FREE+EQUAL
AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

Australian Human Rights Commission

Free & Equal

Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023

Acknowledgments

Inquiry team: The project has been led by Professor Rosalind Croucher AM, President, with Darren Dick PSM, Senior Policy Executive with written contributions to the final report from Sarah Sacher (2022); Jack Regester (2023); Ella Kucharova (2021–22); Graeme Edgerton (2021–23); Helen Sowey (2022–23) and Sara Saleh (2023). Research, policy and legal advice has been provided over the course of the project by Olivia Aitken (2018–2021), Nora Bakalla (2022–23); Jodie Ball (2021–23); Rachel Holt (2021–23); Julie O'Brien (2021–22); Lara Renton (2021–22) and Natasha Rose (2022–23). Valuable insights, editing and other support has been provided by Leanne Smith, Chief Executive; Diana Baker, Director, Projects and Partnerships; Tracey Young, Director, Strategic Communications; and by Michael Badorrek; Omar Dehen; Kali Goldstone; Wendy Lam; Al-Shayma Nahya; Sophia Rinaldis; Heaven Muecke; Rachael Scott; Amber Vidler; Sue Broderick and Chris Field.

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Revitalising Australia's Commitment to Human Rights

Free & Equal Final Report 2023

Australian Human Rights Commission

President

Emeritus Professor Rosalind Croucher AM

08 November 2023

The Hon Mark Dreyfus, KC MP
Attorney General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

I am pleased to present you with *Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023*.

This Final Report of the Free & Equal project recommends a National Human Rights Framework and a reform agenda to improve the protection of human rights at the federal level in Australia.

This report is presented to you pursuant to sections 11(1) (j) and 11(1)(k) of the *Australian Human Rights Commission Act 1986* (Cth).

I look forward to advancing the recommendations of the report with you.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM FAAL FRSA FACLM(Hon) FRSN
President

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President's foreword

This is the Final Report of *Free & Equal: A National Conversation on Human Rights*.

It sets out a reform agenda to modernise how we protect human rights in Australia to meet the challenges of 21st century life.

No matter who we are or what our life circumstances are, we all have the right to be treated with respect and dignity by our government, the people that work for it, and by our fellow community members.

The Commission's overarching finding in this Inquiry is that Australia can, and should, do better in protecting human rights.

The Commission makes 12 recommendations that focus on large, structural reforms at the national level to be advanced through the introduction of a National Human Rights Framework.

Such a Framework will create transparency and better accountability for the consideration of human rights, and better tools for people in Australia to stand up for their human rights when they are breached.

The title of this report refers to the need for Australia to revitalise our commitment to human rights. The report proposes a major reset on how we talk about human rights, and in how they are protected.

The measures proposed in this report complement each other, to ensure that our national approach to human rights is comprehensive and balanced. We need better awareness of human rights and a more proactive focus on them from government and decision makers. But critically, we also need more effective legal protections for when people's rights are not respected and for when they are discriminated against.

Emeritus Professor Rosalind Croucher AM FAAL

President, Australian Human Rights Commission

It is time to put into place appropriate transparency and accountability for human rights at the national level, supported by the tools to rigorously monitor our progress in protecting human rights.

This Report builds on an extensive body of consultation and research conducted over the life of the Inquiry. This includes two detailed Position Papers: *Free & Equal: a reform agenda for federal discrimination laws (2021)* and *Free & Equal: a Human Rights Act for Australia (2023)*, among other materials.

Many people have generously engaged in this Inquiry, sharing their vision and passion for a future Australia that is focused on ensuring that everyone is treated with dignity and respect.

The Commission is deeply grateful for the insights and commitment shared throughout the Inquiry.

In leading this Australian Conversation on Human Rights, we have taken seriously – and aspirationally – the statutory mandate given to us by the Australian Government.

The hard work starts now. The Commission stands ready to work in partnership with government and the community to realise the changes proposed in this Report.

Thank you all.

Emeritus Professor Rosalind Croucher AM FAAL FRSA FACLM(Hon) FRSN
President

Terms of Reference

Free and equal in dignity and rights: A national conversation on human rights

TERMS OF REFERENCE

The Australian Human Rights Commission, HAVING REGARD TO:

- Its functions to:
  - promote an understanding and acceptance, and the public discussion, of human rights in Australia (s.11(1)(g) AHRC Act);
  - report ... as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights (s.11(1)(j) AHRC Act); and
  - report ... as to the action that ... needs to be taken by Australia in order to comply with ... any relevant international instrument (s.11(1)(k) AHRC Act).
- Its duties to ensure that its functions are performed with regard for:
  - the indivisibility and universality of human rights; and
  - the principle that every person is free and equal in dignity and rights (section 10(1) AHRC Act).
- The recognition in the Universal Declaration of Human Rights that 'All human beings are born free and equal in dignity and rights' (Art.1 UDHR) and that through the Universal Declaration, and the subsequent human rights treaties that have been ratified, Australia has pledged 'to achieve ... the promotion of universal respect for and observance of human rights and fundamental freedoms' (Preamble, UDHR).
- The desirability of Australia having processes to:
  - set national priorities on human rights
  - educate the community about human rights o Incorporate human rights standards into domestic law, policy and practice
  - consider the observations of human rights treaty body committees and UN special procedures about compliance with our human rights obligations. Australian Human Rights Commission.

DECIDES to exercise its functions by conducting a national conversation on human rights, as follows:

1. The national conversation on human rights will consider possible actions to ensure that:
   (a) the community understands human rights and is able to protect them (for themselves and others)
   (b) communities are resilient and a protective factor against human rights violations
   (c) law and policy makers explicitly consider the impact on human rights of their decisions and are accountable for this impact
   (d) obust institutions exist to promote and protect human rights
   (e) government and the community can work together to fully realise human rights—understanding the respective role of each other
   (f) public servants, and contracted service providers, see the protection of human rights as core business in exercising their functions
   (g) other issues that are identified as priorities for human rights protection by the Australian community are addressed.

2. The national conversation on human rights will:
   (a) Promote awareness of the importance of human rights to 21st century Australia
   (b) Identify current limitations in the promotion and protection of human rights at the national level
   (c) Identify the key principles and elements of a human rights reform agenda to modernise our system of human rights protection
   (d) Build partnerships and consensus on the future actions required to better protect and promote human rights across the Parliament, government and the community.

3. The national conversation on human rights will include the following activities:
   (a) A national summit on human rights
   (b) Public events and consultations
   (c) A report to the Attorney-General and federal Parliament on actions that should be taken to ensure an effective system to promote and protect human rights
   (d) A report to the United Nations Human Rights Council as part of Australia's 3rd Universal Periodic Review (scheduled to take place in 2020).

For the purposes of these Terms of Reference, 'human rights' are defined as all human rights obligations recognised in international law, and are not limited to those rights that are currently reflected in Australian law.

Dated 10 December 2018

Recommendations

Recommendation 1

Australia establishes a National Human Rights Framework

The Commission recommends that the Australian Government introduce a National Human Rights Framework. The Framework should include the following, inter-related, actions:

1. comprehensive and effective protection of human rights in legislation through the introduction of a national Human Rights Act
2. modernised federal discrimination laws that shift the focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place
3. an enhanced role for Parliament in protecting human rights, through reform to the processes for parliamentary scrutiny and the introduction of new oversight mechanisms for Australia's human rights obligations
4. a National Human Rights Indicator Index to independently measure progress on human rights
5. an annual statement to Parliament on human rights priorities is made by the Government
6. a national human rights education program
7. a sustainable National Human Rights Institution, the Australian Human Rights Commission, to support the Framework
8. support for vibrant and robust civil society organisations to protect human rights.

Recommendation 2

Implementing the National Human Rights Framework

The National Human Rights Framework should:

- set out commitments over a 10 year period, with two 5 year implementation plans
- be adequately, appropriately and sustainably resourced
- include mechanisms for community engagement and participation in the framework's operation
- set measurable targets
- identify how the framework interacts with other national frameworks, agreements and plans
- include a monitoring, evaluation and learning framework with public reporting at regular intervals, in line with the commitments.

Recommendation 3

A National Human Rights Act

The Commission recommends that the Australian Government enact a Human Rights Act. Further, the Commission recommends that an Exposure Draft Bill be developed based on the Commission's model Human Rights Act.

Recommendation 4

Reform of federal discrimination laws

The Commission recommends that the Australian Government modernise federal discrimination laws to ensure their effectiveness and shift the focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place.

Consideration should be given to undertaking these reforms in 2 stages:

> *Stage 1*: addressing immediate priorities and fixing longstanding problems in the operation of federal discrimination law (year 1)
>
> *Stage 2*: introducing a new co-regulatory model that broadens and expands on the positive duty under the Sex Discrimination Act (years 2–3).

Recommendation 5

Parliamentary scrutiny and the role of the Parliamentary Joint Committee on Human Rights (PJCHR)

The Commission recommends that:

A. Amendments be made to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.

B. Amendment of section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), along the lines of the power of the UK Human Rights Committee, to allow it to 'make special reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases). The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.

C. Amendment of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to require Statements of Compatibility for all legislative instruments.

D. That the range of matters to be addressed in a Statement of Compatibility should include consideration of consultations undertaken.

E. That Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.

F. That with the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is amended, or an accompanying legislative instrument drafted, to provide greater clarity on expectations in Statements of Compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.

G. A public sector human rights education program be introduced, to provide training and resources to public servants to enable them to understand and analyse human rights.

H. Consideration be given to having designated human rights advisers in Departments.

Recommendation 6

Parliament's role in reviewing Australia's implementation of our international human rights obligations

The Commission recommends that:

A. The Attorney-General reinstate the practice of tabling Concluding Observations of human rights treaty committees in both houses of Parliament.

B. The Australian Government should maintain a publicly available and up to date database about the Concluding Observations made by each UN human rights treaty committee and their status.

C. The Government reform the Standing National Mechanism for Treaty Body Reporting to include public reporting on treaty bodies and individual communications.

D. The Attorney-General table information about individual communications in Parliament on an annual basis, along with the Australian Government's response to these.

E. The Parliamentary Joint Committee on Human Rights be empowered to review the adequacy of the Australian Government's response to individual communications and/or Concluding Observations from time to time.

F. The Joint Standing Committee on Treaties conduct a review of all existing reservations and interpretive declarations under UN human rights treaties.

Recommendation 7

A National Human Rights Indicator Index

The Commission recommends that the Australian Government introduce a National Human Rights Indicator Index that can measure progress on human rights over time.

Recommendation 8

A National Human Rights Statement

The Commission recommends that the Australian Government commit to an annual National Human Rights Statement to Parliament.

Recommendation 9

A National Human Rights Education Action Plan

The Commission recommends that the Australian Government develop a National Human Rights Education Action Plan, targeted to the Australian Public Service, primary and secondary schools, workplaces and the general community.

Recommendation 10

An appropriately resourced AHRC

The Commission recommends that the Australian Government ensure the Australian Human Rights Commission is appropriately and sustainably resourced to perform its functions, including supporting the Human Rights Framework, in accordance with the UN Paris Principles.

Recommendation 11

A robust civil society to protect human rights

The Commission recommends that the Australian Government support measures that invest in and build community capacity to realise human rights and freedoms, including by:

- instituting regular forums for dialogue with the NGO sector on human rights
- providing funding support for NGOs to advance human rights protection
- supporting the independent participation of NGOs in UN human rights processes
- maintaining and re-establishing programs that build capacity and support the participation of Indigenous peoples and persons with disability in UN human rights mechanisms.

Recommendation 12

The role of business in protecting human rights

The Commission recommends that the Australian Government develop a National Action Plan on Business and Human Rights.

1. Introduction: Towards a revitalised Human Rights Framework for Australia

1.1 Overview

This chapter outlines the actions necessary for the Australian Government to meet its obligations to respect, protect and fulfil human rights in a revitalised Human Rights Framework. It recommends a National Human Rights Framework for Australia so that we can achieve an effective system of human rights protection for 21st century Australia.

The proposed national framework has 8 key action areas (set out in recommendation 1), which are each described in detail in the subsequent chapters of this report. The chapter also sets out key accountability mechanisms for the national framework (set out in recommendation 2).

Recommendation 1

Australia establishes a National Human Rights Framework

The Commission recommends that the Australian Government introduce a National Human Rights Framework. The Framework should include the following, inter-related, actions:

1. comprehensive and effective protection of human rights in legislation through the introduction of a national Human Rights Act
2. modernised federal discrimination laws that shift the focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place
3. an enhanced role for Parliament in protecting human rights, through reform to the processes for parliamentary scrutiny and the introduction of new oversight mechanisms for Australia's human rights obligations
4. a National Human Rights Indicator Index to independently measure progress on human rights
5. an annual statement to Parliament on human rights priorities is made by the Government
6. a national human rights education program
7. a sustainable National Human Rights Institution, the Australian Human Rights Commission, to support the Framework
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Recommendation 2

Implementing the National Human Rights Framework

The National Human Rights Framework should:

- set out commitments over a 10 year period, with two 5 year implementation plans
- be adequately, appropriately and sustainably resourced
- include mechanisms for community engagement and participation in the framework's operation
- set measurable targets
- identify how the framework interacts with other national frameworks, agreements and plans
- include a monitoring, evaluation and learning framework with public reporting at regular intervals, in line with the commitments.

1.2 Introduction

This report sets out the Australian Human Rights Commission's (Commission) recommendations for improving protection of human rights in Australia.

It recommends the introduction of a new National Human Rights Framework to revitalise our commitment to the protection of human rights. Each chapter of this report sets out a key element of this proposed new national framework.

The report is the culmination of the Commission's 5 year long major inquiry, *Free & Equal: An Australian Conversation on Human Rights*.

The Inquiry included the release of 4 consultation papers, the convening of a national conference and multiple rounds of technical workshops, as well as engagement in the Universal Periodic Review process at the United Nations Human Rights Council in 2021 and engagement in the inquiry work of the Parliamentary Joint Committee on Human Rights across 2023. Two major reports underpin this Final Report, setting out law reform priorities: *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) and F*ree & Equal: A Human Rights Act for Australia* (March 2023).

The Free & Equal Final Report sets out a roadmap for what an effective system of human rights protection for 21st Century Australia would look like, and what steps Australia needs to take to get there.

The Terms of Reference for Free & Equal outlined 4 processes for the Commission to investigate – how to:

- set national priorities on human rights
- educate the community about human rights
- incorporate human rights standards into domestic law, policy and practice
- consider the observations of human rights treaty body committees and UN special procedures about compliance with our human rights obligations.

There has been a high level of public and stakeholder engagement in consultations over the 5 years of the Inquiry. This ensures that the recommendations developed are principled, pragmatic, evidence-based and grounded in a level of consensus built across the relevant sectors.

At the centre of this report is a finding that Australia should have in place a national framework for advancing the protection of human rights.

The Commission's observation is that law, policy and practice at the federal level have drifted over the past decade without a durable reference point from which to fully consider the human rights implications of decisions made.

The experience during the COVID-19 pandemic and of decision making in relation to the Robodebt scheme are illustrations of how decision making can lose focus of the human rights impacts on people when decisions are being made without human rights guidance.

This Final Report outlines the actions necessary for the Australian Government to meet its obligations to respect, protect and fulfil human rights in a revitalised Human Rights Framework.

The report is released on the occasion of the 75th anniversary of the adoption by the United Nations (UN) of the Universal Declaration of Human Rights. Australia had a significant leadership role in its adoption, which remains a guiding light for humanity the world over.

1.3 Why do we need a National Human Rights Framework?

There are 5 key factors that underpin the Commission's call for a National Human Rights Framework.

(a) Building a human rights culture of 'rights-mindedness'

Throughout this project, the Commission has emphasised the importance of building a human rights culture, or of building 'rights-mindedness'.

This means that human rights are front of mind when decisions are made or actions taken by the Parliament and Government so that they can choose pathways that advance human rights and that do not unnecessarily cause harm to people in the community. Through 'rights-mindedness', policy design and decision making are based on human rights principles.

At the community level, it means that we are aware of how our actions affect others and we actively choose not to harm others.

At present, our legal framework and supporting policy framework for human rights is very limited and reactive in focus. It relies too heavily on discrimination laws to set the standard, which mostly come into operation when harm has already occurred.

There is not enough focus on proactive measures to advance human rights in the first place or to bring these issues to the front of mind when decisions are made.

We have described the desired mindset shift as building 'upstream' consideration of human rights into our systems for law, policy and practice, as opposed to such consideration being 'downstream' and focused on measures 'after the event'.

A National Human Rights Framework is of vital importance if we are to build a human rights culture at the federal level.

The Victorian Equal Opportunity and Human Rights Commission has identified the benefits of a human rights culture as set out in **Table 1**.[1]

Table 1: Benefits of a human rights culture in Victoria

Benefits of a human rights culture for government

- Builds relationship with the community
- Identifies problem areas
- Improves democratic legitimacy by demonstrating to the Victorian community a genuine commitment to human rights
- Connects Victoria with international efforts to translate human rights goals and standards into results for the people of Victoria
- Reinforces other work, for example safety, equality, multiculturalism.

Benefits of a human rights culture for community members

- Assists government to make decisions that consider rights
- Establishes clear non-negotiable standards
- Strengthens cases where change is needed
- Empowers individuals
- Contributes to a fairer and more inclusive society
- Encourages community participation in decision-making.

Benefits of a human rights culture for public authorities

- Improves quality of service design, in particular for the most marginalised, excluded and disadvantaged in our community
- Improves decision-making by providing a framework to identify, assess and balance human rights against other rights and interests
- Helps manage organisational risks, such as litigation
- Builds reputation and credibility
- Creates a framework for solving problems
- Provides a protective mechanism to engage compliance and adherence to human rights laws.

Benefits of a human rights culture for public servants

- Inspires staff
- Reconnects staff with core public service values
- Gives staff a framework to act with a moral compass when dealing with people.

(b) Closing the 'implementation gap' between international standards and domestic action

Throughout this project the Commission has also noted the implementation gap between the longstanding international human rights standards which Australia has committed to and their domestic protection.

In a Discussion Paper for this project released in 2019 the Commission noted:

> The Commission has identified that there is an **implementation gap** in Australia between the international human rights standards that Australian governments have committed to uphold over many years, and the actual protections in our laws, policies and processes of government.
>
> Of particular concern is the lack of robust, cohesive processes to set national priorities, measure progress in the achievement of human rights and to monitor compliance with international standards.[2]

Whenever Australia participates in UN periodic reviews of its performance under human rights treaties, the limitations of our domestic legal protections of human rights are always raised as a concern, as illustrated in **Table 2**.

Table 2: Human rights treaty body committee observations on the 'implementation gap' in Australia

Treaty title	Concluding Observations by treaty committee
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)	In November 2022, the Committee against Torture recommended that the federal government should 'effectively ensure coherent and consistent implementation of the Convention across all state and territory jurisdictions'.[3]
Convention on the Rights of the Child (CRC, 1989)	In November 2019, the Child Rights Committee noted the need to enact 'comprehensive national child rights legislation fully incorporating the Convention'.[4]
Convention on the Rights of Persons with Disabilities (CRPD, 2006)	In October 2019, the Committee on the Rights of Persons with Disabilities, noted the 'insufficient harmonization of the domestic legal framework with the Convention'.[5]
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)	In July 2018, the Committee recommended that Australia, 'fully incorporate the Convention into national law by adopting a Charter of human rights'.[6]
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)	In December 2017, the Committee recommended that Australia 'take appropriate measures, including through the adoption of a human rights act, to strengthen protection of human rights and give full legal effect to the provisions of the Convention'.[7]
International Covenant on Civil and Political Rights (ICCPR, 1966)	In December 2017, the Human Rights Committee recommended that 'the State party should adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions'.[8]
International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)	In July 2017, the Committee recommended that 'the State party consider introducing a federal charter of rights guaranteeing the full range of economic, social and cultural rights'.[9]

A National Human Rights Framework 'brings rights home' and places accountability for their protection within our domestic borders – in our Parliament, Government and community.

This report makes recommendations to ensure robust mechanisms exist for the implementation of our international obligations, including processes for the Government to set implementation priorities and to be held to account for progress in achieving the realisation of human rights.

(c) Ensuring effective governance for human rights protection

The Commission's proposed National Human Rights Framework adopts a dialogue model, between the 3 branches of government (the Parliament, the Executive and the Courts). Each has a role to play in protecting human rights for the benefit of all people in Australia.

The national framework proposes that the respective roles of the different branches of government are clearly articulated so that, as citizens and members of the community, we can hold government to account for its actions. This will ensure transparency and accountability.

The national framework also sets out in broad terms how we all have a role in protecting human rights in Australia – as businesses, as civil society organisations, as a Human Rights Commission, and as members of the community.

It provides a governance framework for the protection of human rights in Australia. This is necessary because:

- There is no one measure that can fully protect human rights in Australia – we need multiple actions undertaken by multiple actors. It is a complex undertaking, and key actions can fall off the agenda if it is not clear who is responsible for the action and without clarity on what is trying to be achieved.
- Without naming key priority actions for the country, and without capacity to monitor progress, it is difficult to make progress to realise human rights. Commitments to action do not always result in better outcomes. If we do not expressly name and commit to actions to protect human rights, how can we hold government to account for progress? It is harder to reach the end of your journey if you don't know the destination.
- Time and again, we have seen our systems for protecting human rights in Australia lose their way. As in the first Position Paper *Free & Equal: a reform agenda for federal discrimination laws* (2021), the Commission noted, those laws have languished for a generation without considered thought as to their effectiveness and broader purpose. As we approach the 50th anniversary of the first of the federal discrimination laws, the *Racial Discrimination Act 1975* (Cth), we reflect on how these laws are not fit for purpose for 21st century Australia. This reflects the lack of an effective governance framework for human rights at the national level.

