

Free and equal: An Australian conversation on human rights Issues Paper

Submission to Australian Human Rights Commission

23 August 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Australian Human Rights Commission (AHRC) conversation on human rights. This submission responds to ten of the questions presented in the Issues Paper, *Free and Equal: An Australian conversation on human rights*.
2. The ALA believes that this conversation provides a unique and timely opportunity to review Australia's human rights policy and legislative framework and considers whether that framework is sufficiently holding government, public bodies and private interests to account for their conduct and whether it is compliant with our human rights obligations. In addition, it is an opportunity to consider whether that policy and legislative framework provides adequate protection for the human rights of everyone domiciled in Australia or subject to Australian jurisdiction, particularly the most vulnerable and disadvantaged.

What human rights matter to you?

3. The ALA considers that the Government should consider it a high priority to actively promote and provide strong protections for the human rights contained in the international treaties to which Australia is a party. These are:
 - *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (entry into force 4 January 1969; entry into force for Australia 30 October 1975);
 - *International Covenant on Civil and Political Rights* (ICCPR) (entry into force 23 March 1976; Article 41 came into force on 28 March 1979; entry into force for Australia 13 January 1980, except Article 41 which came into force for Australia on 28 January 1993);
 - *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (entry into force 3 January 1976; entry into force for Australia 10 March 1976);
 - *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (entry into force 3 September 1981; entry into force for Australia 27 August 1983);
 - *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (entry into force 26 June 1987; entry into force for Australia 7

September 1989) and the *Optional Protocol to the CAT* (entry into force for Australia 15 December 2017);

- *Convention on the Rights of the Child* (CRC) (entry into force 2 September 1990; entry into force for Australia 16 January 1991) and the two optional protocols to CRC:
 - *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (entry into force 12 February 2002; entry into force for Australia 26 October 2006);
 - *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (entry into force 18 January 2002; entry into force for Australia 2 August 2007); and
- *Convention on the Rights of Persons with Disabilities* (CRPD) (entry into force 3 May 2008; entry into force for Australia 16 August 2008).

4. In addition, the ALA considers that the Government should actively promote and provide strong protection for the human rights contained in the following international instruments to which Australia is a party or for which it has expressed support:

- *Convention in relation to the Status of Refugees* (1951) and the Protocol relating to the Status of Refugees (1967);
- *Convention relating to the Status of Stateless Persons* (1954); and
- The *UN Declaration on the Rights of Indigenous Peoples* (proclaimed by the General Assembly in 2007, supported by Australia 3 April 2009).

5. The ALA also considers that the Government should actively promote and provide strong protection for rights concerning the environment (also known as third generation rights). These rights concern the environment in which humans live and the effect the environment has on people's capacity to enjoy their rights. An example of how such rights have been articulated is contained in section 24 of the South African Constitution:

Everyone has the right:

- To an environment that is not harmful to their health or well being; and
- To have the environment protected, for the benefit of present and future generations.²

How should human rights be protected in Australia?

6. While the ALA recognises that Australia is a robust democracy, which in comparison to many other countries has a relatively sound record on human rights, the ALA submits that it is necessary to strengthen the legislative framework that seeks to protect and promote human rights. This would provide greater human rights protections for all people domiciled in Australia and subject to Australian jurisdiction. Moreover, the ALA submits that many people in Australian society are subject to breaches of human rights, or a failure by government and public bodies to adequately consider their human rights in decision-making. In particular, people from Aboriginal and Torres Strait Islander backgrounds, people living with disabilities, women, people from socio-economically disadvantaged backgrounds, young people, older people and recent arrivals are in need of additional human rights protections.
7. The ALA submits that undertaking the following legislative measures would provide additional protections to the most vulnerable and disadvantaged people in Australia:
 - a. Consolidating Commonwealth Anti-Discrimination laws; and
 - b. Legislating a Federal Human Rights Charter.

a. Consolidating Commonwealth Anti-Discrimination Laws

8. The ALA is of the view that the protection of human rights in Australia would be greatly improved by consolidating the current federal anti-discrimination laws (*Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*) into a single Act. The ALA submits that such a consolidation would

² *Constitution of the Republic of South Africa 1996* (South Africa), s24.

remove unnecessary regulatory overlap, reduce the current complexity and make the system more user-friendly.

