprehensive human rights scrutiny. From 2011 to 2016, on 73 percent of all occasions where the PJCHR expressed a view that legislation was incompatible with human rights the Bill was enacted unchanged.¹¹² This highlights the PJCHR’s failure to make any significant or tangible dent in legislation that raised human rights concerns.

The PJCHR’s delay in reporting also raises significant concerns. From 2011 to 2016, the PJCHR handed down 66 final reports critiquing the human rights impact of a bill or instrument which, by the time the report was finalised, had already been enacted into law.¹¹³ Accordingly, the delay factor represents an opportunity for the government to avoid human rights scrutiny by expediting the passage of a Bill through Parliament.¹¹⁴ Commentators have argued that the Parliamentary scrutiny process will ‘unlikely provide a reliable bulwark against a government intent on passing legislation that is incompatible with human rights’.¹¹⁵

The Parliamentary scrutiny process has also been criticized by the UN. While considering Australia’s sixth periodic report in 2017, the UN-HRC recommended that Australia should ‘strengthen its legislative scrutiny process’ to ensure that ‘no bills are adopted before the conclusion of a meaningful and well-informed review of their compatibility’ with international human rights law.¹¹⁶

It appears that the current mechanisms in place for Parliamentary scrutiny are insufficient to ensure human rights are protected when the government passes legislation.

b. Legislation Review Committee (NSW)

In NSW a legislative scrutiny process is carried out by the Legislation Review Committee. This Committee has a number of shortfalls which suggest that it is ineffective in informing parliamentary debate with respect to human rights protection. The Committee is required

¹¹¹ George Williams, ‘The Legal Assault on Australian Democracy’ (2016) 16(2) *Queensland University of Technology Law Review*. 506.

¹¹² *Ibid* 504.

¹¹³ *Ibid* 501.

¹¹⁴ Williams (n 113) 501.

¹¹⁵ Andrew Byrnes, ‘Book Forum: Andrew Byrnes’ *Australian Public Law* (24/04/2019) <<https://auspublaw.org/2019/04/book-forum-andrew-byrnes/>>.

¹¹⁶ Human Rights Committee, *International Covenant on Civil and Political Rights*, Un Doc CCPR/C/Aus/Co/6 (1 December 2017) 3.

to consider 'any' Bill introduced in Parliament¹¹⁷ and report to both Houses of Parliament as to whether the proposed Bill burdens individual rights.¹¹⁸

In addition, the timeframes given to the Legislative Review Committee to conduct its work are often unrealistic which restricts its ability to influence parliament on the human rights aspects of specific legislation. The Standing Orders of Houses provides that most Bills in the Legislative Assembly must be adjourned for five days following a Bill's introduction, and debate in the Legislative Council must be adjourned for five days following a Bills introduction.¹¹⁹ The purpose of this adjournment is to provide adequate time for the Committee to perform its scrutiny function and give members the opportunity to consider Bills. In that time the Committee is expected to read and analyse the Bill, invite submissions from the public, hold hearings and publish reports. The problem of insufficient time has been further exacerbated by a readiness of governments to rush Bills through parliament, thus not giving enough time for the Committee to exercise its function. However, the government may progress a Bill through both Houses of Parliament if the Bill is declared 'urgent'.¹²⁰ The lack of guidance and definition of what constitutes 'urgency' has been used to justify questionable laws that abrogate some rights and freedoms such as laws relating to terrorism and police powers.

Accordingly, there is room to improve the NSW Legislative Review Committee's capacity to effectively scrutinise legislation for its impact on human rights. For example, the Committee should review 'all' rather than 'any' Bills introduced into parliament.¹²¹ The NSW Government may also wish to consider amending the *Legislation Review Act 1987 (NSW)*¹²² to require the Committee to analyse legislation for human rights compliance against the seven core international human rights treaties to which Australia is a party, being the minimum requirement for the PJCHR.

NSW should learn from the PJCHR's failings. If the NSW Government considers improving the Parliamentary scrutiny process, it should consider a framework requiring that all forms of legislation in NSW should be accompanied by a statement of compatibility and be subject to Parliamentary scrutiny. At both the NSW and federal level, any Parliamentary scrutiny committee should be sufficiently resourced in order to perform its functions effectively and efficiently, and the Committee should be provided a minimum time period to consider each new Bill before it can be debated in Parliament.

¹¹⁷ *Legislation Review Act 1987 (NSW)*, s 8A(1)(a).

¹¹⁸ *Ibid* s 8A(1)(b).

¹¹⁹ Gilbert + Tobin Centre of Public Law and UNSW Law, Submission No 1 to Legislation Review Committee, *Operation of the Legislation Review Act 1987* (23 November 2017) 2.

¹²⁰ *Ibid* 3.

¹²¹ The Law Society of New South Wales Young Lawyers, Submission No 3 to the Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987* (29 November 2017) 5.

¹²² *Legislation Review Act 1987 (NSW)*.

The Alliance submits the best way in which to improve the scrutiny of legislation's human rights impact is via the enactment of human rights specific legislation in the form of a Human Rights Act for NSW and a Federal Charter of Rights.