There are multiple examples in this report of how the current approach to human rights promotion and protection is not systematic or planned. Commitments are regularly made in international fora to undertake actions that then are never implemented or have fallen away.

As an example (and set out later in this report), Australia entered into a declaration to Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) when it ratified that treaty in 1975. The declaration stated that the government would legislate to ensure compliance with the relevant provision 'at the first suitable moment'. This continues to remain in place 48 years later.

A National Human Rights Framework would ensure that we have the right governance in place to more effectively protect human rights, with tangible benefits for all in our community.

(d) Ensuring the effective participation of people about whom decisions are being made

Throughout the Free & Equal project, the Commission has reflected on the need for law, policy and practice at the federal level to be developed with the effective participation of those who are directly affected. In the *Position Paper: A Human Rights Act for Australia*, we note that:

> The Commission has identified that a common factor with laws and policies that breach human rights is that they were developed without the participation of groups most impacted by those policies.[10]

The right to participation is both a stand-alone right and a means to realising other human rights.

The Office of the High Commissioner for Human Rights has noted that the right to participate in public affairs (as set out in Article 12 of the ICCPR) means that governments must 'ensure the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them'.[11]

The right to participation is also a fundamental principle contained in the thematic treaties in relation to children (Article 12, CRC), women (Article 7(b) CEDAW) and persons with disability (Articles 3 and 12, CRPD). The importance of effective participation in relation to Indigenous peoples is also recognised across a number of the international treaties (such as through Art 27 ICCPR, Art 30 CRC and Art 5 ICERD).

Participation is also crucial to realising other rights, including:

- the prevention of discrimination, freedom of expression, opinion and to access information, and
- in determining the adequacy and appropriateness of rights such as to health, education, housing, an adequate standard of living and other economic, social and cultural rights.[12]

One of the key findings of this Inquiry is that ensuring the participation of people in decision making that affects them, particularly for vulnerable or marginalised groups, is one of the most fundamental challenges for getting better human rights outcomes in Australia.

A national framework on human rights would embed participation principles across the range of actions that are proposed, and set out accountability mechanisms to ensure that these principles are continually met and improved over time.

(e) Adopting a cohesive framework that respects, protects and fulfils human rights

There is no one measure that is capable of fully meeting Australia's human rights obligations. What is required is a suite of measures that can act together to achieve different objectives.

In this project, the Commission has used the 'respect, protect, fulfil' framework of human rights obligations to provide the conceptual lens to guide what actions should be taken to meet our human rights obligations.[13]

- The obligation to **respect** human rights requires that governments, through their own actions, do not breach human rights.
- The obligation to **protect** human rights requires governments to take actions to prevent others from breaching human rights. Where a person's rights have been breached, the obligation to protect also requires governments to ensure accessible and effective remedies are available to that person.
- The obligation to **fulfil** human rights requires governments to take positive actions to fully realise the equal enjoyment of human rights.

By using this framing of rights protection, we have a reference point to ensure that we take a well-rounded approach to the task of protecting human rights.

1.4 The key elements of a new National Human Rights Framework for Australia

Recommendation 1

Australia establishes a National Human Rights Framework

The Commission recommends that the Australian Government introduce a National Human Rights Framework. The Framework should include the following, inter-related, actions:

1. comprehensive and effective protection of human rights in legislation through the introduction of a national Human Rights Act
2. modernised federal discrimination laws that shift the focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place
3. an enhanced role for Parliament in protecting human rights, through reform to the processes for parliamentary scrutiny and the introduction of new oversight mechanisms for Australia's human rights obligations
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Implementing the National Human Rights Framework

The National Human Rights Framework should:

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- be adequately, appropriately and sustainably resourced
- include mechanisms for community engagement and participation in the framework's operation
- set measurable targets
- identify how the framework interacts with other national frameworks, agreements and plans
- include a monitoring, evaluation and learning framework with public reporting at regular intervals, in line with the commitments.

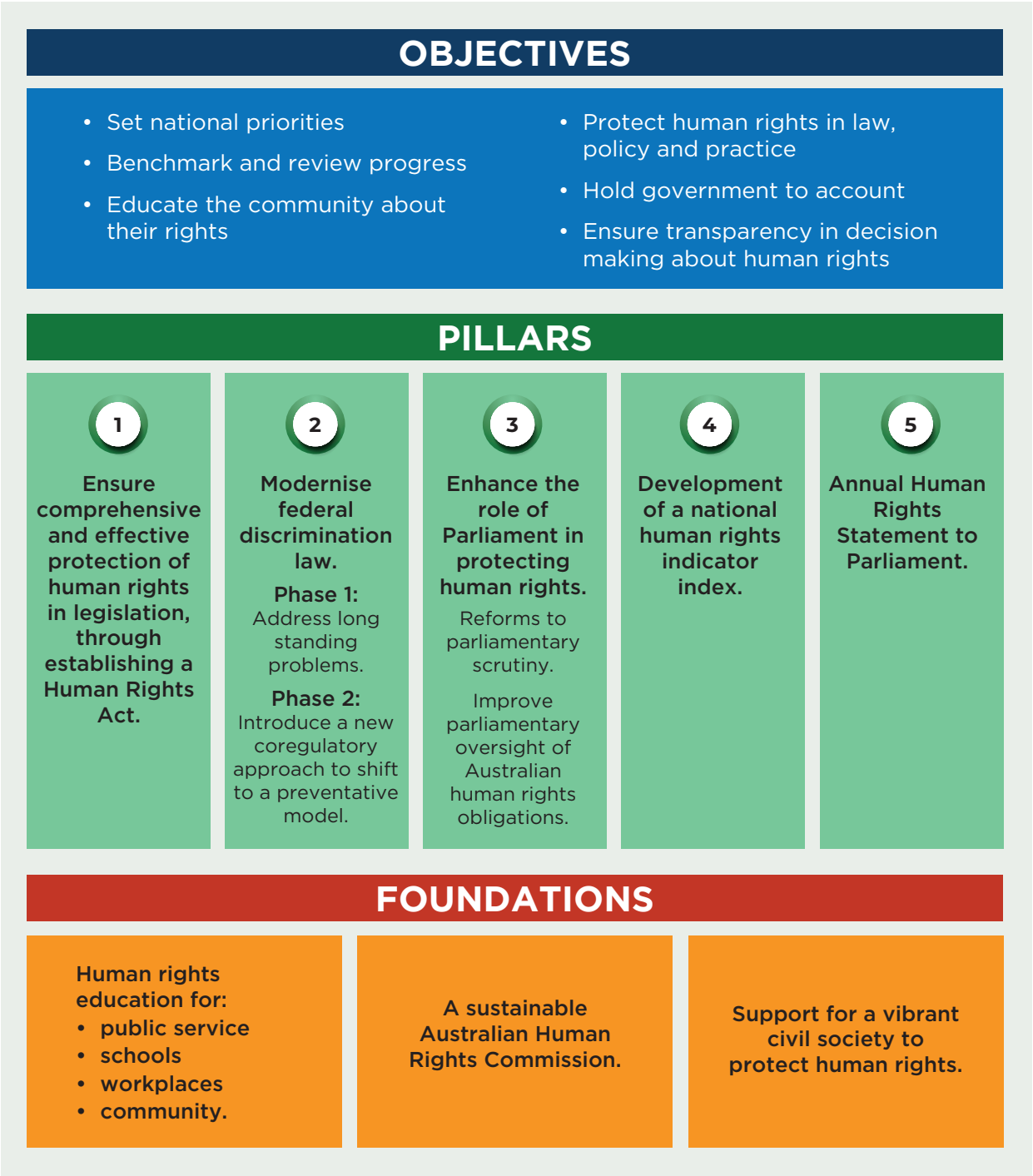
This report recommends that a National Human Rights Framework be established. It sets out the key action areas of a proposed National Human Rights Framework for Australia with 5 pillars for reform and 3 supporting foundations.

These 8 action areas are detailed throughout this report. Each element of the national framework addresses a different requirement if we are to fully protect human rights in Australia.

These action areas are mutually reinforcing and complement each other. Each element is necessary if Australia is to respect, protect and fulfil its human rights obligations.

The proposed national framework is set out in **Figure 1**.

Figure 1: National Human Rights Framework



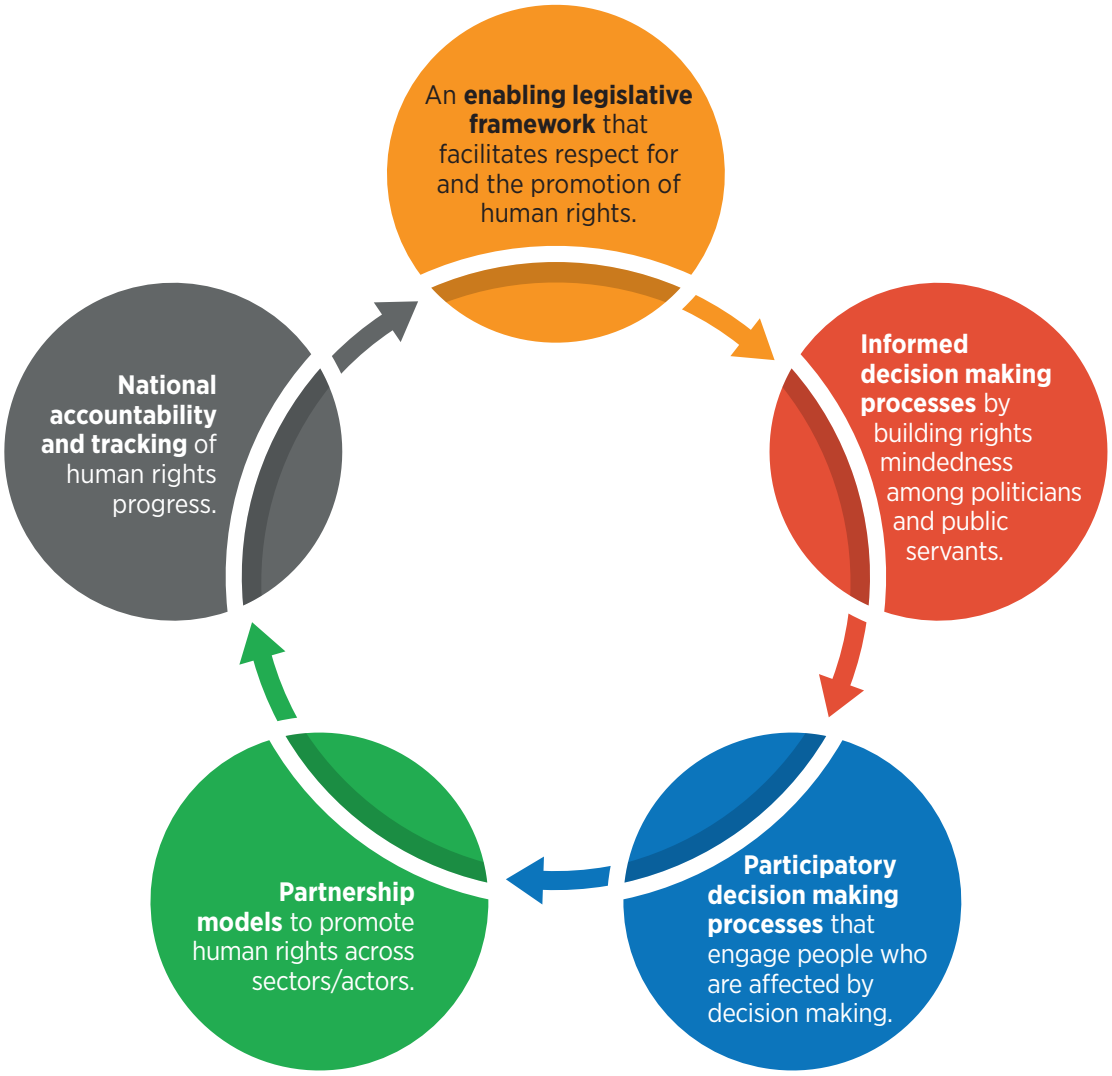
This Framework proposes measures that will meet Australia's obligations to respect, protect and fulfil human rights as set out in **Table 3**.

Table 3: How a National Human Rights Framework will meet Australia's obligations to respect, protect and fulfil human rights

Respect	Protect	Fulfil
Cohesive legal protections for human rights through a domestic Human Rights Act, with remedies available. Positive duty in Human Rights Act prevents breaches of human rights by government. Positive duties to ensure effective participation and access to justice will protect marginalised groups from human rights violations. More effective protections against discrimination through federal discrimination law reform. Strengthened parliamentary scrutiny regime will ensure that human rights implications of legislation is robustly considered. Human rights education for public servants builds rights-mindedness and prevents human rights violations.	Early consideration of human rights impacts in policy, law and decision-making through a Human Rights Act and reformed parliamentary scrutiny processes. Private contractors providing public services on behalf of government bound by Human Rights Act. Other private businesses may voluntarily opt-in to human rights obligations. Positive duty across all discrimination acts to prevent discrimination in areas of public life. Human rights education for the general community and duty bearers builds rights-mindedness and prevents human rights violations. Stronger regulatory powers for the AHRC to increase compliance with human rights and discrimination standards.	Overarching Human Rights Framework with long- and short-term priorities, with sufficient resourcing and in-built accountability mechanisms. National Indicator Framework enables better tracking of human rights progress and efforts to progressive realise rights. Domestic reporting requirements under the Human Rights Act, including by the Australian Human Rights Commission. Processes to ensure better responsiveness to international mechanisms. Strengthening the role of civil society in advocating and educating on human rights. Strengthening institutional accountability and the development of a human rights culture across government.

The proposed National Human Rights Framework would also create a 'human rights eco-system' within which human rights impacts are front of mind at all stages of the legislative and decision making process as set out in **Figure 2**.

Figure 2: Human rights eco-system



The National Human Rights Framework would have 5 inter-related factors:

- **An enabling legislative framework** that requires consideration of human rights (through positive duties in a Human Rights Act and discrimination laws).
- **Informed decision making processes** that build rights-mindedness among politicians and public servants. This would be supported by a more effective system of parliamentary scrutiny of human rights and comprehensive human rights education initiatives.
- **Participatory decision making processes** that engage people who are affected by decision making.
- **Partnership approaches** to recognise the role of different actors in the community for protecting and advancing human rights.
- **National accountability mechanisms** to track progress on human rights, in meeting commitments and to inform decision making in the future.

The scope of this proposed National Human Rights Framework is extensive. It will require dedicated focus over a sustained period in order to effectively implement each of the thematic areas.

For this reason, the Commission also recommends that the Framework be put into place over a 10 year period.

Some of the proposed reforms will take multiple years to achieve. For example:

- The Commission has proposed that its reform agenda for federal discrimination law be staged to address priority issues in the first year, and then more transformational change to the federal discrimination law model after that. Only once these 2 stages are undertaken can consideration be given to issues such as harmonisation of discrimination laws with the states and territories.
- The development of a Human Rights Act is likely to take 12–18 months, with the Commission recommending that an Exposure Draft Bill be developed based on the Commission's model for a Human Rights Act. Once legislated, there should be a 12 month period for preparation and education before the Act's remedial pathways take effect. It should then be reviewed after 5 years of operation.
- Developing a set of national human rights indicators will also require intensive consultation and coordination with other national data reporting systems and frameworks.

As these reform processes are complex, the Commission recommends that the 10 year timeframe is broken into two 5–year implementation plans.

These plans should be appropriately resourced and they should be developed with community input – particularly the participation of groups who are marginalised and whose human rights the framework is seeking to address.

To ensure that the Framework is operating effectively, it should have accountability measures – by publishing targets (with the outputs and outcomes to be achieved, timeframes, identification of the responsible agent to deliver). A monitoring, evaluation and learning framework should also be included with public reporting at regular intervals (for example, 5 and 10 years).

The Commission also considers that the National Human Rights Framework should sit alongside other existing national frameworks, and should not seek to replicate or replace them. We discuss this further in the chapter on human rights indicators and accountability measures. To this end, the Commission also recommends that the framework should identify how it interacts with other national frameworks, agreements and plans.

1.5 Momentum towards reform

In 2023, in the final stage of the Commission's work on this Free & Equal report, there were 2 major propelling forces supporting the reform trajectory of the Commission's recommendations for a new Human Rights Framework for Australia:

- the inquiry of the Parliamentary Joint Committee on Human Rights (PJCHR) into Australia's Human Rights Framework; and
- the Final Report of the Royal Commission into Violence, Neglect and Exploitation of People with Disability (Disability Royal Commission).

(a) 2023 PJCHR inquiry on Australia's Human Rights Framework

On 15 March 2023, the Attorney-General, the Hon Mark Dreyfus KC MP, referred to the Parliamentary Joint Committee on Human Rights (PJCHR) the following matters for inquiry and report by 31 March 2024:

- to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- to consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- to consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and
- to consider any other relevant matters.[14]

The Commission participated actively in this inquiry, making 2 submissions and providing evidence twice.[15]

Much of the evidence to the Committee, in public hearings and submissions, has focused on the Commission's proposed Human Rights Framework, model Human Rights Act and proposals for federal discrimination law reform.

The Commission noted, in evidence to the Committee on 27 September 2023, that it had reviewed the 300-plus submissions made to the Committee to that date, observing that it revealed 'a high degree of consensus on the way forward for Australia'.

Of particular note was that a total of 92% of the 318 published submissions support a Human Rights Act for Australia, which is the central recommendation in the Commission's renewed Human Rights Framework.[16]

(b) Disability Royal Commission

The Disability Royal Commission (DRC) released its Final Report on 29 September 2023, after 4 years of work. Across 12 volumes, the Royal Commissioners recommend a range of reforms to protect persons with disability from violence, abuse, exploitation and neglect. Central to the report's recommendations is a human rights-based approach.

The Final Report provides strong support for the Commission's recommendations in relation to reform of the Disability Discrimination Act. It also recommends a national Disability Rights Act, building on the Commission's model for a national Human Rights Act.

The Disability Royal Commission recommends that the Government respond to the report's recommendations by March 2024, which coincides with the date for the PJCHR to report its findings to the federal Parliament.

There is much crossover between the Commission's Free & Equal proposals, the DRC's Final Report recommendations and the deliberations of the PJCHR.

In the Commission's view, a National Human Rights Framework provides the vehicle to consider the reforms recommended by the DRC as well as those that are forthcoming from the PJCHR.

The Commission reflects on the recommendations of the Disability Royal Commission in **chapters 3** and 4 of the report.

1.6 The Free & Equal process

The scope of the Free & Equal project has been wide and ambitious. To cover such a wide field envisaged in the Terms of Reference, the Commission divided the scope of work into 3 parts:

- discrimination law reform
- developing a model Human Rights Act
- accountability mechanisms.

To launch the project, the Commission held the Free & Equal national conference on human rights, featuring the personal attendance of the United Nations High Commissioner for Human Rights, HE Dr Michelle Bachelet, in October 2019.[17] Immediately following this, the Commission hosted Professor Manfred Nowak, Independent Expert leading the United Nations Global Study on Children Deprived of Liberty, for the Pacific launch of the United Nations Global Study on Children Deprived of Liberty.[18] An initial round of consultations for the project were convened with the attendance of the High Commissioner for Human Rights and Professor Nowak.

During 2019, the Commission released a number of documents to facilitate focused consultation:

- an Issues Paper describing the human rights landscape and asking general questions about priorities for reform[19]
- a Discussion Paper on priorities for federal discrimination law reform[20]
- a Discussion Paper on the positive framing of human rights through a national Human Rights Act[21]
- a Discussion Paper on ensuring effective national accountability for human rights.[22]

The Commission then convened a series of technical workshops on key thematic issues:

- **August 2019:** Ensuring Effective National Accountability for Human Rights Workshop convened in partnership with the Human Rights Institute at UNSW.
- **October–December 2020:** roundtables and industry consultations on federal discrimination law reform with industry, unions, government, community legal centres and legal aid agencies, academics, barristers and NGOs.
- **April–June 2021:** roundtables on the positive framing of human rights and the key elements of a federal Human Rights Act.
- **May 2021:** Technical workshop on improving parliamentary scrutiny of human rights, convened in partnership with the Castan Centre for Human Rights at Monash University and the University of Adelaide.

In 2019 and into 2020, the Commission opened a public submission process for the Discussion Papers as well as conducting consultations nationally. We received over 160 written submissions, with 190 people participating in national consultations. With the outbreak of COVID-19 in March 2020, the consultation methodology shifted to online meetings and roundtables.

In response to the Discussion Papers and in the lead-up to the first Position Paper, *Free & Equal: a reform agenda for federal discrimination laws (2021)*, there were a total of more than 1,000 stakeholders who engaged in the project, inclusive of submissions, consultations, roundtables, technical workshops and the national conference.

Prior to the release of the Human Rights Act Position Paper in March 2023, an additional 45 consultations were held with over 200 participants, from legal, business, NGO and public sectors, academia and Parliamentarians.

In addition, the Commission was assisted by a number of expert readers, in providing final review reading of both Position Papers.[23] The Commission acknowledges the considerable contribution made by them and expresses gratitude to them for voluntarily providing their time and expertise.

