IF AT FIRST YOU DON'T SUCCEED… A CRITIQUE OF THE AUSTRALIAN HUMAN RIGHTS ACT PROPOSAL AND THE INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

BRUCE CHEN*

Australia, being rather an outlier, does not have a national Bill of Rights. The Australian Human Rights Commission ('AHRC') has recently sought to reinvigorate the issue, recommending the enactment of an Australian Human Rights Act. Its proposed model went before the Commonwealth Parliamentary Joint Committee on Human Rights, as part of the Inquiry into Australia's Human Rights Framework. This article considers the need and support for an Australian Human Rights Act, incorporating recent developments during the COVID-19 pandemic. It provides a detailed critique of the AHRC's proposed model and elements for human rights protection. In doing so, the article draws upon the experiences of certain Australian state and territory jurisdictions with Bills of Rights. It concludes by strongly endorsing the AHRC's proposed model, subject to some reservations (about a participation duty, equal access to justice duty and power to exempt certain public authorities) and suggested clarifications or enhancements.

I INTRODUCTION

As is well known, Australia does not have a Commonwealth Bill of Rights. This is an issue which has not been seriously considered for a decade by the Commonwealth Government. In 2010, the Commonwealth Government declined to implement a considered recommendation to enact an Australian Human Rights Act. Instead, it established 'Australia's Human Rights Framework', a new 'Australia's National Human Rights Action Plan', and a Commonwealth parliamentary scrutiny regime for human rights. The need for an Australian Human Rights Act has been reinvigorated by the Australian Human Rights Commission ('AHRC')

* Senior Lecturer, Deakin Law School, Deakin University. Thank you to the anonymous reviewers and the editors for their insightful comments. This article draws upon the following submission: Bruce Chen, Submission No 158 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (1 July 2023). A disclosure: the author is also a member of the Law Institute of Victoria's Human Rights Committee, which provided input in the preparation of submissions by the Law Council of Australia.

in recent times. During 2022 and 2023, it produced a position paper ('*AHRC Position Paper*')[1] and final report ('*AHRC Final Report*')[2] which recommended the enactment of an Australian Human Rights Act.

Following the *AHRC Position Paper*'s publication, the Commonwealth Attorney-General, Mark Dreyfus, requested on 15 March 2023 that the Commonwealth Parliamentary Joint Committee on Human Rights ('PJCHR') conduct an inquiry into Australia's Human Rights Framework ('PJCHR Inquiry').[3] The PJCHR Inquiry's terms of reference were to: (1) 'review the scope and effectiveness of [the Framework] and the National Human Rights Action Plan'; (2) 'consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made'; (3) 'consider developments since 2010 in Australian human rights laws (both at the Commonwealth and state and territory levels) and relevant case law'; and (4) 'to consider any other relevant matters'.[4] The PJCHR Inquiry was due to report on 31 March 2024 (which has since been extended to 30 May 2024).

While broader in scope, the PJCHR Inquiry was clearly prompted by the *AHRC Position Paper* (the *AHRC Final Report* was published after the PJCHR Inquiry commenced). The PJCHR Inquiry's website clarified that its scope encompasses whether an Australian Human Rights Act should be enacted and its elements – referring to the *AHRC Position Paper*.[5] That is the focus of this article. The PJCHR Inquiry also sought views on the effectiveness of existing human rights Acts at the state and territory levels. That is, the *Human Rights Act 2004* (ACT) ('*ACT HRA*'), *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') and *Human Rights Act 2019* (Qld) ('*QLD HRA*').[6]

The purpose of this article is to provide a detailed critique of the AHRC's proposed model for an Australian Human Rights Act ('AHRC Model'). Part II of this article considers the need for an Australian Human Rights Act in light of recent developments, particularly the COVID-19 pandemic. Part III outlines the public support for an Australian Human Rights Act, as demonstrated by survey research and public submissions. Part IV provides a broad overview of the AHRC Model, being a statutory 'dialogue model', and outlines the underlying principles identified by the AHRC for that model. Part V critiques the more specific elements of the AHRC Model, focusing on elements which are not already established at the Commonwealth level. This part critiques the AHRC Model's strengths and

1 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) <https://humanrights.gov.au/sites/default/files/document/publication/free_equal_hra_2022_-_main_report_rgb_0.pdf> ('*AHRC Position Paper*').

2 Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 8 November 2023) <https://humanrights.gov.au/sites/default/files/2311_freeequal_finalreport_1_1.pdf> ('*AHRC Final Report*').

3 'Terms of Reference: Australia's Human Rights Framework', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Terms_of_Reference>.

4 Ibid.

5 'Inquiry into Australia's Human Rights Framework', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>.

6 Ibid.

weaknesses, and implications arising from the Australian constitutional context. Part VI provides a brief critique of additional elements proposed under the AHRC Model, which are not seen in any other dialogue models. Namely, a participation duty for certain groups and an equal access to justice duty. Part VII concludes that it is finally time for an Australian Human Rights Act. The AHRC Model should be endorsed by the PJCHR and draft legislation developed for enactment by the Commonwealth Parliament, subject to some reservations and suggested clarifications or enhancements to that model. Where relevant, this article will draw comparisons to human rights Acts at the Australian state and territory level (as well as Bills of Rights in overseas jurisdictions), upon which the AHRC Model is based. It will also refer to various written submissions made to the PJCHR Inquiry.

To be clear, this article is predominantly concerned with the *mechanisms* for rights protection under the proposed Australian Human Rights Act (rather than the *rights* to be recognised). Nevertheless, it is necessary to make some reference to the range and scope of rights proposed under the AHRC Model, when discussing the need for an Australian Human Rights Act. It is, however, not the intention of this article to provide a fulsome analysis of the AHRC's proposal for how certain rights or standards under international human rights instruments should be recognised – such as economic, social and cultural rights, and First Nations rights of Aboriginal and Torres Strait Islander peoples.

II NEED FOR AN AUSTRALIAN HUMAN RIGHTS ACT

A Attempts at a Bill of Rights

While Australia is bound as a State party to several international human rights treaties, such as the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[7] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[8] the *Convention on the Rights of the Child* ('*CRC*')[9] and the *Convention on the Rights of Persons with Disabilities* ('*CRPD*'),[10] these do not have direct application under the Australian legal system without legislative incorporation. Australia is said to be 'the only democratic country in the world' without a national Bill of Rights.[11] This lack of human rights recognition and protection in a national document has a storied history, which has been comprehensively detailed elsewhere.[12] The framers

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7 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

8 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

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

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

11 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (University of New South Wales Press, 4th ed, 2017) 17.

12 See ibid 99–111; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 27–34; National

of the *Constitution* eschewed the notion of a Bill of Rights entrenched within the *Constitution*. The *Constitution* was primarily focused on establishing a federation and distributing powers between the branches of government. As the High Court of Australia ('High Court') has recognised:

> Those who framed the *Australian Constitution* accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus the *Constitution* deals, almost without exception, with the structure and relationship of government rather than with individual rights.[13]

The *Constitution* also pre-dated World War II and the dawn of the contemporary international human rights law framework. Post-Federation, there have been several attempts to progress an Australian Bill of Rights in statutory (or sometimes constitutional) form. Advocates for a Bill of Rights will know the familiarity of having been here before. A significant attempt to introduce an Australian Bill of Rights was made when the AHRC (as it is now known) was established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).[14] As the *AHRC Position Paper* described it:

> When the Commission was put on a permanent foundation in 1986, an 'Australian Bill of Rights Bill' was introduced into Parliament at the same time, and the Commission was to be the body that administered this law. Together, these steps were supposed to provide cohesive domestic implementation of Australia's obligations under the *ICCPR*. However, a statutory Bill of Rights was not ultimately adopted, leaving a gap in the architecture and work of the Commission.[15]

More colloquially, the current President of the AHRC has described the Commission thus: 'We are like a doughnut – with a hole in the middle.'[16] In contemporary times, there have been three major national consultations which have sought to progress an Australian Bill of Rights, or are otherwise relevant to the state of human rights protections in Australia.

In 2009, a landmark report produced by a National Human Rights Consultation Committee ('*2009 National Human Rights Consultation Report*') recommended the enactment of an Australian Human Rights Act 'based on the "dialogue" model'.[17] It found that the Australian legal system did not sufficiently respect and protect human rights. The Committee described Australia as having 'a patchwork quilt of protection for human rights';[18] 'its inadequacies … felt most keenly by the marginalised and the vulnerable'.[19] The Committee concluded that an Australian

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Human Rights Consultation, *Report* (Report, 30 September 2009) ch 10 <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf> ('*2009 National Human Rights Consultation Report*').

13 *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

14 Now the *Australian Human Rights Commission Act 1986* (Cth).

15 *AHRC Position Paper* (n 1) 59 (citations omitted). See also at 277.

16 Rosalind Croucher, 'Whither Human Rights and Freedoms Protections in Australia? Rights and Freedoms in the Age of COVID-19' (Speech, Samuel Griffith Society 32nd Conference, 29–30 April 2022) <https://humanrights.gov.au/about/news/speeches/whither-human-rights-and-freedoms-protections-australia-rights-and-freedoms-0>.

17 *2009 National Human Rights Consultation Report* (n 12) 371. See also at 378.

18 Ibid 349.

19 Ibid 127.

Human Rights Act 'could constitute a useful, cost-effective means of repairing some of the holes in Australia's patchwork of rights protection'.[20]

Disappointingly, the Commonwealth Government of the day did not follow through with this main recommendation.[21] In lieu of an Australian Human Rights Act, in 2010 it established Australia's Human Rights Framework, and in 2012 a new Australia's National Human Rights Action Plan. The *AHRC Final Report* remarked that the Framework 'cannot be seen to have met its objectives' and was 'of limited reach'.[22] As the terms of reference for the PJCHR Inquiry imply, the Framework has lapsed. The Action Plan was also inhibited 'by ha[ving] no funding attached to it'[23] and was discontinued.[24]

The Commonwealth Parliament also enacted a Commonwealth parliamentary scrutiny regime for human rights – the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*HR(PS) Act*'). That Act established the PJCHR[25] and a scrutiny regime which required the preparation of statements of compatibility (or incompatibility) for Commonwealth Bills and certain legislative instruments.[26] Such human rights assessments are based on some of the core international human rights treaties, rather than domestically recognised human rights.[27]

In 2015, the Australian Law Reform Commission published an inquiry report, titled *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* ('*Traditional Rights and Freedoms*').[28] While the *Traditional Rights and Freedoms* report did not consider the question of whether to enact an Australian Human Rights Act, it did note the limited protection of rights under the *Constitution*, which 'does not expressly protect most civil rights'.[29] The *Traditional Rights and Freedoms* report also remarked that while there might be some overlap between rights and freedoms under the common law and human rights law, 'the two rights may not always have the same scope' of protection.[30]

Finally, and most recently, the AHRC has sought to build on the work undertaken by the *2009 National Human Rights Consultation Report*. The *AHRC Position Paper* was part of a broader 'Free and Equal' Inquiry that commenced in early 2019.[31] According to its Terms of Reference, the overall purpose of the Free and Equal Inquiry was 'conducting a national conversation on human rights',[32]

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20 Ibid 377.

21 For further commentary, see the thematic issue of the *University of New South Wales Law Journal*, titled 'The Future of Human Rights in Australia': (2010) 33(1) *University of New South Wales Law Journal* 1.

22 *AHRC Final Report* (n 2) 35.

23 Ibid.

24 Ibid 39.

25 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pt 2.

26 Ibid pt 3.

27 See ibid s 3 (definition of 'human rights').

28 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) ('*Traditional Rights and Freedoms*').

29 Ibid 34 [2.19].

30 Ibid 41 [2.45].

31 *AHRC Position Paper* (n 1) 33.

32 Australian Human Rights Commission, 'Free and Equal in Dignity and Rights: A National Conversation on Human Rights' (10 December 2018) 2 <https://humanrights.gov.au/sites/default/files/ahrc_tor_national_conversation2019_resized_0.pdf>.

including 'to identify what makes an effective system of human rights protection for 21st century Australia, and what steps Australia needs to take to get there'.[33] This consisted of multiple phases in the inquiry process.