9. The ALA notes that in 2011 the Commonwealth Attorney-General's Department issued a discussion paper seeking comment as to the current framework of Australia's anti-discrimination laws and whether Australia's human rights framework would be improved by consolidating the existing laws into a single anti-discrimination act.³ The Discussion Paper noted that the current Commonwealth anti-discrimination laws had been drafted over a period of nearly 40 years and that there are significant differences in the drafting and coverage of protections under each Act, including definitional inconsistencies, different approaches to the tests for discrimination and different provisions relating to vicarious liability.
10. The ALA submits that consolidating the Commonwealths anti-discrimination laws would reduce the complexity and inconsistency in the legislation, thereby reducing the regulatory burden on businesses, and make it easier for individuals and businesses to understand their rights and obligations under the legislation.
11. The ALA strongly submits that any consolidation of the Commonwealth anti-discrimination laws should ensure that there is no reduction in existing anti-discrimination protections, that there is provision for an accessible, cost-effective process for resolving complaints of discrimination, and that protections are clarified and enhanced where appropriate.
12. The ALA also submits that consolidated Commonwealth anti-discrimination legislation should enhance the specific anti-discrimination protections on the basis of sexual orientation, gender identity, intersex status and religious belief.
13. The ALA submits that the operation of the s38(3) exemption to s21 of the *Sex Discrimination Act 1984* (SDA) causes significant disadvantage to and discrimination against LGBTI students and staff. The exemption also serves to cause significant disadvantage and discrimination to students and staff on the basis of their marital or relationship status or pregnancy. The ALA submits that any consolidated anti-discrimination legislation should not include such an exemption.

³ Australian Government Attorney-General's Department (2011), *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, Commonwealth Attorney-General's Department, September 2011.

14. The ALA is also concerned that the exception currently offered by s37(1)(d) of the SDA that allows faith-based educational institutions to discriminate against LGBTI students, teachers and staff is potentially much broader than that which is currently provided by s38(3). The ALA submits that any consolidated anti-discrimination legislation should specify that such an exception as provided by the current s37((1)(d) of the SDA should not apply to an act or practise of a body established for religious purposes if it is connected with the provision by the body of education. The ALA submits that the exception currently provided in s37((1)(d) should not apply to the treatment of students, teachers or staff by faith-based educational institutions.

b. Legislating a Federal Human Rights Charter

15. The ALA strongly supports the development of a federal legislative human rights charter. Such a charter would provide additional protection to human rights in Australia and enhance our democracy by building a stronger human rights culture in Australia and giving expression to important Australian values such as equality, diversity, respect and inclusion.

16. Australia is the only western democracy without a national Human Rights Act, Bill of Rights or Charter of Rights. In 2009, the largest ever nationwide consultation on human rights protections was conducted, with almost 9 out of 10 Australians consulted supporting a Charter of Rights. An independent panel of experts headed by Father Frank Brennan recommended that Australia adopt a Charter of Human Rights.⁴

17. The ALA considers that a charter of human rights would ensure that those who wield power within Australia's federal institutions are subjected to a code of conduct in accordance with the rule of law which operates to prevent them from exercising power in such a way as to infringe upon the rights of people domiciled in Australia or under Australian jurisdiction. A charter of human rights is a powerful tool not only in keeping society diverse, fair, respectful

⁴ National Human Rights Consultation (2009): <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation.html> (last accessed 15 June 2019); National Human Rights Consultation Report (2009), Recommendation 18: <[http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)_NHRC+Report+\(Recommendations\).pdf/\\$file/NHRC+Report+\(Recommendations\).pdf](http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)_NHRC+Report+(Recommendations).pdf/$file/NHRC+Report+(Recommendations).pdf)> (last accessed 15 June 2019).

and inclusive, but is also an essential adjunct to the institutions of parliamentary democracy and the common law.

18. A federal human rights charter would also give domestic effect to Australia's international human rights obligations, as outlined in paragraphs 3 and 4 above. Moreover, this would enable Australia's human rights framework to be better connected with developments in international human rights law and domestic human rights law in other common law countries such as the United Kingdom and New Zealand. This would also have the effect of modernising our democracy and facilitating the development of Australia's human rights law jurisprudence.
19. The ALA submits that the model of human rights protection that best suits Australia's system of parliamentary democracy, maintaining the sovereignty of Parliament, is a federal legislative human rights charter that follows a dialogue model of human rights protection (similar to what exists in the UK, New Zealand, Victoria, the ACT and Queensland). Such a legislative charter could provide additional human rights protections to all people in Australia in four ways:
 - a) A federal human rights charter would require the courts to interpret all existing legislation and regulations in a manner that is compatible with the protected human rights;
 - b) A federal human rights charter would require that when new legislation and regulations are introduced into Parliament, they are to be accompanied by a Statement of Compatibility in which the relevant Minister is required to certify that the proposed legislation/regulations is compatible with human rights;
 - c) A federal human rights charter would require all public authorities to act in a manner that is consistent with the protected human rights, or in making a decision to take into account the protected human rights. The definition of a 'public authority' would include a public or private body whose functions include functions of a public nature. The phrase 'functions of a public nature' includes functions of a regulatory nature. This would mean that all federal regulatory bodies would have obligations to act compatibly, and make decisions which are compatible, with the rights protected in the Charter; and

d) A federal human rights charter would require all non-government organisations that perform functions of a public nature to comply with the human rights protected by the Charter.