Since March 2023, the Commission has also convened briefings with organisations nationally to provide a detailed overview of the Commission's model Human Rights Act, federal discrimination law reform proposals and recommended National Human Rights Framework.

The purpose of these engagements was to inform the community sector of the Commission's proposals so that they were able to engage on them during the inquiry into Australia's Human Rights Framework by the Parliamentary Joint Committee on Human Rights.

The Commission acknowledges the contribution of all those who participated throughout the Free & Equal Inquiry process. It is invaluable to the work of the Commission and greatly enriches the reform process. We record our deep appreciation to all stakeholders for this contribution.

(c) Outputs

The outcomes of the Free & Equal project have been released in 7 documents:

- two Position Papers on key reform priorities – *Free & Equal: a reform agenda for federal discrimination laws* (2021) and *Free & Equal: A Human Rights Act for Australia* (2023)
- a report to the United Nations Human Rights Council for Australia's 3rd Universal Periodic Review (2021)
- two submissions to the Parliamentary Joint Committee on Human Rights (2023)
- this Final Report
- the Commission has also prepared a Summary Report to provide a short accessible version of this Final Report.

The first Position Paper was released in December 2021: *Free & Equal: A reform agenda for federal discrimination laws*.[24] It set out a reform agenda to modernise the set of 4 federal discrimination laws, including by remedying deficiencies in the current laws, by placing a greater focus on prevention of discrimination and by introducing co-regulatory approaches that enable governments and businesses in particular to be better equipped to prevent and/or deal with discrimination.

The reform proposals in this paper are outlined in **chapter 4** below. They have been updated to reflect developments since the paper's release in December 2021, such as reforms to the Sex Discrimination Act 1984 in response to the Commission's Respect@Work report (2020).

The second Position Paper was released in March 2023: *Free & Equal: A Human Rights Act for Australia*.[25] It sets out the Commission's case for the introduction of a federal Human Rights Act in Australia, and provides an outline of the Commission's proposed model and related improvements to the human rights parliamentary scrutiny regime. This is discussed in **chapters 3** and **5** of the report.

In 2021, the Commission contributed to Australia's 3rd Universal Periodic Review, the peer-review dialogue undertaken by the United National Human Rights Council and all 192 Member States of the UN.[26] We lodged an independent report (in our capacity as Australia's national human rights institution).

The Commission then contributed 2 submissions to the Parliamentary Joint Committee on Human Rights for its inquiry into Australia's Human Rights Framework.[27] These submissions enabled the Commission to 'road-test' the reform proposals included in this Final Report.

This Final Report brings together the various streams of all the Commission's work in advocating a reimagined Human Rights Framework for Australia and a roadmap of law reform for the next decade.

1.7 Report overview

(a) Towards a revitalised Human Rights Framework for Australia

Chapter 1 outlines the actions necessary for the Australian Government to meet its obligations to respect, protect and fulfil human rights in a revitalised Human Rights Framework. It recommends a National Human Rights Framework for Australia so that we can achieve an effective system of human rights protection for 21st century Australia.

The proposed national framework has 8 key action areas (set out in recommendation 1), which are each described in detail in the subsequent chapters of this report. The chapter also sets out key accountability mechanisms for the national framework (set out in recommendation 2).

(b) Context for reform

Chapter 2 sets out the context for the reforms recommended in this report. It describes how a national framing of human rights protections in Australia has been intermittent and incomplete.

There has been patchy implementation, false starts and abandoned plans and frameworks, resulting in significant gaps in protection of human rights and in implementation of expectations and obligations in the international context.

The chapter describes the prior attempts towards national human rights reform, their limitations and failings, to provide the context for the recommendations in this Final Report.

(c) A model Human Rights Act for Australia

Chapter 3 concerns the centrepiece of the Commission's proposed National Human Rights Framework: a national Human Rights Act. It recommends that the Government develop an Exposure Draft Bill based on the Commission's model Human Rights Act for further consideration. The chapter sets out the key elements of the model Human Rights Act, and how it will significantly improve the protection of human rights for all people in Australia.

(d) A law reform agenda for federal discrimination laws

Chapter 4 recalls the 4 integrated sets of reforms to federal discrimination laws set out in the Commission's first Position Paper, to improve the effectiveness of federal discrimination laws. This is built on 4 pillars:

- building a preventative culture
- modernising the regulatory framework
- enhancing access to justice
- improving the practical operation of the laws.

The Commission recommends a staged approach to federal discrimination law in a new Human Rights Framework that can:

- address the immediate priorities of government that are already underway and also address urgent technical fixes to federal discrimination laws that would improve their operation (to be completed in year 1 of the new framework)
- commit to undertaking a broader reform of federal discrimination laws to shift the model and introduce new co-regulatory approaches (to be completed in years 2 and 3 of the new framework).

(e) Strengthening the role of Parliament in protecting human rights

Chapter 5 includes a set of reforms that focus on strengthening the role of Parliament in protecting human rights. The Commission proposes reforms that would enhance the effectiveness of the Parliamentary Joint Committee on Human Rights and the associated process for analysing the human rights impact of proposed laws and regulations; and enhance parliamentary oversight of decision-making in relation to the scope of Australia's international human rights obligations, and actions to be taken to respond to breaches of our international human rights obligations.

(f) Accountability and human rights indicators

Chapter 6 outlines how additional measures to properly measure and track Australia's human rights performance are critical to the success of the Human Rights Framework proposed in this report.

It recommends a new Human Rights Indicator Index and an annual National Statement to Parliament to maximise the effectiveness of a Human Rights Act and in moving from standard setting to effective implementation

(g) Human rights education

Chapter 7 sets out the Commission's proposed approach to human rights education at the national level. Educative and awareness raising measures are needed across all areas of the proposed National Human Rights Framework set out in this report.

(h) A sustainable human rights community

Chapter 8 outlines how a properly resourced and appropriately independent Australian Human Rights Commission and a vibrant and robust civil society will be critical to the success of the National Human Rights Framework.

(i) Looking forward: A revitalised National Human Rights Framework to better protect human rights in Australia

Chapter 9 outlines how the structural reforms required to establish the National Human Rights Framework will operate to provide significant benefits in realising additional human rights protections for distinct groups in our community in most need of protection.

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2. Context for reform

2.1 Overview

This chapter sets out the context for the reforms recommended in this report. It describes how a national framing of human rights protections in Australia has been intermittent and incomplete.

There has been patchy implementation, false starts and abandoned plans and frameworks, resulting in significant gaps in protection of human rights and in implementation of expectations and obligations in the international context.

The chapter describes the prior attempts towards national human rights reform, their limitations and failings, to provide the context for the recommendations in this Final Report.

2.2 Introduction

In the 2019 Issues Paper that launched Free & Equal, the Commission described the overall status of the protection of human rights at the federal level as involving 'an implementation gap':

> between the human rights standards that Australian governments have committed to uphold over many years, and the actual protections in our laws, policies and processes of government.
>
> Without comprehensive legal protection, educational and other measures to promote understanding of human rights and processes for monitoring compliance with human rights, our government is not fully meeting its obligations to make sure that the human rights of all Australians are respected, protected and fulfilled.[1]

In the Commission's report to the United Nations Human Rights Council for Australia's 3rd Universal Periodic Review in 2021, the Commission also stated:

> Australia does not take a proactive approach to human rights. There are limited national targets and commitments to address known human rights challenges, and limited accountability for outcomes.[2]

The Commission stands by this assessment of the current approach to human rights at the federal level.

(a) What are human rights?

Human rights have been recognised through law and practice over many centuries. In modern times, the governments of the world have agreed to a set of common standards for human rights through the 'International Bill of Rights', which comprises 3 documents:

- Universal Declaration of Human Rights: finalised in 1948, it remains the most important international statement of the fundamental values of equality, dignity and freedom. Australia was one of 8 countries that led the drafting of the Universal Declaration.
- International Covenant on Economic, Social and Cultural Rights (ICESCR) which Australia ratified in 1975.
- International Covenant on Civil and Political Rights (ICCPR) which Australia ratified in 1980.[3]

These documents were developed as a response to the horrors of the 2 world wars, in order 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.[4]

(b) Who is responsible for advancing human rights in Australia?

As the Australian Government signs and ratifies human rights treaties on behalf of Australia, it is the Australian Government that has responsibility for protecting and promoting human rights in Australia. This includes an obligation to ensure that all governments in Australia (federal, state and territory) respect human rights.[5]

However, governments are not solely responsible for advancing human rights – it is a responsibility across society.

The Universal Declaration of Human Rights states that:

- everyone has duties to the community, and
- every individual and every organ of society … shall strive by teaching and education to promote respect for … rights and freedoms.

This means that not only the government, but also businesses, community organisations, providers of education, health, employment and other social services, police and law enforcement agencies, civil society, and individuals share the responsibility of promoting and respecting human rights.

When exercising our own rights, we have a responsibility to respect the rights of others. Human rights are about creating and maintaining an environment of mutual respect and understanding, so that everyone can participate.

For the Australian Government, agreeing that all people in Australia will be provided with the protections of human rights treaties creates legal commitments. Governments are obliged to respect, protect and fulfil human rights.

2.3 Prior momentum towards reform

(a) The National Human Rights Consultation Committee Report 2009

On 10 December 2008, International Human Rights Day, the then Commonwealth Attorney-General, the Hon Robert McClelland MP, launched the National Human Rights Consultation, in fulfilment of the Australian Labor Party's 2007 election commitment to 'initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians' and to 'establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy'.[6]

The National Human Rights Consultation Committee (NHRCC), chaired by Father Frank Brennan AO SJ, was to undertake consultation and to report by 30 September 2009.[7]

During 2009, the NHRCC conducted a wide-ranging nationwide consultation on human rights protections. The consultations involved 35,014 written responses and 66 community roundtables with 6,000 people, held in 52 locations around Australia.[8] The NHRCC also held 3 days of public hearings in Canberra, with over 70 speakers taking part in discussions.[9]

The comprehensive NHRCC Report made a series of recommendations about the fulfilment of human rights in Australia.

The NHRCC Report's first recommendation was that education be the 'highest priority' for improving and promoting human rights in Australia towards creating a human rights culture. This included developing a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally.[10]

The NHRCC also recommended the development of a 'whole-of-government framework for ensuring that human rights – based either on Australia's international obligations or on a federal Human Rights Act, or both – are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally'.[11] Australia's Human Rights Framework 2010, considered below, reflected this recommendation.

A central recommendation was that Australia adopt a federal Human Rights Act. This was to be based on a legislative dialogue model, incorporating rights from the international treaties to which Australia is party, primarily the ICCPR.[12]

One of the further key recommendations was the introduction of a human rights parliamentary scrutiny regime, including a requirement of a Statement of Compatibility process.[13] Both were established and continue in operation. They are considered in **chapter 5** of this report.

The 16 recommendations made by the National Human Rights Consultation Committee are attached as **Appendix 1** to this report.

(b) Australia's Human Rights Framework 2010

(i) Overview and assessment

The Australian Government responded to the NHRCC report through the introduction of Australia's Human Rights Framework in 2010 (2010 Framework).

The Framework accepted some, but not all, of the recommendations of the NHRCC Report.

The Government chose not to pursue a Human Rights Act as part of the Framework, although noting at the time that the possibility of introducing a Human Rights Act would be considered when reviewing the operation of the Framework.[14] This decision was made despite strong public support for a Human Rights Act.[15]

Other measures, such as the establishment of the Parliamentary Joint Committee on Human Rights,[16] were pursued. The parliamentary scrutiny regime came into effect the following year in partial fulfilment of the NHRCC Report recommendations.

A National Action Plan on Human Rights was also introduced in 2012, following the completion of a baseline study in 2011.[17]

Measures to introduce human rights education were also undertaken and a process to update and consolidate federal discrimination law reform commenced with the development of an Exposure Draft Bill for public consultation. This Exposure Draft Bill was not pursued with the change of government in 2013, and Australia's Human Rights Framework also expired and was not renewed.[18]

The Commission welcomed the announcement of the introduction of the 2010 Framework as a step towards better protection, although of limited reach. The Commission's then President, the Hon Catherine Branson AC KC, noted that recommendations about, for example, human rights education, would be difficult to deliver 'while human rights in protections in Australia remain an incomplete patchwork'.[19]

Looking back, the 2010 Framework cannot be seen to have met its objectives. The failure of the Framework was due to lack of implementation and lack of commitment from the Government at the time.

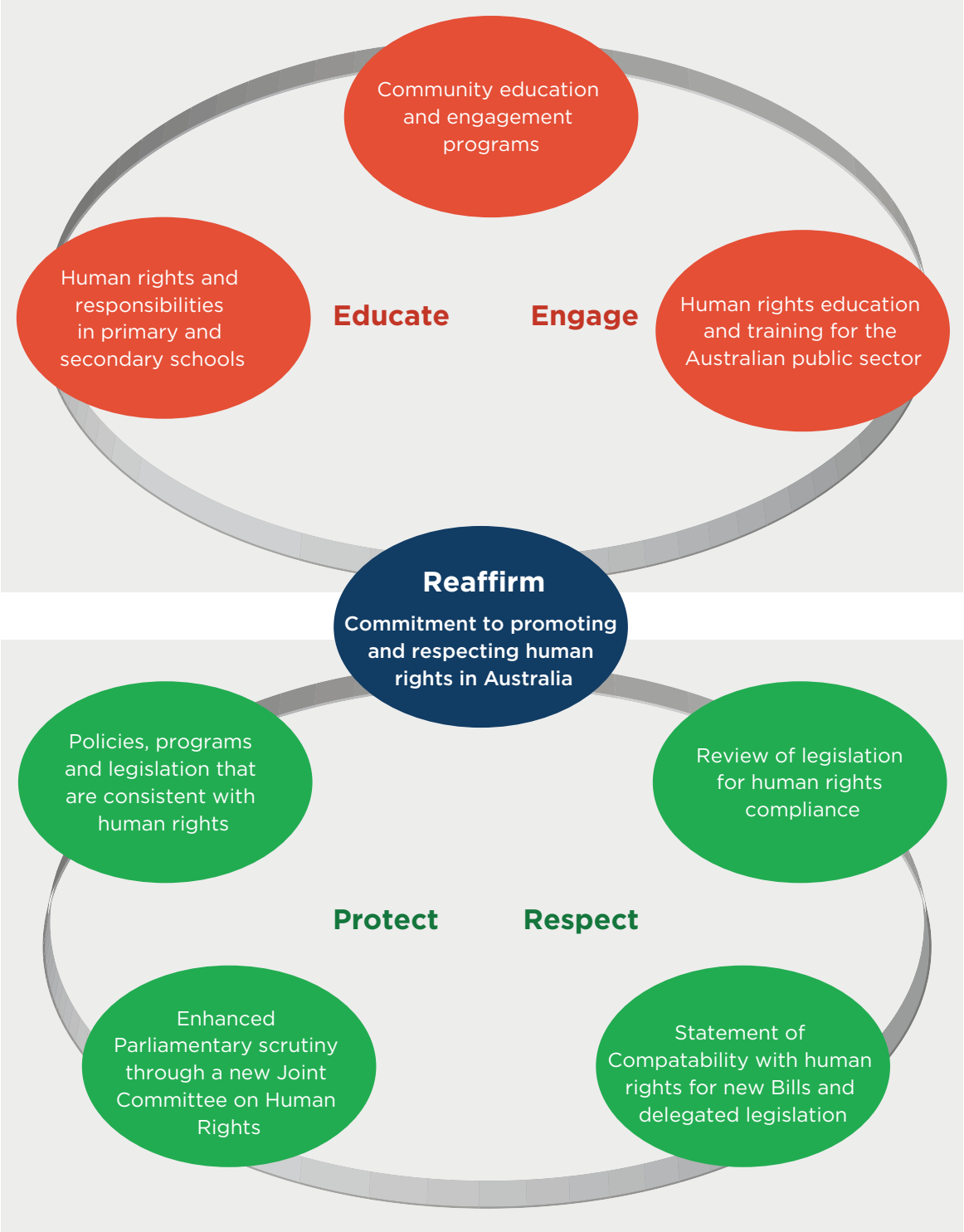
The 2010 Framework lacked transparency mechanisms to hold the Australian Government to account (such as self-reporting of progress by the Government or assessments of quality of actions by an independent agency) and lacked regular independent monitoring. Moreover, it did not enjoy engagement and buy-in from state and territory governments, which also made it fragile and capable of being rendered inoperable without any discussion with other governments.

Actions under the 2010 Framework were only funded to a very limited degree. For example, the *National Human Rights Action Plan 2012* had no funding attached to it, which limited the ability to achieve outcomes or even buy-in from federal government departments and state and territory governments.

(ii) Principles

The 2010 Framework was based on 5 key principles: to educate, engage, protect, respect and reaffirm human rights as illustrated in **Figure 3**.[20] The Framework was strongly focused on the NHRCC recommendation that education must be 'the highest priority for improving and promoting human rights in Australia'.[21]

Figure 3: 2010 Framework in Action



A summary of the key commitments made in the framework mapped against the 5 principles is set out in **Figure 4**.

Figure 4: Australia's Human Rights Framework – key actions

FRAMEWORK IN ACTION

Reaffirm

- The Government reaffirms its commitment to promoting awareness and understanding of human rights in the Australian community and respecting the seven core United Nations human rights treaties to which Australia is a party.

Educate

- The Government will enhance its support for human rights education across the community, including primary and secondary schools.
- The Government will provide funding of $2 million over 4 years to NGOs for the development and delivery of community education and engagement programs to promote a greater understanding of human rights.
- The Government will provide an additional $6.6 million over 4 years to the Australian Human Rights Commission to enable it to expand its community education role on human rights and to provide information and support for human rights education programs.
- The Government will invest $3.8 million in an education and training program for the Commonwealth public sector, including development of a human rights toolkit and guidance materials for public sector policy development and implementation of Government programs.
- The Government will consider appropriate recognition of the need for public servants to respect human rights in policy making in any revision of the APS Values or Code of Conduct.

Engage

- The Government will continue to engage with the international community to improve the protection and promotion of human rights at home, within our region and around the world.
- The Government will develop a new National Action Plan on Human Rights, working with our State and Territory counterparts and NGOs, to outline future action for the promotion and protection of human rights.
- The Government will bring together the NGO Forums on Human Rights hosted by the Attorney-General and the Minister for Foreign Affairs, to ensure the forums provide a comprehensive consultation mechanism for discussion about domestic and international human rights issues.

Protect

- The Government will introduce legislation to establish a Parliamentary Joint Committee on Human Rights which will provide greater scrutiny of legislation for compliance with Australia's international human rights obligations under the seven core UN human rights treaties to which Australia is a party.
- The Government will introduce legislation requiring that each new Bill introduced into Parliament, and delegated legislation subject to disallowance, be accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties to which Australia is a party.

Respect

- The Government will review legislation, policies and practices for compliance with the seven core UN human rights treaties to which Australia is a party.
- The Government will develop exposure draft legislation harmonising and consolidating Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly.
- The Government will include the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council.

(iii) National Human Rights Action Plan 2012

One of the key actions in Australia's Human Rights Framework was the introduction of a national action plan on human rights.

The concept of a national action plan for human rights was put forward by Australia during the June 1993 Vienna World Conference on Human Rights. It was adopted as a recommendation in the *Vienna Declaration and Programme of Action*.[22]

Australia was the first to develop its own national action plan under the Programme of Action, for an initial 4-year period beginning in 1994. The approach then was for the Australian Government to prepare the plan after extensive consultation within government, and with states, territories and civil society. The original plan was updated twice, in 1995 and 1996–7, before a new version emerged in 2005: *Australia's National Framework for Human Rights: National Action Plan*.

The Development of a third National Human Rights Action Plan was a key commitment of the 2010 Framework under the principles of 'reaffirm' and 'engage' – to outline future action for the promotion and protection of human rights and to assist in restoring Australia's reputation as a 'good international citizen'.[23]

The National Human Rights Action Plan was released on Human Rights Day 2012, following consultation with state and territory governments and non-government organisations and the development of a 'Baseline Study' on key human rights issues in Australia.[24]

The National Human Rights Action Plan was intended to be accessible to every Australian, provide a broad overview of policies and practices to protect human rights, accord equal priority to all human rights, and set out strategic priorities for future action.

The National Human Rights Action Plan was informed by Australia's participation in the first Universal Periodic Review before the United Nations Human Rights Council in 2011 and acceptance of approximately 95% of the Council's recommendations.[25] The Australian Human Rights Commission had advocated for the Government to turn all accepted recommendations in that process into specific actions in the Action Plan to improve and promote human rights.

The National Action Plan was introduced without any dedicated additional funding to implement it. It also tended to reflect existing commitments that had been made by the Government.

