



SUBMISSION

Prepared by South-East Monash Legal Service Inc. for the
Parliament of Australia
Inquiry into Australia's Human Rights Framework

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Our organisation

Established in 1973, South-East Monash Legal Service ('**SMLS**') is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal.

For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, employment law, sexual assault and victims of crime, youth law, gambling and electronic gaming machines and other legal topics relevant to our service delivery and the needs of our community.

Acknowledgement of Country

SMLS wishes to acknowledge the traditional custodians of this lands upon which our office are located, the Wurundjeri and the Boon Wurrung peoples. We pay our respects to the Elders past, present and emerging.

We acknowledge the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

Terms of Reference

- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);
- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
 - to the remit of the Parliamentary Joint Committee on Human Rights;
 - the role of the Australian Human Rights Commission;
 - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

Acronyms

AHRC	Australian Human Rights Commission
HRA	Human Rights Act
SMLS	South-East Monash Legal Service Inc.

Endorsements

SMLS endorses the submissions and recommendations from:

- Dr Kate Seear
- Foundation house

Introduction

We thank the Committee for the opportunity to provide feedback in relation to the question of whether the Australian Parliament should enact a federal Human Rights Act. This submission has been drafted by staff and students at South-East Monash Legal Service (**SMLS**). While some of the questions posed are outside of the scope of SMLS services we have still provided comments where we were confident that our expertise was a valuable contribution to the subjects raised.

This submission is informed by SMLS' longstanding experience with clients who experience significant disadvantages and face even greater barriers when they have a legal problem which underscores a national human rights charter so individual's fundamental rights are adequately protected and upheld.

At SMLS, we aim to empower and support members of the community to understand and make use of the law and the legal system to protect their rights and to increase their awareness of their legal responsibilities. To empower our clients to participate fully in civic, political, social, and economic life, we believe a federal bill or charter of rights be implemented in line with the Australian Human Rights Commission paper.

Through our work, we know that having a federal charter would be a powerful legislative mechanism to challenge injustice and be treated properly in line with human rights and put human rights at the forefront of decision-makers' minds when making decisions that carry significant impact on people's lives. This is necessary to ensure the equal opportunity and enjoyment of human rights – something that needs to be afforded to every person regardless of their race, sex, gender, parent's bank balance or postcode.

The introduction of a federal Human Rights Act ('**HRA**') that incorporates both Australian and international elements, would provide effective human rights protections and strengthen existing mechanisms. The lack of current existing mechanisms is inadequate because they do not sufficiently recognise and enforce human rights such as the right to education which can provide a fundamental and indivisible human right that must be protected. A right such as the right to education is one example of a human right that can provide long-lasting impacts with the way it provides a child with the necessary skills and stability to thrive and prosper in life.

Stronger legal protections

Opponents of a HRA argue that existing constitutional and legislative frameworks sufficiently protect human rights.¹ However, the absence of explicit safeguards for human rights has led to violations. For example, in 2022, Australia was found in violation of Indigenous rights, including the right to live a private life free from arbitrary interference.² A HRA would provide stronger legal protection for vulnerable groups, allowing them to assert their rights in courts and tribunals.

Numerous states have adopted their own Human Rights Acts,³ manifesting different legislative approaches.⁴ The disparate jurisprudence and fragmented laws undermine the status of human rights in Australia.⁵ A HRA would provide legal consistency and generate a uniform approach to enhance the protection of legal rights for everyone in Australia.

Australia is the 'only liberal democracy in the world' without 'a national act or charter of rights' setting out basic protections.⁶ This is compared to similar legal systems such as the United Kingdom and New Zealand where Human Rights Acts exist and the United States, Canada, and South Africa where an individual's human rights are constitutionally entrenched.⁷ A HRA would have diplomatic benefits, including demonstrating Australia's commitment to upholding human rights and fulfilling Australia's human rights commitments and obligation under international law⁸.

Elements of a federal Human Right Act

¹ David Malcom, 'Does Australia need a bill of rights?' (1998) 5(3) *Murdoch University Electronic Journal of Law* 1, 16.

² United Nations Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019, 135th sess (21 July 2022).

³ *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

⁴ Helen Watchirs and Gabrielle Mckinnon, 'Five Years Experience of the Human Rights Act 2004 ACT: Insights for Human Rights Protections in Australia' (2010) 33(1) *UNSW Law* 136, 137.

⁵ McGinty (n 1) 13.

⁶ Australian Human Rights Commission, *A National Human Rights Act for Australia* (Web Page) <<https://humanrights.gov.au/human-rights-act-for-australia>>

⁷ National Human Rights Consultation Secretariat, *National Human Rights Consultation Report*, (September, 2009).