20. Drawing on the experiences of legislative human rights charters in Victoria, the ACT and most recently Queensland, the ALA submits that there is significant evidence of the important and practical human rights protections that can be achieved through legislating a human rights charter. The ALA refers the AHRC to the documented case studies compiled by the Human Rights Law Centre from the first five years of operation of Victoria's *Charter of Human Rights and Responsibilities*.⁵ In particular, the ALA notes the following examples in which the Victorian *Charter of Human Rights and Responsibilities* resulted in significant and practical human rights protection for some of Victoria's most vulnerable residents:

Wheelchair-bound tenant protected from eviction

The Victorian Department of Human Services (DHS) attempted to evict a wheelchair-bound man from his premises. The man suffered from mental illness and spoke a limited amount of English. The DHS used information gathered from police regarding a drug-related allegation against the tenant in order to gain an order for possession. The eviction was on the basis of illegal activity, although at the time the man had not been charged with any offence. A community legal centre argued that the man's rights under the Charter were not being considered, in particular that DHS was acting contrary to the presumption of innocence and with no consideration of procedural fairness. The arguments led to a successful settlement of the matter and the tenant was relocated to alternative accommodation.

Source: Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

⁵ Human Rights Law Centre (HRLC) (2012), *Victoria's Charter of Human Rights and Responsibilities in Action – Case studies from the first five years of operation*, March 2012.

96-year-old woman protected from eviction and homelessness

A 96-year-old woman was given a 60-day notice to vacate the home in which she had lived for 21 years. She was unable to find alternative accommodation in this period of time. The notice was contested in VCAT with the advocate arguing that it was a breach of the elderly woman's Charter rights. As a consequence she was given an additional 30 days and was assisted in finding appropriate accommodation.

Source: Hanover Welfare Services: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Right to privacy for person with disability protects dignity

During a routine visit to a disability residential service, a Department of Human Services officer observed carers assisting a client to shower from the door of the unit. The officer provided information on human rights and discussed the impact of the physical environment on the client's right to privacy and on workplace safety. The residential service reviewed the physical environment, arranged for the fitting of a shower curtain, thereby guaranteeing the privacy and dignity of the resident at very little cost to the service.

Source: Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter (2011).

Right to family life and freedom of association for elderly man with disability

A male client in care, who shared his bed with his wife, was about to be forced to use a single bed in order to use a slide sheet for occupational health and safety reasons. A disability advocate successfully employed the Charter to prevent this from happening and find other solutions.

Source: Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter (2011).

21. In addition, the British Institute of Human Rights has documented many case studies indicating the important and practical way in which the UK *Human Rights Act 1998* has been used to protect and promote human rights for some of the most vulnerable people in the UK:⁶

Supporting an older woman strapped into a wheelchair against her wishes

During her afternoon ward round at a London hospital, a consultant came across an older woman who was crying out in distress. The woman had been strapped into a wheelchair causing her distress. The consultant asked staff why the woman was being restrained in this way. They explained that they had strapped her into the wheelchair to stop her walking around, because they were worried she might fall over and hurt herself. The consultant told staff that while their concerns were understandable, strapping her into a wheelchair for long periods was not an appropriate response, because her human rights, and in particular her right to be free from inhuman and degrading treatment, had not been taken into account. Staff quickly agreed to unstrap the woman and, after she was assessed by a physiotherapist, they were encouraged to actively support her to improve her mobility.

Transport policy left young girl with disability unable to go to school

A local authority had a policy of providing school transport for children with special educational needs living more than 3 miles from their school. One young learning disabled girl lived 2.8 miles from the special school she attended. Despite being unable to travel on her own, she was advised by the local authority that she should instead take two buses to and from school each day. The girl's mother approached the head of the school and explained that the transport decision was a disproportionate interference with her daughter's right to respect for private life, given the failure to consider her individual circumstances. The head teacher took the issue to the local authority and the decision was reversed. The girl was provided with transport to and from school from then on.