The Action Plan prioritised Australian Government actions, 'taking into account available resources and focusing on practical outcomes'.[26] The Plan included a range of programs and laws already in place to strengthen human rights protections and improve opportunities for all Australians, and actions the Government had initiated in the course of developing the Action Plan. These included:

- laying the foundations for the launch of a National Disability Insurance Scheme, to provide people with disability access to care and support services they need over the course of their lifetime, including $1 billion in funding for the first stage from the Australian Government
- establishing a new National Children's Commissioner within the Australian Human Rights Commission
- ratifying the Optional Protocol to the Convention Against Torture
- investigating ways that the justice system can address the needs of people with a mental illness and/or cognitive disability (including intellectual disability and acquired brain injury)
- undertaking a review of reservations under the seven core international human rights treaties
- the $3.7 billion Living Longer Living Better aged care reform package to create a flexible and seamless system that provides older Australians with more choice, control and easier access to a full range of services, where they want it and when they need it

- reviewing federal legislation for any barriers to older people participating in productive work
- an Act of Recognition acknowledging the unique and special place of Australia's First Peoples, as an important step towards holding a successful referendum to change the constitution to recognise Indigenous people
- working with the states and territories on the regulation of sterilisation of women and girls with disability
- implementing the National Anti-Racism Partnership and Strategy, led by the Australian Human Rights Commission, and
- ensuring accessible communications for people with disability in the event of an emergency.[27]

The Action Plan was discontinued when there was a change of government in September 2013, and there has been no national action plan or substituted alternative in the 10 years since.

In **chapter 6** of this report (on accountability mechanisms), the Commission proposes alternatives to the adoption of a new National Human Rights Action Plan, in light of the challenges faced with previous action plans.

(iv) Parliamentary scrutiny

The establishment of the Parliamentary Joint Committee on Human Rights (PJCHR) in 2012 was an action under the principle of 'protect' in the 2010 Framework.[28] The human rights scrutiny processes established under the Act included the requirement for each new Bill and delegated legislation subject to disallowance to be accompanied by a statement outlining its compatibility with 7 core UN human rights treaties to which Australia is a party.[29] The object of this scrutiny was to encourage early and ongoing consideration of human rights issues in policy and legislative development.

The effectiveness of the PJCHR and its functions have not been formally reviewed by Parliament or government since it began operating a decade ago. The Commission undertook a detailed analysis of its operation in the *Position Paper: A Human Rights Act for Australia* in 2023. The Commission commends the introduction of the PJCHR and the requirement of a Statement of Compatibility and, in **chapter 5** of this report, makes recommendations to enhance the operation of this parliamentary scrutiny process.

(v) Human rights education

Under the 2010 Framework, the Government committed to enhancing support for human rights education, including the provision of:

- $2 million over 4 years to non-government organisations for the development and delivery of community education and education programs
- $6.6 million over 4 years to the Australian Human Rights Commission for community education
- $3.8 million for an education and training program for the Commonwealth public sector, including the development of a human rights toolkit and guidance materials for public sector policy development and implementation of Government programs.

Funding for the above education initiatives was not continued at the end of the 4 years of the Framework.

In this report, the Commission affirms its support for human rights education measures to be central to a renewed Human Rights Framework.

(vi) Review of legislation and policy

Under the principle of 'respect', the Australian Government committed to reviewing legislation, policies and practices for compliance with the 7 core UN human rights treaties to which Australia is a party.[30] The Framework also stated that 'views expressed by UN human rights bodies will be taken into account in identifying areas for review'.[31]

The *National Human Rights Action Plan 2012* was informed by the UPR process and reviewing the reservations under the seven core

international human rights treaties to which Australia is a party was listed as an item to be given to the Standing Council of Treaties. Consultation was to be undertaken with states and territories, relevant Australian Government agencies and civil society and to be finalised by the end of 2012.[32]

The 2010 Framework and subsequent UPR voluntary pledges included actions that would adopt a more systemic approach to considering and addressing human rights at the national level. These commitments were aimed at addressing known and accepted deficiencies in the national system of protecting human rights. These mechanisms have mostly fallen into disuse, with public-facing information being out of date and not maintained on a regular basis.

(vii) Streamlining and harmonising anti-discrimination legislation

The 2010 Framework included a commitment to harmonise and consolidate Commonwealth anti-discrimination laws 'to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly'.[33] The objective was 'to create a more effective system of protections from unlawful discrimination, greater certainty for businesses and the most efficient enforcement mechanisms'.[34]

The aim was that streamlined Commonwealth laws would lead the way for the development of national harmonised laws across Australia, led through the Standing Committee of Attorneys-General.[35] An Exposure Draft Bill consolidating federal anti-discrimination laws was released in November 2012.[36] While there were many positive features to the Bill, a number of changes were recommended by a parliamentary committee inquiry. The Australian Government announced that it would not seek to address these prior to the next federal election, and would instead deal with the discrete issue of including new protections in the Sex Discrimination Act against discrimination on the basis of sexual orientation, intersex status and gender identity.

The then Government lost the subsequent election in September 2013, and as the new Government did not support the Bill, the broader reforms to federal discrimination law did not occur.

The Commission's Position Paper, *Free & Equal: a reform agenda for federal discrimination laws (2021)* provides an extensive review of the current status of these laws and highlights the pressing and long overdue need for reform. Reforms to federal discrimination laws, based on the Commission's recommendations in the Position Paper, together with subsequent consideration in the Disability Royal Commission in particular, form part of the recommendations in this report in **chapter 4**.

(viii) Other commitments

The 2010 Framework also committed to NGO Forums on Human Rights, hosted by the Attorney-General and the Minister for Foreign Affairs. The forums would provide a 'comprehensive consultation mechanism for discussion about domestic and international human rights issues'.[37] At least one joint NGO Forum was held before this practice was discontinued.

The Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) had a longstanding practice of convening separate annual human rights forums. While DFAT has regularly maintained this and other engagement ahead of each session of the UN Human Rights Council, the convening of NGO forums by the AGD has been more sporadic.

The 2010 Framework and National Human Rights Action Plan also committed to including the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council.[38] This occurred until the Administrative Review Council was effectively discontinued in 2015, with its functions consolidated into the Attorney-General's Department.[39]

While Australia does not have a current National Human Rights Action Plan, it does have multiple national action plans and national frameworks on a range of thematic issues. For

example, national frameworks on the protection of children, family violence, closing the gap and early childhood. The important role of these is considered in **chapter 6**.

2.4 Parallel work of the Commission

Free & Equal has focused on the key elements of a National Human Rights Framework, to appropriately respect, protect and fulfil human rights in Australia.

At the same time as this project, the Commission has also:

- engaged in UN human rights treaty body scrutiny processes (as well as the Universal Periodic Review process)
- engaged in the work of parliamentary committees to provide a human rights analysis on Bills under consideration and other thematically-focused inquiries
- intervened in court proceedings to provide human rights advice, and
- undertaken research and consultations through each of the thematic commissioners on a wide variety of issues.

The Commission has drawn on this work in the Position Papers and this Final Report for Free & Equal. Examples of work that has been conducted across the Commission in the past 5 years includes the following.

(a) Cross-Commission work

(i) Sex Discrimination

- Sexual harassment in Australian workplaces (including the federal Parliament)
- Economic security of women at all stages of the life cycle
- Women in leadership
- The treatment of women in male-dominated industries
- Cultural reform in security-related agencies (the Defence Forces, Australian Federal Police and Border Force) and in national sporting codes
- The removal from federal laws of discriminatory treatment experienced by LGBTIQA+ communities, and the introduction of protections against such discrimination in federal discrimination law
- Guidance on surgical procedures undertaken on children with variations in their sex characteristics

(ii) Age Discrimination

- Elder abuse and reform to powers of attorney
- Age stereotyping
- Inter-generational cooperation
- Tackling discrimination and stigma in employment against older workers, persons with a disability and women
- The risk of homelessness for older women

(iii) Race Discrimination

- Experiences of discrimination faced by Muslim and African communities in Australia
- The adequacy of national mechanisms to protect against racism, and scoping of a national framework to prevent racism

(iv) Disability Rights

- Access to transport and education for persons with a disability
- Employment for people with disability
- Engagement on the development of a national data asset supporting persons with a disability

(v) Children's Rights

- The protection of children's human rights through family law, care and protection, and juvenile justice mechanisms
- Addressing cyber bullying experienced by children
- Tackling mental health and self-harming behaviours among children
- Development of a child rights impact assessment tool to assist decision makers to fully consider the human rights impacts of proposed actions on child's rights

(vi) Aboriginal and Torres Strait Islander social justice

- The over-representation of Aboriginal and Torres Strait Islander peoples and persons with a disability in criminal justice processes
- National representative mechanisms for Aboriginal and Torres Strait Islander peoples
- Measures to close the gap in Aboriginal and Torres Strait Islander disadvantage
- Elevating the voices of Aboriginal and Torres Strait Islander women and girls
- Reform to native title, land rights and heritage protection laws

(vi) Human Rights

- Instituting adequate protections and oversight mechanisms for cruel, inhuman and degrading treatment in institutional settings (including through OPCAT implementation)
- Conditions of detention in immigration detention in Australia and offshore, including the treatment of children
- The challenges to freedom of religion in Australia, and the need for protection against discrimination on this basis
- Disproportionate limitations on people's freedoms through national security laws
- Restrictions on freedom of speech and press freedom
- The need for reform to address the implications of new technologies on human rights, particularly artificial intelligence-based decision making, the use of facial recognition technologies and issues of accessibility of technology to the general community

(b) Prevalence studies

The Commission also periodically conducts prevalence research on issues of major concern.

(i) Sexual harassment

In 2022, the Commission conducted the fifth national survey to investigate the prevalence, nature and reporting of sexual harassment in Australian workplaces. For the first time, the survey also asked about workers' views on the actions taken by their employers to address workplace sexual harassment. The report, *Time for Respect,* was released in November 2022.[40]

The survey provides vital information about the scale of workplace sexual harassment and the need for prevention and response initiatives. The survey was conducted with over 10,000 people aged 15 years or over, using a sample that is representative of the Australian population in terms of gender, age and geographic location. The Commission conducted and reported on similar sexual harassment surveys in 2003, 2008, 2012 and 2018.

The 2018 prevalence study was conducted in conjunction with the Respect@Work national inquiry into sexual harassment. The Commission also conducted prevalence studies on sexual harassment in particular settings: in the retail sector, and universities.

(ii) Age discrimination in the workplace

In 2015, the Commission released its first report on the national prevalence survey of age discrimination in the workplace.[41] The objectives of this survey were to quantify the prevalence, nature and impact of workplace age discrimination amongst those aged 50 years and older.

The results showed that over a quarter of Australians aged 50 years and over reported that they had experienced some form of age discrimination in the previous 2 years. When managers were asked if they factored age into their decision making, a third responded that they did.

This research was intended to become the benchmark against which we can measure future gains in addressing age discrimination.

Research on the employment climate for older workers and the shift in perceptions around Australia's ageing workforce has been conducted by the Australian HR Institute, in partnership with the Commission, in 2014, 2018, 2021, and most recently in 2023, with the release of the *Employing and Retaining Older Workers report*.[42]

The most recent survey data found that one in 6 organisations will not consider hiring people aged 65 and above, while only a quarter are open to hiring those aged 65 and above 'to a large extent'.

2.5 Inadequacy of current national protections of human rights

The 2010 Framework and subsequent UPR voluntary commitments included actions that would adopt a more systemic approach to considering and addressing human rights at the national level.

These commitments were aimed at addressing known and accepted deficiencies in the national system of protecting human rights.

These systemic mechanisms have mostly fallen into disuse, with public-facing information being out of date and not maintained on a regular basis.

In particular, since the 2010 Framework lapsed, there have been:

- no adequate processes for national priority setting on human rights issues such as through a national action plan or alternative measures
- no regular consideration of reforms required to better protect human rights, such as through the consolidation of discrimination laws and audit of existing laws
- no appropriate investment and information to build human rights awareness – human rights education for public servants and the community
- no rigorous, transparent accountability mechanisms for tracking progress on human rights – developing and implementing a national action plan; Standing National Mechanism; tabling of treaty body Concluding Observations in Parliament; rights tracking/ implementation status of recommendations
- no regular public engagement on human rights issues – NGO engagement; commitments to review reservations to treaties.

In the absence of a national framework, governments over the past decade have not put into place adequate, alternative steps to protect human rights.

The lapsing of the 2010 Framework should therefore be seen as a regression in the systems for protecting human rights at the national level.

Importantly, without its own human rights framework, Australia does not set its own agenda for human rights protection, which leaves human rights accountability, monitoring and prioritisation of domestic measures to the international sphere.

Ideally, Australia would have a domestic framework that sets out Australia's human rights goals, with a roadmap for implementation and measurement. This would create ownership, consistency and a shared vision throughout government and the broader public sector, for addressing human rights matters. It would also take into account Australia's international obligations, thereby improving international reporting and compliance.

The Commission's first 2 recommendations in this report are for the establishment of a new National Human Rights Framework and the key features of this framework to ensure it is rigorous and holds government to account.

Chapter 2: Endnotes

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2. Australian Human Rights Commission, (2020), *Submission to Australia's Third Universal Periodic Review*, p. 6, <https://humanrights.gov.au/our-work/legal/submission/australias-third-universal-periodic-review>.
3. Human rights are written down in international agreements called 'conventions', 'covenants' and 'treaties'. They reflect international agreement among the governments of the world about what human rights are, and how they should be protected and promoted. In addition to the ICCPR and ICESCR, Australia has signed up to other international human rights agreements that specify how human rights apply to certain groups of people or in particular situations. These include:
   - Convention on the Rights of the Child, agreed to by Australia in 1990
   - Convention on the Elimination of All Forms of Discrimination against Women, agreed to by Australia in 1983
   - International Convention on the Elimination of All Forms of Racial Discrimination, agreed to by Australia in 1975
   - Convention on the Rights of Persons with Disabilities, agreed to by Australia in 2008
   - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, agreed to by Australia in 1989
   - International Labour Organisation Discrimination (Employment and Occupation) Convention ILO 111 (which prohibits discrimination in employment), agreed to by Australia in 1973.
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5. It is clearly understood that the internal governance arrangements within countries (such as states and territories) are not an excuse for failing to protect human rights. See for example Article 27 of the Vienna Convention on the Law of Treaties.
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11. Commonwealth of Australia, (September 2009), *National Human Rights Consultation Report*, Rec 8, <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.
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14. This is referenced in a generalised manner on page 11 of Australia's Human Rights Framework, noting that 'the changes in this Framework are intended to have broad effect and to enhance the understanding of and respect for human rights in Australia. It is appropriate to review their effectiveness after a period in operation and look at whether other or additional measures are required.'
15. Commonwealth of Australia, (September 2009), *National Human Rights Consultation Report*, pp. 263–264, <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.
16. Commonwealth of Australia, (September 2009), *National Human Rights Consultation Report*, Rec 7, and the Recommendation for a Statement of Compatibility, in Rec 6, <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.
17. Commonwealth of Australia, (September 2009), *National Human Rights Consultation Report*, Rec 2, <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.
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28. *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) came into force on 4 January 2012.
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3. A Human Rights Act for Australia

3.1 Overview

This chapter concerns the centrepiece of the Commission's proposed National Human Rights Framework: a National Human Rights Act. It recommends that the Government develop an Exposure Draft Bill based on the Commission's model Human Rights Act for further consideration. The chapter sets out the key elements of the model Human Rights Act, and how it will significantly improve the protection of human rights for all people in Australia.

Recommendation 3

A National Human Rights Act

The Commission recommends that the Australian Government enact a Human Rights Act. Further, the Commission recommends that an Exposure Draft Bill be developed based on the Commission's model Human Rights Act.

3.2 Introduction

Throughout the Free & Equal project, the Commission has identified the importance of improving the 'upstream' consideration of human rights by the Parliament and Government.

This means considering human rights from the outset of policy development, service design and decision making. This would prevent the violation of human rights from occurring in the first place, and ensure the engagement of the community in matters that directly affect them.

Australia has taken many approaches to the protection of human rights over time, but structural weaknesses remain in how these rights are treated at the federal level. This was particularly evident throughout the COVID-19 pandemic and with significant policy failures, such as the 'Robodebt' scheme.

The missing element is a national Human Rights Act.

A Human Rights Act would provide a level of accountability to elevate the consideration of human rights by explicitly naming Australia's human rights obligations in a domestic legal framework and placing positive duties on public authorities to fully consider human rights. This provides a framework to improve human rights outcomes and to intervene early to prevent human rights breaches.

Importantly, a Human Rights Act would ensure that there are consequences for failing to appropriately consider and protect human rights.

The Commission's Position Paper on this issue, released on 7 March 2023,[1] sets out a model for a national Human Rights Act based on extensive research and consultation. The Commission's model is calibrated to address the specific legal environment at the federal level in Australia.

The model set out in the Position Paper builds on the existing Human Rights Act models and relevant reviews in the Australian Capital Territory (ACT), Victoria and Queensland. Since their enactment in the ACT and Victoria in 2004 and 2008 respectively, these Acts have enhanced the protection of human rights and

the quality of government decision making in those jurisdictions. The model also learns from similar models overseas, particularly in the United Kingdom and New Zealand.

The Commission's Position Paper provides a clear framework for a Bill that could be drafted.

Past debates about Human Rights Acts have tended to become mired in theoretical perspectives on the concept of a Charter of Rights. The issues raised in those debates often bear little resemblance to what is proposed in model Human Rights Acts: community understanding, policy development, legislative drafting and decision-making by, and accountability of, public authorities.

Grounding the next stage of consideration of a Human Rights Act in an Exposure Draft Bill will significantly lift the quality of debate and engagement – including within the forum of Parliament – and ensure that a Human Rights Act is tailored to the federal legal system in which it would operate.

3.3 Support for a national Human Rights Act

As noted in **chapter 1**, the PJCHR commenced an inquiry into Australia's Human Rights Framework in March 2023. The inquiry is considering whether Australia should implement a new National Human Rights Framework. This includes considering whether Australia should enact a federal Human Rights Act. The PJCHR has focused on the Commission's model Human Rights Act as a pathway for achieving this.

The Commission has closely followed the progress of the PJCHR inquiry. We have listened with interest to the witnesses who appeared at the 6 days of public hearings conducted by the Committee and have reviewed the 300 plus submissions made to the Committee.[2]

This has revealed a high degree of consensus on the way forward for Australia. Of the submissions lodged with the Committee:

- 116 referred to the Commission's model Human Rights Act and indicated support for it
- 178 indicated their support for a Human Rights Act more generally, without referencing the Commission's model
- 5 expressed their opposition to a Human Rights Act
- 19 offered no position on a Human Rights Act.

In total, 92% of the 318 published submissions supported a Human Rights Act for Australia.

That is a striking, indeed exceptional, degree of support. The Human Rights Law Centre, for example, said that:

> A federal Human Rights Charter or Act (federal Charter) is essential to the practical realisation of human rights – to ensuring that human rights ideals and commitments guide government decision-making and empower people. A federal Charter will set out the human rights which the Australian government must consider in law-making, respect in public service delivery and actions, and to which the federal government can be held to account.[3]

The Secretariat of National Aboriginal and Islander Child Care (SNAICC) suggested that:

> A federal Human Rights Act would contribute to both a stronger renewed national discourse on rights and increase accountability for protecting rights across all levels of government.

The Charter of Rights campaign coalition, an alliance of 90 organisations across the Australian community, urged:

> By ensuring human rights are at the heart of our laws, and that people can take action when their rights are violated, a Charter makes a huge difference to the lives of people across our community. Charters are of particular importance for parts of the community marginalised by a combination of neglect with respect to critical services, or cultural attitudes that lead to discrimination, and as a result are prevented from fully enjoying their rights. People need enforceable human rights to help redress the wrongs they face, but more importantly improve government laws and decisions so that they properly consider human rights at the outset.[4]

Much of the discussion at the PJCHR public hearings has focused on the Commission's model for a Human Rights Act. Witnesses and submissions have proposed amendments to the Commission's model, for example to expand the scope of the rights included in the model Human Rights Act.

Ultimately, the dialogue that has occurred in the PJCHR hearings has shown that the Commission's model is an appropriate vehicle by which to take forward a national Human Rights Act to the Exposure Draft Bill stage.

3.4 The case for a Human Rights Act

(a) People's rights matter, all of the time

The need for a national Human Rights Act can be summed up in one simple statement: **people's human rights matter, all of the time**.

No matter who we are, we all deserve to be treated with dignity and respect by our government. The Human Rights Act would embed these values into public life in Australia by making the government accountable for protecting our rights – no matter who is in power.

A Human Rights Act would mean that all of us, no matter who we are, will have a better understanding of our human rights. We will be empowered to stand up for ourselves and our communities and take action to get justice when someone in the government tries to violate our rights.

No matter who we are or what our life circumstances are, we all have the right to be treated with respect and dignity by our government and the people that work for it. When we know what our rights are under the law, we can stand up for ourselves and our communities if the government does something unfair or even abusive.

But right now, it is too hard to understand just what rights we do have under Federal law. That can make it difficult for us to know what to do when we are treated badly or denied our fundamental freedoms by someone who works for the government. Our human rights are scattered across a patchwork of different and sometimes contradictory laws – and some are not protected at all.