3. What are the Barriers to The Protection of Human Rights in NSW?

Previous attempts to enshrine comprehensive human rights protections in law in NSW have been unsuccessful. Barriers against the introduction of a Human Rights Act for NSW have included the assumption that a protection of rights will involve a financial burden, a fear of increased litigation, and a lack of awareness of human rights in the community.

A. Fears of Financial 'Burden' and Increased Litigation

In recommending whether to introduce a Human Rights Act in NSW in 2001, the Standing Committee on Law and Justice stated that human rights legislation would 'raise more problems than it resolves'.¹²³ This argument is largely based on the idea that a Human Rights Act would create uncertainty in the law and encourage a 'major increase in litigation of a speculative nature',¹²⁴ leading to higher costs to taxpayers and congestion in the court system.¹²⁵

However, the NSW Government is in a unique position to learn from the experiences of Victoria, the ACT and Queensland. Although critics of the ACT Act predicted that it would result in a flood of lawsuits, the effect of the Act generating litigation has not appreciably added to the workload of courts and tribunals'.¹²⁶ On average, there are 81 cases in Victoria and 24 in the ACT per year that have contained some mention of their respective human rights legislation.¹²⁷ These numbers are relatively small in comparison to the 6235 civil and criminal cases finalised by the ACT Supreme Court from 2004 to 2009.¹²⁸ The figure below indicates that the ACT Act has not resulted in a notable increase in litigation.¹²⁹

¹²³ NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights* (Report 17, October 2001) 113.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* 99.

¹²⁶ Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights For Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 145.

¹²⁷ George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 82.

¹²⁸ Watchirs and McKinnon (n 128) 145.

¹²⁹ Williams and Reynolds (n 129) 83.

Figure: Percentage of Total ACT cases containing mention of *Human Rights Act 2004* (ACT)



Source: George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal*, 83.

Rather than encouraging a 'flood' of costly and time-consuming litigation, a Human Rights Act for NSW could function as a preventative mechanism through requiring consideration of human rights in both law and decision-making. A NSW Human Rights Act could reduce human rights infringements before they occur and limit the need to go to court. A Human Rights Act could also require the NSW Government to promote transparency by providing statements of compatibility and increasing the use of public exposure drafts to encourage society to contribute to debates on human rights issues.

The various benefits of having a Human Rights Act are evident in the ACT and Victoria, where the respective Human Rights Acts have encouraged decision-makers in government to actively consider human rights in their work. For example, the ACT Act has provided 'an impetus for agencies to properly consider human rights obligations'.¹³⁰ In addition, the Victorian Charter has 'helped build a greater consideration of and adherence to human rights principles by the public sector'.¹³¹

The financial cost of establishing a Human Rights Act for NSW would likely be minimal. For example, a recent study on the Victorian Charter found that the cost of the Act was just 50

¹³⁰ Attorney-General, *Economic, Social and Cultural Rights in the Human Rights Act 2004: Section 43 Review* (November 2014) 26.

¹³¹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 22.

cents per Victorian per year.¹³² This demonstrates that human rights legislation does not incur a significant cost to the public purse, particularly in the light of its contribution to advancing human rights and the associated significant social benefits.

B. Public Awareness

A number of studies have confirmed the need for greater human rights education and for the development of a human rights culture in the community. For example:

- Three quarters of those surveyed in 2009 stated that the issue of human rights in Australia was very important to them;¹³³
- A recent survey found that 61 percent of respondents believe that Australia has a national Bill of Rights;¹³⁴
- The Colmar Brunton Social Research Report noted that just 45 percent of all participants agreed that ‘people in Australia are sufficiently educated about their rights’;¹³⁵ and
- The National Human Rights Consultation Report found that almost 80 percent of all respondents were in favour of establishing a Human Rights Act.¹³⁶

These statistics indicate that the awareness and understanding of rights is limited in Australia. There is a strong consensus for change, respect and progress towards a better human rights culture and a growing recognition that the existing system for protecting and promoting human rights is inadequate and must be improved. A Human Rights Act would assist in educating individuals and groups about their rights and empowering them to call for better promotion and protection of those rights.¹³⁷

¹³² Ben Schokman, ‘50 Cents is a Wise Investment to Project Fundamental Rights’, *Human Rights Law Centre* (Web Page, 2 September 2011) <<https://www.hrlc.org.au/opinion/50-cents-is-a-wise-investment-to-protect-fundamental-rights>>.

¹³³ Commonwealth of Australia, *National Human Rights Consultation* (September 2009) app B National Human Rights Consultation – Community Research Phase, *Colmar Brunton Social Research Final Draft* (August 2009) 11.

¹³⁴ Paul Gregoire, ‘The Need for a Bill of Rights: An Interview with UNSW Professor George Williams’, *Sydney Criminal Lawyers* (Web Page, 04/11/2017) <<https://www.sydneycriminallawyers.com.au/blog/the-need-for-a-bill-of-rights-an-interview-with-unsw-professor-george-williams/>>.

¹³⁵ Commonwealth of Australia, *National Human Rights Consultation Report* (September 2009) 6.

