

Inquiry into the potential for a Human Rights Act for South Australia

Submission to the Social Development Committee,
Parliament of South Australia

14 February 2024

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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 people of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input to the Social Development Committee ('Committee') regarding the potential for a Human Rights Act for South Australia.
2. The ALA has consistently advocated for legislative human rights instruments across Australia – in Federal,² State and Territory jurisdictions.³ In South Australia, that has included joining over 150 other organisations and individuals in December 2022 in signing an open letter calling for an inquiry like this one to be established to focus on progressing a Human Rights Act for South Australia.⁴
3. The ALA contends that a legislative human rights instrument in South Australia is an important and essential reform for the State – a reform which has consistently attracted popular support.⁵ A Human Rights Act in South Australia would operate successfully within South Australia's existing parliamentary democracy and justice systems, as well as providing another avenue for enlivening in South Australia the rights and freedoms enshrined in international human rights law and frameworks, consistent with the contents of the Human Right Act.
4. Our submission will address:
 - a. the effectiveness of current laws for protecting human rights in South Australia and the case for adopting a Human Rights Act in South Australia;
 - b. the operation and effectiveness of human rights legislation in other jurisdictions;
 - c. the elements of a future Human Rights Act in South Australia; and
 - d. the potential implications of a Human Rights Act in South Australia for the making of laws, courts and tribunals, public authorities and other entities.

² See, eg, Australian Lawyers Alliance, *A federal Human Rights Act: The case for a legislative human rights instrument in Australia* (Policy Paper, 6 December 2023) <www.lawyersalliance.com.au/documents/item/2597>.

³ See, eg, Australian Lawyers Alliance, Submission to Queensland Parliament's Legal Affairs and Community Safety Committee, *A Human Rights Act for Queensland* (April 2016) <www.lawyersalliance.com.au/documents/item/580>.

⁴ *Proposing a Human Rights Law for South Australia* (Open Letter, 9 December 2022) <www.lawyersalliance.com.au/documents/item/2351>.

⁵ See: Human Rights Law Centre, 'COVID-19 sees huge increase in support for a Charter of Human Rights: poll' (Media Release, 9 September 2021); Attorney-General's Department, Australian Government, *National Human Rights Consultation* (Report, September 2009).

The effectiveness of current laws for protecting human rights in South Australia and the case for adopting a Human Rights Act

5. The ALA contends that human rights are currently only protected in South Australia in limited, minimal and informal ways. While some South Australian laws protect specific rights,⁶ there is currently no obligation on the South Australian Parliament and public entities in South Australia to consider the full range of human rights when making laws, developing policies and making decisions.
6. The ALA thus submits that adopting a Human Rights Act in South Australia would ensure that the South Australian Parliament and public entities must actively assess the impact on human rights – including both the promotion of human rights and any potential violations of human rights – as part of developing laws and policies, as well as in the decision-making processes of the State.
7. Such a legislative instrument would provide human rights protections in South Australia and enhance South Australia’s democracy by building a stronger human rights culture within the State. A State-based Human Rights Act would give expression to values important to all South Australians, such as equality, diversity, respect and inclusion in relation to those matters that concern the State. It would encourage a culture where it is understood within the community that discrimination is unlawful, and where it becomes unacceptable in community to discriminate.
8. As the only Western democracy without a human rights instrument (noting the debate is also being engaged on a Federal level),⁷ to have protections in South Australia through a Human Rights Act will enable South Australians to have affinity with the international community, so protected by their own charters and Acts.
9. A Human Rights Act would provide an avenue for ensuring that those who exercise power within South Australia are subjected to a legislative framework, in accordance with the Rule of Law, that would operate to prevent them from exercising power in such a way as to infringe upon the human rights of people in South Australia.

⁶ See, egs, *Racial Vilification Act 1996 (SA)*, *Equal Opportunity Act 1984 (SA)*, *Public Interest Disclosure Act 2018 (SA)*.

⁷ See: Australian Lawyers Alliance, Submission to the Commonwealth Parliamentary Joint Committee on Human Rights, *Inquiry into Australia’s Human Rights Framework* (30 June 2023) <www.lawyersalliance.com.au/documents/item/2499>.