The second position paper, the *AHRC Position Paper*, was produced in December 2022. A detailed 380-page document, it recommended the enactment of an Australian Human Rights Act and measures to improve the parliamentary scrutiny regime under the *HR(PS) Act*.[34] Similarly to the *2009 National Human Rights Consultation Report*, the *AHRC Position Paper* described the Australian legal system's protection of human rights as 'patchy'[35] in nature. The *AHRC Position Paper* stated: 'This leaves a significant hole in our legal architecture. The rights that are protected are located in scattered pieces of legislation, the *Constitution* and the common law, forming an incomplete and piecemeal framework, with many gaps.'[36]

In November 2023, the AHRC produced its final report, the *AHRC Final Report*, on the broader issues canvassed in the Free and Equal Inquiry. Relevantly, the AHRC reiterated its proposal for the enactment of an Australian Human Rights Act.[37] The AHRC described it as the 'centrepiece' of the AHRC's proposal for a new National Human Rights Framework.[38] Moreover, the AHRC recommended that the Commonwealth Government develop an Exposure Draft Bill on an Australian Human Rights Act to progress the issue.[39]

B Range and Scope of Protected Rights

Recent years have demonstrated the need for clearer and more effective mechanisms for human rights protections. Chapter 1 of the *AHRC Position Paper* pointed to Australia's response to the COVID-19 pandemic as a case study of 'key failures which resulted in human rights breaches',[40] and the broad and unchecked discretionary powers which can be conferred on the executive in practice.[41] In the author's view, the COVID-19 related litigation has reconfirmed that the range or scope of rights and freedoms under the *Constitution* is more restricted compared to under the common law, which in turn is generally more restricted than under human rights law.

In relation to 'lockdowns', the High Court in *Gerner v Victoria* confirmed there is no general implied constitutional freedom of movement (so as to protect *intra*state movement).[42] There is only an express freedom of 'intercourse among the

33 'Free and Equal: An Australian Conversation on Human Rights', *Australian Human Rights Commission* (Web Page, 8 December 2023) <https://humanrights.gov.au/free-and-equal> ('Australian Conversation on Human Rights').
34 *AHRC Position Paper* (n 1) 33–4.
35 Ibid 46–7.
36 Ibid 46.
37 *AHRC Final Report* (n 2) 47.
38 Ibid.
39 Ibid 47–8.
40 *AHRC Position Paper* (n 1) 37. See generally at 36–41.
41 Ibid 72–5. See also Senate Select Committee on COVID-19, Parliament of Australia, *Final Report* (Report, April 2022) 42–4 [3.25]–[3.38] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024920/toc_pdf/Finalreport.pdf;fileType=application%2Fpdf>.
42 (2020) 270 CLR 412.

States' (ie, *inter*state movement).[43] The position is clearly different under the right to freedom of movement in the *ICCPR*.[44] As for prohibitions on travel overseas or returning, it remains unresolved whether there is an implied constitutional freedom to depart from or re-enter Australia.[45] This issue was not raised in *LibertyWorks Inc v Commonwealth*[46] and was raised – but not determined – in *Newman v Minister for Health and Aged Care*.[47] The lack of clarity contrasts with the right to freedom of movement in the *ICCPR*.[48]

The constitutional freedom of religion includes the freedom from legislation 'prohibiting the free exercise of any religion'.[49] As is well established, the freedom is limited in scope and has been restrictively interpreted by the courts. This was highlighted in the Federal Court of Australia case of *Athavle v New South Wales* regarding lockdown restrictions on religious gatherings.[50] The constitutional freedom did not apply to the states and its 'focus is on the purpose of the law and not its effect'.[51] This is unlike the right to freedom of thought, conscience, religion and belief under the *ICCPR*, which is interpreted much more broadly.[52]

In *Kassam v Hazzard* ('*Kassam*'), the New South Wales Court of Appeal found that so-called 'vaccine mandates' did not infringe the common law right to bodily integrity.[53] That was because consent remained voluntary, even under threat of loss of employment.[54] It is in contrast with the right not to be subjected to medical treatment without free consent under state and territory human rights Acts.[55] *Kassam* also confirmed that there is no general common law right to privacy[56] or

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43 *Constitution* s 92. COVID-19 state border closures by Western Australia were recognised as infringing the freedom of interstate intercourse but their validity was upheld by the High Court in *Palmer v Western Australia* (2021) 272 CLR 505 ('*Palmer*').

44 *ICCPR* (n 7) art 12(1).

45 See Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2022) 27(2) *Australian Journal of Human Rights* 211, 216–19 <https://doi.org/10.1080/1323238X.2021.1996529>; Olivera Simic and Kim Rubenstein, 'The Challenge of "COVID-19 Free" Australia: International Travel Restrictions and Stranded Citizens' (2023) 27(5) *International Journal of Human Rights* 830, 836–7 <https://doi.org/10.1080/13642987.2022.2058496>. As for the common law position, see Bruce Chen, 'No Way Out? Australia's Overseas Travel Ban and "Rights-Based" Interpretation' (2022) 10(1) *Griffith Journal of Law and Human Dignity* 53.

46 (2021) 286 FCR 131.

47 (2021) 173 ALD 88, 89–90 [3]–[4], 105 [68] (Thawley J).

48 *ICCPR* (n 7) arts 12(2), (4).

49 *Constitution* s 116.

50 (2021) 290 FCR 406.

51 Ibid 425 [87] (Griffiths J) (emphasis omitted).

52 *ICCPR* (n 7) art 18. See generally Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 20 July 1993).

53 (2021) 106 NSWLR 520 ('*Kassam*').

54 Ibid 543 [96]–[97] (Bell P, Meagher JA agreeing at 550 [138]).

55 See, eg, *Johnston v Carroll* [2024] QSC 2, [313]–[333] (Martin SJA). As to the *ICCPR* (n 7), see Kay Wilson and Christopher Rudge, 'COVID-19 Vaccine Mandates: A Coercive but Justified Public Health Necessity' (2023) 46(2) *University New South Wales Law Journal* 381 <https://doi.org/10.53637/KXUL1406>.

56 See also *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1, 11 [39] (Kiefel CJ and Keane J), 22–3 [90] (Gageler J). There is, however, a common law freedom from trespass by police officers on private property: see *Coco v The Queen* (1994) 179 CLR 427.

right to work, which presently are, at most, 'rights' in an aspirational or rhetorical sense.[57] This stands in contrast with the right to privacy and right to work under the *ICCPR*[58] and *ICESCR*[59] respectively.

While there have been recent attempts to claim a common law freedom of assembly,[60] the ratio is more conservatively stated. In *Attorney-General (Qld) v Sri*,[61] a 'sit-in' public protest was planned despite COVID-19 attendance limits on public gatherings. The Queensland Supreme Court ('QSC') noted the High Court case of *Melbourne Corporation v Barry*,[62] where 'critical[ly]',[63] the common law only went so far as to recognise the liberty of procession. Accordingly, 'there is no right of "public meeting" in a public thoroughfare'.[64] The QSC recognised that a sit-in protest, being 'static'[65] in nature, was different. That is evidently far narrower than the right to peaceful assembly under the *ICCPR*.[66]

The domestic incorporation by the Commonwealth Parliament of human rights under an Australian Human Rights Act would have the benefit of providing a broader range of rights and freedoms protected in Australia, compared to the common law.[67] The recognition of common law rights and freedoms is 'ultimately a matter of judicial choice'.[68] As judge-made law, there is 'no authoritative statement of'[69] recognised common law rights and freedoms. As the *AHRC Position Paper* stated, an Australian Human Rights Act would 'provid[e] clarity and certainty'.[70] It would also be democratically sanctioned by Commonwealth Parliament.[71] Common law rights and freedoms may be abrogated or curtailed, and human rights may be limited. However, the common law principle of legality (discussed below in Part II(C)) does not formally encompass justification and proportionality considerations,[72] whereas an Australian Human Rights Act would. In comparison, this makes limitations on

57 *Kassam* (n 53) 542 [91] (Bell P, Meagher JA agreeing at 550 [138]).
58 *ICCPR* (n 7) art 17(1).
59 *ICESCR* (n 8) art 6.
60 See, eg, *South Australia v Totani* (2010) 242 CLR 1, 28 [30] (French CJ).
61 [2020] QSC 246 ('*Sri*').
62 (1922) 31 CLR 174 ('*Melbourne Corporation*').
63 *Sri* (n 61) [19] (Applegarth J).
64 *Melbourne Corporation* (n 62) 196 (Issacs J), citing *R v Cunninghame Graham* (1888) 16 Cox CC 420, 427 (Charles J).
65 *Sri* (n 61) [39] (Applegarth J).
66 *ICCPR* (n 7) art 21.
67 See *AHRC Position Paper* (n 1) 52.
68 Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209, 211 <https://doi.org/10.1177/1037969X1303800402>; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 459. See also David Dyzenhaus, Marray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 6 <https://doi.org/10.1080/14729342.2001.11421382>.
69 Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 345.
70 *AHRC Position Paper* (n 1) 67.
71 Bruce Chen, 'The Principle of Legality and s 32(1) of the *Victorian Charter*: Is the Latter a Codification of the Former?' (2020) 31(4) *Public Law Review* 444, 449 ('The Principle of Legality and s 32(1) of the *Victorian Charter*').
72 See *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 465 [80] (Warren CJ).

human rights 'explicit, transparent and more analytically robust'.[73] An Australian Human Rights Act would also be far more comprehensive in range and scope than the limited rights and freedoms protected under the *Constitution*.[74]

Most of the issues outlined in the COVID-19 related litigation pertained to civil and political rights. However, there is even less protection of economic, social and cultural rights under the *Constitution* and common law. Chapter 5 of the *AHRC Position Paper* recommended the protection of 'minimum core' obligations of economic, social and cultural rights.[75] That is, the 'minimum essential'[76] content of those rights which are considered immediately realisable under international human rights law. Significantly, this went further than the *2009 National Human Rights Consultation Report*, which fell short of making economic, social and cultural rights justiciable.[77] It also built upon the rather selective range of economic, social and cultural rights recognised by the state and territory human rights Acts.[78]

The above approach is a pragmatic one, which allows for immediate enforceability under an Australian Human Rights Act. However, it has been criticised in some submissions to the PJCHR Inquiry for not going far enough.[79] The *AHRC Position Paper* additionally recommended the recognition of a right to a healthy environment,[80] reflecting recent developments both internationally[81] and domestically.[82] The above proposals are highly significant and deserving of greater consideration, to be taken up by other commentators. They are beyond the scope of this article.

C Going Beyond Existing Interpretive Principles and Mechanisms

An Australian Human Rights Act would go beyond existing principles of statutory interpretation under the common law and mechanisms for human rights protection, such as the existing parliamentary scrutiny regime and AHRC complaints-handling function.

One way in which rights may be respected and protected, albeit indirectly, is through favourably interpreting legislation by way of common law principles

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73 Chen, 'The Principle of Legality and s 32(1) of the *Victorian Charter*' (n 71) 456.

74 See *AHRC Position Paper* (n 1) 50. See also *Traditional Rights and Freedoms* (n 28) 34 [2.19].

75 *AHRC Position Paper* (n 1) 116–17, 128. On the issue of recognition of economic, social and cultural rights in Australia, see, eg, Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *University of New South Wales Law Journal* 193; Andrew Byrnes, 'The Protection and Enjoyment of Economic, Social and Cultural Rights' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 1, 133.

76 Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations*, 5th sess, UN Doc E/1991/23 (14 December 1990) 3 [10].

77 *2009 National Human Rights Consultation Report* (n 12) 365–6, 376–8.

78 See *Human Rights Act 2004* (ACT) pt 3A ('*ACT HRA*'); *Human Rights Act 2019* (Qld) pt 2 div 3 ('*QLD HRA*').

79 See Cristy Clark et al, Economic, Social and Cultural Rights (ESCR) Network (Australia and Aotearoa/New Zealand), Submission No 86 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (June 2023).

80 *AHRC Position Paper* (n 1) 131.

81 See *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res A/76/L 75, UN Doc A/RES/76/300 (1 August 2022, adopted 28 July 2022).

82 See Human Rights (Healthy Environment) Amendment Bill 2023 (ACT).

of statutory interpretation. The principle of legality is the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law, except by clear and unambiguous language.[83] The presumption of constitutionality is the presumption that so far as the language permits, a statute should be interpreted consistently with the *Constitution*.[84] The presumption of consistency with international law is the presumption that so far as the language permits, a statute should be interpreted so that it conforms with Australia's international obligations.[85] This includes the core international human rights treaties to which Australia is a State party.