¹³⁶ *Ibid* 11.

¹³⁷ *Ibid* xxiv.

Example – Child protection and adoption laws in NSW

Amendments to the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*¹³⁸ and the *Adoption Act 2000 (NSW)*¹³⁹ commenced on 4 February 2019. The reforms create a fast-track pathway to forced adoptions and guardianship orders by expanding the grounds to dispense with consent for adoption, introducing an arbitrary two-year time limit for family restoration, and reducing judicial discretion on key issues, including grounds for restoration.¹⁴⁰

These amendments raise a number of significant concerns regarding the human rights of children, the right to family and the right to self-determination. Whilst these reforms do not overtly nor specifically target Aboriginal and Torres Strait Islander children and their families, with 38 per cent of all children removed into statutory care being Aboriginal, it is clear they will be the group disproportionately affected by these rushed measures.¹⁴¹ Children subject to guardianship orders can now be adopted without their parents' consent. In 2018, there were approximately 810 Aboriginal children subject to guardianship orders who are now subject to this fast-tracked pathway to adoption,¹⁴² where the best interests of the child does not appear to be a primary consideration, contravening Australia's international human rights obligations under Article 2 of the UNCRC¹⁴³ and Articles 18 and 19 of the UNDRIP.¹⁴⁴

Prior to the introduction of these Bills into the NSW legislature there was no meaningful public engagement and consultation process with stakeholders, including Aboriginal and Torres Strait Islander organisations. These reforms may result in the NSW Government repeating past mistakes with some of the state's most vulnerable children and risk another stolen generation.¹⁴⁵

¹³⁸ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

¹³⁹ *Adoption Act 2000 (NSW)*.

¹⁴⁰ Community Legal Centres NSW, 'Briefing: Children & Young Persons (Care and Protection) Amendment Bill 2018' (Web Page, 2 November 2018) 2 <<https://www.clcnsw.org.au/briefing-children-young-persons-care-and-protection-amendment-bill-2018>>; AbSec 'Moves Toward Adoption in NSW and Nationwide Put Aboriginal Kids at Risk' (Web Page, 26 November 2018) <<https://www.absec.org.au/news-moves-towards-adoption-in-nsw-and-nationwide-put-Aboriginal-kids-at-risk.html>>.

¹⁴¹ Community Legal Centres NSW (n 142) 4; Australian Lawyers for Human Rights, 'Reforms to the Children and Young Persons (Care and Protection) Act 1998 and the Adoption Act 2000' (Web Page, 26 November 2018) <<https://alhr.org.au/wp/wp-content/uploads/2018/11/26-11-2018-Letter-NSW-care-and-protection-and-adoption-reforms-3.pdf>>.

¹⁴² Community Legal Centres NSW (n 142) 2.

¹⁴³ UNCRC (n 14) art 2.

¹⁴⁴ UNDRIP (n 16) arts 18, 19.

¹⁴⁵ Australian Lawyers for Human Rights, 'NSW Bill Planning To Overhaul Child Protection Laws Risks Another Stolen Generation' (Web Page, 31 October 2018) <<https://alhr.org.au/nsw-bill-planning-overhaul-child-protection-laws-risks-another-stolen-generation/>>.

If NSW had a Human Rights Act, public authorities, including Family and Community Services, would be required to act compatibly with human rights and consider human rights as part of their decision-making process. The NSW Parliament would also be required to actively consider the human rights implications of legal reforms as an integral part of the law-making process.

Example – Anti-protest laws in NSW

Protest movements in Australia have been successful in securing many rights and privileges by enabling the articulation of ideas through joint action. Protests can encourage the development of an engaged and informed community and strengthen representative democracy by enabling direct participation in public affairs. The right to freedom of association, freedom of assembly and freedom of expression thus provide crucial checks and balances on government in a democratic society. On 1 July 2018, new protest regulations came into effect in NSW. The *Crown Land Management Regulation 2018*¹⁴⁶ prohibits the following activities on Crown land:

- ‘Taking part in any gathering, meeting or assembly,’ except at cemeteries;¹⁴⁷
- Displaying a sign or notice;¹⁴⁸ or
- Distributing ‘printed, drawn, written or photographic matter.’¹⁴⁹

These *Regulations*¹⁵⁰ interplay with the *Crown Land Management Act 2016*¹⁵¹ which enables police, local council officials and state government employees to have the power to direct individuals to refrain from conducting activities prescribed in the regulations and to remove people from Crown land with ‘reasonable force’.¹⁵² This is despite police already having powers to arrest and detain people for offences such as trespass, breach of the peace or property damage.¹⁵³

These rights can only be limited to an extent that is ‘necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.’¹⁵⁴ Currently NSW anti-protesting laws do not meet Australia’s international obligations as they are too broad and go beyond what is necessary and proportionate for the protection of public order.

¹⁴⁶ *Crown Land Management Regulation 2018* (NSW).

¹⁴⁷ *Crown Land Management Regulation 2018* (NSW) s 13(1).

¹⁴⁸ *Ibid* s 13(6).

¹⁴⁹ *Ibid* s 13(7).