10. A legislative human rights instrument can be a powerful tool, not only in keeping society diverse, fair, respectful and inclusive, but also being an essential adjunct to the institutions of parliamentary democracy and the common law.
11. The benefit of such an instrument means that governments, in providing responses to community concerns (for example, with the response to the protests by climate activists or with the intention of dealing with sex offenders who have completed their sentences), will need to take into account human rights principles – and not just community outrage at a particular event – as to whether the proposed amendments would curtail rights.
12. Further, the ALA submits that a legislative human rights instrument can avoid litigation and not cause it. One example is in Tasmania – also without such an Act or Charter. The Tasmanian Government sought to enact the *Workplace (Protection from Protesters) Act 2014 (Tas)* to give wide ranging preventative powers to the State to prevent planned protests. Former Senator Bob Brown challenged this legislation and the decision had to be determined by the High Court, which struck down the legislation, saying it offended the implied freedom of political communication.⁸
 - a. If such legislation had to be checked against a Human Rights Act or Charter, challenges such as this would not have to go before the Courts at all. Clearly the Tasmanian legislation was in breach of the sorts of rights we would propose are adopted by South Australia.
 - b. The ALA notes that the South Australian Parliament increased penalties in South Australia for persons blocking traffic following protests in 2023.⁹ No doubt any protestor charged under the new provisions will consider a *Brown*-type challenge. This process would be lengthy and costly for all parties involved. If South Australia had a Human Rights Act, the proposed changes would have offended its provisions and would not have passed through Parliament in the form it did.
13. Another example illustrating the need for a Human Rights Act in South Australia concerns the use of spit hoods on children and on adults, for which the South Australian Government came

⁸ *Brown v Tasmania* [2017] HCA 43. ('*Brown*')

⁹ Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA), which amended the *Summary Offences Act 1953 (SA)*.

under fire in the last decade, following the death in custody of Wayne Fella Morrison and the inquiry in the Northern Territory in relation to the Don Dale Youth Detention facility.

- a. In South Australia, until they were banned, the South Australian Government's youth justice system had been using spit hoods on children and young people.¹⁰ The Ombudsman conducted an inquiry into the use of spit hoods on children and recommended their banning.¹¹ The South Australian Government eventually agreed.
- b. For adults, the South Australian Government eventually phased out their use in 2021 following work by the family of the deceased, Mr Morrison. It was clear that spit hoods had a role in his death – he died from a cardiac arrest while having a spit hood over his head, while placed on the floor of a van and while he was cuffed to legs and wrists. A South Australian Human Rights Act would not permit the use of restraints which are not necessary and which are in clear breach of rights.
- c. The ALA notes that the cost to the State was enormous for both of the aforementioned investigations into spit hoods.
- d. In the inquest into Mr Morrison's death,¹² the coroner heard of the failures to take into account and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody, in particular about cultural matters. A Human Rights instrument in South Australia would ensure that such failures were audited and compliance with those recommendations – designed to prevent deaths – were implemented.

14. The ALA shares with the Committee one further example, which is in relation to workplace harassment within the Parliament of South Australia.

¹⁰ See: Ombudsman SA, Government of South Australia, *Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre* (Report, September 2019) <www.ombudsman.sa.gov.au/publications/investigation-reports/2019-investigation-decisions>.

¹¹ Ombudsman SA, Government of South Australia, 'Department of Human Services – Use of 'spit hoods' in the Adelaide Youth Training Centre' (Media Release, 24 September 2019) <www.ombudsman.sa.gov.au/publications/news/department-of-human-services-use-of-spit-hoods-in-the-adelaide-youth-training-centre>.

¹² Jayne Samia Basheer, Deputy State Coroner, Coroner's Court of South Australia, *Finding of Inquest into the Death of Wayne Fella Morrison* (12 May 2023) <www.courts.sa.gov.au/wp-content/uploads/download-manager-files/Morrison,%20Wayne%20Fella.pdf>.

- a. In February 2021, the South Australian Equal Opportunity Commission to the Houses of the South Australian Parliament ('EOC') reported on its findings following a request to investigate the issue of harassment within the South Australian Parliamentary workplace.¹³ Up until the EOC's inquiry, the South Australian Parliamentary workplace had been immune arising from the protection under current legislative protections.
- b. The EOC's recommendations called for changes and have been adopted for staff of that workplace but not for members of Parliament, who still lack such protections. A Human Rights Act could protect all South Australian residents and not preclude a class or group.
- c. The aforementioned inquiry only took place after an incident involving an allegation of sexual misconduct at a Christmas party between two members of Parliament. If a Human Rights Act is enacted in South Australia, such an inquiry would not need to occur, as a Human Rights Act would ensure protections for complainants in all workplaces.