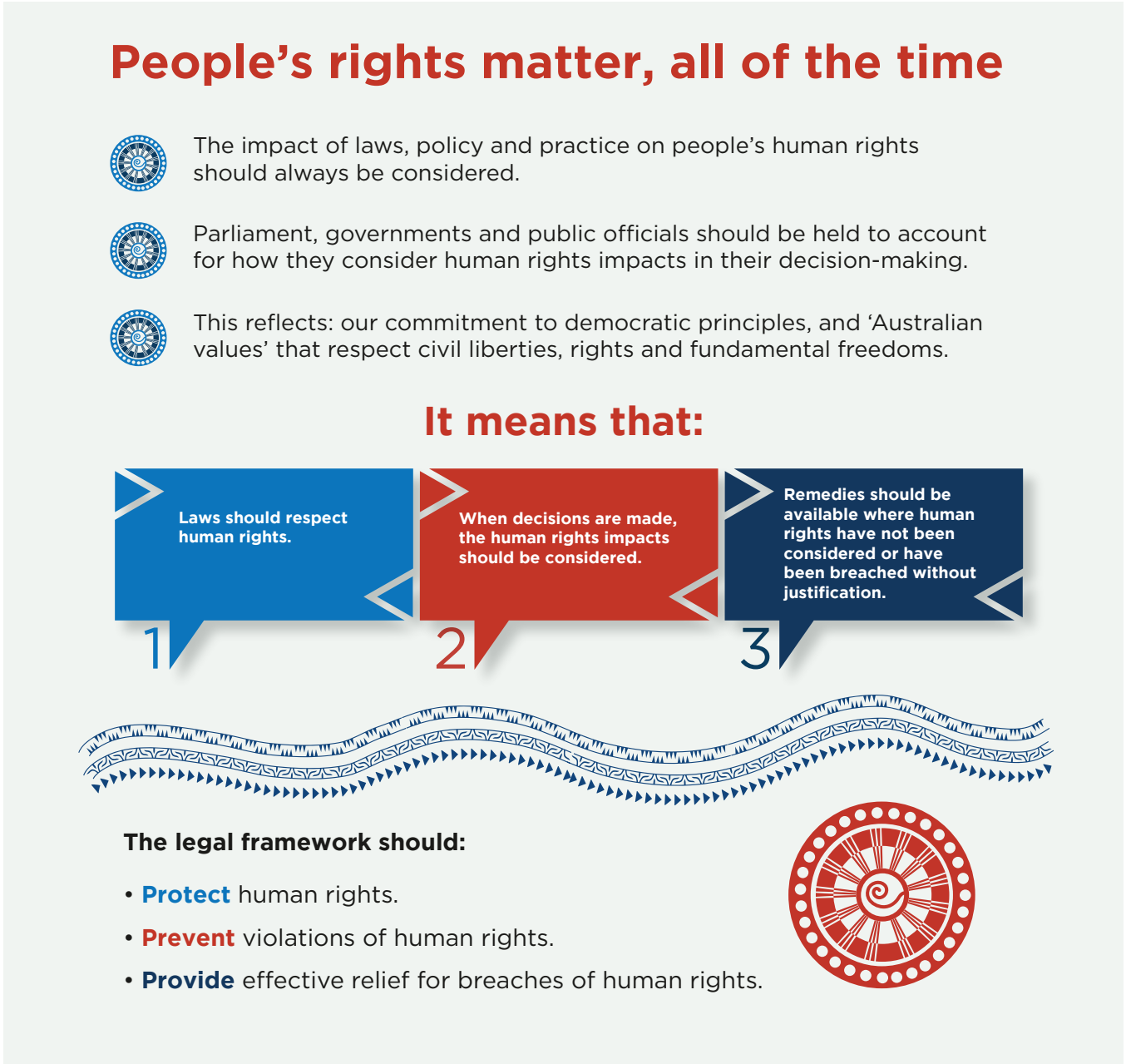
With a Federal Human Rights Act, all our rights would be clearly laid out in one place and accessible to anyone who needs them – from families navigating the healthcare system to people detained by immigration authorities. The Human Rights Act would be a powerful new tool not only to protect ourselves and our communities, but to get justice when governments fail us.

Society works best when we all know what the basic rules are. A Human Rights Act would be a central document that everyone can access – a way to make sure we all know what our rights are – and what action we can take if they are not respected. At present, Australia does not adequately protect human rights. The impact of a Human Rights Act is illustrated in **Figure 5**.

A national Human Rights Act would mean that:

- the impact of laws, policy and practice on people's human rights would always be considered
- Parliament, government officials and decision makers would be held to account for how they consider the human rights impact of their actions and decisions
- people in Australia would have access to a remedy when their rights have been breached unjustifiably.

Figure 5: The impact of a Human Rights Act



Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal.

The Australian Constitution offers only limited protection for a small number of discrete human rights. This includes the implied right to freedom of political communication; and a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution. Moreover, the protection of the Constitution operates only as a limitation on the power of the Commonwealth Parliament to make laws, not as conferring rights on individuals.

The common law recognises a number of rights and freedoms. It protects human rights indirectly through statutory interpretation principles such as the 'principle of legality', which presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'. However, common law protections are fragile as Parliament can pass a law that overrides them at any time.

While Parliamentary scrutiny measures enable some consideration of human rights during the law-making process, these measures alone have not resulted in an embedded human rights culture within Parliament. Parliament routinely passes laws that are not human rights compliant.

While discrimination laws implement key aspects of the international treaties Australia has ratified, they are only a partial implementation of them, with many key international rights finding no corresponding federal protections. UN Treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system.[5] Many of Australia's commitments to human rights lack domestic protection.

In addition to this limited protection, the current rights framework in Australia is not easily explainable, or readily comprehensible to all people in Australia, whose rights are meant to be protected. Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all.

(b) A Human Rights Act for Australia is an evolution not a revolution

It is notable that Human Rights Acts have been passed in 3 states and territories in Australia and been in operation since 2004.

The Commission's Position Paper, *A Human Rights Act for Australia* contains multiple case studies of how a Human Rights Act has made a positive difference to the protection of human rights in the ACT, Victoria and Queensland, as well as in the multiple countries that have introduced such legislation over the past 20 years.

The Commission's proposed model for a federal Human Rights Act does 3 things:

- It builds on the success and lessons from the tried and tested existing Human Rights Act models in Australia and overseas.
- It remedies the shortcomings of these models.
- It tailors the provisions of the proposed national Human Rights Act to the specific constitutional requirements of Australia.

The proposed model for a Human Rights Act also builds on the lessons from the Commission, having administered for almost 40 years a complaints-handling stream under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) for breaches of human rights referable to the international instruments scheduled to the AHRC Act, and discrimination in emploment, under the Internal Labour Organization Discrimination (Employment and Occupation) Convention (ILO 111), 1958.

There are deficiencies in how these complaint processes operate, which limit their effectiveness. In the Commission's model for a Human Rights Act, these existing human rights complaint streams would be replaced with a much clearer set of rights in the Human Rights Act.

By learning from the lessons of other models, and building on the legacy of the AHRC Act processes that have been in domestic law for nearly 40 years, the Commission's proposal for a Human Rights Act is an evolution not a revolution.

3.5 The model Human Rights Act for Australia

(a) Framing principles

In the development of the proposed model for a national Human Rights Act, the Commission was guided by the following principles. An Act must be:

1. **Australian:** We need a Human Rights Act that reflects our shared values and embeds rights into our domestic system.
2. **Democratic:** We need a Human Rights Act to strengthen existing democratic and rule of law principles. The model should be parliamentary, accountable, participatory and balanced.
   - *Parliamentary* – by preserving parliamentary sovereignty in a model based on dialogue.
   - *Accountable* – by enhancing the rule of law and providing a check on executive power.
   - *Participatory* – by improving the quality of public debate and enabling minority and vulnerable groups to have a voice in decisions that affect them.
   - *Balanced* – by setting out a framework for navigating the intersection of varied public interests and rights.
3. **Preventative:** We need proactive measures to prevent human rights abuses. A Human Rights Act should embed procedural measures to enable early consideration of human rights, and foster a culture of respect for human rights throughout the whole of government.
4. **Protective:** We need safeguards against human rights abuses, through a Human Rights Act with pathways for individuals to access justice and redress through courts.
5. **Effective:** We need a Human Rights Act that facilitates better decision making based on human rights standards, and equality of access to effective interventions to protect human rights.

(b) Summary – key elements of a national Human Rights Act

Table 4 sets out the key elements of the Commission's proposed national Human Rights Act.

Table 4: Summary of key features of proposed national Human Rights Act

The Human Rights Act (HRA) should be a 'dialogue' model, that preserves parliamentary sovereignty but necessitates consideration of human rights at all stages of decision making processes
The HRA should incorporate rights derived from the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and include a right to a healthy environment (drawn from the above instruments)
The HRA should reflect key rights and principles contained in the United Nations Declaration on the Rights of Indigenous Peoples
There should be a positive duty on public authorities to act compatibly with human rights
The scope of public authorities should include core executive bodies and contractors /entities providing public services
The positive duty should be implemented alongside a comprehensive education and training program for public authorities
The HRA should include key procedural duties – a 'participation duty' and an 'access to justice' duty
It should also account for technological decision-making
The HRA should apply to all within Australia's federal jurisdiction
The HRA should provide guidance about how rights in the HRA should be interpreted.
The HRA should provide guidance to courts about how they should interpret legislation in light of the human rights contained within the HRA.
The HRA should include a limitations clause describing the circumstances in which human rights may be permissibly limited.
The HRA should include a mechanism to provide notification to Parliament regarding laws that are incompatible with human rights, for further consideration by Parliament
The HRA should include a standalone cause of action for all rights, with remedies as considered appropriate by the courts
The HRA should allow a person to make a human rights complaint to the Australian Human Rights Commission or for the administrative review of a decision about them
There should be representative standing under the HRA
The HRA should be subject to periodic reviews to ensure its effective operation
Existing Parliamentary scrutiny mechanisms should be improved alongside the introduction of an HRA
The Commission should be granted additional powers to enable education measures and compliance with the HRA

For a comprehensive overview of the features of the Commission's proposed national Human Rights Act, see **Appendix 2** of this report.

Each key element of the model is now described in this chapter.

(c) A Human Rights Act based on dialogue

The Commission proposes a Human Rights Act built on the legislative dialogue model. Dialogue models incorporate a formal 'dialogue' between the executive, legislature and judiciary, with each branch of government sharing responsibility for respecting and protecting human rights. Dialogue models – like that used in the UK – also strongly focus on the 'upstream' arena of decision making and policy development.

In accordance with this model, there would be a specific 'positive duty', like the one provided in the new Respect@Work legislative amendments, on the executive to act compatibly with human rights and to properly consider human rights when making decisions. Government entities, known as 'public authorities' would be bound by this duty.

Parliament would be required to consider human rights when making and debating laws, through existing parliamentary scrutiny measures. The judiciary would be required to interpret laws in a way that is compatible with the Human Rights Act where it is reasonably possible to do so in light of Parliament's intention. The judiciary would also review the executive's compliance with the positive duty in relation to particular decisions and may issue remedies for breaches of the Human Rights Act.

Unlike the state and territory models, and the UK model, the Commission's model does not include provision for a formal 'declaration of incompatibility' by a federal court, given uncertainty about the constitutionality of such a provision. Such a declaration involves the courts formally indicating that a legislative provision is in breach of human rights.

(d) Jurisdiction and scope

A Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination. This reflects the fundamental principle that human rights are universal and apply equally to all human beings.

A Human Rights Act should include individuals under Australia's 'effective control' overseas in order to fully implement Australia's international obligations.

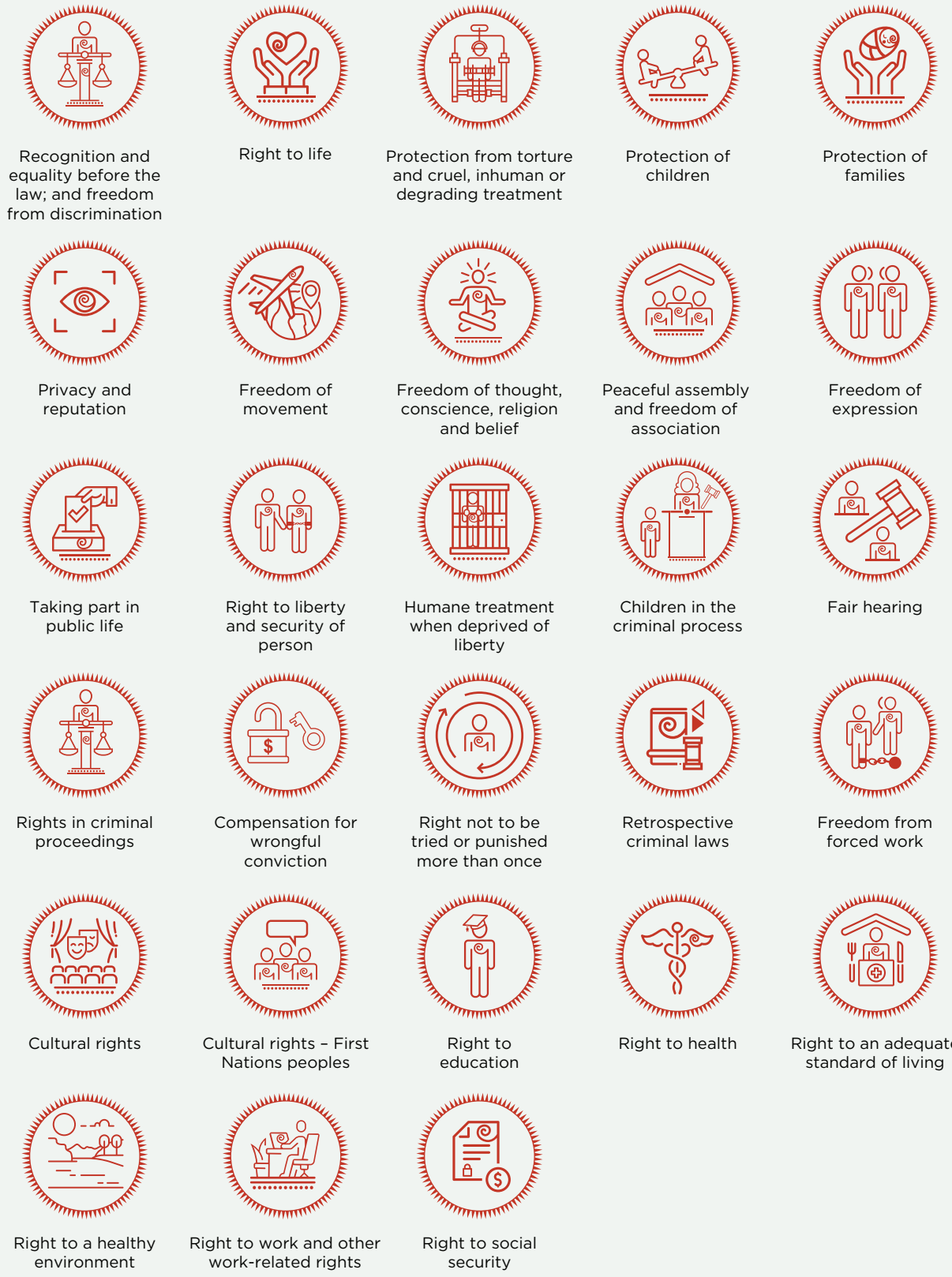
In light of Australia's constitutional structure and the existing Human Rights Act instruments in states and territories, the Commission proposes that a federal Human Rights Act should be restricted to federal laws and federal public authorities. The Human Rights Act instruments in place in Victoria, Queensland and the ACT should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory should be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act.

(e) What rights should be included in a Human Rights Act?

The key function of the Human Rights Act will be to coherently implement Australia's international obligations domestically, and to reflect and codify fundamental common law rights. It would provide the 'bedrock of rights' in Australian law.

The Commission's proposed Human Rights Act includes the rights set out in **Table 5**.

Table 5: Rights reflected in the Human Rights Act



The Commission's recommended model primarily incorporates rights derived from the ICCPR and the ICESCR. When formulating the wording of these rights, the Commission has taken into account state and territory human rights instruments, and Australia's specific constitutional and federal structure.

The Commission has also reflected Australia's obligations arising from 'thematic' treaties beyond the ICESCR and ICCPR, relating to particular sections of the population, such as children (CRC) and persons with disability (CRPD); as well as rights and principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), noting Australia's particular obligations to First Nations peoples.

The Commission proposes that the thematic instruments are reflected through the inclusion of a clause that requires the Human Rights Act to be interpreted in light of international human rights instruments.

This clause would reference the 7 core treaties that Australia has ratified, and UNDRIP. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights within the Human Rights Act, and consider how the rights in the Human Rights Act may apply to federal legislation that raises human rights considerations.

(f) Approach to economic, social and cultural rights

Economic, social and cultural rights are of critical importance to people's ability to live healthy, safe and productive lives. Whether it is through access to bare minimums, such as safe drinking water, accommodation or social security, or ensuring that health, education and employment can be accessed in a respectful manner, no one can thrive without these rights being recognised.

For this reason, the Commission includes rights contained in the ICESCR in its model Human Rights Act.

To ensure that these rights are justiciable and constitutionally compliant, the Commission proposes an implementation of ICESCR rights that is narrower than the full expression of those rights contained in ICESCR.

The Commission proposes focusing on including the essential, core and/or immediately realisable aspects of these rights. Importantly, the proposed articulation of ICESCR rights is designed to accord with the Commission's proposal for including a direct cause of action for unlawfulness under the Human Rights Act.

The Commission notes that the full scope of ICESCR rights are implemented through the package of proposals in a new National Human Rights Framework, not solely through the operation of the proposed Human Rights Act.

The Commission recognises that ICESCR implementation, particularly with regard to the principle of progressive realisation, occurs primarily outside of the realm of the courts. Progressive realisation is most relevant to 'upstream' decision making about policy and resourcing.

Parliamentary scrutiny and Commission reporting would provide opportunities to address the broader aspects of ICESCR rights that extend beyond the narrower articulation of rights in the Human Rights Act to be applied by courts.

The Commission also envisions that legal foundations in a Human Rights Act would be complemented by overarching national targets and measurable indicators assessing human rights implementation, enabling the progressive realisation of rights over time. It would be accompanied by effective national level responsiveness to the Concluding Observations of treaty body periodic reviews, which may include some other priority actions for reform.

(g) Approach to Aboriginal and Torres Strait Islander peoples' rights

Within the Human Rights Act model, the Commission proposes that the rights of Aboriginal and Torres Strait Islander peoples be reflected in the following manner, subject to further consultations with First Nations peoples:

- A 'participation duty' applicable to the executive, to reflect principles of self-determination through practical measures by public authorities.
- The inclusion of cultural rights, non-discrimination rights and ICESCR rights ensure the incorporation of key UNDRIP rights within the Human Rights Act.
- A standalone cause of action, with capacity for representative actions, will enable organisations to bring claims on behalf of communities – recognising the collective aspect of these rights.
- First Nations participation reflected in parliamentary scrutiny processes through the requirement to list in Statements of Compatibility steps taken to ensure that participation of First Nations peoples has occurred, where relevant. This would also be subject to assessment by the Parliamentary Joint Committee on Human Rights.
- A clause enabling human rights in the Human Rights Act to be interpreted in light of UNDRIP in cases where the rights of First Nations peoples have been affected.
- The right to self-determination articulated in a preamble to the Human Rights Act as an overarching principle of the instrument.

The Commission considers that, in combination with a Human Rights Act, a range of additional steps should be undertaken to implement the rights of First Nations peoples, particularly as set out in UNDRIP. This includes through introduction of a National Plan to implement UNDRIP, national and regional representative mechanisms to ensure participation in decision making, and the implementation of the Uluru Statement from the Heart.

(h) Positive duty on public authorities

(i) Nature of the duty

A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to give proper consideration to human rights when making decisions.

This is also known as a 'positive duty' applying to public authorities.

The requirement to give 'proper consideration' to human rights applies to making decisions and implementing legislation and policy – a procedural obligation. The requirement to 'act compatibly' with human rights is a substantive obligation on public authorities.

Public authorities would also be required to engage in participation processes where the 'participation duty' is relevant, as part of the 'proper consideration' limb.

Compliance with the positive duty would be reviewable by courts (and possibly by tribunals as discussed below in relation to administrative law remedies).

The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

(ii) Scope of public authorities

The scope of public authorities with obligations to comply with the positive duty includes 'core' executive bodies, such as government departments, agencies and offices, and the police. It also includes 'functional' public authorities, which are private businesses, non-government organisations and contractors that have functions of a public nature and are exercising those functions on behalf of government. Private entities only have to comply with the Human Rights Act when they carry out public functions.

The Commission has proposed adapting state and territory definitions of 'public authorities' to suit the federal context, in a manner that is flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with the Human Rights Act.

There is a range of factors included in the definition that indicate whether or not an entity is a functional public authority – for example, whether the function is conferred on the entity under a statutory provision, and whether the entity is publicly funded. The definition also includes examples of functions that are definitively of a public nature. Examples of functional public authorities at the federal level would include a private company operating a federal prison; and a private service provider delivering services through the NDIS.

Not included in the scope of public authorities are:

- the Parliament of Australia, except when acting in an administrative capacity
- the courts, except when acting in an administrative capacity and where the Human Rights Act applies to the court's own procedures
- entities declared by Human Rights Act regulations not to be a public authority.

The Commission also proposes including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act.

(iii) Implementing the duty

A positive duty must be accompanied by intensive measures to ensure cultural change and the adoption of a preventative approach to human rights protection within public authorities.

There should be a transition period of one year pre-introduction, to develop proficiency within the public service. Human Rights Act implementation should include an initial whole-of-government education program, followed by permanent routine educational requirements at all levels of government to maintain fluency with the Human Rights Act and an embedding of 'rights-mindedness'.

There should also be:

- permanent, dedicated internal departmental human rights expertise and responsibility for consultation and education on Human Rights Act matters
- the development and implementation of human rights action plans by federal departments and agencies
- the development of tailored guidelines, checklists and resources to enable staff within public authorities to make human rights-compliant decisions within their areas of competence
- respect for human rights included within public sector codes of conduct.