¹⁵⁰ *Crown Land Management Regulation 2018* (NSW).

¹⁵¹ *Crown Land Management Act 2016* (NSW).

¹⁵² *Ibid* ss 9.11, 9.12.

¹⁵³ See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 23, 99.

¹⁵⁴ *Ibid* arts 21, 22(2).

By creating a human rights framework for the passage of laws and government decision-making a Human Rights Act for NSW would provide an opportunity to adequately protect the rights of freedom of expression, assembly and association whilst proportionately balancing the government's responsibility to protect national security and public safety.

A Human Rights Act for NSW would meaningfully enhance the wellbeing of all NSW residents, especially those most vulnerable. Public authorities (such as state government departments, local governments and organisations delivering state government services) would be required to consider human rights when they make laws, develop policies and provide their day-to-day services.¹⁵⁵

It would also make it easier for people to understand their rights when they are dealing with government. People have the same rights whether they are dealing with Police, their council, the Department of Human Services, or their local state primary school.¹⁵⁶

a. Service Delivery

A Human Rights Act would foster a human rights-based approach to service delivery. This will encourage public authorities to evaluate the human rights impact of their policies, service delivery and decisions.

For example, by looking at their *Charter* obligations, Consumer Affairs Victoria has developed a range of information services to support and educate marginalised consumers, including people with disabilities, Aboriginal and Torres Strait Islander consumers and consumers from culturally and linguistically diverse backgrounds. This includes providing easy-to-read information in accessible formats, advocacy and outreach services and a revised curriculum for use in primary and secondary schools.¹⁵⁷

b. Encouraging Participation

A Human Rights Act would encourage public authorities to engage with the communities they serve and to listen to those who are directly affected by the decisions they make. This process of participation helps to inform and improve decision-making. For example, in 2011 the Victorian City of Casey undertook a community survey and held focus groups to help Council improve services that support mothers who are breastfeeding.¹⁵⁸

¹⁵⁵ Human Rights For NSW, 'Benefits of a Human Rights Act' (Web Page)
<<https://humanrightsfornewsw.org/benefits-of-a-human-rights-act>>.

¹⁵⁶ Ibid.

¹⁵⁷ Victorian Equal Opportunity & Human Rights Commission, 'The Charter of Human Rights and Responsibilities: The Charter and the Work of Government' (Factsheet, May 2012)
<https://www.humanrightscommission.vic.gov.au/media/k2/attachments/The_Charter_and_the_work_of_government.pdf>.

¹⁵⁸ Ibid.

The below case studies exemplify the ways in which Human Rights Acts in Victoria and the ACT are meaningfully impacting outcomes for residents in those States, particularly those most vulnerable.

Example - Cultural Rights

A Victorian Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died, she went back to her country for a couple of weeks of 'sorry business'. When she returned, she started receiving warnings to engage with services, however she was not able to do so because she was overwhelmed with family responsibilities, trauma and grief. A possession order was made and the police came to her door with a warrant.

Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with her cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the Victorian *Charter*. As a result, the community organisation withdrew their possession application and engaged an Aboriginal support service.¹⁵⁹

Example - Delays In The Criminal Justice System

An Aboriginal girl was serving a sentence in a youth justice centre in the ACT for a number of offences. While incarcerated, she was also charged with two assaults and one charge of obstructing a territory official. She was convicted of these offences and sentenced. She appealed the sentences on the basis that the sentences were excessive and that certain required factors had not been taken into account. The judge found that the sentences were inappropriate, reduced them to shorter periods and ordered that they be served concurrently with her current period of incarceration.

The judge took the young person's personal circumstances into account and found that the significant delay between the offence and the sentencing was unacceptable and in violation of the *ACT Act*.¹⁶⁰

¹⁵⁹ Victorian Aboriginal Legal Service, Submission No 98 to Charter Review, (June 2015) Case Study 1.

¹⁶⁰ *TM v Karapanos and Bakes* [2011] ACTSC 74.

Housing Rights

Example 1

A Victorian man suffering from physical disabilities and limited mobility continued to live in his family home after his mother had been admitted to an elderly care unit and placed under a financial administration order. In order to prevent the home being sold, the man's advocate raised the right to property under the Victorian *Charter*. In consideration of this right an agreement was reached so that the man could continue living in the house as a tenant paying rent.¹⁶¹

Example 2

Following the death of her father and incarceration of her mother, a 23 year old woman agreed to be the guardian of her three younger siblings. She maintained their public housing tenancy and had rental payments deducted from her Youth Allowance payments. While overseas on a study tour, her Youth Allowance was cancelled due to the discontinuation of her enrolment. As a result, she accrued significant arrears. She did not receive notice of these arrears. The Department of Housing applied for a possession order after having issued a notice to vacate. The woman's advocates argued that the Department had failed to consider the rights of the young woman and her siblings protected in the Victorian *Charter*. Instead of making a possession order, the Victorian Civil and Administrative Tribunal made an order that the young woman pay \$10 per week towards her rental arrears in addition to her rent.¹⁶²

Example - Right To Education

A Victorian student with a learning disability was threatened with expulsion by his school due to his behavioural issues. His advocate outlined to both the school and to the Department of Education and Early Childhood Development the student's relevant human rights as protected in the Victorian *Charter*. As a result of the communication, the boy was provided with support, which reduced his behavioural issues and consequently, he was allowed to stay on at the school.¹⁶³

¹⁶¹ Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, discussed in Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities on Action: Case Studies from the first five years of operation* (Report, March 2012) 36.