15. With the above examples and many others in mind, the ALA thus strongly believes a Human Rights Act in South Australia would be of great benefit to the State and to all South Australians.

The operation and effectiveness of human rights legislation in other jurisdictions

16. The United Kingdom, New Zealand, the Australian Capital Territory (ACT), Victoria and Queensland each has a legislative human rights instrument that follows a dialogue model of human rights protection.¹⁴

17. The ALA submits that this model of human rights protection is well-suited to jurisdictions which have a system of parliamentary democracy, as it preserves the sovereignty of

¹³ See: Equal Opportunity Commission to the Houses of the South Australian Parliament, Government of South Australia, *Review of Harassment in the South Australian Parliament Workplace* (Report, 26 February 2021) <www.equalopportunity.sa.gov.au/documents/reviews/Report-Review-of-Harassment-SA-Parliament-Workplace.pdf>.

¹⁴ See: *Human Rights Act 1998* (UK); *Human Rights Act 1993* (NZ); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

Parliament. Using a dialogue model of human rights protection, a legislative Human Rights Act provides additional human rights protections in four ways:

- 1) requiring the courts to interpret all existing legislation and regulations in a manner that is compatible with the protected human rights;
- 2) requiring that when new legislation and regulations are introduced into Parliament, they are to be accompanied by a Statement of Compatibility through which the relevant Minister is required to certify that the proposed legislation/regulation is compatible with human rights;
- 3) requiring 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; and
- 4) requiring all non-government organisations that perform functions of a public nature to comply with the human rights protected by the Human Rights Act.

18. Drawing on the experiences of legislative human rights instruments in the ACT, Victoria and Queensland in particular, there is significant evidence of the important and practical human rights protections that can be achieved through legislating a Human Rights Act in South Australia.

19. The following examples from the Human Rights Law Centre,¹⁵ from Human Rights for South Australia,¹⁶ and from the Victorian Equal Opportunity and Human Rights Commission,¹⁷ illustrate how a Human Rights Act can lead to significant, positive, life-changing outcomes for some of the most vulnerable people in our community – outcomes which could be replicated in South Australia with South Australia’s own legislated human rights instrument.

¹⁵ 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); Human Rights Law Centre, *101 cases of how charters of human rights make our lives better* (Web Page, 2022) <<https://charterofrights.org.au/101-cases>>.

¹⁶ Human Rights for South Australia, *Case studies that evidence the benefits of the Human Rights Acts operating in Queensland, the Australian Capital Territory and Victoria* (Document) <www.rightsnetworksa.com>.

¹⁷ Victorian Equal Opportunity and Human Rights Commission, *2018 report on the operation of the Charter of Human Rights and Responsibilities* (Annual Report, November 2019).

20. A number of the following case studies also demonstrate how effective legislative human rights instruments can be, including for service/program delivery to Australians and in shaping human rights-focused processes within public entities.

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.

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.

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).

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 for other solutions to be explored.

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

Tenants Queensland used the *Human Rights Act 2019* (Qld) to help a single mother who had experienced domestic violence to avoid eviction. The tenant's housing provider had sought to terminate her lease for serious breaches caused by her ex-partner who refused to leave the premises. Tenants Queensland assisted the mother to draft a letter of complaint under the *Human Rights Act 2019* (Qld) and submissions in response to the application for termination. The tribunal granted an adjournment which allowed the parties to negotiate a transfer of tenancy. The housing provider then withdrew the application for termination.

Source: Queensland Human Rights Commission, Putting people first: The first annual report on the operation of Queensland's Human Rights Act, 2019-20 (Annual Report, 2020) 112, published in Human Rights Law Centre, Domestic violence survivor avoids eviction to homelessness (2022).

The ACT Government has published guidelines to instruct government departments on how to consider the human rights protected in the ACT Human Rights Act in the development of legislation and policy. For example, the guide instructs public officials to consider the cultural rights protected by section 27 of the *Human Rights Act 2004* (ACT) when they are developing policies that have the potential to limit the ability of Indigenous or other ethnic groups to continue to take part in distinct cultural practices.