⁸ Zak Vidor Staub, 'Five reasons why Australia should adopt a statutory national Bill of Rights', *UNSW: Australian Human Rights Institute* (online) <<https://www.humanrights.unsw.edu.au/news/five-reasons-why-australia-should-adopt-statutory-national-bill-rights>>

Proposed by the Australian Human Rights Commission ('AHRC'), the HRA should build upon a foundation that balances preventative and remedial elements.⁹ This includes avenues for redress and preliminary decision-making procedures that all branches of the government must engage with.¹⁰

Furthermore, this model should bolster current Australian values and democratic elements. The HRA should enshrine human rights that Australians endorse like the right to education which are not sufficiently protected in all states.¹¹ Codifying Australian expectations of government in legislation provides certainty of rights and obligations.¹² This promotes the democratic elements of participation and accountability.¹³ By empowering vulnerable groups to advocate for themselves, the branches can be held accountable to a higher standard when enacting laws and policies that are open to public scrutiny.¹⁴

Although the model must cater to Australian society and consider current legislative structures, it should also integrate international best practice elements from treaties. By adopting elements from treaties that contemplate specific rights needed for vulnerable groups, a higher standard of protection can be achieved.¹⁵

Federal institutions engage with human rights through various mechanisms. They adhere to Constitutional protections,¹⁶ safeguard specific human rights through legislation,¹⁷ establish bodies like the AHRC,¹⁸ submit compatibility statements for new laws,¹⁹ engage with civil society, and report to UN Treaty Bodies. These mechanisms provide a foundation for protecting human rights in Australia. Nevertheless, since the 2010 Human Rights framework lapsed, there has not been an adequate response to protect human rights.²⁰

⁹ Australian Human Rights Commission, *Position Paper: A Human Rights Act for Australia* (Position paper, 2022) 32 ('Position Paper').

¹⁰ Ibid.

¹¹ Position Paper (n 11) 356; *Human Rights Act 2019* (Qld) s 36; *Human Rights Act 2004* (ACT) s 27A.

¹² Position Paper (n 11) 67; Commonwealth Human Rights Initiative, *Our Rights Our Information: Empowering People to Demand Rights through Knowledge* (Print World, 2007), 11.

¹³ Position Paper (n 11) 72.

¹⁴ Ibid 76.

¹⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990); *United Nations Declaration on the Rights of Indigenous Peoples* (entered into force 13 September 2007)

¹⁶ *Australian Constitution* s 41 (Right to vote); s 51(xxxi) (Protection against acquisition of property on unjust terms); s 80 (Right to a trial by jury); s 116 (Freedom of Religion); s 117 (Prohibition of discrimination on the basis of State of residency).

¹⁷ *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

¹⁸ *Australian Human Rights Commission Act 1986* (Cth) ('Human Rights Commission Act').

¹⁹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 8(1).

²⁰ Australian Human Rights Commission, Submission No 1 to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2023) 5 ('Parliamentary Inquiry').

Strengths of existing mechanisms

The AHRC's recourse to alternative dispute resolution procedures have been lauded for expedient settlement outcomes.²¹ This enhances its appeal to disadvantaged members of the community, who are disproportionately affected by human rights violations.²²

Furthermore, it has been credited for vernacularising human rights into the Australian context by gauging public sentiment and procuring evidence into mainstream public consciousness.²³ This framework is commensurate with the common law tradition of "bottom-up" rights recognition.²⁴ Additionally, statements of compatibility have allowed for increased scrutiny of government actions and identifying potential human rights violations.

Limitations of existing mechanisms

These mechanisms have several limitations that make them inadequate in safeguarding human rights. Limited constitutional protections, restricted legislative safeguards, and the absence of judicial review prevent the recognition and enforcement of certain rights, creating gaps in protection. Furthermore, resource constraints and a lack of institutional expertise hinder effective engagement with human rights.²⁵ Moreover, the public consultation process may not capture diverse perspectives because individuals with limited resources and access may struggle to participate effectively.²⁶

The AHRC is constrained by limited resource allocation, exacerbated during periods of political tension with the executive.²⁷ Furthermore, the resolution mechanism has been censured as a 'case management technique' – with the purpose of negotiating private compensatory remedies without addressing the systemic aspects of the violation.²⁸ Moreover, the current system hinders the development of human rights jurisprudence by

²¹ Dominique Allen, 'Voices in the Human Rights Dialogue: The Individual Victim and Australian Human Rights Dialogue' (2010) 35(3) *Alternative Law Journal* 159, 160.