⁶ British Institute of Human Rights: <<https://www.bih.org.uk/Pages/FAQs/>> (last accessed 18 May 2019).

Challenging poor practice in aged-care homes

An advocate was visiting a nursing home in London when she saw several residents effectively trapped in special 'tilt-back' chairs. The chairs were being used because they stopped people in the home from trying to get up, falling and hurting themselves. This meant that many older people who could walk weren't able to get up and out of their chairs. Instead, they had to wait for staff to come and get them out of the chairs so they could go to the toilet or go and get something to eat. The residents at the home who were previously very independent could no longer choose what they wanted to do with their days, and because they couldn't walk around very often, they started to lose their mobility and find walking very difficult.

The advocate was concerned that this practice in the home raised human rights issues. She talked to the residents who were kept in the chairs, who told her they felt their dignity and independence was being taken away from them. By not allowing the residents who could walk the freedom to move around, their dignity and autonomy, protected by the right to private life in the *Human Rights Act*, was being compromised. There were also concerns about inhuman or degrading treatment. These concerns were raised with the staff who were able to see that treating all of the residents the same in order to protect the few who needed the tilt-back chairs was not appropriate. Residents who could walk were no longer placed in the tilt-back chairs and staff encouraged them to start using their walking skills again.

22. These examples illustrate how a legislative charter of rights can lead to significant, positive, life-changing outcomes for some of the most vulnerable people in our community. The ALA submits that a federal human rights charter could lead to similar protections across the Australian community, resulting in improved quality in service delivery in disability services, aged-care services, veterans' services and social security services.

What are the barriers to the protection of human rights in Australia?

23. The ALA submits that the Australian legal system provides an inadequate level of protection for human rights. While the Australian legal system provides some protections for particular individual rights and a limited range of remedies where those rights are infringed, the ALA submits that these protections are piecemeal and located in a range of different pieces of

legislation, regulations, the Constitution and the common law. As result, there is a low level of rights awareness in the Australian community, making it difficult to ensure strong protection of human rights overall in Australia.

24. The ALA also submits that there are significant gaps in human rights protections within the legal framework. While federal legislation protects some human rights such as the right not to be discriminated against on the basis of sex, race, disability or age, there are many human rights which Australia has committed to implementing through its ratification of various conventions, as outlined in paragraphs 3 and 4 above, which are not provided with sufficient protection within the federal legislative framework.
25. For example, the ALA notes that there is no specific federal law that protects freedom of expression, freedom of movement, freedom from torture, the right to liberty and security of the person, and the right to humane conditions while in detention. The ALA also notes that while there are a number of common law doctrines that serve to protect rights, such as the right against self-incrimination, onus of proof in criminal proceedings, and the burden of proof beyond reasonable doubt in criminal proceedings, these common law doctrines can be displaced where the parliament indicates a clear legislative intent to do so.
26. Accordingly, the ALA submits that the current federal legislative framework fails to provide sufficient protection for human rights. Moreover, the absence of a clear legislative instrument that provides a comprehensive statement of human rights protection has resulted in a 'patchwork quilt' of human rights protections in Australia, which has significant gaps resulting in a low level of community awareness of whether human rights are guaranteed in Australia and which human rights are protected.
27. This low level of human rights awareness is reflected in the commonly held community belief that human rights are already adequately protected in Australia.⁷ This misperception reflects the fact that where human rights breaches do occur, they are often experienced by the most

⁷ For example, see *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee*. Melbourne, Department of Justice, 2005, p 14; National Human Rights Consultation Report (2009), pp 15-16, <[http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)_NHRC+Report+\(Chapter+2\).pdf/\\$file/NHRC+Report+\(Chapter+2\).pdf](http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)_NHRC+Report+(Chapter+2).pdf/$file/NHRC+Report+(Chapter+2).pdf)> (last accessed 15 June 2019).

disadvantaged members of the community and are often not within the general public consciousness.

28. The ALA submits that this ignorance and low level of human rights awareness presents one of the most significant barriers to human rights protection in Australia as it means that Australia still has some way to go in terms of developing a human rights culture that promotes values of fairness, diversity, individual liberty and respect for the rights of others. A federal human rights charter would have the potential to be a powerful symbol of Australian human rights values that could serve to educate the community of the expected standards in terms of how government should treat people and how people should treat each other.

How should the Government address the situation where there is a conflict between different people's rights?