Source: Kerry Weste, Obligations on Public Authorities to Act consistently with Human Rights (15 November 2022), published by Human Rights for South Australia.

Adrian Burragubba, a leader of the Wangan and Jagalingou people, and his family were camping, practicing their culture and performing traditional ceremonies on a pastoral lease area. Police officers approached the group and asked them to leave, stating that an international mining company occupying the land had claimed they were 'trespassing'. The site was the subject of an Indigenous Land Use Agreement but the family opposed the agreement and the mine, saying that Aboriginal people had been exercising their culture by fishing and hunting and performing ceremonies for more than 40,000 years. Cultural rights of Aboriginal peoples and Torres Strait Islander peoples are specifically protected by the *Human Rights Act 2019* (Qld), including the right to maintain their distinctive spiritual, material and economic relationship with the land and waters with which they hold a connection. The family told the police that they had received expert advice that

they could lawfully exercise their cultural rights and responsibilities. However, the police ordered the group to pack up their equipment and leave within an hour. The family says that this caused grief and trauma. The Queensland Police Service agreed to provide a statement of regret which was able to be shared publicly. The statement acknowledged that the events caused embarrassment, hurt and humiliation for Mr Burragubba and his extended family, that there are complex legal issues and cultural sensitivities, and that the Queensland Police Service will commit to take into account the issues in the complaint in future responses.

Source: Queensland Human Rights Commission, Balancing life and liberty: The second annual report on the operation of Queensland's Human Rights Act, 2020-21 (Annual Report, 2020) 162, published in Human Rights Law Centre, Police express regret about asking traditional custodians to move on while exercising their cultural rights (2022).

After the Victorian Charter was passed, the Victorian Equal Opportunity and Human Rights Commission developed an education project to train government agencies, businesses and the community on their obligations to comply with human rights. In 2017, 119 staff from Victoria's Registry of Birth, Deaths and Marriages undertook human rights training. Following this training, the Registry's leadership team raised awareness of human rights by explicitly discussing human rights in their daily interactions and decision-making with the public, stakeholders and Registry staff. The Registry also developed a tailored presentation with practical examples and interactive exercises to assist Registry staff in identifying when and how to act compatibility with human rights in their daily work.

At the East Gippsland Shire Council in Victoria, councillors, executive leaders, managers, coordinators and team leaders from all business units undertook the targeted human rights training to understand their obligations under the Victorian Charter. With the assistance of the Victorian Equal Opportunity and Human Rights Commission, the Council developed a best practice human rights approach to customer service that was rolled out across the Council to over 100 local government services. Senior leaders in the Shire Council also committed to integrating human rights into the organisational vision, strategic planning, and policies. For example, the Council developed a complaints management policy and procedure to ensure that when a member of the public submits a complaint, it is managed fairly and objectively in a manner that upholds the human rights of that individual.

Source: Kerry Weste, Obligations on Public Authorities to Act consistently with Human Rights (15 November 2022).

21. As an addendum to the last example provided above, the ALA notes that the Victorian Equal Opportunity and Human Rights Commission has since found:¹⁸

...encouraging indications that many public sector staff know about and value human rights. There were strong signs the public sector is engaging community organisations in decisions that impact their rights.

22. The Victorian Equal Opportunity and Human Rights Commission's report also features a case study of Anthony Murphy, Operations Manager at Barwon Prison.¹⁹ Having received education on Victoria's Charter from the Victorian Equal Opportunity and Human Rights Commission, Mr Murphy reflected as follows:²⁰

Everyone hears about 'human rights', but after the training we had a much better understanding about what we are required to do. ...

We need to consider human rights in our decisions and be able to demonstrate we've done that. If we're not considering human rights at all, with the Charter in mind, then we won't be making the best decisions. ...

One of the most telling moments for me was when I realised that I'm not hamstrung or hindered if I use the Charter in my job. This is something people worry about.

For example, I got a chance to use the Charter on the same day I received the Charter education, and it led to a positive outcome.

We had a challenging prisoner who was very aware of the Charter and his human rights, as a lot of prisoners are. He was in a holding cell and was required to produce a urine sample. However, he was demanding to the prison staff that he wanted his lunch, and that it was against his human rights not to give it to him.