¹⁶² Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, discussed in Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities on Action: Case Studies from the first five years of operation* (Report, March 2012) 44.

¹⁶³ Youth Affairs, Council of Victoria: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, discussed in Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities on Action: Case Studies from the first five years of operation* (Report, March 2012) 34.

Example - Arbitrary Interference with home

The Commissioner for Social Housing in the ACT served a "no cause" termination notice on a tenant in jail, and then sought orders to evict him from his home just prior to his expected release on parole. Eviction in these circumstances would have meant the tenant was facing losing his personal belongings with no where to store them, homelessness upon release, and the possibility of delaying parole due to not having somewhere stable to live. The ACT Civil and Administrative Tribunal declined to terminate the tenancy and referred among other considerations to the ACT Human Rights ACT in the exercise of its discretion. The Tribunal quoted the tenant: *My home is the most important thing to me. It's important for my recovery and to enable me to get parole but more importantly because it's the first place that I can call my own for very many years. It would be completely devastating to me to lose it now after so much I feel I have achieved while in prison.* Shortly after the decision the tenant was released on parole back to his own home.

4. How Should the NSW Government Address the Situation Where There is a Conflict Between Different People's Rights

In NSW's diverse community, there will be occasions when individuals wishing to exercise their rights may come into conflict with the rights of others. This is likely to occur in two types of scenarios:

- Where two or more parties are making human rights claims. For one party to fully enjoy their rights and freedoms it may be necessary for their activities to impact on another person's rights or freedoms. For example, a person's right to be free from discrimination may be at odds with another person's right to freedom of expression; or
- Where only one party is making a claim for their human rights to be protected. For the individual to fully enjoy their human rights, there may be an impact on the legal entitlements of the other party. For example, an employee wearing religious jewelry may conflict with their employer's workplace uniform policy.¹⁶⁴

The Alliance notes that under international human rights law, the balancing of competing rights is a necessary aspect of the interpretation of human rights, as is the related principle that rights must not be abused by being relied upon for fraudulent or inappropriate ends.¹⁶⁵

¹⁶⁴ Ontario Human Rights Commission, *Policy on Competing Human Rights* (2012) 3
<<http://www.ohrc.on.ca/en/policy-competing-human-rights>>.

¹⁶⁵ See for example 'Prohibition on Abuse of Rights, Guide on Article 17 of the European Convention on Human Rights, European Court of Human Rights available at https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf and

In Canada, which has had a constitutionally enshrined *Charter of Rights and Freedoms*¹⁶⁶ since 1982, the Ontario Human Rights Commission has in addition developed a policy¹⁶⁷ for individuals and organisations trying to manage situations where there are competing rights. The policy proposes any analysis and reconciliation of rights should occur against a background of mutual dignity and respect for each other. It is necessary for any stigma or power imbalance to be addressed and if possible, use co-operation to try and find an agreeable solution, which maximises the enjoyment of everyone's rights.¹⁶⁸ In conducting a public consultation on a Human Rights Act for NSW, the NSW Government should consult on how to best balance competing rights while managing diverse interests.

In order to best balance competing rights while managing diverse interests, the Alliance recommends that the NSW Government:

- incorporate specific principles of interpretation based on international human rights jurisprudence into a Human Rights Act for NSW; and
- adopt the Canadian policy.

A. When Can Rights be Subject to Limits?

a. Absolute Rights and Non-Absolute Rights

Although human rights are universal and inalienable most human rights can be subject to permissible reasonable limits. There are some rights which are absolute rights. These rights cannot be limited for any reason nor suspended or restricted even if there is a declared state of emergency.¹⁶⁹ These absolute rights are:

- Freedom from torture and cruel, inhuman or degrading treatment and punishment;¹⁷⁰
- Freedom from slavery and servitude;¹⁷¹
- Freedom from imprisonment on the basis of inability to fulfil a contractual obligation;¹⁷²
- Prohibition against retrospective application of criminal laws;¹⁷³ and
- Right to recognition before the law.¹⁷⁴

¹⁶⁶ *Canadian Charter of Rights and Freedoms* (n 78).

¹⁶⁷ Ontario Human Rights Commission (n 166).

¹⁶⁸ *Ibid.*

¹⁶⁹ Australian Government Attorney-General's Department, *Public Sector Guidance Sheets: Absolute Rights* (Web Page) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>>.

¹⁷⁰ ICCPR (n 9) art 7.

¹⁷¹ *Ibid* art 8.

¹⁷² *Ibid* art 11.

¹⁷³ *Ibid* art 15.

¹⁷⁴ *Ibid* art 16.