29. Given the breadth of human rights that require recognition and protection, and to which Australia has obligations to protect and promote under International Law, situations may arise where there may be conflict between different people's rights. For instance, there may be occasions where a person's right not to be discriminated against on the basis of sex, race or sexuality may appear to be in conflict with another person's right to freedom of expression. The ALA submits that a legislative charter of human rights can provide a formula by which human rights can be balanced against each other and other competing public interests. This is achieved by a provision that sets out the circumstances in which a human right can be limited.
30. The legislative human rights instruments in New Zealand, Victoria, the ACT and Queensland all contain a provision which provides that human rights can be subject only to reasonable limits that can be justified in a free and democratic society. This is similar to the limitations provision contained in the Canadian *Charter of Rights and Freedoms*, which is entrenched in the Canadian Constitution. According to the Canadian Supreme Court, for a limitation on a right to be reasonable and demonstrably justified, two conditions must be satisfied:
- The objective of the law that seeks to limit human rights must be of sufficient importance to warrant overriding a protected right or freedom. The objective must relate to concerns which are pressing and substantial; and

- The means chosen to achieve that objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are designed to meet the objective in question, whether they impair rights or freedoms as little as possible and whether there is proportionality between the effects of the measures and the objective which the law that seeks to limit human rights is seeking to achieve.⁸

31. This proportionality test has been enshrined in the ACT *Human Rights Act 2004* (s28), the Victorian *Charter of Human Rights and Responsibilities Act 2006* (s7(2)) and the Queensland *Human Rights Act 2019* (s13). The ALA submits that a similar provision should be included in a federal human rights charter. In this way the Charter will provide a proportionality test that will enable competing rights to be appropriately considered and balanced.

What should happen if someone's human rights are not respected?

32. The ALA strongly believes that a federal human rights charter should ensure that persons who allege that their human rights have not been respected can obtain a prompt and effective remedy, including access to injunctions and compensation where applicable. The Charter should include an independent statutory cause of action against a federal public authority for a breach of its human rights obligations as set out under the Charter.

33. The ALA submits that a direct right of action for individuals who allege that their human rights have been infringed by a public authority should be included in a federal human rights charter. The ALA believes that such a direct right of action provides a strong incentive for public authorities to ensure that they are human rights compliant in their service delivery and decision-making.

34. The ALA submits that if as a result of an individual bringing an action against a public authority for an infringement of her/his rights and the court considers that that person's rights have been infringed and that the public authority could have acted or exercised its powers in a manner consistent with human rights, than that court should have the power to grant appropriate relief. This includes remedies available under administrative law and the capacity to grant injunctions to prevent continuing human rights breaches. The ALA also submits that in some circumstances it is appropriate for the court to make an order for damages to compensate for financial loss, personal injury or psychological injury arising as a result of a

⁸ *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.

breach of a person's human rights. In addition, in cases of particularly egregious violations of human rights by a public authority, it is appropriate for the court to be able to make an award of punitive damages against that public authority.

35. The ALA submits that the cause of action for an infringement of human rights should be a stand-alone cause of action. The ALA does not support the provision for what has been described as a 'piggy-back' cause of action as exists under s39(1) of the *Victorian Charter of Human Rights and Responsibilities Act 2006*, which states:

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.

36. The ALA also submits that the Australian Human Rights Commission should have a role in receiving complaints from people who allege that their human rights have been infringed and for a human rights complaint that is accepted by the Commission to be investigated and referred to a conciliation conference. Such a provision is included in the recently enacted *Queensland Human Rights Act 2019* (ss64, 77-79) and represents a significant advancement on the Victorian Charter and the ACT *Human Rights Act 2004*.

37. The ALA submits that the purpose of conciliation of a human rights complaint should be to promote the resolution of the complaint in an informal, quick and efficient manner. However, the ALA submits that the process of conciliation will be deficient if there is no binding or clear outcome from a complaint being brought to the Commission. The ALA submits that if the outcome of the conciliation is an acknowledgment by the respondent public entity that it has acted unlawfully, there needs to be a provision in the Charter that obliges the public entity, or gives powers to the Commission to compel the entity, to remedy the breach or provide some redress to the complainant.

38. The ALA submits that the Commission should have the power to direct a public entity to address the issues raised in the complaint that have been acknowledged by the respondent or which the Commission considers to have been substantiated.

39. The ALA is concerned that a complaints and conciliation process that does not provide for a clear or binding outcome, or provide for the enforcement of the rights that are protected in the legislation, will result in individuals who allege human rights abuses losing confidence in

the complaints and conciliation process and ultimately in the charter and the Commission itself. This will undermine the role of the Commission and the ability of the Charter to fulfil its main object of protecting and promoting human rights and a human rights culture.