We identified that the prisoner's human rights were engaged – he was hungry and had the right to be treated with dignity as a person. However, in this situation, providing him lunch would compromise the process, and we would only be delaying his lunch for a short time. We communicated to the prisoner that we'd considered his human rights but had decided it was justified to limit them in these circumstances. The prison staff rang me later and they told me that they couldn't believe how willingly the prisoner accepted the decision after that had been communicated to him.

Considering the prisoner's human rights absolutely changed the situation for the better. I've always been about fairness and equality anyway, as a person. But that gave me a real insight into what we are required to do under the Charter.

¹⁸ Victorian Equal Opportunity and Human Rights Commission, *2018 report on the operation of the Charter of Human Rights and Responsibilities* (Annual Report, November 2019) 3.

¹⁹ Ibid 56.

²⁰ Ibid.

Elements of a Human Rights Act in South Australia

23. This section of the ALA's submission will address what elements we recommend ought to be included in a Human Rights Act in South Australia.

Which human rights and freedoms should be protected

24. Broadly, the ALA supports including in legislative human rights instruments:

- civil and political rights;
- economic, social and cultural rights; and
- procedural rights.

25. What is enshrined in the ACT's *Human Rights Act 2004* (ACT) ('ACTHRA'), Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter') and Queensland's *Human Rights Act 2019* (Qld) ('QHRA') provides comprehensive precedents for South Australia as to which rights and freedoms should be included in South Australia's future Human Rights Act.

- a. Civil and political rights – which can include the right to vote, freedom of speech, freedom of association, freedom of assembly, the right to life, the right to be free from torture, freedom of movement, freedom from arbitrary detention, and the right to a fair trial – are included in the ACTHRA, the Victorian Charter and the QHRA.
- b. Some economic, social and cultural rights are included in the ACTHRA (the right to education and the right to work) and also in the QHRA (the right to education and the right to health services).²¹

26. The ALA submits that South Australia's Human Rights Act should protect all of those rights set out in the *Universal Declaration of Human Rights*, the United Nations' *International Covenant on Civil and Political Rights* (ICCPR), the United Nations' *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the United Nations' *Nelson Mandela Rules*, and the United Nations' *Convention on the Rights of the Child*. The rights contained in these frameworks mainly concern civil, political economic, social and cultural rights.

²¹ *Human Rights Act 2004* (ACT) ss 27A-27B; *Human Rights Act 2019* (Qld) ss 36-37.

27. In addition, the ALA considers that South Australia should recognise more procedural and modern rights, such as:

- the right to public participation in decision-making;
- the right to access to justice;
- the right to protest; and
- the right to a healthy and safe environment.

Specific rights for Aboriginal and Torres Strait Islander peoples

28. The enactment of a legislative Human Rights Act in South Australia presents as a significant opportunity to provide legislative protections for specific rights for Aboriginal and Torres Strait Islander peoples.

29. However, any initiatives to incorporate Aboriginal and Torres Strait Islander rights within a Human Rights Act, should be developed through genuine participation with Aboriginal and Torres Strait Islander peoples and groups. South Australia's First Nations Voice to Parliament, a recent and very welcome reform by South Australia's Government, would be an appropriate consultative avenue for such protections.

30. The ALA also supports including in South Australia's Human Rights Act the principles and rights outlined in the United Nations' *Declaration on the Rights of Indigenous Peoples* (UNDRIP).

31. Consideration of the rights enshrined in the UNDRIP by South Australia's Parliament and public entities operating within South Australia would be entirely compatible and consistent with the ongoing formation of the South Australian First Nations Voice to Parliament.

32. Aboriginal and Torres Strait Islander peoples' rights could further be included within a human rights act in the following ways:

Recognition and protection of distinct cultural rights of Aboriginal and Torres Strait Islander peoples

33. The Human Rights Act could include a provision recognising that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right, to maintain, control, protect and develop their identity and cultural heritage, traditional knowledge, distinctive spiritual practices, observances, beliefs, teachings and language.