However, these 'rights-based' statutory interpretation principles are somewhat limited in their operation in Australia. They are not directed at whether the executive strikes a proportionate balance with rights and freedoms when exercising broad statutory discretionary powers (or it is at least highly doubtful they can be applied in this way). The principle of legality 'is a principle of statutory interpretation concerning the scope of the power and not the manner of its exercise'.[86] Whether legislation impermissibly infringes certain constitutional freedoms 'can and should be answered by reference to the authorising provisions of the … Act rather than by reference to any particular exercise of those statutory powers'.[87] The presumption of consistency 'is no more than a canon of construction',[88] and on one view, 'gives rise to no presumption that the statute is to be read as legislatively constraining the [executive] officer to act in conformity with international law norms'.[89]

This can be contrasted with the AHRC Model for public authority obligations,[90] which directly integrates human rights and proportionality considerations into the exercise of broad discretionary powers. Such obligations would impose 'an additional, or supplementary obligation'[91] on the executive, thereby confining the scope of the exercise of such powers. As the *AHRC Position Paper* stated, the rationale for such obligations – which exist under the state and territory human rights Acts – 'is to change the culture of decision making and embed transparent, human rights-based decisions as part of public culture'.[92] Where there is a failure to comply with these obligations, consequences before the courts exist.[93]

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83 See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

84 See, eg, *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

85 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J) ('*Teoh*').

86 *Kassam v Hazzard* (2021) 393 ALR 664, 725 [245] (Beech-Jones CJ at CL).

87 *Palmer* (n 43) 530 [63] (Kiefel CJ and Keane J). See further Bruce Chen, 'Constitutional Freedoms: Relevance to Statutory Discretions?' (2023) 53(1) *Australian Bar Review* 58; Janina Boughey and Anne Carter, 'Constitutional Freedoms and Statutory Executive Powers' (2022) 45(3) *Melbourne University Law Review* 903 <https://doi.org/10.2139/ssrn.4038024>.

88 *Teoh* (n 85) 287 (Mason CJ and Deane J).

89 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 627 [385] (Gageler J).

90 See below Part V(E).

91 *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 234 [323] (Tate JA) ('*Bare*').

92 *AHRC Position Paper* (n 1) 8.

93 See below Part V(G).

Relatedly, the Senate Standing Committee for the Scrutiny of Delegated Legislation has said in recent years: 'The response to the COVID-19 pandemic brought into strong relief the fact [that] Parliament may not always be aware of the implications that might follow from all the legislation it passes.'[94] The preparation of statements of compatibility by the Commonwealth executive and scrutiny by the PJCHR pursuant to the *HR(PS) Act* play an important role. However, of itself, this parliamentary scrutiny regime is not adequate to respect and protect human rights. It is only one element of a statutory dialogue model.

The *AHRC Position Paper* rightly observed that 'we have not seen a noticeable improvement in the protection of human rights in Australia over the past generation'.[95] It 'is scrutiny that exists without consequence'.[96] Over the past decade since the establishment of the parliamentary scrutiny regime, successive studies have laid bare the significant limitations of the reliance on Commonwealth Parliament as the predominant branch of government to oversee the protection of human rights.[97] The potential for human rights impacts does not end at pre-enactment. Post-enactment, there are still the matters of interpreting and applying legislation, exercising discretions and making decisions which respect and protect human rights – matters which an Australian Human Rights Act would address.

As Australia's independent national human rights agency, the AHRC's functions include promoting human rights.[98] It also has jurisdiction to inquire into and conciliate complaints of breaches of human rights[99] under certain international human rights instruments, scheduled to or declared pursuant to the *Australian Human Rights Commission Act 1986* (Cth). This includes the *ICCPR*, *CRC* and

94 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) 102 [7.21] <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/Exemptfromoversight/Final_Report_-_Exemption__of_delegated_legislation_from_Parliamentary_oversight.pdf?la=en&hash=C34048F510CDCA9575EA8B71C89F2CD751998E94>.

95 *AHRC Position Paper* (n 1) 34. See also at 57.

96 Ibid 47.

97 See, eg, Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38(3) *University of New South Wales Law Journal* 1046; Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 143 <https://doi.org/10.5040/9781509919857.ch-008>; Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256; Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020); Adam Fletcher and Philip Lynch, 'Australia's Human Rights Framework: Has It Improved Accountability?' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 1, 11; Adam Fletcher, Human Rights Law Centre, *Human Rights Scrutiny in the Australian Parliament: Are New Commonwealth Laws Meeting Australia's International Human Rights Obligations?* (Report, 6 December 2022) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/638d88179ce68a745d686c14/1670219801582/HRLC_AusParliament_Scrutiny+Report_FINAL.pdf>.

98 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g).

99 Ibid s 11(1)(f).

CRPD (but not, for example, the *ICESCR*).[100] It does not encompass the complete range of core international human rights treaties to which Australia is a State party. Beyond this limited jurisdiction, there is a potential dead end. International human rights treaties are not fully incorporated into federal legislation.[101] Nor are the rights they protect directly justiciable before the federal courts – even if the AHRC conciliation process is unsuccessful.[102] As the *AHRC Position Paper* recognised, 'it is a jurisdiction based on international law';[103] and 'the Commission's ability to resolve human rights complaints can be very limited'.[104]

III PUBLIC SUPPORT FOR AN AUSTRALIAN HUMAN RIGHTS ACT

A Survey Research

The *2009 National Human Rights Consultation Report* was preceded by a wide range of public consultation, including commissioning a telephone survey of a sample of 1,200 people.[105] The survey results indicated that 'most participants gave little thought to their human rights because they believed those rights to be adequately secured'.[106] Of the participants, 64% agreed that '[h]uman rights in Australia are adequately protected'.[107] The survey also asked participants whether they would oppose or support a 'specific Human Rights law that defined the human rights to which all people in Australia were entitled – passed by the federal Parliament and able to be amended by future parliaments without requiring a referendum'.[108] In other words, a statutory model. In response, 57% supported this proposal, with 14% opposed and 30% neutral.[109]

Survey research has also been undertaken by advocacy groups. In a relatively new initiative since 2021, Amnesty International Australia has conducted an online survey on human rights, with a sample of about 1,600 people. Survey results are published in an annual report titled the *Human Rights Barometer*. In its most recent 2022 report,[110] Amnesty International Australia observed that '[a]wareness of which rights are currently protected under Australian law remains varied and

100 'Information for People Making Complaints', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/complaint-information-service/information-people-making-complaints>; Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 317.

101 *AHRC Position Paper* (n 1) 46–8; McBeth, Nolan and Rice (n 100) 306–10.

102 *AHRC Position Paper* (n 1) 57–8, 275–6.

103 Ibid 57.

104 Ibid 58 (emphasis omitted).

105 *2009 National Human Rights Consultation Report* (n 12) 264.

106 Ibid 15.

107 Ibid 98.

108 Ibid app B.

109 Ibid 264, 362.

110 Amnesty International Australia, *2022 Human Rights Barometer* (Report, 2022) <https://www.amnesty.org.au/wp-content/uploads/2022/09/BAROMETER-2.pdf>.

seemingly not well understood'.[111] However, there was a high level of support for a Human Rights Act when participants were advised that Australia does not have one. When asked, 'Do you support or oppose Australia having a Human Rights Act?', 73% supported this proposal, with only 3% opposed and 24% neutral.[112]

The Human Rights Law Centre, in its most recent 2021 online survey with a sample of about 1,000 people, also obtained results favourable to a Human Rights Act.[113] When participants were provided with the statement, 'Australia should have a document that sets out in clear language the rights and responsibilities that everyone has here in Australia', 83% agreed.[114] When a component of 603 people were asked, '[a]t the moment, do you think a Charter of Human Rights sounds like an idea you would support?', 75% supported this proposal, with 25% opposed (with no neutral response option).[115] When the remaining smaller component of 435 people were given the option of a neutral response, 46% still supported the proposal, with 10% opposed and 43% neutral.[116]

The AHRC's Free and Equal Inquiry also undertook significant public consultation, but this did not appear to include survey research. There is of course a need to be cautious with drawing comparisons across the above survey results. The survey results are not directly comparable, with the survey research having (likely) adopted distinct methodologies, and with differently framed questions and response options. Nevertheless, it appears to suggest significant-to-high public support for the enactment of an Australian Human Rights Act.[117]

B Public Submissions

Returning to the *2009 National Human Rights Consultation Report*, the Committee received a large number of written submissions – said to be 'by far the largest response to a national consultation in Australia' at that time.[118] The Committee received 35,014 submissions in total, of which 32,091 raised the proposal for an Australian Human Rights Act.[119] The Committee's analysis revealed that of those submissions, 27,888 submissions were in favour of an Australian Human Rights

111 Ibid 4.
112 Ibid 5.
113 'COVID-19 Sees Huge Increase in Support for a Charter of Human Rights: Poll', *Human Rights Law Centre* (Web Page, 9 September 2021) <https://www.hrlc.org.au/news/2021/9/7/covid-19-sees-huge-increase-in-support-for-a-charter-of-human-rights-poll>.
114 QDOS Research, 'Charter of Human Rights 2019 and 2021' (Survey, June 2021) 4 <https://static1.squarespace.com/static/5b7e1a0be2ccd10a603592f6/t/6136bfb2573d0042b24c1d5b/1630977974312/Charter-of-Human-Rights-2019%262021-Survey.pdf>.
115 Ibid 3.
116 Ibid 2.
117 It is not only survey research conducted by advocacy groups which have recently demonstrated a high level of support for human rights protections: see Sarah Joseph, Susan Harris Rimmer and Chris Lane, 'What Did Queenslanders Think of Human Rights in 2021? An Attitudinal Survey' (2022) 41(3) *University of Queensland Law Journal* 363 <https://doi.org/10.38127/uqlj.v41i3.6245>, albeit in the context of a state human rights Act – the *QLD HRA* (n 78).
118 *2009 National Human Rights Consultation Report* (n 12) 5.
119 Ibid 6.

Act, whereas 4,203 submissions were opposed to it.[120] This constituted 87% in favour, with 13% opposed. The Committee did observe that '[a] substantial number of' submissions appeared to be 'facilitated' by lobby groups.[121]

The AHRC's Free and Equal Inquiry, which commenced in 2019, also called for written submissions. However, it appears most have not been published, so it is not possible for the author to undertake a statistical analysis.[122] The *AHRC Position Paper* described the submissions as having 'strongly supported' a statutory dialogue model.[123]

The PJCHR Inquiry launched on 22 March 2023[124] has attracted significantly less public attention, by comparison to the *2009 National Human Rights Consultation Report*. The low-key profile of the PJCHR Inquiry is reflected in the number of submissions received. According to the *AHRC Final Report*, 318 submissions to the PJCHR Inquiry were made publicly available, of which 299 raised the proposal for an Australian Human Rights Act.[125] Of those submissions, 294 submissions were in favour of an Australian Human Rights Act (either generally or the AHRC Model specifically), with 5 submissions opposed.[126] Converted into percentages, this meant that of those 299 submissions, over 98% were in favour of such a proposal, with under 2% opposed. Statistically, there was very little opposition in written submissions to the PJCHR Inquiry. Support for an Australian Human Rights Act in this forum was near unanimous. While involving a significantly smaller pool of submissions compared to the *2009 National Human Rights Consultation Report*, the author did observe that the number of lobby group-led submissions was discernibly fewer on this occasion (or at least, were far less obvious in their presentation).

IV AHRC MODEL FOR AN AUSTRALIAN HUMAN RIGHTS ACT

The AHRC has recommended[127] enactment of an Australian Human Rights Act in the form of a statutory 'dialogue' model.[128] The Australian Human Rights

120 Ibid. See also at app H.

121 Ibid 6.

122 'Australian Conversation on Human Rights' (n 33).

123 *AHRC Position Paper* (n 1) 101.

124 Mark Dreyfus, 'Review into Australia's Human Rights Framework' (Media Release, 22 March 2023) <https://ministers.ag.gov.au/media-centre/review-australias-human-rights-framework-22-03-2023>.

125 *AHRC Final Report* (n 2) 48. Out of the 318 submissions, 19 'offered no position on a Human Rights Act'.