What can the community do to protect human rights? How should the government support this?

40. As noted above, there is general community ignorance and misunderstanding about the human rights protections that currently exist in Australia. While developing a single law that protects against discrimination and a statutory human rights charter at the federal level will be important in raising awareness of human rights in the Australian community, the ALA firmly believes that for these laws to be effective and for the community to embrace the importance of human rights, the Government needs to undertake an effective, comprehensive education strategy to build a human rights culture across the community. How this education strategy should be implemented is discussed in further detail below.
41. In addition, the ALA strongly supports the inclusion of a provision in a federal human rights charter that enables an entity to request the federal Attorney General to declare that the entity is subject to the human rights obligations of a public authority under the human rights charter. Such a provision has been described as an ‘opt-in provision’. The ALA notes that an opt-in provision is in both the *ACT Human Rights Act 2004* (s40D) and the *Queensland Human Rights Act 2019* (s60). The ALA also notes that that the statutory eight-year review of the Victorian Charter recommended that the Charter be amended to include an opt-in provision.⁹
42. The ALA submits that an opt-in provision can assist in promoting cultural change by developing a ‘rights consciousness’ across Australia, encouraging broader, voluntary compliance with human rights standards, promoting a meaningful human rights dialogue within the community and cultural change by developing a human rights consciousness across the business and broader community.
43. In order to strengthen the influence of an ‘opt-in provision’ the Government needs to undertake comprehensive promotion and encouragement of the opportunity for private, non-government and corporate entities to voluntarily elect to be subject to human rights

⁹ Brett Young, Michael (2015), *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 64-5.

obligations under the federal Charter. Such promotion should emphasise that voluntarily opting in to statutory human rights obligations will enhance corporate social responsibility within the operations of private and corporate bodies, result in higher quality, person-centred service delivery and contribute to creating a human rights culture across the Australian community.

How should individuals, businesses, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

44. The ALA submits that a statutory federal charter of rights can provide various mechanisms by which businesses, individuals and community organisations can be encouraged to respect human rights and adhere to human rights compliant conduct. In particular, the ALA submits that a human rights charter that requires all public authorities to act in a manner that is consistent with the protected human rights, or in making decisions that take into account the protected human rights, with a detailed and comprehensive definition of the what is a 'public authority', will encourage businesses, individuals and community organisations to respect human rights.
45. The ALA submits that the definition of a 'public authority' should include a public or private body whose functions include functions of a public nature. The phrase 'functions of a public nature' should be defined to include functions of a regulatory nature. This would mean that all federal regulatory bodies would be required to act compatibly, and make decisions which are compatible, with the rights protected in the Charter.
46. The operation of government and statutory regulatory schemes that govern the licensing, accreditation or regulation of non-government service providers is a mechanism by which government can secure human rights compliance from non-government service providers undertaking contracted-out services. Where those schemes operate pursuant to legislation or are operated by a government department or agency, as 'core' public authorities they are required to comply with human rights obligations. Given the guidance that has been specified in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (s4(2)c)), the ACT *Human Rights Act 2004* (s40A(1)c)) and the Queensland *Human Rights Act 2019* (s10(1)c)), it is likely that any statutory or private regulatory schemes are public authorities when performing functions of a regulatory nature.

47. A similar provision in a federal human rights charter would mean that the regulatory body governing the provision of aged-care services, currently the Australian Aged Care Quality and Safety Commission, would have obligations to act compatibly, and make decisions that are compatible, with the rights protected in the Charter. Accordingly, in fulfilling its own public authority human rights obligations, the Commission would need to include requirements for human rights compliance as a precondition for licensing or industry accreditation, including requirements for annual reporting of human rights compliance by organisations in order to maintain their licensing or accreditation status. A failure to adhere to required human rights standards would have adverse consequences for the organisations themselves, including possible cancellation of contracted arrangements or punitive responses from the regulator. Similarly, the NDIS Quality and Safeguards Commission would have obligations to act compatibly, and make decisions which are compatible, with the rights protected in the Charter.
48. A federal human rights charter with a definition of a ‘public authority’ that includes a public or private body whose functions include functions of a public nature, would also require all non-government organisations that perform functions of a public nature to comply with the human rights protected by the Charter. The Charter should provide a non-exhaustive list of factors and *indicia* that may indicate that the organisation is performing a function of a public nature, similar to what is provided in s4(2) of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, s40A(1) of the ACT *Human Rights Act 2004* and s10(1) of the Queensland *Human Rights Act 2019*. This list should include the following:
- Whether the function is conferred on an entity under a statutory provision;
 - Whether the function is connected to or generally identified with the functions of government;
 - Whether the function is of a regulatory nature;
 - Whether the entity is publicly funded to perform the function; and
 - Whether the entity is a government-owned corporation.
49. The ALA submits that the phrase ‘connected to or generally identified with the functions of government’, requires further legislative guidance in order to reduce uncertainty and confusion amongst non-government organisations as to whether they are public authorities