Non-absolute rights can be subject to express or implied limitations. Express limitations, articulated in the wording of the relevant treaty articles themselves, are usually for the benefit of public order or the protection of other people's rights. An example is the freedom to manifest one's religion or belief being limited for the protection of 'public safety, order, health, or morals or the fundamental rights and freedoms of others'.¹⁷⁵ Express limitations may also be expressed in a separate article of the treaty¹⁷⁶ or a provision of the relevant legislation.¹⁷⁷ The language in which the right is described in the international treaty may also give rise to implied limitations on the rights. Terms such as 'fair' in relation to a trial,¹⁷⁸ 'reasonable'¹⁷⁹ and 'arbitrary' in relation to right to life,¹⁸⁰ liberty¹⁸¹ or freedom from interference and right for privacy¹⁸² indicate there are circumstances that would justify the limiting of rights.

b. Derogable and Non-Derogable

Rights can also be classified as either derogable or non-derogable. Derogable rights can be temporarily suspended in exceptional circumstances such as a state of emergency.¹⁸³ Non-derogable rights cannot be suspended but some non-derogable rights may be subject to permissible limitations in certain circumstances. Article 4(2) of the ICCPR¹⁸⁴ states that in addition to the above absolute rights, the right to life¹⁸⁵ and the right to freedom of thought, conscience and religion¹⁸⁶ cannot be derogated.

c. General Limitation Clause

Human Rights Acts usually include a general limitation clause that guarantees rights, but also stipulates that the protected rights are subject to reasonable limits prescribed by law and that can be justified in a free and democratic society. The three specific Human Rights Acts in Australia have similar wording in their general limitation clauses,¹⁸⁷ as does the Canadian *Charter of Rights and Freedoms*¹⁸⁸ and the New Zealand *Bill of Rights*.¹⁸⁹

¹⁷⁵ Ibid art 18(3); *Charter* (n 2) s 15(3).

¹⁷⁶ ICESCR (n 10) art 4.

¹⁷⁷ *Charter* (n 2).

¹⁷⁸ ICCPR (n 9) art 14.

¹⁷⁹ Ibid art 25.

¹⁸⁰ Ibid art 6.

¹⁸¹ Ibid art 9.

¹⁸² Ibid art 17.

¹⁸³ Ibid art 4.

¹⁸⁴ Ibid art 4(2).

¹⁸⁵ Ibid art 6.

¹⁸⁶ Ibid art 18.

¹⁸⁷ *ACT Act* (n 1) s 28(1); *Charter* (n 2) s 7(2); *Queensland Act* (n 3) s 13(1).

¹⁸⁸ *Canadian Charter of Rights and Freedoms* (n 78) s 1.

A Human Rights Act for NSW should follow international human rights jurisprudence, consider these categories of rights carefully and provide clear provisions specifying which rights are absolute, non-absolute, derogable and non-derogable. A parliamentary inquiry into a Human Rights Act for NSW should consider whether a Human Rights Act for NSW should include a clear general limitation clause.

B. Balancing Rights

a. Reasonable, Necessary, Proportionality Analysis

When human rights are limited, the restrictions must be provided for by law,¹⁹⁰ not be arbitrary and be necessary to pursue a legitimate purpose.¹⁹¹ The necessity analysis has been held to include requirements of adequacy and proportionality.

The High Court utilised a structured proportionality test in *McCloy v New South Wales*,¹⁹² to determine whether a law infringed the constitutional right to freedom of political communication. An alternative analysis is found in the consideration of whether the restrictions on rights in the relevant law is 'reasonably appropriate and adapted'¹⁹³ to serve a legitimate end, which reflects a form of proportionality analysis.

The existing Australian Human Rights Acts also give guidance on the specific factors which need to be considered to determine if the limit of a human right is reasonable, being:

- The nature of the affected right;
- The purpose, nature and extent of the limitation;
- The relationship between the limitation and its purpose; and
- If there are any reasonable less restrictive means that would achieve the same purpose as the limitation.¹⁹⁴

A Human Rights Act for NSW should give similar guidance on how to balance rights and when limitations are reasonable.

b. Necessity or Proportionality of Any Limitation Needs to be Assessed on a Case by Case Basis

¹⁸⁹ *New Zealand Bill of Rights Act 1990* (NZ) s 5.

¹⁹⁰ *The Sunday Times v United Kingdom (No 1)* (1979) 2 Eur Court HR (ser A) [49].

¹⁹¹ Australian Human Rights Commission, 'Human Rights Brief No 4: Lawful Limits on Fundamental Freedoms' (Web Page, 8 March 2006) <https://www.humanrights.gov.au/our-work/human-rights-brief-no-4#2_objective>.

¹⁹² *McCloy v New South Wales* (2015) 257 CLR 178.

¹⁹³ *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ).

¹⁹⁴ *ACT Act* (n 1) s 28(2); *Charter* (n 2) s 7(2); *Queensland Act* (n 3) s 13(2).