126 Ibid.

127 Ibid 54; *AHRC Position Paper* (n 1) ch 4.

128 As to the meaning of Bills of Rights 'dialogue', see the seminal account by Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35(1) *Osgoode Hall Law Journal* 75 <https://doi.org/10.60082/2817-5069.1612>. In the Australian context, see Julie Debeljak, 'The Fragile Foundations of Human Rights Protections: Why Australia Needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 1, 39, 66 n 136 ('Human Rights Instrument'), responding to remarks by the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*') criticising the 'dialogue' model characterisation.

Act would be applicable to the Commonwealth Parliament, the Commonwealth executive and the judiciary. This model is not unfamiliar.[129] It exists at the state and territory level with the *ACT HRA*, *Victorian Charter* and *QLD HRA*. The inspiration for those human rights Acts was drawn from overseas, particularly the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*') and the United Kingdom's ('UK') *Human Rights Act 1998* (UK) ('*UK HRA*'). They also drew upon other constitutional dialogue models.[130]

The statutory dialogue model has now been in existence overseas for over 30 years.[131] While the statutory human rights Acts across the Australian, Aotearoa New Zealand and UK jurisdictions have their nuances, they possess one common underlying theme. The statutory dialogue model strikes an innovative balance between, on the one hand, preserving the Westminster system of government and parliamentary sovereignty or supremacy, and, on the other hand, ensuring the protection of human rights. Unlike a constitutional dialogue model, the 'courts cannot strike down Acts for being incompatible with human rights'.[132] A limitation is that the statutory dialogue model would not, of itself, prevent Parliament from 'routinely pass[ing] laws that are not human rights compliant', as is presently the case.[133] Rather, as the *AHRC Position Paper* explained, a dialogue model involves the three branches of government 'sharing responsibility for respecting and protecting human rights'.[134] Broadly speaking, 'Parliament considers human rights when it makes laws, the executive when it applies laws and policies, and the judiciary when it interprets laws.'[135]

The AHRC's proposed Australian Human Rights Act is said to be based on five underlying principles.[136] First, an *Australian* 'values statement' of rights and freedoms, which apply to us all.[137] Second, a *democratic* 'dialogue' model which preserves parliamentary supremacy, strengthens accountability, enhances public participation, and provides a balancing framework amongst rights and interests.[138] Third, measures which are proactively *preventative* of human rights breaches and the transformation of culture.[139] Fourth, measures which are *protective* of the marginalised and vulnerable, and enforceable domestic remedies for human rights breaches.[140] Fifth, *effective* economic benefits from improving equality of access

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129 The dialogue model is alternatively termed the 'new Commonwealth model of constitutionalism': Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 1 <https://doi.org/10.1017/CBO9780511920806>.

130 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2 ('*South African Bill of Rights*').

131 See further Debeljak, 'Human Rights Instrument' (n 128) 63–77.

132 *AHRC Position Paper* (n 1) 252.

133 Ibid 55.

134 Ibid 101.

135 Ibid (citations omitted).

136 *AHRC Position Paper* (n 1) ch 3; *AHRC Final Report* (n 2) 52.

137 *AHRC Position Paper* (n 1) 67–9.

138 Ibid 70–9.

139 Ibid 79–83.

140 Ibid 86–92.

and service quality.[141] The AHRC's five principles neatly summarised the potential benefits of the statutory dialogue model.

In the Australian states and territories, the statutory dialogue model has led to positive outcomes for the human rights of members of the public, documented by human rights advocacy groups and independent human rights agencies.[142] This goes beyond litigation, although some jurisprudential examples are provided below. The enactment of an Australian Human Rights Act would, broadly speaking, complete the missing elements of the dialogue model recommended by the *2009 National Human Rights Consultation Report*.

V ELEMENTS OF THE AHRC MODEL

A Overview

As with the *2009 National Human Rights Consultation Report*, the *AHRC Position Paper* and *AHRC Final Report* convincingly make out the case for an Australian Human Rights Act. The enactment of an Australian Human Rights Act should be strongly supported. The following elements of the AHRC Model from chapters of the *AHRC Position Paper* should be endorsed:

1. Strengthening of the Commonwealth parliamentary scrutiny regime involving the drafting of statements of compatibility and PJCHR committee scrutiny process (Chapter 13);
2. Inclusion of an interpretive clause to interpret primary and subordinate legislation (Chapter 9);
3. Non-inclusion of a declarations of inconsistency/incompatibility power for courts (Chapter 10);
4. Inclusion of a general limitations clause which makes clear that most human rights can be subject to limitations that are prescribed by law, reasonable and demonstrably justified; and applies to limitations in all their forms – on acts, decisions and legislation (Chapter 9);
5. Inclusion of public authority obligations to act compatibly with human rights and give proper consideration to human rights when making decisions (Chapter 6);

141 Ibid 92–3.

142 See, eg, Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better: Here Are 101 Cases Showing How* (Report, 2022) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/62e9d75b7c16926c8cadbdc4/1659492229319/Charter_101+Cases_08_22.pdf>; Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case Studies from the First Five Years of Operation* (Report, March 2012) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ab45dd31ae6cf2ed3804195/1521769952176/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf>; Australian Capital Territory Human Rights Commission, *20th Anniversary of the Human Rights Bill: A Collection of 20 Human Rights Case Studies* (Report, 2023) <https://www.hrc.act.gov.au/__data/assets/pdf_file/0010/2329147/20th-ANNIVERSARY-OF-THE-HUMAN-RIGHT-BILL_A-COLLECTION-OF-20-HUMAN-RIGHTS-CASE-STUDIES_2023.pdf>.

6. Continuation of the AHRC's human rights complaints handling function, but adapted to rights domestically recognised by an Australian Human Rights Act (Chapter 11); and
7. Provision of an independent cause of action so that human rights breaches by public authorities are enforceable in legal proceedings (Chapter 11).

This Part focuses on the elements proposed by the AHRC Model which are entirely new at the Commonwealth level, namely elements (2)–(7). The elements of the AHRC Model drew heavily upon the lessons learnt from the Australian Capital Territory, Victorian and Queensland experiences. The effectiveness of mechanisms under existing state and territory human rights Acts is discussed in this Part. Where relevant, suggested clarifications or enhancements to the AHRC Model have been made.

The *AHRC Position Paper* noted that one particular element of its AHRC Model is a 'key departure'[143] from the typical dialogue model – the non-inclusion of a power conferred on courts to make declarations of inconsistency or incompatibility.[144] Another non-inclusion relates to an element only sporadically seen in a dialogue model. That is, a power conferred on Parliament to override the application of a Human Rights Act. An 'override clause' of this kind exists under the *Victorian Charter*[145] and *QLD HRA*[146] (but not the *ACT HRA*). It is based on an equivalent clause (a 'notwithstanding clause') under the *Canadian Charter of Rights and Freedoms*,[147] a constitutional dialogue model. A power to override an Australian Human Rights Act is unwarranted under the statutory dialogue model,[148] given Commonwealth parliamentary supremacy is retained. The *AHRC Position Paper* wisely does not recommend its inclusion.[149]

B Interpretive Clause

The *AHRC Position Paper* recommended the enactment of an interpretive clause, requiring that federal legislation be interpreted by reference to domestically incorporated human rights, so far as is reasonably possible.[150] This obligation, of particular relevance to courts and tribunals (but applicable to anyone reading

143 *AHRC Position Paper* (n 1) 102.
144 See below Part V(C).
145 *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3 div 2 ('*Victorian Charter*').
146 *QLD HRA* (n 78) pt 3 div 2.
147 *Canadian Charter of Rights and Freedoms* (n 130) s 33.
148 See further Julie Debeljak, 'Of Parole and Public Emergencies: Why the *Victorian Charter* Override Provision Should Be Repealed' (2022) 45(2) *University of New South Wales Law Journal* 570 <https://doi.org/10.53637/TMSV9345>. The review of the *Victorian Charter* (n 145) following eight years of operation also recommended that its override clause be repealed: Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 1 September 2015) 200 <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1295292/0> ('*Eight Year Review Report*'). On recent *QLD HRA* (n 78) developments, see Danielle Pedersen, 'Balancing Children's Wellbeing and Community Safety: Overriding Queensland's Human Rights Act', *University of New South Wales Australian Human Rights Institute* (Blog Post) <https://www.humanrights.unsw.edu.au/students/blogs/overriding-queensland-human-rights-act>.
149 Indeed, the *AHRC Position Paper* (n 1) makes no mention of this issue at all.
150 Ibid ch 9.

legislation), is directed at interpretation. As explained above, it does not allow for the invalidation of primary legislation in contrast to constitutional Bills of Rights like the *Canadian Charter of Rights and Freedoms*.

The AHRC's inclusion of an interpretive clause, and in particular a condition that the human rights interpretation must be 'reasonably possible', should be endorsed.[151] That is the approach taken under earlier *NZ BORA* jurisprudence in respect of its interpretive clause.[152] The author has previously advocated for a 'reasonably open' approach to interpretation under the *Victorian Charter*,[153] which is substantively the same concept. A 'reasonably possible' approach would align with existing common law approaches to statutory interpretation (such as a purposive approach to interpreting legislation, the presumption of constitutionality, and the principle of legality). Nevertheless, the AHRC is correct in having suggested that in practice an interpretive clause under an Australian Human Rights Act 'should be stronger than approaches broadly equivalent to the principle of legality'.[154] That is because an interpretive clause has a 'democratic mandate' as a direction from Parliament to the courts.[155]

The AHRC's proposed drafting for an interpretive clause is set out below.[156] It should be supported, subject to the following minor amendments (in bold):

> Interpretation of federal laws
>
> All primary and subordinate Commonwealth legislation is to be interpreted, so far as is reasonably possible, in a manner that is ~~**consistent**~~ **compatible** with human rights.
>
> If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent **reasonably** possible ~~**that is consistent with its purpose**~~, be interpreted in a way that is most compatible with human rights.

The suggested amendments ensure that there is consistency in terminology ('compatible' rather than 'consistent'), and consistency in approach ('reasonably possible') within the interpretive clause itself. The suggested amendment to 'compatible', rather than 'consistent', helps to make clear the link between the interpretive clause and general limitations clause.[157] This is particularly significant, given the uncertainty arising from *Momcilovic v The Queen* ('*Momcilovic*').[158]

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151 Ibid 251–3. Cf Julie Debeljak, Submission No 15 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (June 2023) 68–70 ('Submission No 15').

152 *R v Hansen* [2007] 3 NZLR 1 ('*Hansen*'). Cf *Fitzgerald v The Queen* [2021] 1 NZLR 551, 578–9 [58] (Winkelmann CJ).

153 Bruce Chen, 'Revisiting Section 32(1) of the *Victorian Charter*: Strained Constructions and Legislative Intention' (2020) 46(1) *Monash University Law Review* 174, 219–21 ('Revisiting Section 32(1) of the *Victorian Charter*'). See also Law Council of Australia, Submission No 120 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (3 July 2023).

154 *AHRC Position Paper* (n 1) 251. See at 24. See also Pamela Tate, Submission No 61 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (29 June 2023) 3 ('Submission No 61'); Debeljak, 'Submission No 15' (n 151) 50.

155 Chen, 'The Principle of Legality and s 32(1) of the *Victorian Charter*' (n 71) 453; *Eight Year Review Report* (n 148) 144, 146.

156 *AHRC Position Paper* (n 1) 253. See also *AHRC Final Report* (n 2) 61.

157 See below Part V(D).

158 *Momcilovic* (n 128).

That case, which was decided over a decade ago, remains the most significant authority on a state and territory human rights Act. In *Momcilovic*, there was a lack of a binding majority as to whether justification and proportionality testing applies to interpretation, or to the declarations power.[159] That doubt arose because under the *Victorian Charter* there was no definition of 'compatible' as referred to in the interpretive clause, and the declarations power referred to 'consistently' rather than 'compatibly'. Another suggested amendment is that it is unnecessary to include the words 'that is consistent with its purpose'. Courts and tribunals would in any event apply the interpretive clause having regard to not only the purpose of the legislation being interpreted, but also its text and context.