34. Both the ACTHRA and the QHRA include a provision that recognises and protects the distinct cultural rights of Aboriginal and Torres Strait Islander peoples.²²

An overarching 'participation duty' on public authorities

35. The Human Rights Act could also include an overarching 'participation duty' on public authorities that would provide a process requirement to ensure the full participation of Aboriginal and Torres Strait Islander peoples in decisions that affect them. Such a duty is required under Articles 18 and 19 of the UNDRIP.
36. It is important to again emphasise that any provision that recognises a specific articulation of an Aboriginal and Torres Strait Islander participation duty within a Human Rights Act should be determined by Aboriginal and Torres Strait Islander peoples and organisations. Accordingly, this proposal should be subject to further consultations with Aboriginal and Torres Strait Islander peoples and communities, including through South Australia's First Nations Voice to Parliament.

Additional elements for consideration

37. The ALA submits the following additional elements for consideration by the Committee in the future development of a Human Rights Act in South Australia.

A requirement to consider human rights

38. South Australia's Human Rights Act must include a requirement that human rights principles are considered in all forms and processes of parliamentary and public entity law- and decision-making.
39. Relatedly, the ALA submits that South Australia's Human Rights Act should require that all Members of Parliament, government officials, public servants and judicial officers undertake relevant human rights training.

²² *Human Rights Act 2004 (ACT) s 27, Human Rights Act 2019 (Qld) s 28.*

Reasonable limits on human rights and freedoms

40. It should be clear in South Australia's Human Rights Act when reasonable limits are permitted to be placed on the rights and freedoms protected in South Australia's Human Rights Act.
41. Where human rights need to be balanced against each other and/or other competing public interests the Human Rights Act can provide the formula by which this balancing process is undertaken. This can be achieved by a provision that sets out the circumstances in which a human right can be limited. The process of balancing rights against each other requires ensuring that, where giving effect to one right may involve imposing restrictions or limitations on another right, those restrictions are proportionate, reasonable and demonstrably justified in a free and democratic society. This means consideration of the following:
- a. whether the objective that the rights-limiting law is trying to fulfil is of sufficient importance to warrant overriding the protected right or freedom – that is, the objective must relate to concerns which are pressing and substantial;
 - b. whether the means adopted to limit the right are designed to meet the objective in question;
 - c. whether the means adopted impose the least possible restriction on the rights – that is, what other options were available that did not involve a restriction on the rights; and
 - d. whether there is proportionality between the effects of the measures and the objective which the rights-limiting law is seeking to achieve.²³
42. The proportionality test has been enshrined in the legislative human rights instruments of the ACTHRA,²⁴ the Victorian Charter,²⁵ and the QHRA.²⁶ All three human rights instruments contain a provision which provides that human rights can be subject only to reasonable limits that are justifiable in a free and democratic society.

²³ *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.

²⁴ *Human Rights Act 2004* (ACT) s 28.

²⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

²⁶ *Human Rights Act 2019* (Qld) s 13.

43. The ALA submits that a similar provision should be included in South Australia's Human Rights Act. In this way South Australia's Human Rights Act would provide a proportionality test that will enable a considered approach to balancing the rights which may be in conflict with each other and/or other competing public interests.

Scrutiny of legislation and explanatory statements of compatibility

44. The South Australian Human Rights Act should ensure that existing, proposed and future laws are subject to scrutiny by an independent entity to ensure compliance with its provisions. That proposed entity would review those laws against the Human Rights Act to check for consistency and to highlight any inconsistencies for urgent consideration and amendment through the parliamentary process.
45. This independent review entity could come in the form of establishing a Parliamentary Committee on Human Rights to review existing, proposed and future laws.
46. Where this independent review entity highlights a breach or breaches of the Human Rights Act which had not been discussed in the explanatory statement of compatibility or related materials, the independent review entity should be empowered to require an explanation from those proposing the new law as to why the breach should be permitted or how the breach will be rectified.

An accessible complaints process and a direct right to bring legal action

47. The complaints process should be easily accessible and efficient for those seeking to progress concerns about human rights breaches, who would make a complaint to the existing EOC which, as in Victoria, would have its role extended to encompass this human rights role.
- a. The ALA submits that there must be appropriate funding for the EOC if it takes on the additional role for the South Australian Human Rights Act implementation.²⁷

²⁷ In 2019, the South Australian Equal Opportunity Commission complained that its funding had gone from \$2 million a decade earlier to only \$995,000 that year. The then-Commissioner pointed out that the funding in