International jurisdictions such as in Europe and Canada provide guidance for the situation when a court or tribunal is considering competing rights and a fair balance must be struck between the conflicting interests of the individuals or of the individual and the community.¹⁹⁵ The restriction which limits an individual's rights must be for a legitimate aim and be justified and proportionate in a democratic society.¹⁹⁶ The seriousness of the consequences for the individuals involved must also be considered. Due to these requirements, determination of the necessity and proportionality of any limitation must be assessed on a case by case basis.

The European Court of Human Rights took this approach in a number of cases in relation to religious freedom, including *Eweida and Others v United Kingdom*¹⁹⁷ where the court afforded different weights to a private company's enforcement of their uniform policy in the context of health and safety in a hospital environment as opposed to the applicant's right to wear a religious necklace.

A Human Rights Act for NSW should provide guidance that when approaching balancing competing rights, the requirements of necessity and proportionality must be considered on a case by case basis.

5. What Should Happen if Someone's Human Rights are Not Respected?

A Human Rights Act which clearly articulates the human rights that will be protected in NSW, 'will promote a greater awareness of, and respect for, human rights within government and throughout the community. If we have a strong human rights culture in NSW, human rights problems will be more easily prevented.'¹⁹⁸ As human rights aim to protect human dignity this focus on prevention of breaches is fundamentally important. However, despite the best of intentions, human rights will not always be respected. It is important that avenues to address human rights breaches are available, noting that there is a human right to an effective remedy when human rights are violated in international law.¹⁹⁹

A. International Obligations

The human rights treaties Australia has ratified either explicitly or implicitly require that an individual who has had their rights breached has access to effective remedies, including

¹⁹⁵ *Eweida v The United Kingdom* [2013] ECHR 37 [84], [91].

¹⁹⁶ *Ibid* [80], [84], [104].

¹⁹⁷ *Ibid*.

¹⁹⁸ Human Rights For NSW, 'Benefits of a Human Rights Act' (Web Page) <<https://humanrightsfornsw.org/benefits-of-a-human-rights-act>>.

¹⁹⁹ UDHR (n 6) art 8.

judicial remedies.²⁰⁰ According to the UN-HRC and the CERD, an ‘effective remedy’ encompasses an obligation to bring to justice perpetrators of human rights abuses, and also to provide appropriate reparation to victims. Reparation can comprise measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.²⁰¹

A Human Rights Act for NSW needs to ensure it upholds Australia’s international obligations to provide effective remedies as provided for in the treaties Australia has ratified.

B. Remedies

a. Current Options for Remedies

As discussed at section 2 (‘How should human rights be protected in NSW?’) B (‘Current protection mechanisms’), existing complaints processes to address human rights issues include:

- AHRC human rights complaints;
- AHRC discrimination complaints; and
- ADB NSW complaints.

A fundamental aspect of having an effective remedy is that the remedy is affordable. There are no fees associated with lodging a complaint with the AHRC, or the ADB NSW. However, the process itself is voluntary and even if parties engage in conciliation, there may be no reasonable prospect of resolving the complaint through conciliation. If the conciliation process is unsuccessful at the AHRC and the complainant wishes to pursue their complaint through the Federal Court or Federal Circuit Court, both are cost jurisdictions, and the costs can very often be prohibitive. If a litigant is self-represented, they also face the complexity of attempting to enforce their rights at Court, which may mean that they do not pursue their matter after conciliation.

b. Future Remedies

A parliamentary inquiry into a Human Rights Act for NSW should explore providing affordable access to the full range of remedies for individuals and groups in a Human Rights

²⁰⁰ CERD (n 11) art 6; CAT (n 13) art 14; CEDAW (n 12) art 2(c); ICCPR (n 9) art 2(3); ICESCR (n 10) art 2(1); CRC (n 14) art 4; CRPD (n 15) art 4; See also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) [5].

²⁰¹ Human Rights Committee, *General Comment No 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th session, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [16]; Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009) 14.

Act for NSW. Remedies could include internal complaint handling mechanisms within public authorities, declarations, injunctions, compensation and reparations.²⁰²

C. Lessons Learnt from Other States

NSW is in a unique position to learn from any challenges that have been identified in Victoria and ACT in relation to accessing remedies under their human rights legislation.

a. Stand Alone Cause of Action

NSW should follow the *ACT Act* which has a freestanding cause of action²⁰³ for seeking remedy. This differs to the Victorian Charter where a claimant cannot rely solely on breach of the Charter to commence legal action.²⁰⁴ To seek relief under the *Charter*, the claim must be ‘piggy backed’ to an existing cause of action for an unlawful act or decision. The rationale for a ‘piggy back’ cause of action was to reduce recourse to the courts, however, it has resulted in lengthier and more complex litigation.²⁰⁵ Queensland has adopted a ‘piggy back’ cause of action that mirrors the Victorian *Charter*. In Victoria there is evidence that significant resources (for example scarce pro bono resources, court time and legal costs) are spent not on resolving whether a public authority has breached a person’s human rights but on preliminary jurisdictional questions.²⁰⁶

b. Access to Remedies

Effective remedies need to be accessible, in relation to both time and cost. The 2015 review of the Victorian Charter identified that the Victorian Civil and Administrative Tribunal (VCAT) would be an appropriate forum for claims under the Charter. It was felt that VCAT was more accessible for claimants as it is low cost and experienced in supporting self-represented litigants.²⁰⁷

The Alliance recommends that the NSW Government consider whether a NSW Human Rights Act should make provision for the commencement of proceedings for a claim that human rights have been breached in a more accessible tribunal such as a specialist human rights division in the NSW Civil and Administrative Tribunal or a newly constituted

²⁰² Australian Human Rights Commission, Submission to the National Human Rights Consultation (June 2009) 5.