²² Elisabeth Reichart, *Understanding Human Rights: An Exercise Book* (Sage Publications, 3rd ed, 2006) 78.

²³ Detmer Kremer, 'The Effectiveness of National Human Rights Institutions: The Australian Human Rights Commission and Immigration Detention Centres' (2019) 13(1) *International Public Policy Review* 27, 30.

²⁴ Fleur Johns, 'Human Rights in the High Court of Australia, 1976 - 2003: The Righting of Australian Law?' (2005) 33(2) *Federal Law Review* 287, 288 ('The Righting of Australian Law').

²⁵ Parliamentary Inquiry (n 22) 10.

²⁶ Phil Parvin, 'Democracy Without Participation: A New Politics for a Disengaged Era' (2018) 24 *Res Publica* 31, 32.

²⁷ Parliamentary Inquiry (n 21) 21.

²⁸ Allen (n 22) 160; Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No 8, Centre for Employment and Labour Relations Law, University of Melbourne, 1995) 1.

diverting complaints away from judicial determination, stagnating Australia's legal 'internalisation of human rights'.²⁹

Furthermore, the effectiveness of statements of compatibility are undermined by the lack of independent scrutiny, exemptions for delegated legislation,³⁰ and delayed conclusions, leading to bills being passed before the Committee's final report.³¹

Improvements to existing mechanisms

Enacting a HRA would establish a comprehensive framework, integrate human rights into decision-making, and provide avenues for redress. Federal institutions could also invest in capacity building programs on human rights for public officials, policymakers, and members of federal institutions. This would enhance processes that protect human rights by fostering a better understanding and integration of human rights considerations.

Divesting the AHRC of its complaints handling and conciliatory functions (and vesting these capacities to an independent statutory organisation) would nullify their impartiality.³² They would be enabled to 'advise and assist' prospective litigants and institute proceedings.³³ This would require the AHRC to be insulated from government reprisal or executive interference. This could be achieved by establishing 'statutory guarantees of independence' and a system of funding independent of direct ministerial control.³⁴ The ensuing democratic deficit could be assuaged by mandating parliamentary reporting obligations.

Establishing an independent body to scrutinise statements of compatibility would enhance the impartiality and quality of assessments. Moreover, empowering this body to determine its own scrutiny agenda, including delegated legislation, ensures all aspects of law-making are assessed.³⁵ Additionally, implementing a guaranteed minimum time period for

²⁹ Johns (n 25) 288.

³⁰ Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluation Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38(3) *UNSW Law Journal* 1046, 1074-6.

³¹ 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, 501.

³² Allen (n 22) 161.

³³ *Ibid.*

³⁴ House of Lords and House of Commons Joint Committee on Human Rights, *Commission for Equality and Human Rights: The Government's White Paper* (Sixteenth Report of Session 2003-04) 19.

³⁵ Williams and Reynolds (n 31) 500-1.

considering new Bills prevents their enactment without scrutiny.³⁶ While these changes would improve parliamentary scrutiny, implementing a HRA would have a stronger effect on advancing human rights protections.

Laws concerning refugees and people seeking asylum

Existing mechanisms have not stopped the passage of legislation and other harmful practices that frequently violate the rights of refugees and people seeking asylum. Often these laws directly authorise the Commonwealth to act in a way which violates international law, such as mandatory detention, temporary protection visas, offshore processing, lack of family reunion, refoulement and indefinite detention.

The introduction of a Human Rights Act would help to ensure that the rights of asylum seekers and refugees are properly protected and respected under Australian law.

Conclusion

Overall, a federal HRA would alleviate issues posed by Australia's current human rights framework. Without such protections, marginalised and vulnerable individuals, communities and groups who we work with will continue to be disproportionately affected. Australia will not be alone in its pursuit of such goals. Australia is well-positioned to follow in the footsteps of other democratic nations that have proven that human rights can be codified into legislation with harmonious and lasting positive effects.

Recommendations:

1. A federal bill or charter of rights be enacted.
2. The federal Human Rights Act should be directly enforceable and offer accessible and effective remedies.
3. Increased resourcing for key agencies and organisations be provided to enable them to increase their advocacy on human rights issues including the provision of rigorous, detailed and quality input into rights processes (e.g. through parliamentary submissions). Such as:
 - Australian Human Rights Commission
 - Community legal centres and legal aid organisations,

³⁶ Australian Law Reform Commission, Traditional Rights and Freedoms — Encroachments by Commonwealth Laws, Report No 127 (Interim) (2015) 52.

- non-governmental organisations including national peak and peer user organisations for historically marginalised populations frequently subject to rights violations
4. That a Human Rights Act ensures that the rights of refugees and people seeking asylum are understood, respected and protected.