subject to human rights obligations. The ALA notes that s10(3) of the Queensland *Human Rights Act 2019* and s40A(3) of the ACT *Human Rights Act 2004* lists particular functions that are defined as being of a public nature. The ALA further notes that the statutory eight-year review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* recommended that the Charter be amended to include a similar provision.¹⁰ The review noted that such a provision was necessary given that several non-government organisations experienced continuing uncertainty about whether they are functional public authorities. The review noted that this was a barrier to the incorporation of the Charter in the day-to-day work of these organisations and inhibited the development of a human rights culture within those organisations.¹¹

50. The clarification of the phrase ‘function of a public nature’ assists in providing greater certainty to non-government organisations that perform public functions as to their obligations under the legislation. The ALA submits that a federal human rights charter should include a similar provision to s10(3) of the Queensland *Human Rights Act 2019* and s40A(3) of the ACT *Human Rights Act 2004* that lists particular functions that are defined as being of a public nature.
51. As noted above, the ALA supports the inclusion of a provision in a federal human rights charter that enables an entity to request the Federal Attorney-General to declare that the entity is subject to the human rights obligations of a public authority under the human rights charter (i.e. an ‘opt-in provision’). Such a provision, if well promoted and related to government contracting and tender processes, could provide a vehicle by which businesses and community organisations are encouraged to respect human rights and adhere to human rights compliant conduct.
52. The original intention for the s40D opt-in provision in the ACT *Human Rights Act 2004* was to encourage voluntary compliance with human rights standards across the private sector. However, none of the seven organisations that has voluntarily agreed to be subject to the ACT *Human Rights Act 2004* under s40D could be regarded as a private sector organisation. Each organisation is a non-government, not-for-profit organisation that has a long-standing commitment to human rights values. According to Schetzer, based on detailed field research

¹⁰ See n 9 above, 62.

¹¹ *Ibid*, 58.

involving each of these organisations, the organisations exhibited exceptional practice in terms of operationalising human rights standards throughout their policies and activities. Human rights practices were considered to be embedded in the culture and service practices of these organisations.¹²

53. While s40D has not as yet attracted private sector organisations to opt-in to the human rights obligations as originally intended, the opt-in provision has had an important influence in the development of a human rights culture within the ACT, given the example provided by the opt-in organisations to other organisations in terms of the practical incorporation of human rights practice into their operations. Each organisation was able to audit and review its policies, operations and procedures within a limited budget, to ensure that the organisation fulfilled its human rights obligations under the ACT *Human Rights Act 2004*. The organisations considered that by embedding human rights standards into their policies and operations, the quality of their service delivery to service users was improved. Moreover, the organisations noted that by opting-in to the ACT *Human Rights Act 2004*, they secured greater certainty regarding their human rights obligations under the ACT *Human Rights Act 2004*.¹³ The example provided by these not-for-profit opt-in organisations in the ACT indicates that the process of implementing a human rights-compliant business model for service delivery does not involve a significant or overly burdensome financial cost, and can result in significant benefits for the organisations concerned.

54. The ALA submits that an 'opt-in' provision could provide government with a further tool to encourage business and community organisation compliance with human rights. The Government could develop a government tender pre-qualification process in which prospective tenderers for government contracts have to satisfy, among other things, their capacity to adhere to the federal human rights charter. Organisations that voluntarily elect to be subject to the Charter pursuant to the 'opt-in' provision could be provided with an exemption to this requirement.

¹² Schetzer, Louis (2018), 'The ACT Human Rights Act – How it has been applied by non-government organisations', Chapter 11 in Schetzer, Louis (2018), *Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services*, 288, available online at: <https://www.unsworks.unsw.edu.au/primo-explore/fulldisplay?vid=UNSWORKS&docid=unsworks_49235&fromSitemap=1> (last accessed 12 November 2018).

¹³ *Ibid*, 289.

What should the Australian Human Rights Commission and the government do to educate people about human rights?