²⁰³ *ACT Act* (n 1) s 40.

²⁰⁴ *Charter* (n 2) s 39.

²⁰⁵ Michael Brett Young (n 133) 127.

²⁰⁶ Law Institute of Victoria, Submission No 78 to the *Review of the Charter of Human Rights and Responsibilities 2006* (Vic) (2015) 19; Michael Brett Young (n 133) 119–126.

²⁰⁷ Michael Brett Young (n 133) 128–129.

tribunal.²⁰⁸ There should be consideration of a mandatory conciliation process prior to the commencement of proceedings.

Further, the Alliance recommends that the above option be available in addition to provision for people to also go directly to the NSW Supreme Court for a declaration via an application for judicial review, given the important role in establishing binding precedent arising from such declarations

c. Need Clear Consequences for Breaching a Human Rights Act

For a Human Rights Act to be effective the consequences for breaching the Act must be clear. Having clear consequences should increase the incentive for public authorities to be compliant with their obligations under the Act. In this regard, NSW can learn from experiences in Victoria. Section 39 of the Victorian Charter has been criticised by the Courts as being ‘convoluted and extraordinarily difficult to follow’²⁰⁹ and the 2015 Review of the Victorian Charter found that a lack of clear, enforceable remedies has created a disincentive for compliance and hindered the development of a human rights culture.²¹⁰

While the Queensland Government mirrored section 39 of the Victorian Charter in section 59 of the new Queensland Act, it heeded the recommendations of this review in establishing an inexpensive accessible complaints mechanism. The Queensland Act allows complaints about an alleged contravention of section 58(1) by a public entity in relation to an act or decision of the public entity to be made directly to the Queensland Human Rights Commission. NSW should follow the Queensland example in creating a complaints mechanism of this nature, but should take leadership in remedying the deficiencies in both the Victorian and Queensland models by creating an independent cause of action to a superior court and the power to award a range of remedies for non-compliance with the legislation.

A parliamentary inquiry into a Human Rights Act for NSW should consider ensuring that a Human Rights Act not only has clear consequences for breaching the Act but also has effective access to remedies including a stand alone cause of action.

²⁰⁸ Law Institute of Victoria (n 152) 19; Michael Brett Young (n 161) 128-129.

²⁰⁹ *Director of Housing v Sudi* (2001) 33 VR 559 [214] (Weinberg JA).

²¹⁰ Michael Brett Young (n 133) 124.

Conclusion

Australia currently holds a seat on the United Nations Human Rights Council for the first time in our history. The Australian Government has stated that this inaugural membership reflects its commitment to the aims and purposes of the UDHR and to the ongoing promotion and protection of human rights²¹¹ as values that are ‘deeply embedded in Australian society’.²¹²

However, in the absence of human rights specific legislation residents of NSW are unable to enforce their human rights, give meaning to a culture of respect for human rights and know that decisions of government and its agencies have been made within a human rights framework. As discussed in this submission, the lack of legislative and constitutional protection for human rights in NSW presents considerable barriers to the promotion and protection of human rights in this State and to the wellbeing of every NSW resident. NSW has the opportunity to enact human rights legislation that will ensure that every person in NSW is treated fairly and equally and with compassion and respect.

As the case studies in this submission illustrate, the status quo does not provide sufficient protection for human rights. Moreover, NSW is now lagging behind the more progressive Australian states that have enacted human rights specific legislation.

In the absence of a Federal Human Rights Act, all Australians live without the human rights protections enjoyed by the citizens of every other comparable Western democracy in the world.

A Human Rights Act for NSW will result in better decision-making by public servants and improve consideration of human rights in the law-making process. By creating and fostering the development of a culture of respect for human rights, a Human Rights Act will result in a fairer and more equal society in NSW, where everyone is treated with dignity and respect.

We urge the NSW Government to hold a parliamentary inquiry into a Human Rights Act for NSW, and engage in extensive public consultation to determine the most effective model for such legislation.

Please don't hesitate to contact the Human Rights for NSW alliance via its co-conveners Kerry Weste at president@alhr.org.au and Simon Bruck at office@nswccl.org.au should you wish to discuss our submission.

Kind regards,

Human Rights for NSW Alliance

²¹¹ Australian Government Department of Foreign Affairs and Trade, ‘Australia: Member of the United Nations Human Rights Council 2018-2020’ (Web Page) <<https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/Pages/australias-membership-unhrc-2018-2020.aspx>>.

²¹² Australian Government Department of Foreign Affairs and Trade, ‘Pillars and Priorities’ (Web Pages) <<https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/pillars-and-priorities/Pages/pillars-and-priorities.aspx>>.