The Commission considers that it would have a central role in providing tailored and general education about the Human Rights Act for public authorities, and would require dedicated ongoing resourcing to do so.

(i) Procedural duties

(iv) Participation duty

In addition to the positive duty on public authorities to consider and act in accordance with human rights, the Commission proposes that an overarching 'participation duty' be introduced into a Human Rights Act. The participation duty would primarily operate as an aspect of the binding positive duty on public authorities.

This would require ensuring the effective participation of these affected groups in decision making that affects them directly. This would apply at 2 levels:

- *Group level*: Government would need to describe how it had engaged with affected communities in drafting legislation and regulations, with the PJCHR having an oversight role of the adequacy of this.

- *Individual level*: Administrative review would be available for decisions about individuals, to ensure that they were able to effectively participate in the process leading to the decision. This would be of particular importance for persons with a disability by requiring that decision making processes facilitated supported (rather than substituted) decision making.

The participation duty would apply to proponents of legislation in a non-binding respect, reflected in Statements of Compatibility and assessed through the scrutiny process of the PJCHR.

The participation duty would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The participation duty addresses a fundamental problem in the development of federal policies and decisions – inadequate engagement with the very people to whom those policies and decisions directly apply.

The Commission's proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures concerning consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in policy formulation and decision-making processes.

International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would be a means of realising key procedural elements of the existing rights in the Human Rights Act, in relation to these 3 groups.

The duty will apply differently to each of these groups, as defined by the relevant international instruments. However, the same underlying requirement applies. When decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions.

- Where decisions of public authorities will affect the rights of First Nations peoples and communities, participation processes should be facilitated in line with UNDRIP principles and standards relevant to consultation and participation.
- When individual children are affected by a decision, the 'best interests' principle should be applied, and the child should be heard, with their views given due weight in accordance with their age and maturity. When children as a group are affected by proposed policies or laws, the best interests of children should be proactively considered, and children should be consulted as part of the development process.
- Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. When decisions have an impact upon people with disabilities as a group, persons with disability, including through their representative organisations, should be consulted as part of the process.

The participation duty would arise when public authorities are developing policies, or making decisions, that affect the rights of these 3 groups. The duty would arise when decisions are being made that directly concern these groups, or where the decision is likely to have a disproportionate impact on the group in question. For example, changes to planning policies may have a disproportionate impact on people with disabilities if they affect accessibility.

Where decisions are made that affect groups of people, the decision maker need only show that there was sufficiently fair and representative consultation, not that participation occurred comprehensively with all relevant bodies or individuals.

In the Commission's Position Paper, the Commission sets out guidelines identifying the key considerations for determining the quality of a general participation process.[6] These

include, for example, that consultations should occur at a formative stage; and that the results of the consultation should be conscientiously taken into account.

Such objective criteria can be applied by the courts when determining whether the Human Rights Act was breached due to failure to consult in relation to particular right(s). Where public authorities can show that they enabled affected person(s) to genuinely participate in a decision made about them, this will fulfil the participation duty, and point to the fulfilment of the substantive right under consideration by a court. As with substantive rights in the Human Rights Act, the participation duty could be justifiably limited through the application of the limitations clause.

(v) Participation duty on proponents of legislation

The participation duty would also apply as a non-binding duty for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in Statements of Compatibility. This would also be subject to scrutiny by the PJCHR. Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question.

(j) Equal access to justice duty

In addition to an overarching participation duty, the Commission proposes a complementary 'equal access to justice duty' for public authorities.

The equal access to justice duty would embed procedural fairness and civil rights protections into decision making and court processes, so that people are equally able to access justice. This may include being provided information in a format that is comprehensible (such as through interpreters and translation) or with processes adapted to address trauma and other impacts on victims of violence.

This duty would mean that public authorities have a positive duty to realise access to justice principles – and would require active steps by public authorities to ensure the provision of key elements of a functioning justice system. Specifically, it would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.

This duty would create an obligation to meet minimum requirements associated with the right to a fair hearing, overlayed by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law. This is a principle of *equal access,* in order to overcome current barriers to access faced by particular groups.

The purpose of this duty is not only to codify but to strengthen and support key principles established by common law courts by linking them to positive human rights obligations as defined by international law.

The duty would embed non-discrimination principles into planning and policy by public authorities associated with the justice system. The duty may arise as part of a consideration of whether related Human Rights Act rights were breached by public authorities due to a failure to implement minimum justice guarantees.

(k) Technology and decision making

Increasingly, public authorities are utilising technology, such as automated processes and artificial intelligence (AI), when making decisions. This includes decisions that directly affect people's rights. It is important that the same procedural fairness principles and rights consideration apply to *all* decisions made by public authorities, *regardless* of how the decision is made. This should be explicitly clarified in the Human Rights Act.

3.6 Interpretation of rights in the Human Rights Act

The Commission proposes that the Human Rights Act provide guidance about how rights in the Human Rights Act should be interpreted.

As Human Rights Act rights are derived from international law, it is necessary for courts, tribunals and public authorities to be directed to consider international source instruments and related authoritative international materials to gain context for how the rights are to be understood.

The Human Rights Act should include a clause that references the seven core treaties that Australia has ratified, along with UNDRIP, and requires the rights in the Human Rights Act to be interpreted in light of these instruments. This will encourage courts (as well as Parliament and the Executive) to take into account these instruments when interpreting the rights in the Human Rights Act.

This approach would also encourage consideration of explanatory General Comments and other relevant international materials, ensuring that the Human Rights Act remains a 'living document' that takes into account developments in international law, including after the Human Rights Act is adopted.

3.7 Interpretation of federal laws and limitations on human rights

The interpretive clause provides guidance to courts about how they should interpret legislation in light of the human rights contained within the Human Rights Act. Courts are to prefer an interpretation that is compatible with human rights, provided that this is consistent with the intention of Parliament, as expressed through the statute under analysis.

The limitations clause provides guidance on the ways in which human rights can be permissibly limited. This can be relevant to the task of interpreting statutes in a way that is consistent with human rights. A statutory restriction on human rights may be permissible – and therefore consistent with human rights – if it is justified by the limitations clause, for example because it is proportionate to the achievement of a public purpose or the fulfilment of a different, competing human right.

The limitations clause will also be relevant in assessing whether decisions or actions of public authorities that limit human rights are permissible. This will be particularly relevant to claims by individuals that their human rights have been breached.

Public authorities will need to have regard to the interpretative clause when making decisions or taking action pursuant to statutory authority. More generally, they will need to have regard to the limitations clause in relation to any decision or action that has the potential to impact on human rights.

(a) Interpretive clause

An interpretive clause requires courts to interpret legislation in a way that is consistent with human rights where possible.

At the same time, the interpretive clause requires courts to respect the parliamentary intention underlying the statute – noting that, in a dialogue model, parliamentary intention will prevail, due to the ultimate supremacy of Parliament.

The Commission's approach to the interpretive clause is designed to chart a middle ground between a constitutionally uncertain approach that would grant too much interpretive power to the courts to alter the meaning of legislation; and an approach that would simply be akin to the existing common law principle of legality. The approach that received the most support in consultations is the following formulation.

> All primary and subordinate Commonwealth legislation is to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.

In addition to this clause, the Commission also proposes clarifying that courts cannot declare that Acts of Parliament are invalid on the ground that they are incompatible with human rights. However, a statutory instrument that is not compatible with human rights may be invalid if it goes beyond what is authorised by the empowering Act, read in accordance with the interpretive clause.

(b) Limitations clause

A limitations clause describes the circumstances in which human rights may be permissibly limited.

Most human rights are not absolute, and circumstances may require that different rights be balanced against important public interests, and countervailing rights. For example, it may be necessary to balance the right to freedom of expression with the right to privacy; and the right to access information with national security interests.

The Commission proposes an overarching limitations clause be included in the Human Rights Act. The limitations clause should be based on the 'proportionality' test that is strongly established in international law and applicable to human rights instruments. The wording of the limitations clause should serve a dual purpose of being a straightforward and complete legal test for the courts to apply, and a clear directive to public servants on how to conduct the limitations analysis in their day-to-day work.

A clause of this kind should incorporate an overarching statement to the effect that the rights and freedoms contained in the Human Rights Act may be subject only to such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society. The Commission has not proposed a particular form of words for the limitations clause but has identified its important elements. When deciding whether a limit is reasonable and justifiable, the following factors are relevant:

- whether the limitation is in pursuit of a legitimate purpose
- the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
- the extent of the interference with the human right
- whether there are any less restrictive and reasonably available means to achieve the purpose
- whether there are safeguards or controls over the means adopted to achieve the purpose.

Additionally, the limitations clause should prescribe that absolute rights, such as freedom from torture and freedom from forced work, must not be subject to any limitations.

The Commission further proposes that the limitations clause include examples that highlight the minimum core of certain ICESCR rights. This will signify that ICESCR rights should not be limited to such an extent as to encroach upon the minimum protection required by the right.

(c) Notification to Parliament regarding incompatible laws

State and territory Human Rights Acts provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights though applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI).

DOIs are designed to notify Parliament that a law is considered incompatible with human rights, and trigger a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.

However, the High Court's comments in the 2010 decision in *Momcilovic v The Queen*[7] have led to legal uncertainty about the constitutionality of DOIs at the federal level. This poses a risk that a federal Human Rights

Act could not validly include a provision empowering federal courts to make DOIs.

In light of this uncertainty, the Commission has considered a number of options to address potential constitutional concerns. It does not propose incorporating a formal DOI power for the courts to apply, and instead suggests an alternative approach.

In the course of applying the interpretive clause in the Human Rights Act, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the Human Rights Act or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment, regardless of whether a 'formal' DOI power exists.

The Commission proposes that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question.

This will require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act. It will not require a formal DOI to be issued by the court to Parliament.

3.8 Cause of action, complaints and remedies

The integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision making and policy design.

However, sometimes better processes and education will not be enough, and breaches of human rights may occur. In those circumstances a Human Rights Act should provide a cause of action, a complaints pathway, and enforceable remedies.

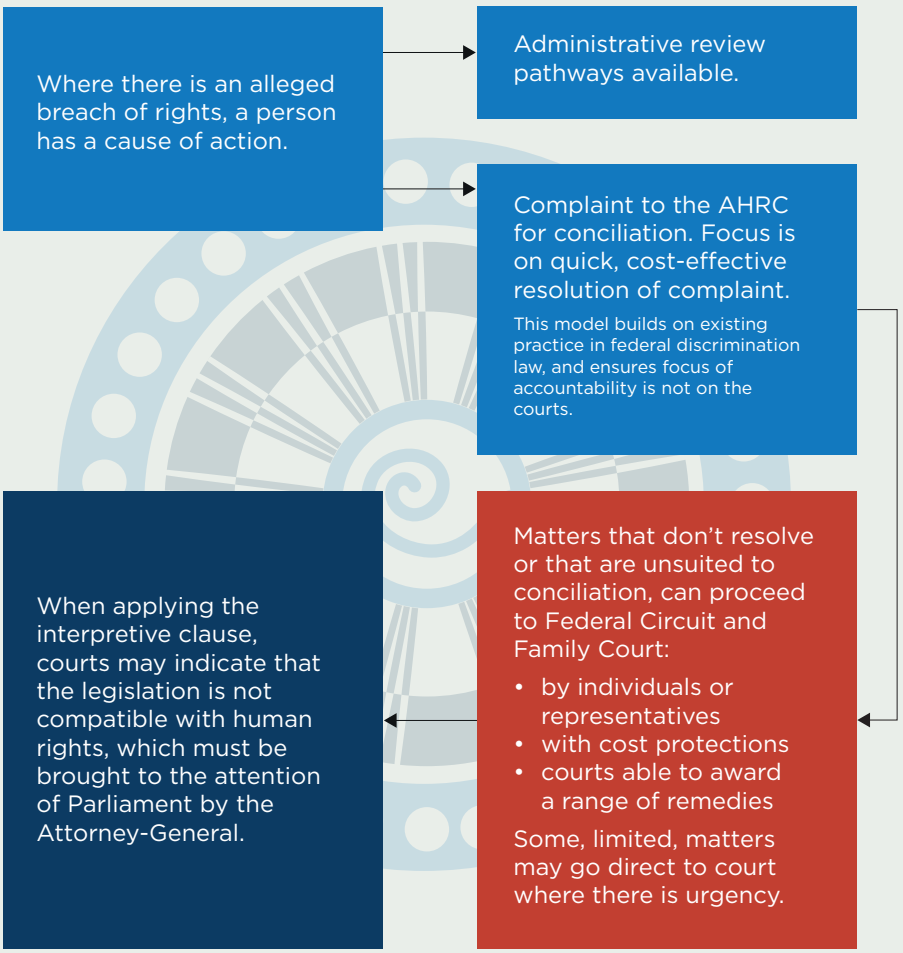
The Commission recommends that each right should have a direct cause of action, and an associated range of remedies.

If the complaint does not resolve, often due to Government deciding not to participate in conciliation, then the Commission reports on the complaint and decides whether a human rights breach has occured. The Commission makes recommendations for the Government to act where rights are breached, but there are no obligations for the Government to act. There is no pathway to court under this existing complaint process.

Under a Human Rights Act, individuals will continue to be able to make complaints to the Commission but rather than such complaints referring to international instruments, it would be by reference to the rights enumerated in the Human Rights Act. If complaints are not resolved, people will be able to pursue outcomes in the courts.

This is consistent with how federal discrimination law operates, by providing a clear pathway to bring claims before the courts alleging a breach of these rights. The operation of the cause of action and remedial pathways is illustrated in **Figure 6**.

Figure 6: What happens in my rights are breached?



(a) Cause of action

The Commission's proposed rights are all amenable to enforcement by complaints bodies and courts. Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action. This would provide clarity and consistency and enable the enforcement of rights in accordance with Australia's international obligations.

The Human Rights Act should also allow for Human Rights Act rights to be raised in the context of another legal proceeding – for example, in a judicial review proceeding or as part of a bail application.

(b) Complaints

The Human Rights Act should allow a person to make a human rights complaint to the Commission. The Commission's existing unlawful discrimination jurisdiction could be suitably adapted to human rights complaints.

The Commission proposes implementing a Human Rights Act complaint system that mirrors the unlawful discrimination jurisdiction.

This would mean that there would be a requirement for complainants to first bring a complaint to the Commission, and if conciliation fails or is inappropriate, the complaint would be terminated by the Commission. The complainant could then make an application to a court for adjudication.

The same processes that currently exist for unlawful discrimination matters would apply in the human rights context, including all the termination grounds, and representative complaints processes. For example, existing termination grounds would enable a person to proceed to court when there is another claim on foot in a court or tribunal that the human rights claim will be joined to.

The Commission also proposes one additional termination ground. This would enable a claim to be fast-tracked to the court where there is an imminent risk of irreparable harm. There would be an adapted and quick internal lodgment and review process, so that the Commission could return a response quickly in urgent cases.

The Commission suggests that the complaints model be subject to review at a future date, through the broader Human Rights Act review process.

An accessible complaints process including conciliation would reduce the impact of a Human Rights Act on the judicial system. Litigation need not be the only port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed.

(c) Administrative law

Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could have an impact on those mechanisms by supplementing existing bases for challenging government decisions.

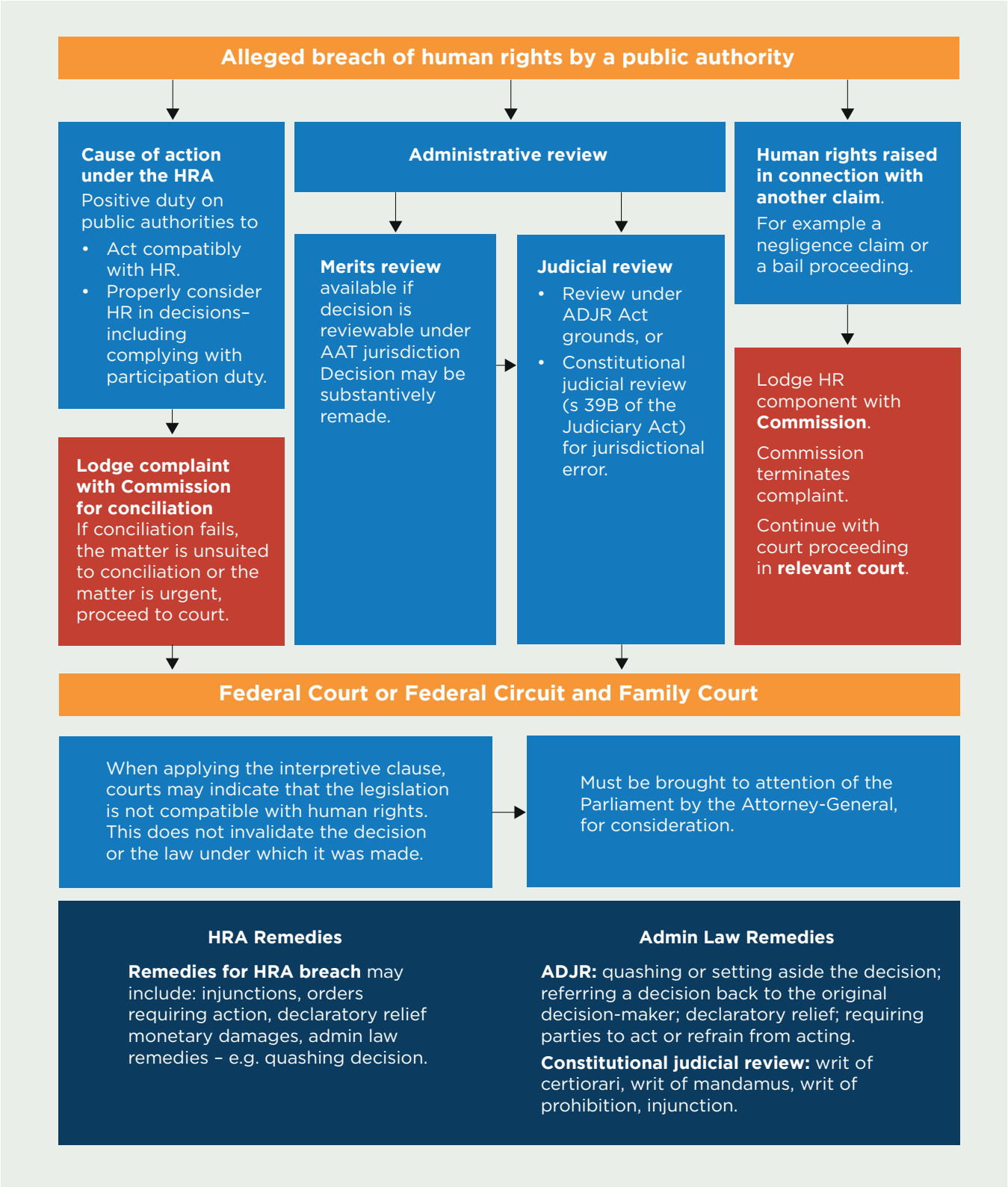
The Administrative Appeals Tribunal (AAT) has the function of conducting merits review of many kinds of government decisions. In doing so, the AAT reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. This process is often described as 'stepping into the shoes' of the original decision maker. A 'correct' decision is one made according to law. A 'preferable' decision is the best decision that could be made on the basis of the relevant facts. If human rights (either consideration of, or substantive compliance with) were a requirement for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider those human rights issues again independently.[8]

In the Commission's Position Paper, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (December 2021), the Commission recommended that serious consideration be given to reintroducing an intermediate adjudicative process to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts in relation to unlawful discrimination matters. This could also be extended to the resolution of disputes in relation to Human Rights Act matters.

A person who considers that a statutory decision maker did not give proper consideration to a relevant human right, as required by a Human Rights Act, could also seek judicial review of the decision through the courts. Under existing grounds for review, a person may be able to argue that the decision was affected by jurisdictional error, that the decision involved an error of law, or that the decision was an improper exercise of power because of a failure to take into account a relevant consideration that the decision maker was bound to take into account. Principles of administrative law, and administrative remedies should apply as usual to decisions that require adherence to the Human Rights Act.

Figure 7 illustrates the various pathways for complainants under the Commission's Human Rights Act model.

Figure 7: Pathways through complaints and courts



(d) Standing and costs

The Commission proposes that standing under the Human Rights Act be afforded to individuals who claim that their human rights were breached by public authorities, and organisations or entities acting in the interest of a person, group or class affected by human rights breaches (representative standing).

It is important that representative standing be circumscribed to ensure that claims address a specific breach of human rights in relation to a particular individual or a clearly defined and identified group of individuals. The organisation initiating a claim should also have some kind of subject matter connection and/or representative interest in the matter at hand.

An additional means of enhancing access to justice is to include protections against adverse cost orders.

(e) Remedies

The Commission proposes that the Human Rights Act give courts discretion over the range of remedies available, noting the range of different kinds of human rights claims and the importance of flexibility. Available remedies may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.

3.9 Periodic reviews

The Human Rights Act should include a provision for a periodic statutory review process within a set timeframe. The Commission proposes that an initial review be undertaken at the 5-year mark, with the timeline for subsequent reviews assessed at that stage.

3.10 The Disability Royal Commission's recommendations for a Disability Rights Act

The Commission welcomes the Final Report and recommendations made by the Disability Royal Commission, after four and a half years of inquiry. Over the course of its inquiry, the Disability Royal Commission took a rights-based approach, which is reflected in its Final Report and recommendations.