55. As noted above, the ALA believes that the effectiveness of any legislative human rights protection requires an effective, comprehensive education strategy to build a human rights culture across the community, so that we work towards a society that embraces the importance of human rights. The ALA submits that the Australian Human Rights Commission is the most appropriate organisation to be responsible for the delivery of such a community education strategy and should be substantially resourced to undertake that role.
56. Such an education strategy should illustrate how human rights relate to everyday lives in ways that many in the community take for granted, and how these rights are often infringed for many of the most disadvantaged in the community. The strategy should also reinforce important human rights values as an essential part of Australian culture, including diversity, respect, equality and fairness. The strategy should also emphasise the rejection of racism, sexism, homophobia, religious intolerance and discrimination as part of Australian culture.
57. The ALA submits that the human rights education program should include the following elements:
- Education in schools as a strategy for fostering a human rights culture;
 - Education for businesses as to appropriate, human rights focused corporate conduct, including promotion of any 'opt-in provision' that is included in a federal human rights charter; and
 - General community education that engages local community groups, churches, mosques, youth groups, local ethnic community groups and community leaders, that seeks to foster rights awareness and a human rights culture.
58. The Australian Human Rights Commission should also play a role in educating, training and assisting public authorities to comply with their obligations. This includes having the capacity to undertake human rights audits of public authorities when requested by a public authority to review that authority's programs and practices.

What actions are needed to ensure that the government meets its obligations to fulfil human rights?

59. As indicated above, the ALA submits that a statutory federal human rights charter which requires all public authorities to act in a manner that is consistent with the protected human rights, or in making a decision to take into account the protected human rights, is one mechanism that will make it more likely that the Government will meet its obligations to fulfil human rights. For such a mechanism to be effective it is essential that the phrase 'public authority' is comprehensively defined to include all government departments and regulatory bodies, and will also cover contracted-out public services.

60. The ALA submits that in a federal charter, the term 'public authority' should be explicitly defined to include the following:

A public body with powers of functions under a law of the Commonwealth or which is involved in the delivery of Commonwealth programs or performing functions of a public nature, including:

- A government agency under the *Public Service Act 1999*;
- A government Agency Head under the *Public Service Act 1999*;
- An Australian Public Service employee under the *Public Service Act 1999*;
- An Australian Public Service Commissioner under the under the *Public Service Act 1999*;
- The Australian Federal Police and all its personnel;
- The Australian Defence Force and all its personnel;
- The Australian Border Force and all its personnel;
- A court or tribunal;
- An entity established by a statutory provision that has functions of a public nature;
- A Minister;

- Members of a Parliamentary Committee when the Committee is acting in an administrative capacity;
- An entity declared by regulations to be a public authority;
- an entity established by a statutory provision that has functions of a public nature; or
- an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the Commonwealth or a public authority (whether under contract or otherwise).

61. As indicated above in paragraphs 48 and 49, the ALA submits that the federal charter should provide a non-exhaustive list of factors and *indicia* as to what amounts to an organisation performing a function of a public nature, and also list particular functions that are defined as being of a public nature.

How should we hold governments to account for its actions in protecting human rights?

62. The ALA submits that a charter of rights that provides for a direct right of action for individuals who allege that their human rights have been infringed by a public authority is an important mechanism by which governments can be held to account for its actions in protecting human rights. As indicated above in paragraphs 33 and 35, the ALA believes that such a direct right of action provides a strong incentive for government agencies and public authorities to ensure that they are human rights compliant in their service delivery and decision-making.

63. Also, as indicated above in paragraphs 34 and 35, the ALA submits that the cause of action against a government agency or public authority for an infringement of human rights must be a stand-alone cause of action, and that the full suite of remedies should be available should the allegations of a human rights infringement be found proven, including injunctions and compensation where applicable.

64. The ALA also submits that there is an important role for the Australian Human Rights Commission (AHRC) to play in holding government to account for its actions and decision-making in terms of protecting human rights. The ALA believes that the AHRC should have the capacity to investigate and monitor systemic human rights abuses and report its findings and

recommendations to government. The ALA submits that the AHRC needs to have sufficient resources to undertake this important investigative and monitoring role of systemic human rights abuses, and that its independence and authority in undertaking this role should not in any way be undermined or compromised by government or by parliamentary processes and committees.

Conclusion

65. The Australian Lawyers Alliance (ALA) welcomes the opportunity to contribute to the AHRC conversation on human rights. The ALA would be pleased to further assist the AHRC in this important review of Australia's human rights policy and legislative framework and would be available to participate in the technical workshops to be convened by the Commission regarding direct incorporation of human rights and freedoms into Australian law and approaches to implementing and monitoring human rights nationally. The ALA also looks forward to attending the national summit on human rights to be held in October 2019.

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