There were initial fears from certain sections that the *Victorian Charter* would encourage judges to trespass beyond the boundaries of judicially interpreting to judicially legislating, thus breaching the separation of powers under the *Constitution*. This was by reference to UK cases such as *Ghaidan v Godin-Mendoza*[160] and *R v A [No 2]*.[161] Those authorities provided that the equivalent interpretive clause under the *UK HRA*[162] allowed courts to 'depart from the unambiguous meaning'[163] of a statutory provision, and to 'do considerable violence to the language'[164] in certain circumstances.[165] In Australia, courts are sometimes willing to depart from the natural or ordinary meaning of legislation as a matter of statutory interpretation.[166] However, the above is said to go beyond traditional Australian orthodoxy. Indeed, in *Momcilovic*, Heydon J (dissenting) was the only member of the High Court to find that the *Victorian Charter*'s interpretive clause was at least as strong as the UK approach. But this meant it was constitutionally invalid.[167]

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159 *AHRC Position Paper* (n 1) 252, citing ibid 50 [51] (French CJ), 91–2 [166]–[170] (Gummow J), 123 [280] (Hayne J), 200 [512], 217 [565], 221 [579] (Crennan and Kiefel JJ), 250 [684] (Bell J). See also Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the *Victorian Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340 <https://doi.org/10.2139/ssrn.2603929>; Chen, 'Revisiting Section 32(1) of the *Victorian Charter*' (n 153).

160 [2004] 2 AC 557 ('*Ghaidan*').

161 [2002] 1 AC 45.

162 In any event, these are very early UK authorities. As a recent UK review report has said, 'Parliament has not itself over the last twenty years considered that there was a systematic problem with the UK Courts' exercise of the duty imposed on them by [the UK *Human Rights Act*'s interpretive clause]': *The Independent Human Rights Act Review* (Report, December 2021) 207 [64].

163 *Ghaidan* (n 160) 571 [30] (Lord Nicholls).

164 Ibid 585 [67] (Lord Millett).

165 Although the strength of that interpretive clause is qualified by the notion that the interpretation is not 'inconsistent with a fundamental feature' of the legislation, and 'must be compatible with the underlying thrust of the legislation': ibid 572 [33] (Lord Nicholls). See also at 586 [68] (Lord Millett).

166 See discussion in *ENT19 v Minister for Home Affairs* (2023) 410 ALR 1, 24–5 [86]–[87] (Gordon, Edelman, Steward and Gleeson JJ); *R v A2* (2019) 269 CLR 507; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ); *Esso Australia v Australian Workers' Union* (2017) 263 CLR 551, 582 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] n 56 (McHugh, Gummow, Kirby and Hayne JJ) (including by reference to the common law principle of legality); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

167 *Momcilovic* (n 128) 183–5 [454]–[456] (Heydon J).

The Victorian experience has ultimately not lived up to those initial fears. The interpretive clause under state and territory human rights Acts has been applied modestly, particularly post-*Momcilovic*. If anything, in Victoria there has been criticism that the interpretive clause has not been utilised enough.[168] Nevertheless, it has provided support for positive outcomes under the *ACT HRA*, *Victorian Charter* and *QLD HRA*. Several examples can be provided.

HYY (Guardianship) was about forcible physical restraint to ensure compliance with medical treatment.[169] A decision to apply physical restraint could not be made by an appointed guardian under the *Guardianship and Administration Act 2019* (Vic), without authorisation by order of the Victorian Civil and Administrative Tribunal. Human rights including the right to equality were engaged.

In *SF v Department of Education*,[170] disclosure of a residential street number and name, where the applicant had moved with her children to escape family violence, was not required for an application for home schooling under the *Education (General Provisions) Act 2006* (Qld), pursuant to the rights to equality, privacy, protection of children, and access to education.

Victorian Toll v Taha related to a court's power to order a person owing outstanding fines to be imprisoned.[171] This power could not be exercised without first considering the statutory exceptions of whether the person has a mental or intellectual impairment or whether other special circumstances applied under the *Infringements Act 2006* (Vic), compatibly with the rights to liberty, fair hearing and equality.

In *Davidson v Director-General, Justice and Community Safety Directorate*,[172] a statutory obligation under the *Corrections Management Act 2007* (ACT) – to ensure, as far as practicable, that prison detainees have access to open air and can exercise for at least one hour each day – required a suitable space and could not be denied on an ongoing basis, compatibly with the right to humane treatment when deprived of liberty. A small, fully enclosed courtyard covered with a metal mesh roof did not meet that requirement.

The freedom of information case of *Marke v Victoria Police FOI Division (Review and Regulation)* concerned documents which a complainant sought from Victoria Police in response to their complaint, referred from the Independent Broad-based Anti-corruption Commission.[173] These documents could not be exempted from disclosure under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). Properly construed, no 'investigation' had actually been conducted under that Act, pursuant to the right to freedom of expression including to seek, *receive* and impart information.

In *PBU v Mental Health Tribunal*, two persons with mental health illnesses were wrongly found to not have capacity to refuse electroconvulsive treatment

168 Chen, 'Revisiting Section 32(1) of the *Victorian Charter*' (n 153).
169 [2022] VCAT 97.
170 [2021] QCAT 10.
171 (2013) 49 VR 1.
172 (2022) 18 ACTLR 1 ('*Davidson*').
173 [2018] VCAT 1320.

under the *Mental Health Act 2014* (Vic).[174] The Victorian Supreme Court quashed the orders on appeal, interpreting the Act compatibly with the rights to equality, not to be subjected to medical treatment without free consent, and privacy.

Such outcomes must of course be read in light of the text, context and purpose of the legislation being interpreted. None of the interpretations reached could be said to involve the radical 'rewriting' of statutes. They do not attract the concerns regarding the 'very strong and far reaching'[175] approach to the *UK HRA*'s interpretive clause in cases such as *Ghaidan v Godin-Mendoza*. The Australian cases do however illustrate that an interpretive clause still enables the courts to ensure some protection of human rights, where the statutory provision is 'capable of more than one meaning',[176] or in other words, '[w]here more than one interpretation of a provision is available'.[177]

C Non-inclusion of Declarations of Inconsistency/Incompatibility

Under the *ACT HRA*, *Victorian Charter* and *QLD HRA*, a power to make declarations of inconsistency or incompatibility for legislation is conferred on their Supreme Courts and Courts of Appeal.[178] In instances where those courts are unable to apply the interpretive clause to reach a human rights compatible interpretation, the courts may instead make a declaration that the legislation is inconsistent or incompatible. The intention is to facilitate a dialogue with and response from the executive and Parliament. As noted earlier, the AHRC's proposal not to include a formal declarations power is a departure from the typical dialogue model. This should be supported, based on Australian state and territory experiences.

First, *Momcilovic* cast real doubt over the constitutional validity of the declarations power in the Victorian context. The High Court by a bare 4:3 majority upheld the power under the *Victorian Charter*.[179] However, such concerns as to constitutional validity are exacerbated at the federal level, where a strict separation of judicial powers exists. Second, state and territory experiences have shown that the declarations power has rarely been exercised by the courts.[180] In contrast to overseas jurisdictions, particularly the UK, the declarations power has not proven a particularly effective mechanism for promoting dialogue on the impacts of legislation on human rights. Third, the non-inclusion of a declarations power would not necessarily prevent federal courts from reaching a finding or indicating

174 (2018) 56 VR 141.

175 *Sheldrake v DPP (UK)* [2005] 1 AC 264, 303 [28] (Lord Bingham).

176 *Slaveski v Smith* (2012) 34 VR 206, 215 [24] (Warren CJ, Nettle and Redlich JJA).

177 *R v DA* (2016) 263 A Crim R 429, 443 [44] (Ashley, Redlich and McLeish JJA). See also *Momcilovic* (n 128) 50 [50] (French CJ) ('[i]t operates upon constructional choices which the language of the statutory provision permits').

178 *ACT HRA* (n 78) s 32; *Victorian Charter* (n 145) s 36; *QLD HRA* (n 78) s 53.

179 *Victorian Charter* (n 145) s 36.

180 See Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the *Victorian Charter*' (2021) 44(3) *Melbourne University Law Review* 928. The declaration of inconsistency issued by the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436 was set aside on appeal to the High Court of Australia. The Australian Capital Territory Supreme Court has issued two declarations of incompatibility: *Re Application for Bail by Islam* (2010) 4 ACTLR 235; *Davidson* (n 172). There has yet to be a declaration of incompatibility in Queensland.

(both short of making a formal declaration) that the legislation is incompatible with human rights.[181] As noted in the *AHRC Position Paper*, this is likely to form part of the courts' reasoning process when determining it is not possible to apply the interpretive clause.[182] That is, where it is not 'reasonably possible' to interpret the legislation at issue compatibly with human rights. Fourth, it would grant the courts some space to decide the limits of when it can interpret legislation compatibly with human rights under the interpretive clause, without the distraction of a 'back up' declarative remedy.[183]

As to *who* should be required to give notice of a finding of incompatible legislation, the *AHRC Position Paper* recommended that this be done by the federal Attorney-General, rather than involving the courts themselves in the process (as is usually the case under a dialogue model).[184] However, concern has been expressed in submissions to the PJCHR Inquiry that this may still be at risk of unconstitutionality.[185]

D General Limitations Clause

The *AHRC Position Paper* recommended the enactment of an overarching limitations clause – commonly known as a 'general limitations clause'.[186] This makes clear that (most) human rights can be subject to limitations that are 'prescribed by law' (concept of lawfulness), 'reasonable' and 'demonstrably justified' (concept of justification and proportionality).[187] This approach is consistent with the state and territory human rights Acts, as well as Bills of Rights in overseas jurisdictions including Canada and Aotearoa New Zealand.[188] It would also be consistent with the PJCHR's analytical framework to scrutinising Bills and legislative instruments.[189]

The inclusion of a general limitations clause which makes clear that it applies across the Australian Human Rights Act should be endorsed.[190] Potential human rights limitations in all their forms – on acts, decisions or statutory provisions[191] – should be subject to the requirements of being lawful, justified and proportionate. A general limitations clause provides an important analytical framework for policy,

181 In the Aotearoa New Zealand context, such an indication is known as a '*Hansen* indication' from the leading authority of *Hansen* (n 152). In the UK context, some judges were open to the potential of reaching a finding of incompatibility in the absence of a declaration: *R (Nicklinson) v Ministry of Justice* [2015] AC 657, 791–2 [112]–[113] (Lord Neuberger PSC, Lord Wilson JSC agreeing at 819 [196]), 817–8 [190]–[191] (Lord Mance JSC).

182 *AHRC Position Paper* (n 1) 262.

183 See Matthew Groves, 'Interpreting the Effect of Our Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights: A Decade On* (Federation Press, 2017) 2, 20–1.

184 *AHRC Position Paper* (n 1) 263.

185 See Tate, 'Submission No 61' (n 154) 4.

186 *AHRC Position Paper* (n 1) ch 9.

187 Ibid 255.

188 The factorial approach under the general limitations clause is based on section 36 of the *South African Bill of Rights* (n 130).

189 See Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015) ii, 7–8 [1.12]–[1.22] <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf?la=en&hash=BAC693389A29CE92A196FEC77252236D78E9ABAC>.

190 See Tate, 'Submission No 61' (n 154) 3; Debeljak, 'Submission No 15' (n 151) 42, 51.

191 *AHRC Position Paper* (n 1) 253.

decision and law-making to determine when limitations will be 'compatible' with human rights. Under the *Victorian Charter*, the application of a general limitations clause has been particularly contested with respect to the interpretive clause. As the author has previously summarised in the *Victorian Charter* context:

> (1) as a concept, human rights are not absolute and are balanced against each other and competing public interests and policy objectives [(an exception is in relation to absolute rights, such as the right not to be subjected to torture)];
>
> (2) applying [a general limitations clause] to [the interpretive clause] is consistent with the approach taken in comparative jurisdictions with Bills of Rights, and broadly consistent with international human rights law;
>
> (3) it recognises the central importance of [a general limitations clause] and ensures consistency of the meaning of 'compatible' under the *Victorian Charter*, across all aspects of its operation …; [and]
>
> (4) otherwise, it would introduce anomalous outcomes across the *Victorian Charter*'s operation (eg statements of incompatibility being issued on a regular basis, and public authorities being found in breach, even where their acts or decisions are reasonable and demonstrably justified) …[192]

This relationship between the general limitations clause and interpretive clause has been helpfully clarified under the *QLD HRA*.[193] Clarifying this relationship is not without a degree of constitutional risk. Some justices in *Momcilovic* did not consider that justification and proportionality were appropriate in the context of interpretation.[194] Nevertheless, the High Court has since become more comfortable with assessing the justification and proportionality of legislation, at least in the context of challenges to the constitutionality of legislation.[195]

Sometimes under state and territory human rights Acts, limitations are specified within certain human rights (commonly known as 'internal limitations'). For example, the right not to have 'privacy, family, home or correspondence *unlawfully* or *arbitrarily* interfered with',[196] and the right to freedom of expression being 'subject to lawful restrictions reasonably necessary' on specified grounds.[197] When operating in conjunction with a general limitations clause applicable across rights, there is 'a "double up" in the limitations process'.[198] Given this, the *AHRC Position Paper* recommended that reliance be placed on the general limitations clause, and that internal limitations not be enacted under an Australian Human Rights Act.[199] This recommendation should be supported so far as possible.[200] The Victorian Court of

192 Chen, 'The Principle of Legality and s 32(1) of the *Victorian Charter*' (n 71) 456.

193 See *QLD HRA* (n 78) s 8.

194 *Momcilovic* (n 128) 43 [34] (French CJ) ('a proportionality assessment of the reasonableness of legislation is not an interpretive function'), 172 [431] (Heydon J) ('[it] creates difficult tasks. … But they are not tasks for judges'), 219–20 [574] (Crennan and Kiefel JJ) ('[it] contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision').