The Disability Royal Commission acknowledged the work underway through the Commission's Free & Equal project and the PJCHR inquiry into the scope and effectiveness of Australia's Human Rights Framework. It took the view that consideration of a federal Human Rights Act was beyond its terms of reference:

> Human rights and anti-discrimination law reform along the lines proposed by the AHRC has the potential to enhance rights protection for all Australians, including people with disability. However, even with these reforms, more protection of the human rights of people with disability would still be needed.[9]

While broadly supportive of the Commission's proposal for a Human Rights Act, the DRC limited its recommendation to the enactment of a standalone Disability Rights Act (DRA) to protect the rights of people with disability. Among other things, the DRA would create a new National Disability Commission.

The Commission welcomes the particular attention paid by the Disability Royal Commission to implementing specific rights under the UN CRPD[10] in domestic legislation.

Just as the Commission proposes to potentially consolidate discrimination laws, there remains a strong argument for the establishment of a holistic and comprehensive Human Rights Act that can include obligations contained in all of the international treaties.

The individual rights and obligations proposed by the Disability Royal Commission to be included in a DRA have, for the most part, been incorporated in the Commission's proposal for a Human Rights Act.

There are 2 proposals by the DRC that require further consideration in relation to the Commission's model Human Rights Act:

- a specific right to live free from violence, abuse, neglect and exploitation, consistent with Article 16 of the CRPD
- a positive duty to promote disability equality and inclusion.

The Commission considers that the right to be free from violence would form part of the interpretation of rights included in the model Human Rights Act. For example, the right to non-discrimination and equality for persons with a disability, as well as specific measures to support persons with disability experiencing violence being included within rights to social security, adequate housing and health.

Similarly, a duty to promote disability equality will fall within the 3 elements of the positive duty proposed in the Commission's model – relating to equal access to justice, effective participation and the general positive duty.

Nonetheless, these recommended actions could be included more explicitly in the model Human Rights Act – either through explanatory materials to the Human Rights Act or as standalone provisions.

The DRC's recommendations could be implemented through the legislative drafting stage of the Human Rights Act.

With regard to the Disability Royal Commission's recommendation for the establishment of National Disability Commission, the recommended functions under the DRA are in relation to capacity building, compliance and complaints.

An initial review by the AHRC of the specific functions recommended by the DRC shows that the Australian Human Rights Commission Act already confers these functions on the AHRC, or that these functions are proposed through Free & Equal reforms to the *Disability Discrimination Act 1992* (Cth) and the model HRA.

The Disability Royal Commission also proposes 3 independent monitoring and reporting functions in relation to Australia's Disability Strategy, independent monitoring of the implementation of Disability Royal Commission recommendations, and the implementation of the CRPD.

These matters could be addressed through reforms to the functions of the Disability Discrimination Commissioner at the AHRC, with appropriate funding. This would avoid unnecessary duplication and confusion from having a Disability Rights Commission and a Disability Discrimination Commissioner.

3.11 Ten ways a national Human Rights Act would make a difference to people in Australia

There are 10 ways that a Human Rights Act would better protect the rights of people in Australia.

1. **There is a better understanding of human rights:** A lesson from Human Rights Acts in other jurisdictions is that over time they result in increased human rights literacy among Parliamentarians, public officials and the general community.
2. **'Rights-mindedness' leads to better decision making:** The combination of measures contained in the Human Rights Act encourage the early consideration of human rights impacts in developing laws, policy and programs. A Human Rights Act builds a mindset that is focused on preventing violations of human rights in the first place. It encourages understanding how different processes will impact particular groups of people and to consider how to protect their rights in these circumstances.
3. **There is increased transparency and accountability about the impact of decision making on human rights.** A Human Rights Act sets out criteria for the balancing of rights and how to appropriate limit human rights (so that the chosen option for law, policy or programs has the least restrictive impact on people's human rights, and is appropriately tailored to the circumstances).
4. **The focus of decision makers will be on ensuring law and policy causes the least harm to people's human rights.** Where laws and policies negatively impact people's human rights, it will be incumbent on public officials to demonstrate how the approach proposed is the least restrictive option, how it is necessary, and how such restriction will be for the minimum period required. The Human Rights Act embeds a 'do no harm' principle in decision-making processes.
5. **Engagement with the community on proposed laws and policies will be improved.** The combination of a positive duty on public servants to fully consider human rights and enhanced parliamentary focus on human rights will require better engagement with the community in the development of laws and policies, especially if they propose to negatively impact on people's rights. A failure to ensure such engagement could breach the proposed positive duties, and be considered in remedial processes.
6. **The views of persons with disability, Aboriginal and Torres Strait Islander peoples and children will matter under a Human Rights Act.** Multiple provisions in the Commission's model Human Rights Act ensure that engagement and participation is central to all stages of the decision-making process. Government would be obliged to seek out and fully consider the views of these groups on laws, policies and programs that disproportionately or directly impact them.
7. **The proposed participation duty will improve individualised decision making.** The Human Rights Act would embed the requirement to ensure the participation of persons with a disability at an individual level by ensuring that supported decision-making processes are adopted in all decisions that directly affect an individual.
8. **There are pathways for addressing breaches of people's rights:** The range of mechanisms proposed in the Human Rights Act (from the informal conciliation process of the AHRC, to review of decisions through to court action) will ensure that people have a pathway to address breaches of their rights.
9. **The remedial framework under a Human Rights Act is accessible to the most vulnerable in the community.** Through the availability of conciliation at the AHRC, administrative review and access to courts, those most affected by human rights breaches will have the ability to hold government to account for breaching their rights.
10. **The requirement of reasonable adjustment is built into the administration of justice.** This is through the operation of the proposed equal access to justice duty. This would ensure that persons with a disability, Aboriginal and Torres Strait Islander peoples, and people from culturally and linguistically diverse communities, among others, have equal treatment in the operation of the civil and criminal justice systems, and administrative review.

Chapter 3: Endnotes

1. Australian Human Rights Commission, (March 2023), *Free & Equal Position Paper: A Human Rights Act for Australia,* <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.
2. Submissions to the inquiry are available online at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions> and transcripts of public hearings are available online at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Public_Hearings>.
3. Human Rights Law Centre, (July 2023), *Submission to the Parliamentary Joint Committee on Human Rights*.
4. Charter of Rights Campaign, (7 July 2023), *A Human Rights Charter Benefits Everyone*, (submission), p. 13.
5. See Table 2 in Chapter 1 of this report for the most recent comments by each of the seven human rights treaty committees in their most recent periodic reviews of Australia.
6. Australian Human Rights Commission, (March 2023), *Free & Equal Position Paper: A Human Rights Act for Australia*, pp. 184–186, <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.
7. *Momcilovic v The Queen* (2011) HCA 34 CLR 1.
8. The AAT is currently in the process of being replaced with a new federal administrative review tribunal.
9. Commonwealth of Australia, (29 September 2023), *Final report – Volume 4, Realising the human rights of people with disability*, p. 107, <https://disability.royalcommission.gov.au/publications/final-report-volume-4-realising-human-rights-people-disability>.
10. Commonwealth of Australia, (29 September 2023), *Final report – Volume 4, Realising the human rights of people with disability*, p. 131, <https://disability.royalcommission.gov.au/publications/final-report-volume-4-realising-human-rights-people-disability>.

4. Discrimination law reform

4.1 Overview

This chapter recalls the 4 integrated sets of reforms to federal discrimination laws set out in the Commission's first Position Paper, to improve the effectiveness of federal discrimination laws. This is built on 4 pillars:

- Building a preventative culture
- Modernising the regulatory framework
- Enhancing access to justice
- Improving the practical operation of the laws.

The Commission recommends a staged approach to federal discrimination law in a new Human Rights Framework that can:

- address these immediate priorities that are already underway and address urgent technical fixes to federal discrimination laws that would improve their operation (to be completed in year 1 of the new framework)
- commit to undertaking a broader reform of federal discrimination laws to shift the model and introduce new co-regulatory approaches (to be completed in years 2 and 3 of the new framework).

Recommendation 4

Reform federal discrimination laws

The Commission recommends that the Australian Government modernise federal discrimination laws to increase their effectiveness and shift their focus from a reactive model that responds to discriminatory treatment to a proactive model that seeks to prevent discriminatory treatment in the first place.

Consideration should be given to undertaking these reforms in 2 stages:

Stage 1: addressing immediate priorities and fixing longstanding problems in the operation of federal discrimination laws (year 1).

Stage 2: introducing a new co-regulatory model that broadens and expands on the positive duty in the *Sex Discrimination Act 1984* (years 2–3).

The specific reform actions and staging is set out in **Table 6** in this chapter.

4.2 Introduction

Australia's federal discrimination laws are outdated and difficult to use. Some of these laws have remained substantially untouched since they were introduced over 30 and 40 years ago. They do not respond to the challenges of modern life and are often unsuccessful as a means of remedying discrimination, let alone *preventing* it.

Australia was a world leader on discrimination protections when the *Racial Discrimination Act 1975* (Cth) was introduced. The *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) and *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) were also considered international best practice at the time they were introduced.[1]

What was best practice in the second half of the 20th Century is not so in the 21st Century.

Australia has fallen behind other comparable jurisdictions within Australia and internationally in providing protection against discrimination and the transformation that has occurred in other jurisdictions in advancing equality.

Comprehensive reform proposals to improve federal discrimination laws have sat largely unaddressed for nearly 20 years, for example, with the recommendations of the Senate Legal and Constitutional Committee's reforms of the Sex Discrimination Act in 2008[2] and earlier reform recommendations for the Disability Discrimination Act.[3]

The most recent attempt to reform these laws was the process that was commenced to consolidate all discrimination laws into one cohesive framework, conducted under the Australian Human Rights Framework in 2011–12.[4] This process stalled in 2012, and was abandoned following a change of government in September 2013.

This chapter sets out the Commission's proposals and rationale for the reform of federal discrimination laws. The Commission first published this reform agenda in its Position Paper, *Free & Equal: A reform agenda for federal discrimination law* released in December 2021.

Since that time, the Commission's *Respect@ Work: Sexual Harassment National Inquiry Report* into the prevention of sexual harassment in the workplace has resulted in reforms primarily to the Sex Discrimination Act, with some of the Free & Equal proposals also implemented.

There remains under consideration in 2023 proposed legislation to protect against religious discrimination and an inquiry by the Australian Law Reform Commission (ALRC) into the religious exemptions in the Sex Discrimination Act. The ALRC is required to report by 31 December 2023.

The recent report by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission), released in September 2023, provides the latest set of recommendations calling for substantial reform to the Disability Discrimination Act. As set out in **Text Box 1**, the Disability Royal Commission identifies a suite of reforms that are remarkably similar to those proposed by the Commission in the Position Paper, *Free & Equal: A reform agenda for federal discrimination law*.[5]

Text Box 1: Recommendations for reform of the Disability Discrimination Act by the Disability Royal Commission (2023)

The Disability Royal Commission released its Final Report in September 2023. Volume 4 of the report extensively considered reform options to fully protect the rights of people with disability. This included consideration of the effectiveness of the protections in the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act).

The Disability Royal Commission concluded that the Disability Discrimination Act is not meeting its purpose and that it 'needs to be refreshed and reformed to more effectively promote equality and greater inclusion of people with disability'.[6]

The Disability Royal Commission summarised its concerns with the operation of the Disability Discrimination Act as follows:

- The Disability Discrimination Act needs to be simple, clear and effective. The definitions of 'direct discrimination' and 'indirect discrimination' need to be simplified.
- The Disability Discrimination Act needs to better protect and enhance the rights of people to live free from harassment and vilification.
- The Disability Discrimination Act can do more to promote substantive equality with the introduction of a positive duty to eliminate discrimination, harassment and victimisation and a standalone duty to make adjustments for a person with disability.
- Some defences and exemptions to the Disability Discrimination Act should be repealed or revised to align with the United Nations *Convention on the Rights of Persons with Disabilities*.
- The mechanisms for enforcing rights under the Disability Discrimination Act need to be clear and more person-centred.[7]

It made recommendations to address these issues.

There are 2 notable features to the recommendations made by the Disability Royal Commission:

- They were made with explicit consideration of the Commission's proposed reforms set out in this Free & Equal project, as set out in the Position Paper on federal discrimination law reform. That there is a high level of similarity between the Commission's proposals for reform and those of the Disability Royal Commission is intentional by the Royal Commissioners.
- The Disability Royal Commission's recommendations were also made with full consideration of the recent amendments to the Sex Discrimination Act, which introduced the positive duty to prevent sexual harassment and related matters. The extensive consideration of how such a duty should also be implemented in the Disability Discrimination Act provides compelling reasons for why a positive duty should exist more broadly in the federal discrimination law model.

Due to the crossover between the recommended actions by the Disability Royal Commission and the Commission's recommended reforms across all federal discrimination laws, the Royal Commission's recommendations are cross-referenced in the Commission's proposed roadmap in **section 4.3**.

It is notable that while federal discrimination law has been left mostly untouched outside the recent Sex Discrimination Act reforms relating to sexual harassment, the Australian Government has engaged in an ambitious process of standardising, where appropriate, the regulatory powers across a vast array of other areas of federal law. This 10-year process has followed the passage of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act), which provides for a standard suite of monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

That discrimination laws were not reviewed in light of the Regulatory Powers Act provisions suggests a lack of engagement from governments of the past decade to this area of law.

(a) The case for reform

The reform of federal discrimination laws is now long overdue.

The failure to reform these laws continues to create inefficiencies for business, impedes access to justice, and means that there are ineffective protections against discrimination at the national level.

Discrimination laws are an integral component of a National Human Rights Framework. They send a message to the broader community that we should all be able to live without being discriminated against, harassed or vilified in all areas of public life.

For too long, the suite of federal discrimination laws have been left untouched and without consideration as to how they would best serve the community. They are now riddled with complexities and inconsistencies, with uneven levels of protection depending upon which characteristic discrimination is based on, and they are difficult to access. Federal discrimination law is outdated and not effective as a remedial process.

The 'modern' regulatory landscape has also by-passed discrimination law. This new landscape shifts the expectation about the role of the law from being solely focused on a remedial framework where harm is caused, to being an enabling framework to prevent discriminatory treatment in the first place. In this chapter the Commission proposes a range of reforms required so that federal discrimination laws can effectively support an enabling environment.

The Commission's reform agenda for federal discrimination law will substantially improve the effectiveness of these laws – encouraging and supporting preventative action across the community, while ensuring that remedies are more accessible where discrimination is experienced.

Figure 8 sets out a series of concerns about the operation of federal discrimination laws identified during the Free & Equal consultations.

Figure 8: Why reform of discrimination laws in necessary

There are a number of key problems.

First, addressing discrimination is heavily reliant on individuals to bring complaints, rather than on more systemic approaches to building cultures of prevention within businesses, services and the institutions of public life. The focus should shift to *preventing* discrimination, rather than reacting to it after the fact.

Secondly, the regulatory framework is out of date and needs strengthening. There *should* be a full range of regulatory responses available to target discrimination of different kinds, at different levels of severity, and to engender understanding and certainty about legal obligations. Federal discrimination laws do not provide adequate support to the business sector to take proactive efforts to address potential discrimination.

Thirdly, the discrimination system, while offering a range of options, can be difficult to navigate, and legal remedies are difficult to access, with the result that many meritorious claims may not be pursued in the courts. Individuals need the tools to obtain access to justice.

Fourthly, there are gaps in protection, so some people are *not* protected at all by discrimination laws, or are unable to obtain access to a remedy for discriminatory conduct. This includes discrimination on the basis of religion and irrelevant criminal record.

Finally, the mix of discrimination laws is complex and sometimes inconsistent, which leads to difficulties in applying the law. There are 4 federal discrimination laws, a discrimination law in each state and territory *and* overlapping regimes such as under the Fair Work Act.

The limitations that exist in the legislative scheme as it stands mean that:

- protections are less accessible than they should be, therefore people who experience discrimination are not being fully protected
- the business sector is not being supported as well as it should be to take steps to prevent discrimination, or to have confidence that it will be supported when it confronts discrimination head on
- addressing discrimination is heavily reliant on individuals bringing complaints, which means that the true extent of discrimination in the community is not reflected in the operation of the legislation
- there is limited incentive for proactive measures to be taken that will create a climate that prevents discrimination from occurring in the first place.

4.3 The reform agenda for federal discrimination laws

(a) Objectives

The Commission's reform agenda for federal discrimination laws proposes that these laws should meet the following objectives. They should be:

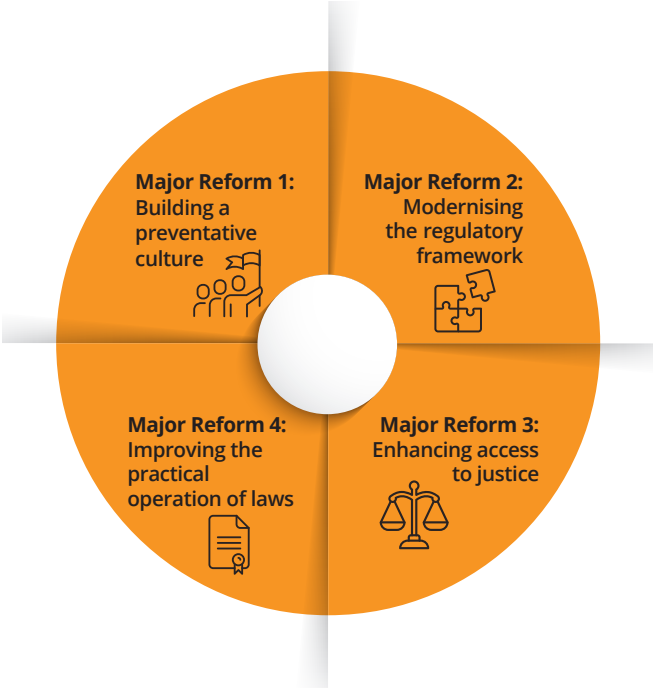
- **Clear:** Any legislation must be readily understandable by the community, and avoid unnecessary complexity.
- **Consistent:** Key definitions should be consistent across different grounds of discrimination, unless there is a distinct or unique aspect to one ground that must be accounted for.
- **Comprehensive:** Discrimination laws should be comprehensive in their coverage by protecting all individuals and communities.
- **Intersectional:** Protections for different attributes must be able to work together easily – having different tests for different attributes (such that a person has different elements of proof) and having to litigate discrimination in relation to each attribute separately is burdensome and less effective.
- **Remedial:** Where someone has experienced unlawful discrimination, there should be effective remedies for breaches of their rights.
- **Accessible:** Discrimination laws provide remedial support to people in vulnerable situations – the operation of these laws should aid access to justice rather than creating barriers to such access.
- **Preventative:** While discrimination laws are currently largely remedial in focus, greater consideration should be given to mechanisms that require law and policy makers to prevent discrimination and promote equality of treatment and equal opportunity as the ultimate goals.
- **Predictable:** There has been a limited number of cases that have made their way to the federal courts over the past twenty years. While this points to the success of the conciliation process to informally resolve matters, it has left a dearth of knowledge about key elements of these laws. A lack of precedent is a major inhibiting factor to the effective operation of federal discrimination laws, and the need for different options to provide non-judicial guidance.
- **Trusted:** The community should have confidence in the laws as a reliable means by which discrimination can be prevented and remedied.

Any reform to discrimination laws should also improve protection across the community. It should not involve creating new forms of discrimination against any sector of society.