- b. The EOC could have the role of receiving complaints from people who allege that their human rights have been infringed and for a human rights complaint that is accepted by the EOC to be investigated and referred to a conciliation conference.
- 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.
 - The process of conciliation will be deficient if there is no binding or clear outcome from a complaint being brought to the EOC.
 - 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 South Australia's Human Rights Act that obliges the public entity or gives powers to the EOC to compel the entity, to remedy the breach or provide some redress to the complainant.
- c. Accordingly, the EOC could 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 EOC considers having been substantiated.
- d. A complaints and conciliation process which does not provide for a clear or binding outcome or provide for the enforcement of the rights that are protected in the South Australia's Human Rights Act, will result in individuals who allege human rights abuses losing confidence in the complaints and conciliation process and ultimately in the Human Rights Act and the EOC itself. This will undermine the role of the EOC and the ability of the Human Rights Act to fulfil its object of protecting and promoting human rights and a human rights culture.

48. The direct right to bring legal action in the Courts or at the South Australian Civil and Administrative Tribunal (SACAT) – the latter of which has jurisdiction for the existing discrimination legislation appeals – for a breach or breaches of human rights should also be included in South Australia's Human Rights Act.

South Australia for the role was the lowest in Australia. See: Lauren Novak, 'Equal Opportunity Commissioner calls for more funding as office buckles under budget strain', *The Advertiser* (online, 4 February 2019) <www.adelaidenow.com.au/news/south-australia/equal-opportunity-commissioner-calls-for-more-funding-as-office-buckles-under-budget-strain/news-story/95b8146d596d393a6f54ab7e0619fb09>.

- a. This direct right to bring legal action must be a freestanding cause of action, not dependent on bringing another action of law simultaneously or of applying to the EOC initially (although it is submitted such a step to be an option for a complainant).
- b. South Australia's Courts and the SACAT should have the ability to provide a range of remedies for human rights breaches, including compensation and the capacity to grant injunctions to prevent human rights breaches from continuing.
- c. There must also be a direct right of remedy whereby a Judicial Review of legislation inconsistent with the South Australian Human Rights Act can be taken to the South Australian Supreme Court.

Reviewing the Human Rights Act

49. South Australia's Human Rights Act should include a provision for a periodic and mandatory statutory review process. That review should include open and thorough public consultation with stakeholders, especially oppressed and vulnerable groups, and should be independent with proper resourcing.
50. The ALA submits that the timeframe chosen for reviewing South Australia's Human Rights Act beyond the first review must be clearly defined and specified. This will ensure that these important reviews do take place and that those involved undertake the requisite planning to avoid any future delays in those reviews being progressed.

The potential implications of a Human Rights Act in South Australia for the making of laws, courts and tribunals, public authorities and other entities

51. As noted earlier in the ALA's submission, the three main elements of a legislative human rights act that follows the dialogue model are:
 - a. Pre-legislative scrutiny of new legislation;
 - b. An obligation on the courts to interpret all existing legislation and regulations in a manner that is compatible with the protected human rights; and

- c. An obligation on 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.

Pre-legislative scrutiny of new legislation

- 52. The South Australian Human Rights Act should require that future proposed laws and regulations must be accompanied by an explanatory Statement of Compatibility, which would detail how the proposed legislation or regulation complies with South Australia's Human Rights Act; how, if at all, the proposed law may interfere with human rights; why any interference might be necessary; the extent of and results of public consultation; and the results of auditing under the proposed independent entity for the proposed laws.
- 53. Where human rights need to be balanced against each other and/or other competing public interests, the Statement of Compatibility will detail how this balancing process is undertaken in accordance with the proportionality test that is included in the Human Rights Act (referred to above in this submission).
- 54. The ALA submits that this requirement would ensure that all lawmakers in South Australia are transparent in their law-making where the intention is to limit human rights.
- 55. Further, the ALA contends that this requirement ensures that Ministers and their Departments would consider the impact of proposed legislation and policies on human rights *before* they become law.

Interpretation and limitation of rights by the courts

- 56. The ALA submits that a legislative Human Rights Act in South Australia should require all Courts and Tribunals to interpret all existing legislation and regulations in a manner that is compatible with the protected human rights. Where relevant, international law and the judgments of foreign and international courts and tribunals should be considered.
- 57. This would mean that where a Court or Tribunal is required to consider whether a human right should be limited in order to give effect to another human right, or where human rights need to be balanced against each other and/or other competing public interests, the Courts and

Tribunals will need to apply the proportionality test as provided in the Human Rights Act (referred to above in this submission).