195 See *McCloy v New South Wales* (2015) 257 CLR 178; *Comcare v Banerji* (2019) 267 CLR 373; *Palmer* (n 43).

196 See, eg, *Victorian Charter* (n 145) s 13(a) (emphasis added).

197 See, eg, ibid s 15(3).

198 *ARHC Position Paper* (n 1) 254.

199 Ibid.

200 There are examples of internal limitations under the *AHRC Position Paper* (n 1) which could be removed. For example, the right not to have a person's privacy, family, home or correspondence *unlawfully* or

Appeal case of *Thompson v Minogue* demonstrates how the overlaps (and shifting onuses) between internal limitations and the general limitations clause have proven technically challenging for the courts (and litigants) to address.[201]

E Public Authority Obligations ('Positive Duty')

The *AHRC Position Paper* recommended that a 'positive duty' be imposed on Commonwealth public authorities to act compatibly with human rights (substantive obligation) and to give proper consideration to human rights when making decisions (procedural obligation).[202] It is preferable to frame the public authority obligations as a positive duty, rather than as a negative duty like under the state and territory human rights Acts.[203]

The public authority obligations are primarily imposed on the executive (they only apply to courts when acting in an administrative capacity). Under the state and territory human rights Acts, they are where much of the heavy lifting has been done within the public service (and when resort to litigation has been necessary). Experienced public servants within government,[204] as well as independent observers,[205] have remarked on the proactive nature of these obligations in embedding a human rights culture in the everyday work of government. They require that public authorities seriously turn their minds to human rights impacts and reach human rights compatible outcomes. The public authority obligations play an important role in the exercise of discretionary powers. As discussed earlier, they go further than the 'rights-based' common law principles of statutory interpretation.[206] Those principles are not concerned with the manner in which discretionary powers are exercised and whether proportionate outcomes are reached. The public authority obligations also go beyond traditional common law grounds of judicial review.[207]

The positive duty under the *AHRC Position Paper* refers to *acts* for the substantive obligation and *decisions* for the procedural obligation.[208] This reflects the drafting of the *Victorian Charter* and *ACT HRA*.[209] However, in practice

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arbitrarily interfered with; no person shall be *arbitrarily* deprived of the right to enter their own country: see at app 'Rights Content with Commentary'.

201 *Thompson v Minogue* (2021) 67 VR 301 ('*Thompson*').

202 *AHRC Position Paper* (n 1) 139.

203 Under the state and territory human rights Acts, these are obligations *not* to act *in*compatibly with or *fail* to give proper consideration to human rights.

204 Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020) 209, 211, 227; Kent Blore and Brenna Booth-Marxson, 'Breathing Life into the *Human Rights Act 2019* (Qld): The Ethical Duties of Public Servants and Lawyers Acting for Government' (2022) 41(1) *University of Queensland Law Journal* 1 <https://doi.org/10.38127/uqlj.v41i1.6351>.

205 Helen Watchirs, 'Reflections on the ACT's Human Rights Bill 20 Years On: Lessons for the National Inquiry' (2023) 268 (Winter) *Ethos* 26, 28, 31, 33–4; *Eight Year Review Report* (n 148) 55, 68–9.

206 See above Part II(C).

207 See *Bare* (n 91); *Thompson* (n 201).

208 *AHRC Position Paper* (n 1) 16, 20, 139.

209 Cf *QLD HRA* (n 78) s 58(1).

'decisions are often implemented by acts, and acts involve the decision to act'.[210] The AHRC proposed that the public authority obligations be treated cumulatively.[211] This would mean that a public authority must both give proper consideration to human rights *and* reach a human rights compatible outcome, regardless of whether an act or decision is involved. The AHRC also recommended that a less formal test than the general limitations clause be applied to the procedural obligation, as 'in some circumstances it will not be appropriate to require a detailed process of consideration'.[212] That would reflect, the AHRC said, the current state of the law under the *ACT HRA* and *Victorian Charter*.[213]

That being so, a positive duty under an Australian Human Rights Act should ensure that it makes clear that a public authority must give proper consideration to human rights when *acting or* making a decision; and act *or make a decision* compatibly with human rights.[214]

In terms of scope of application of the positive duty, the *AHRC Position Paper* proposed that the positive duty apply to not only 'core' public authorities (public bodies), but also 'functional' public authorities (private bodies performing public functions).[215] This should be endorsed. It is a common feature for human rights Acts and is especially important to ensure accountability, given the level of privatisation and contracting out in modern government including in service delivery.[216] The AHRC also recommended the conferral of a power, similar to that under the *Victorian Charter*, to make regulations to clarify that certain entities are public authorities[217] (as well as an 'opt-in clause' for non-public authorities).[218] This is also appropriate to help foster a human rights culture both within and beyond the Commonwealth Government.

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210 Judicial College of Victoria, '3.2. Obligations on Public Authorities (s 38)', *Charter of Human Rights Bench Book* (Web Page, 4 January 2023) <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57276.htm>. See also Emilios Kyrou, 'Obligations of Public Authorities under Section 38 of the *Victorian Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria Online Journal* 77, 78.

211 *AHRC Position Paper* (n 1) 143.

212 Ibid 145.

213 Ibid. Cf *QLD HRA* (n 78) s 58(5)(b).

214 Alternatively, to avoid conceptual confusion, the positive duty could simply refer to 'act' (and 'acting'), and define this as including a 'decision' (and 'making a decision').

215 *AHRC Position Paper* (n 1) 146–50.

216 See ibid 146. On this modern government phenomenon, see also Independent Panel of the Australian Public Service Review, *Our Public Service Our Future: Independent Review of the Australian Public Service* (Report, 20 September 2019) <https://www.pmc.gov.au/sites/default/files/resource/download/independent-review-aps.pdf>; Senate Finance and Public Administration References Committee, Parliament of Australia, *APS Inc: Undermining Public Sector Capability and Performance* (Report, November 2021) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024628/toc_pdf/APSIncunderminingpublicsectorcapabilityandperformance.pdf;fileType=application%2Fpdf>; 'Inquiry into Management and Assurance of Integrity by Consulting Services', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Consultingservices>.

217 *AHRC Position Paper* (n 1) 151.

218 Ibid 150–1.

At the same time, the *AHRC Position Paper* recommended the use of regulations to clarify that certain entities are *not* public authorities.[219] This should not be supported. In Victoria, a similar clarifying power has become a de facto exemptions power.[220] The exemption of the Victorian parole boards from the operation of the *Victorian Charter* provides a cautionary tale. Initially, this was to allow Victorian parole boards 'an extended time to prepare themselves for *Charter* compliance'.[221] These exemptions have continued to operate since the *Victorian Charter* fully commenced operation over 15 years ago.[222] As part of a review of the *Victorian Charter* following eight years of operation ('*Eight Year Review Report*'), a number of prominent stakeholders submitted that the power to exempt public authorities by regulation was inappropriate and should be repealed.[223] Whether an entity falls outside the public authority definition should be a matter for clarification by the courts.

F AHRC Complaints Handling Function

The *AHRC Position Paper* recommended that its existing human rights complaints jurisdiction be adapted. It proposed that the AHRC conciliate human rights complaints against public authorities by reference to domestically recognised human rights under an Australian Human Rights Act, rather than by reference to international human rights instruments.[224]

This proposal to retain and refine the AHRC's human rights complaints handling jurisdiction is crucial. At the state level, the lack of a dispute resolution process handled by the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), for complaints exclusively about human rights breaches, is a significant weakness in the *Victorian Charter* scheme. VEOHRC has advocated in favour of that function for some time.[225] The conferral of a dispute resolution function (including conciliation) on the Queensland Human Rights Commission under the subsequent *QLD HRA* is a significant advancement and has already begun to bear fruit.[226] The Australian Capital Territory has followed suit with a dispute resolution function.[227]

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219 Ibid 151.

220 Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to Michael Brett Young, *Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (June 2015) 58.

221 Ibid 59.

222 Most recently under the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2023* (Vic) reg 5.

223 See *Eight Year Review Report* (n 148) 67.

224 *AHRC Position Paper* (n 1) 59, 275–8.

225 See, eg, Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to Scrutiny of Acts and Regulations Committee, *Four Year Review of the Charter of Human Rights and Responsibilities Act 2006* (1 July 2011) 116–17 <https://www.humanrights.vic.gov.au/static/16c54603134736c7df204bc45da060f7/Submission-Scrutiny_of_Acts_and_Regulations_Committee-Four_year_review-Charter_review_submission-Jul_2011.pdf>.

226 See Queensland Human Rights Commission, *Shifting the Focus: The Third Annual Report on the Operation of Queensland's Human Rights Act 2019: 2021–22* (Report, 2022) 99–129 <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0006/41379/ShiftingTheFocus_HumanRightsActAnnualReport_2021-22.pdf>.

227 *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT).

The *AHRC Position Paper* suggested that complaints processes could also be embedded in public sector oversight bodies, such as the Australian Public Service Commission.[228] Further to this, the author suggests that jurisdiction should also be given to the Commonwealth Ombudsman and National Anti-Corruption Commission to investigate human rights breaches by public authorities as part of their existing roles. As the Commonwealth Ombudsman stated in its submissions to the PJCHR Inquiry, 'the promotion and protection of human rights, the promotion of good governance and respect for the rule of law, are all integral to the role of Ombudsmen'.[229]

The Victorian experience has shown that such functions could potentially be complementary and led to state integrity bodies bringing to light significant human rights issues within the Victorian public service.[230] During the COVID-19 pandemic, the Victorian Ombudsman investigated and reported breaches of public authority obligations in implementing a 'hard lockdown' of public housing towers,[231] and concerns about proper consideration of human rights in administering exemption permits during Victorian state border closures.[232] Explicit reference to this kind of jurisdiction should be made under the Australian Human Rights Act itself, to ensure general public awareness of this important function of federal integrity bodies.

G Independent Cause of Action and Remedies

The *AHRC Position Paper* sought to advance the present position under federal law regarding the lack of judicial enforcement and remedies, outlined earlier in this article.[233] It recommended an independent (or 'standalone') cause of action, available to individuals or groups,[234] for claims of breach of the public authority obligations. This would mean that where conciliation before the AHRC is unsuccessful or inappropriate (or if the matter is urgent), a litigant can bring such claims independently in the federal courts.[235] This is broadly equivalent to

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228 *AHRC Position Paper* (n 1) 280.

229 Commonwealth Ombudsman, Submission No 197 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (3 July 2023) 2 [2], citing *The Role of the Ombudsman and Mediator Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law*, GA Res 75/186, UN Doc A/RES/75/186 (28 December 2020, adopted 16 December 2020).

230 See, eg, Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (Report, August 2021) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/the-ombudsman-for-human-rights-a-casebook/>; Independent Broad-based Anti-corruption Commission, *Police Misconduct Issues and Risks Associated with Victoria Police's Critical Incident Response Team: Special Report* (Report, October 2022); Independent Broad-based Anti-corruption Commission, *Victoria Police Handling of Complaints Made by Aboriginal People* (Audit Report, May 2022).

231 Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (Report, 17 December 2020) 18, 179 <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/Public-housing-tower-lockdown/Victorian-Ombudsman-report-Investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-COVID-19-hard-lockdown-in-July-2020.pdf>.

232 Victorian Ombudsman, *Investigation into Decision-Making under the Victorian Border Crossing Permit Directions* (Report, 7 December 2021) 103 <https://assets.ombudsman.vic.gov.au/assets/Investigation-into-decision-making-under-the-Victorian-Border-Crossing-Permit-Directions_Dec-2021.pdf>.

233 See above Part II(C).

234 *AHRC Position Paper* (n 1) 284–5.

235 Ibid 280–2.

the process for unlawful discrimination complaints under federal law.[236] Although the effectiveness of the unlawful discrimination complaints process has been questioned from time to time,[237] the approach suggested by the AHRC is an appropriately cautious and pragmatic one for now.

Alternatively, the *AHRC Position Paper* proposed that a litigant can rely on the public authority obligations to supplement other legal proceedings.[238] For example: in merits review proceedings before the Administrative Appeals Tribunal (the Commonwealth Government has since introduced a Bill intended to replace it),[239] the tribunal would itself be a public authority and therefore bound by the procedural and substantive obligations; and in judicial review proceedings before the federal courts reviewing the decision of a first instance decision-maker.[240]

The *AHRC Position Paper* recommended 'grant[ing] courts a broad discretion over remedies'.[241] As the AHRC pointed out, '[t]he right to an effective remedy is central to the *ICCPR* – and to international human rights in general'.[242] Unfortunately, Australia is often found to be non-compliant with international human rights law, for failing to provide an effective remedy for human rights breaches.[243] The AHRC's proposal for an independent cause of action is consistent with international human rights law. The *AHRC Position Paper* cited Pamela Tate KC, who suggested that failure to provide an independent cause of action might even be unconstitutional.[244] Tate noted in the *Victorian Charter* context: '[T]he *ICCPR* provides for a right to an effective remedy and this is not reflected in the

236 Ibid.

237 See, eg, Australian Centre for Disability Law, Submission No 203 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (6 July 2023); Disability Discrimination Legal Service, Submission No 270 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 June 2023); Australian Federation of Disability Organisations, Submission No 274 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (August 2023). See also Monash University Law School, 'Panel: A Human Rights Act for Australia' (YouTube, 26 September 2023) 0:52:20–1:11:16 <https://www.youtube.com/watch?v=4-_sDqTCIUY>.

238 *AHRC Position Paper* (n 1) 282–4.

239 See Administrative Review Tribunal Bill 2023 (Cth).

240 As to the differences between judicial review on traditional common law grounds, and on breach of public authority/entity obligations grounds, see Pamela Tate, 'Judicial Review and Rights Review' (2023) 30(1) *Australian Journal of Administrative Law* 30; Groves (n 183) 5–6.

241 *AHRC Position Paper* (n 1) 275. This included awards of damages, which goes beyond the *ACT HRA* (n 78), *Victorian Charter* (n 145) and *QLD HRA* (n 78).

242 *AHRC Position Paper* (n 1) 268, citing *ICCPR* (n 7) art 2(3). See also *AHRC Position Paper* (n 1) 108.

243 In the context of the *ICCPR* (n 7), see, eg, Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997, adopted 3 April 1997); Human Rights Committee, *Views: Communication No 1885/2009*, 110th sess, UN Doc CCPR/C/110/D/1885/2009 (5 June 2014, adopted 27 March 2014); Human Rights Committee, *Views: Communication No 193/2010*, 112th sess, UN Doc CCPR/C/112/D/1973/2010 (26 January 2015, adopted 21 October 2014). See also Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [3.3].

244 *AHRC Position Paper* (n 1) 268, citing Pamela Tate, 'Human Rights in Australia: What Would a Federal Charter of Rights Look Like?' (2009) 13 *Southern Cross University Law Review* 1, 20 ('What Would a Federal Charter of Rights Look Like?').

[*Victorian Charter*]. There is no stand-alone simple cause of action against public authorities under the [*Victorian Charter*].'[245]

Tate went on to say, in the federal context:[246]

> Would a federal [Human Rights Act] that sets out the rights contained in the *ICCPR* without providing for an effective remedy when those whose rights are violated, be … reasonably capable of being seen as appropriate and adapted to giving effect to the treaty? … [W]e must consider how important the right to an effective remedy is in the context of the *ICCPR*, and therefore whether its omission would render a federal Charter invalid.[247]

Aside from compliance with international human rights law, making human rights judicially enforceable is also necessary as an incentive for public authority compliance. As the *Eight Year Review Report* found, '[t]he lack of consequences … influences leadership, oversight, workplace culture and, in the end, whether effect is given to fundamental human rights'.[248] Further, for claims of breach made against functional public authorities, an independent cause of action could mitigate an oversight gap existing in Australian administrative law with respect to acts or decisions by private actors.[249]

An independent cause of action is highly preferable to the position under the *Victorian Charter* and *QLD HRA*. Those human rights Acts contain a 'piggyback' provision in relation to claims of breaches of public authority/entity obligations,[250] although even that description is debatable. By way of example, an extract of the *Victorian Charter* clause is set out below:

> 39 Legal proceedings
>
> (1) If, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this *Charter*.

The Victorian and Queensland experiences show us that such a provision gives rise to a host of unnecessarily complex questions. Some are listed below.[251]

First, whether a litigant must be successful on a non-Human Rights Act claim to be able to 'seek' a Human Rights Act claim for breach by a public authority/entity. The Victorian case law has clarified that the answer is 'no'.[252] The subsequently

245 Tate, 'What Would a Federal Charter of Rights Look Like?' (n 244) 11.

246 By reference to the external affairs power under section 51(xxix) of the *Constitution*.

247 Tate, 'What Would a Federal Charter of Rights Look Like?' (n 244) 18–19.

248 *Eight Year Review Report* (n 148) 86. See also at 12, 27, 51–2, 118, 124.

249 This is the '*Datafin*' issue: *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815. In Australia, it remains unresolved at common law whether a decision by a private body performing a public function may be subject to judicial review. See also Janina Boughey, 'The Scope and Application of the Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights: A Decade On* (Federation Press, 2017) 36, 40–1, 43–4.

250 *Victorian Charter* (n 145) s 39; *QLD HRA* (n 78) s 59.

251 Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 10 <https://doi.org/10.1177/1037969X19899661>.

252 *Goode v Common Equity Housing Ltd* [2014] VSC 585; *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 598 [549]–[550] (Dixon J) ('*Certain Children [No 2]*').

enacted *QLD HRA* has expressly clarified that a litigant need not be successful on a non-*QLD HRA* claim to be able to 'seek' a *QLD HRA* claim.[253]

Second, whether 'factual availability' is sufficient – in the sense that a litigant must 'seek' (or at least be able to 'seek'), a non-Human Rights Act claim to be able to 'seek' a Human Rights Act claim.[254] Adoption of this approach would give rise to a number of sub-questions, such as:

- Whether the non-Human Rights Act claim must be able to survive an application for strike out or summary dismissal.[255]
- Whether the non-Human Rights Act claim must be 'non-colourable' in the sense that it is not 'made for the improper purpose of "fabricating" jurisdiction'[256] – ie, 'bona fide and not spurious, hypothetical, illusory or misconceived'.[257]
- Whether the non-Human Rights Act claim must be unlawful 'in an administrative law sense'.[258] For example, whether tort claims (and which kinds) are a form of non-Human Rights Act unlawfulness which can support a Human Rights Act claim for relief or remedy.[259]

Third, and alternatively, whether some of kind of 'abstract availability' is sufficient – in the sense that the relief or remedy for the Human Rights Act claim is merely available 'in principle' and the litigant 'has the right process, the right court and is within time'.[260]

Fourth, the extent to which a tribunal has jurisdiction to hear claims of Human Rights Act breach by a public authority,[261] and the extent to which it does not have

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253 *QLD HRA* (n 78) s 59(2). See also *SQH v Scott* (2022) 10 QR 215, 254 [103], [105] (Williams J) ('*SQH*'). However, the provision still renders the public entity obligations 'imperfect': Blore and Booth-Marxson (n 204) 11.

254 This is the predominant approach taken under the *Victorian Charter* (n 145) and *QLD HRA* (n 78). See Mark Moshinsky, 'Bringing Legal Proceedings against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria Online Journal* 91, 96–7. This was cited in *Bare* (n 91) 258–9 [394] (Tate JA); *Thorpe v Head, Transport for Victoria* (2021) 66 VR 56, 101–4 [148]–[158], 107 [172] (Forbes J) ('*Thorpe*'). See also *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623, 679 [268]–[269], 680 [275] (Ryan J); *SQH* (n 253) 251 [83] (Williams J); *Sandy v Queensland Human Rights Commissioner* (2022) 12 QR 556, 582–3 [94]–[96] (Williams J); *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, [367]–[368] (Freeburn J).

255 *Djime v Kearnes* [2019] VSC 117, [153] (Cavanough J); *Thorpe* (n 254) 101–2 [149]–[150], 107 [172] (Forbes J).

256 *Kheir v Robertson* [2019] VSC 422, [101] (McDonald J).

257 Ibid, quoting *Edge Technology Pty Ltd v Lite-On Technology Corporation* (2000) 156 FLR 181, 186 [31] (Santow J). See also *Thorpe* (n 254) 101 [149] (Forbes J); *Sloan v Victoria* [2021] VCAT 933, [44]–[45], [71] (Senior Member Hoysted).

258 *Slattery v Manningham CC* [2013] VCAT 1869, [152], [160] (Senior Member Nihill) ('*Slattery*').

259 *Gebrehiwot v Victoria [Ruling No 2]* [2019] VCC 1229, [111], [138]–[139] (Judge Bourke) (appealed but not on this point) ('*Gebrehiwot [Ruling No 2]*'). It has also been suggested breach can supply an element of unlawfulness: Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis, 2008) 126 [4.32]–[4.33], 127 [4.35]–[4.36]. This issue was also raised in *Gebrehiwot [Ruling No 2]* (n 259) [34]–[35], [80], [110], [119]–[121], [125] (Judge Bourke).

260 See Moshinsky (n 254) 96–7.

261 See, eg, *Caripis v Victoria Police* [2012] VCAT 1472, [98]–[99] (Senior Member Steele); *Slattery* (n 258) [160] (Senior Member Nihill); *Kuyken v Lay* (2013) 240 IR 89, 123 [194] (Member Grainger); *Mizner v Queensland* [2022] QCAT 245, [41] (Member Fitzpatrick).

jurisdiction.[262] This issue is likely to be less pronounced in the federal context, due to the scope of tribunal review. As noted above, the Administrative Appeals Tribunal exercises merits review; it does not have original jurisdiction.[263] The same is proposed for the Administrative Review Tribunal, the intended replacement. This would mean that the tribunal is itself a public authority – bound by the procedural and substantive obligations.

Fifth, whether or not a finding of Human Rights Act breach by a public authority amounts to jurisdictional error.[264] A finding of jurisdictional error usually leads to invalidity of a decision under Australian administrative law. Doubt as to whether breach by a public authority is a jurisdictional or non-jurisdictional error presents difficulties at the federal level for 'constitutional'[265] judicial review.[266]

The so-called 'piggyback' provision has been criticised in the jurisprudence for being 'convoluted and extraordinarily difficult to follow'.[267] The *Eight Year Review Report* described it as a 'confusing and limited remedies provision … undermining its effectiveness'.[268] Despite this, the Victorian and Queensland courts and tribunals have managed to hold the executive to account for public authority/entity breaches and provide remedies in somewhat restricted circumstances. They have granted remedies for human rights breaches in favour of, for example, complainants of discrimination,[269] persons under guardianship or administration orders,[270] children in youth justice,[271] and imprisoned persons.[272]

The technicalities described above give rise to arid points of debate, taking up valuable time and resources in litigation and advice work. They draw focus away from the true substance of the claims – non-compliance with human rights obligations. Their impenetrable nature can have a 'chilling effect' on the bringing of legitimate human rights claims. In Victoria, the provision 'sends mixed messages'[273] and has 'held back the development of a human rights culture' within the executive.[274]

It need not be this way. The *Victorian Charter* and *QLD HRA* provisions are not replicated in a dialogue model anywhere else in the world. By contrast, the

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262 See, eg, *Director of Housing v Sudi* (2011) 33 VR 559 ('*Sudi*'); *AVW v Nadrasca Ltd* [2017] VCAT 1462, [81]–[83] (Member Calabro).