58. Where a Court or Tribunal is unable to interpret a legislative provision in a manner that is compatible with human rights, then the Court/Tribunal must refer the matter to the Supreme Court for determination.
- a. If the Supreme Court is unable to interpret the provision(s) in a way that is consistent with the legislative Human Rights Act, then it may make a Declaration of Incompatibility (DoI). Such a DoI will not detract from the operation of the provision or affect its validity or continuing operation.
 - b. Under a legislative Human Rights Act, the effect of such a DoI is to require the Attorney-General to table the DoI in Parliament within six sitting days of receiving the DoI, and to provide a written response to the DoI in Parliament within six months.

Obligation on public authorities

59. South Australia's Human Rights Act should, in the ALA's view, 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.
60. A Human Rights Act in South Australia should, therefore, provide a detailed and comprehensive definition of what is a 'public authority'. It should include government departments, statutory authorities, the police and local government. It should also include all persons and bodies which perform functions of a public nature, when they are performing those functions. This would mean that all non-government organisations that perform functions of a public nature would be required to comply with the human rights protected by the Human Rights Act.
61. The Human Rights Act 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 section 40A(1) of the ACTHRA, section 4(2) of the Victorian Charter and section 10(1) of the QHRA. 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.

Functions of a regulatory nature

62. The phrase ‘functions of a public nature’ should be defined in South Australia’s Human Rights Act to include functions of a regulatory nature. This would mean that all regulatory bodies would be required to act compatibly, and make decisions which are compatible, with the rights protected in the Human Rights Act.

63. 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 ACTHRA,²⁸ the Victorian Charter,²⁹ and the QHRA,³⁰ it is likely that any statutory or private regulatory schemes are public authorities when performing functions of a regulatory nature.

A function is connected to or generally identified with the functions of government

64. The ALA notes 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.

²⁸ *Human Rights Act 2004* (ACT) s 40A(1)(c).

²⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2)(c).

³⁰ *Human Rights Act 2019* (Qld) s 10(1)(c).

65. Section 10(3) of the QHRA and section 40A(3) of the ACTHRA list particular functions that are defined as being of a public nature. The statutory eight-year review of the Victorian Charter recommended that the Victorian Charter be amended to include a similar provision.³¹ 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 Victorian Charter in the day-to-day work of these organisations and inhibited the development of a human rights culture within those organisations.

66. 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.

67. The ALA submits that a Human Rights Act in South Australia should include a similar provision to section 10(3) of the QHRA and section 40A(3) of the ACTHRA that lists particular functions that are defined as being of a public nature. This should include:

- prison and other places of detention or correctional facilities;
- emergency services;
- gas, electricity and water supply;
- public health services;
- public disability services;
- public education, including public vocational education;
- public housing and funded housing support services; and
- public transport.

³¹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 64-65.

The meaning of ‘public authority’ – including an ‘opt-in’ provision

68. The ALA supports the inclusion in South Australia’s Human Rights Act of a provision that enables an entity to request that the Attorney-General of South Australia declares that the entity is subject to the human rights obligations of a public authority under South Australia’s Human Rights Act – that is, an ‘opt-in’ provision.
69. Such a provision, if promoted well and if related to Government contracting and tender processes, could provide a vehicle by which businesses and community organisations in South Australia are encouraged to respect human rights and adhere to human rights compliant conduct.
70. The original intention for the section 40D ‘opt-in’ provision in the ACTHRA was to encourage voluntary compliance with human rights standards across the private sector.
- a. While section 40D 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.
 - b. The ALA submits that the organisations who have opted-in provide an example to other organisations in terms of the practical incorporation of human rights practice into their operations.
 - c. Not-for-profit organisations have noted that, by opting-in to the ACTHRA, they secured greater certainty regarding their human rights obligations under the ACTHRA.³² 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.

³² ‘The ACT Human Rights Act – How it has been applied by non-government organisations’ (Chapter 11) in Louis Schetzer (2018), ‘Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services’ (Faculty of Law, University of NSW, February 2018). 289.

Conclusion

71. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Social Development Committee's inquiry into a potential for a Human Rights Act for South Australia.

72. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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