263 See discussion in *Sudi* (n 262) 578 [89] (Maxwell P), 602–4 [250]–[260] (Weinberg JA).

264 *Bare* (n 91). Cf *QLD HRA* (n 78) s 58(6)(a).

265 See *AHRC Position Paper* (n 1) 284.

266 By contrast, statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) does not require jurisdictional error: at ss 5(1)(f), 6(1)(f).

267 *Sudi* (n 262) 596 [214] (Weinberg JA).

268 *Eight Year Review Report* (n 148) 127. In the context of the *QLD HRA* (n 78), see Nicky Jones and Peter Billings, *An Annotated Guide to the Human Rights Act 2019 (Qld)* (LexisNexis, 2023) 484 [5.185]–[5.186].

269 *Slattery* (n 258); *Bare* (n 91).

270 *PJB v Melbourne Health* (2011) 39 VR 373; *LG v Melbourne Health* [2019] VSC 183.

271 *Certain Children [No 2]* (n 252).

272 *Davidson* (n 172); *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250; *Thompson* (n 201).

273 *Eight Year Review Report* (n 148) 127.

274 Ibid 124.

ACT HRA and *UK HRA* provide for an independent cause of action.[275] The AHRC's proposal, also for an independent cause of action – but with conciliation as a preliminary step where appropriate – should be strongly supported.

VI ADDITIONAL POSITIVE DUTIES

The *AHRC Position Paper* recommended additional second and third positive duties be imposed – a public consultation duty and an equal access to justice duty.[276] These proposals go beyond any existing state and territory human rights Acts, and indeed any dialogue model overseas.

A Participation Duty

The second positive duty the AHRC proposed consisted of two sub-set obligations. One was a *binding* duty on public authorities to ensure participation by certain marginalised or vulnerable groups in the making of *decisions*.[277] The scope of that duty would depend on whether the decision generally affected a group, or whether it specifically affected an individual.[278] Failure to consult would amount to a breach of the procedural obligation (itself a positive duty).[279] The other obligation was a *non-binding* duty to ensure participation by those groups in the legislative development process (under the parliamentary scrutiny regime).[280] The relevant groups were First Nations peoples, children and persons with disabilities.[281]

In terms of content, the *AHRC Position Paper* did not attempt 'a specific articulation of a First Nations participation duty'.[282] Rather, it suggested this be developed in consultation with First Nations peoples.[283] In respect of children, it was proposed that the content of the participation duty would reflect two 'core principles'[284] – the 'best interests of the child' and 'right of the child to be heard'.[285] As for persons with disabilities, participation included 'through permanent representative consultative bodies, and/or established procedures in decision-making processes',[286] and the embedding of principles related to legal capacity, supported decision making, and respect for the person's will, preferences and rights.[287]

275 *Human Rights Act 1998* (UK) s 7; *ACT HRA* (n 78) s 40C.
276 *AHRC Position Paper* (n 1) 161, 215.
277 Ibid 161, 182.
278 Ibid 172–3.
279 Ibid 161, 183.
280 Ibid 161, 182.
281 Ibid 182–3.
282 Ibid 191.
283 Ibid 190.
284 Ibid 196.
285 Ibid 202.
286 Ibid 213.
287 Ibid 208–9, 214.

Having greater participation by marginalised or vulnerable groups in executive decision-making and parliamentary law-making is essential and laudable. It reflects the saying, 'nothing about us without us'.[288] The AHRC's recommendation drew upon participatory rights found in international human rights instruments, particularly the *United Nations Declaration on the Rights of Indigenous Peoples*,[289] *CRC*[290] and *CRPD*.[291] It is also said to build upon the common law right to procedural fairness and comparative examples overseas. However, the proposed participation duty is far reaching and goes beyond them.

As the AHRC has acknowledged, the participation duty would be a 'novel addition' to an Australian Human Rights Act.[292] One commentator described it as 'fairly radical' and 'ambitious'.[293] Caution about the duty's potential implications has been expressed by the peak legal professional association.[294] There are several matters which give pause for thought (particularly given its justiciability with respect to public authorities). For example, the identification of groups for consultation and the extent of consultation is unclear – it need only be 'sufficiently fair and representative'.[295] Concerns have been raised that, although consistent with international human rights instruments, the duty might be unduly narrow. Certain other marginalised groups, such as women,[296] are not included in the participation duty.[297] Further, a claim of breach of the participation duty will only be actionable where there is a 'decision' involved.[298] However, this further delineates between *acts* and *decisions* for public authority obligations, whereas the AHRC's intention is for the obligations to be treated cumulatively.

B Equal Access to Justice Duty

Warning: This section of the article contains the name of an Indigenous person who has died.

The third and final positive duty recommended by the AHRC was a duty on public authorities to realise equal access to justice. The intention of this duty is

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288 Ibid 206, quoting Committee on the Rights of Persons with Disabilities, *General Comment No 7 (2018) on the Participation of Persons with Disabilities, including Children with Disabilities, through Their Representative Organizations, in the Implementation and Monitoring of the Convention*, 20th sess, UN Doc No CRPD/C/GC/7 (9 November 2018, adopted 21 September 2018) 1–2 [4].

289 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 18–19.

290 *CRC* (n 9) arts 3, 12.

291 *CRPD* (n 10) arts 4(3), 12.

292 *AHRC Position Paper* (n 1) 161.

293 Monash University Law School (n 237) 0:36:08–0:51:41.

294 Law Council of Australia (n 153) 30 [132].

295 *AHRC Position Paper* (n 1) 183.

296 See Women's Legal Service NSW, Submission No 97 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 June 2023) 14 [66]–[68]; Women's Rights Network Australia, Submission No 177 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 June 2023) 7–8.

297 See also Victorian Equal Opportunity and Human Rights Commission, Submission No 162 to Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (July 2023) 10.

298 *AHRC Position Paper* (n 1) 183.

'embed[ding] access to justice principles that are important to the realisation of rights'.[299] This is said to 'ensure the provision of key elements of a functioning justice system', and 'overcome current barriers to access faced by particular groups'.[300]

The *AHRC Position Paper* recommended that this duty at least include: 'publicly funded lawyers in criminal trials for people who cannot afford one'; 'interpreters where required (including First Nations languages, and ASL [American Sign Language])'; 'supports including accessible court facilities and procedural accommodations to ensure equal participation of persons with disability in legal proceedings'; 'specialist children's advocates/lawyers'; and 'support for culturally safe legal services'.[301]

The strengthening of rights protection to overcome barriers to equal access to justice should be applauded. However, it is unclear why enactment of the proposed equal access to justice duty is required to achieve this. One must be mindful to ensure that public authorities, which are administered by people (such as public servants), are not overburdened with multiple and unnecessary obligations under an Australian Human Rights Act.

The AHRC's proposed recognition of human rights under an Australian Human Rights Act already included rights protective of equality and access to justice.[302] In particular, the right to a fair hearing,[303] rights in criminal proceedings,[304] right to equality and non-discrimination,[305] children's rights[306] and cultural rights.[307] It is not clear why these human rights, with more specific drafting as to their scope, could not adequately protect the aspects of the proposed duty outlined above.

Moreover, courts and tribunals are already – as the *AHRC Position Paper* identified elsewhere – bound by the public authority procedural and substantive obligations when acting in an administrative capacity.[308] For example, in the recent coronial inquest into the passing of Veronica Nelson ('*Inquest into the Passing of Veronica Nelson*'),[309] the Coroners Court of Victoria found several breaches of human rights 'at almost every stage of the criminal justice process'.[310] This included breach of the right to equality and cultural rights by the Magistrates Court when it was acting in an administrative capacity. That finding was based on inadequate cultural support and processes for Aboriginal court users, partly due to 'under-resourc[ing]'.[311]

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299 Ibid 109.
300 Ibid 22. See also at 215.
301 Ibid 217.
302 See ibid app 'Rights Content with Commentary'.
303 Implementing *ICCPR* (n 7) art 14(1).
304 Implementing ibid arts 14(2)–(3), (5).
305 Implementing ibid arts 2(1), 3, 16, 26; *ICESCR* (n 8) art 2(2).
306 Implementing *ICCPR* (n 7) arts 10(2)(b), (3), 14(4), 24; *CRC* (n 9) arts 3, 37(b)–(c).
307 Implementing *ICCPR* (n 7) art 27.
308 And in other potential capacities: see *AHRC Position Paper* (n 1) 152–3.
309 *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 30 January 2023).
310 Bruce Chen and Anita Mackay, 'The Nelson Inquest: Relevance of the *Victorian Charter* to the Coronial Function of Preventing Deaths in Custody' (2023) 48(4) *Alternative Law Journal* 245, 248 <https://doi.org/10.1177/1037969X231208037>.
311 *Inquest into the Passing of Veronica Nelson* (n 309) 125 [362].

The *AHRC Position Paper* stated that the equal access to justice duty is not 'a "duty" per se on courts', because resourcing to ensure equal access to justice 'is a function of government, rather than the judiciary'.[312] However, this appears to be conceptually confused. It is unclear how the duty would be justiciable (as it appears to be intended) without impugning the acts or decisions of the courts, when they are the relevant public authority. The *Inquest into the Passing of Veronica Nelson* provides such an example.

VII CONCLUSION

This article examined the need and support for an Australian Human Rights Act, an issue which the AHRC squarely put back on the national agenda. The case for an Australian Human Rights Act has been made convincingly and repetitively over many years. Similarly to the *2009 National Human Rights Consultation Report*, the AHRC recently found a patchwork of inadequate human rights protections under Australia's legal system. This was borne out in the recent COVID-19 pandemic litigation. To rectify this situation, the *AHRC Position Paper* and *AHRC Final Report* again (like the *2009 National Human Rights Consultation Report*) recommended the enactment of an Australian Human Rights Act, in the form of a statutory dialogue model. It is past time for this main recommendation to be endorsed and acted upon.

The enactment of an Australian Human Rights Act would confer more significant roles on the Commonwealth executive and judiciary in the protection of human rights, rather than predominantly relying on the Commonwealth Parliament. The adaptation of an effective dispute resolution function for the AHRC to handle complaints of breach of public authority obligations would also be highly beneficial (while enforceable consequences before the courts for breach is essential). The AHRC Model has built upon the experiences of the Australian Capital Territory, Victoria and Queensland (as well as jurisdictions overseas). As demonstrated by this article, those human rights Acts have contributed to the protection of human rights across the three branches of government and public institutions, with some scope for improvement and adaptation to the Australian federal context.

The AHRC should be highly commended for its work. The *AHRC Position Paper* is comprehensive, considered and mostly pragmatic. The AHRC Model has most of the typical features of a statutory dialogue model. In some respects, it takes the matter further. Further thought and clarification should be given to the proposed participation duty with respect to certain marginalised or vulnerable groups. This article has argued against the inclusion of an equal access to justice duty, and a power to effectively exempt certain entities from public authority obligations. However, the overwhelming balance of the recommendations in the *AHRC Position Paper* should be strongly supported, with some suggested clarifications or enhancements. As the AHRC has said, the 'proposal for a Human Rights Act is

312 *AHRC Position Paper* (n 1) 215.

an evolution not a revolution'.[313] Let this not be another squandered opportunity in Australian political history to evolve to better respect and protect the human rights of us all in Australia.

VIII POSTSCRIPT

On 30 May 2024, the PJCHR tabled its report. A Committee majority (comprised of independents and members of the Labor Government) recommended the introduction of an Australian Human Rights Act (with an appended example Human Rights Bill), supported by a revitalised Australian Human Rights Framework. The Committee's report found that the AHRC's proposal broadly provides a 'balanced approach' between protecting human rights and respecting parliamentary sovereignty.[314] Notably, the Committee endorsed the participation duty and equal access to justice duty,[315] and recommended that the Commonwealth Government consult on how they should operate.[316] The Committee's report also clarified that it had received over 4,000 pro forma or lobby group-led letters from the public in support of an Australian Human Rights Act[317] (which were not published on the Inquiry website). A Committee minority (comprised of Coalition opposition members) recommended that an Australian Human Rights Act not be introduced. The matter is presently with the Commonwealth Government for consideration, and potentially, further legal advice and consultation.

313 Ibid 12; *AHRC Final Report* (n 2) 52.
314 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024) 301 [9.13].
315 Ibid 307–8 [9.30]–[9.31].
316 Ibid 312 [9.44] (Recommendation 4).
317 Ibid 299 [9.6].