(b) Four pillars of reform

The Commission sets out 4 integrated areas of reforms that are required to improve the effectiveness of federal discrimination laws, namely:

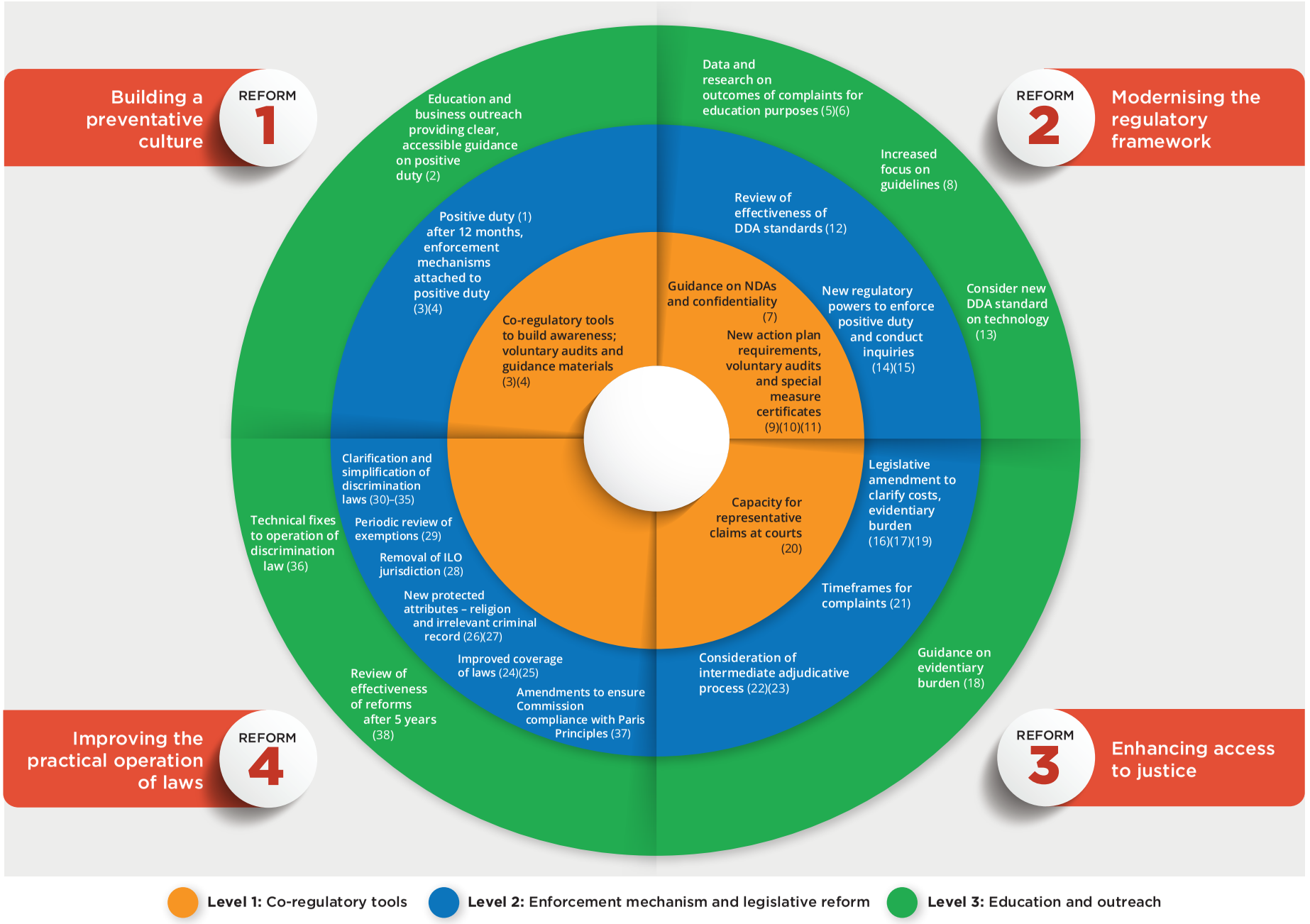
1. Building a preventative culture
2. Modernising the regulatory framework
3. Enhancing access to justice
4. Improving the practical operation of the laws.



Across these 4 pillars, the Commission identifies 38 actions for reform of federal discrimination laws.

These are summarised in **Figure 9**.

Figure 9: Four integrated sets of reforms to improve the effectiveness of federal discrimination laws



The Commission's proposals are practical, building on past reform exercises and lessons learned. We propose that reforms be staged.

The first stage of reforms is urgently needed to address existing, known problems with the operation of federal discrimination laws. These reforms can be implemented immediately and are well overdue. Additional process based reforms, such as by embedding a periodic review of exemptions to ensure they remain appropriate at all times, should also commence.

A second stage of reforms proposes measures that are transformational, moving beyond the limitations of the existing model. These are focused on modernising the regulatory framework by:

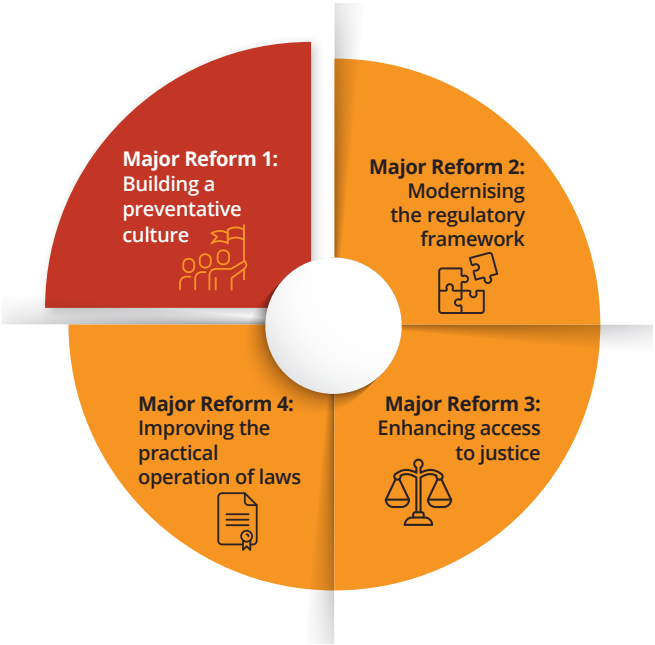
- turning it into a more proactively focused system that is less disputes-focused and encourages business confidence and innovative business practice
- introducing more effective enforcement mechanisms to address systemic issues or persistent non-compliance with the law.

These reforms should be accompanied by significant outreach to stakeholders, including through educative and engagement measures. As set out in this paper, some measures should be given time for familiarity to develop and for the adaption of policies before legal consequences flow. This can be achieved by some measures coming into effect 12 months after they are enacted.

Ultimately, the Commission considers that for the system of anti-discrimination protections to be truly effective, it must shift to focus more on prevention, with measures that will assist duty-holders to prevent discrimination from occurring in the first place.

Above all, reform should be seen as a shared endeavour, in which individuals, businesses, organisations and governments each actively contribute to, and are assisted in reaching, positive outcomes.

(i) Pillar 1: Building a preventative culture



Recommended actions under Pillar 1 are:

Reform 1: A positive duty to eliminate discrimination should be introduced across all federal discrimination laws.

Reform 2: Education and outreach on the positive duty must be developed to provide clear and accessible guidance on the duty.

Reform 3: The positive duty should be staged by providing a 12-month introduction period before it comes into legal effect.

Reform 4: There should be a focus on co-regulatory functions, in the introductory phase of the positive duty in addition to enforcement mechanisms.

The first of 4 major reforms proposed by the Commission seeks to refocus federal discrimination laws so to encourage, and indeed expect, action to prevent discrimination from occurring in the first place.

The Commission proposes that existing protections against discrimination in each of the federal discrimination laws be complemented by the inclusion of a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination, along with harassment and victimisation.

This involves a significant cultural shift in the operation of federal discrimination laws, albeit a shift that has been occurring in discrimination laws in other jurisdictions and in work, health and safety laws.

The current model of federal discrimination laws is heavily dependent on individuals bringing forward complaints of discriminatory treatment as the only available method for enforcing the law. We know that many people who have been discriminated against and treated unlawfully will never take such action.

To do so, requires a person to be prepared to relive an incident or pattern of behaviour that may have been deeply hurtful or traumatic for them. It requires them to have enough knowledge of the law, and/or of how to get legal assistance, even to know that their treatment may be unlawful. It involves a significant investment of time and often, money. It also requires them to exercise bravery and, in some instances, to risk experiencing further adverse consequences from stepping forward.

Those most likely to experience discrimination on a regular basis may be less likely to bring individual actions. They are often the least resourced and least supported in our community to do so, and the cumulative impact of their exposure to such treatment on a regular basis may leave them the most disempowered in the community.

The Commission's report, *Wiyi Yanu U Thangani: Women's Voices* (2020),[8] is a vivid illustration of this. It details regular experiences of discrimination faced by Aboriginal and Torres Strait Islander women and girls – most of which goes unaddressed.

Ensuring that there are remedies for those subject to discrimination is fundamental. It is a key component to meeting obligations to respect, protect and fulfil the right to non-discrimination.

Complaints mechanisms are, therefore, of critical importance, but such mechanisms should not be the first or only mechanism for addressing discrimination, because they are focused on redress rather than prevention.

Positive duties are an emerging feature of discrimination laws in Australia and overseas, reflecting a shift to a preventative focus that is proactive in dealing with discrimination and avoiding harm.

The Commission's report, *Respect@Work: National inquiry into Sexual Harassment in Australian Workplaces (2020)*, recommended a positive duty to take measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

That was based on the model in Victoria that has been in place since 2010.[9] The Commission considered that the positive duty should be part of a new regulatory model in relation to the continuing problem of sexual harassment in the workplace.

As illustrated in **Text Box 2**, the Sex Discrimination Act was amended in 2022 to implement the positive duty in relation to sexual harassment and related situations. Enforcement powers of the Commission relating to this positive duty commence in December 2023.

However, sexual harassment and discrimination in the workplace are only one aspect of matters covered by federal discrimination law. The Commission considers that a broader positive duty incorporating all discrimination laws is essential if Australia is to achieve the goal of the elimination of discrimination.

This language is clearly reflected in Australia's international obligations. For example, Article 2 of the ICERD states the commitment that Australia, and all other governments, have made is to eliminate racial discrimination in all its forms.

The Commission therefore proposes that a positive duty be a central reform to *all* discrimination laws to place a new, significant focus on the prevention of discrimination.

Such a duty would extend beyond the workplace, to all areas of public life, and incorporate all protected grounds.

All organisations with responsibilities under discrimination laws would be required to comply with the duty, including employers and businesses, government entities, and providers of accommodation, education, or goods and services.

This would set out a clear expectation that all these responsible organisations will always act in a non-discriminatory manner and pre-emptively consider and address risks of discrimination. The Commission also recommends that the positive duty be enforceable through several enforcement mechanisms as set out in **Text Box 2**.

Text Box 2: The positive duty to prevent sexual harassment – the first step in building a preventative culture

Amendments to the Sex Discrimination Act in 2022, introduced a positive duty to eliminate, as far as possible, the following unlawful behaviour from occurring:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex
- related acts of victimisation.

This legal obligation applies to organisations and businesses nationally, requiring them to take proactive and meaningful action to prevent relevant unlawful conduct from occurring in the workplace or in connection to work. Taking preventative action will help to create safe, respectful and inclusive workplaces.

This important change requires organisations and businesses to shift their focus to actively preventing workplace sexual harassment, sex discrimination and other relevant unlawful conduct, rather than responding only after it occurs.

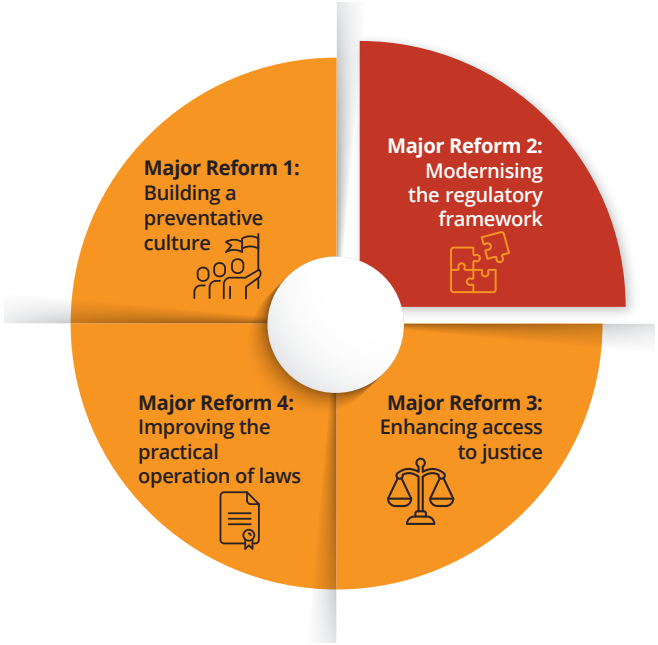
The Commission has new powers to investigate and enforce compliance with the positive duty. These powers will commence on 12 of December 2023.

These reforms were introduced in response to the findings and recommendations of the Respect@Work National Inquiry by the Commission.

It is an important first step towards re-orienting the way federal discrimination law as a whole operates, with its focus on proactively preventing discrimination from occurring.

Accordingly, the Commission supports the application of a positive duty across **all areas** of discrimination. As set out further below, the Commission also considers that such a change should be accompanied by a broader range of co-regulatory powers and functions. This would enable the Commission to build confidence in measures to prevent discrimination from occurring in the first place, while also ensuring that organisations that permit serious or persistent acts of discrimination are held to account.

(ii) Pillar 2: Modernising the regulatory framework



Recommended actions under Pillar 2 are:

Reform 5: A review of the secrecy provisions under the AHRC Act should be conducted to determine whether secrecy provisions with criminal sanctions are warranted.

Reform 6: The Commission and academic partners should receive resourcing to provide publicly available information and analysis about trends in complaints on a periodic basis.

Reform 7: Guidance should be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters.

Reform 8: Funding be provided to the Commission on an ongoing basis for the specific purpose of developing guidance materials.

Reform 9: The capacity to develop and lodge action should be expanded as a measure available across all federal discrimination laws.

Reform 10: The Commission should be given the powers to conduct voluntary audits of policies or programs of a person or body, to assess compliance with federal discrimination laws.

Reform 11: The AHRC Act should be amended to provide the Commission with a power to issue special measures certifications, which are judicially reviewable and time limited.

Reform 12: A review of the Disability Standards be conducted to assess their effectiveness in addressing unlawful discrimination and accountability mechanisms for their implementation.

Reform 13: Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.

Reform 14: The Commission be empowered to conduct own-motion inquiries into systemic instances of discrimination.

Reform 15: Consideration be given to attaching Model provisions of the Regulatory Powers (Standard Provisions) Act to compliance notices as an enforcement tool.

The powers of the Commission in unlawful discrimination matters are almost entirely based on persuasion, reliant on education and awareness raising and, where disputes arise, alternative dispute resolution.

It is difficult to think of any other area of law in the federal arena where a regulatory agency operates solely on the basis of such limited powers.

This is not an effective regulatory model.

The current federal discrimination law regime lacks key elements to build a preventative culture to address discrimination and to ensure accountability.

The investigation and conciliation process, which sits at the core of Australia's anti-discrimination framework, can be an empowering process for complainants and can be very effective at achieving both individual and systemic outcomes.

However, the compliance framework that operates alongside this is extremely limited. Individual complainants, and the alternative dispute resolution (ADR) process, should not bear the bulk of responsibility for ensuring compliance with discrimination laws.

As Associate Professor Belinda Smith observed:

> Anti-discrimination legislation is designed to protect disempowered groups – those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.[10]

The Commission's ADR powers have remained largely as they were at the establishment of the first iteration of the Commission in 1981. However, the Commission's additional powers which were established in 1986 and which revolved around a hearing and determination function were reduced in 2000, in response to the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*.[11]

At the same time, other regulatory agencies have had their frameworks modernised, with a broader suite of regulatory powers and options to aid compliance and address non-compliance.

In 2014, the Australian Government introduced the Regulatory Powers Act to provide 'a framework of standard regulatory powers exercised by agencies across the Commonwealth'.

Regulatory powers are the suite of different tools used by government agencies to ensure individuals and industry comply with legislative requirements. The key features of the Regulatory Powers Act include monitoring and investigation powers as well as enforcement provisions, through the use of civil penalty provisions, infringement notices, enforceable undertakings and injunctions.[12]

The Regulatory Powers Act commenced on 1 October 2014, but only has effect where Commonwealth Acts are drafted or amended to trigger its provisions. As the Attorney-General's Department explained:

> Implementation of the Regulatory Powers Act supports the government's regulatory reform agenda, as it simplifies and streamlines Commonwealth regulatory powers across the statute book.[13]

The range of powers included in the Regulatory Powers Act are:

- monitoring powers, which can be used to monitor compliance with provisions of an Act and to monitor whether information given to the Commonwealth is correct (Part 2)
- investigation powers, which can be used to gather material that relates to the contravention of an offence or civil penalty provision (Part 3)
- the power to apply to a court for civil penalty orders and injunctions (Parts 4 and 7)
- the power to issue infringement notices (Part 5)
- the power to accept and seek enforcement of undertakings relating to compliance with legislative provisions (Part 6).[14]

The Explanatory Memorandum noted it was expected that, over time, 'existing regulatory regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the Regulatory Powers Bill'.[15]

Provisions in existing legislation would be replaced with references to the standard provisions as appropriate – some legislative schemes would wholly adopt these standard provisions, and some would adopt some of the provisions while maintaining their own unique provisions as appropriate.

In the period since 2014, there has been no consideration as to whether federal discrimination law should be amended by adding new regulatory provisions covered in the Regulatory Powers Act.

Accordingly, federal discrimination laws rely on the regulatory framework as it was in the 1980s to address the challenges of the 2020s.

The modern approach to regulation has bypassed federal discrimination laws.

The Commission's proposed reforms in this area reflect the concept of 'responsive regulation'.

This envisages that different tools are required to achieve compliance with the law, depending on the willingness and capacity of individuals and organisations. It envisages capacity building for circumstances where there is an inability to comply, and more coercive powers for circumstances where there is an unwillingness to comply with discrimination legislation.[16]

The Commission concludes that its effectiveness as a regulatory agency can be enhanced by shifting from the current reliance solely on conciliation (ADR) and persuasion, to a broader suite of regulatory approaches, including co-regulatory powers and inquiry powers.

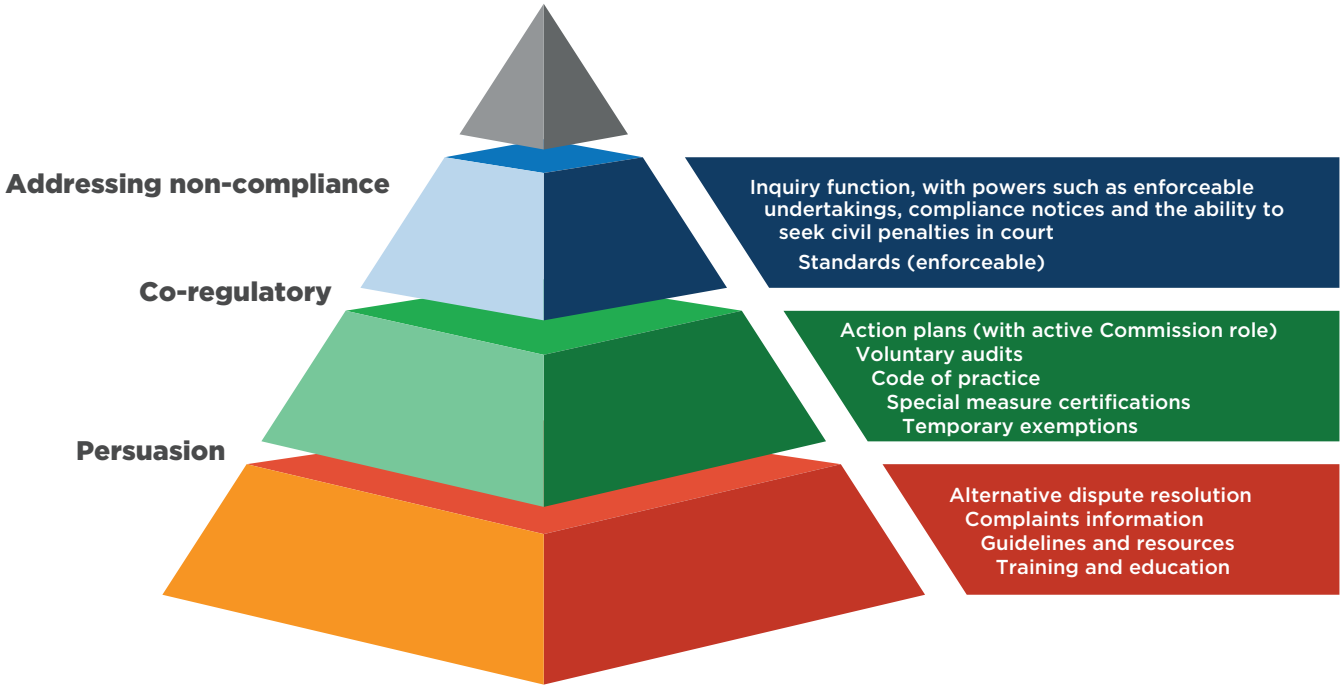
The proposed new co-regulatory powers are summarised in **Figure 10**.

The mix of powers would assist in building greater predictability and confidence in the operation of federal discrimination laws, as well as greater understanding and awareness of rights and duties.

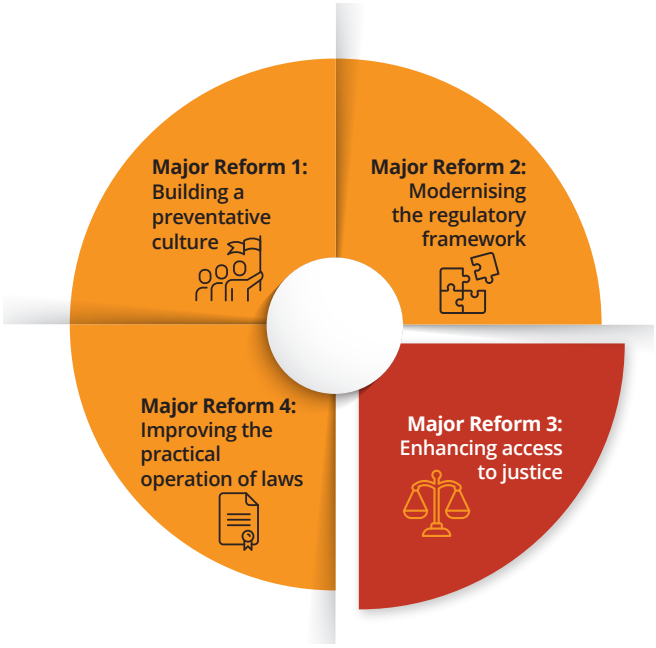
Confidence and certainty are 2 foundational expectations of business and industry that the Commission has factored into its proposals to modernise the regulatory framework.

The Commission considers that there are several measures that can be introduced to assist people and organisations to better understand their responsibilities under the law and to provide increased certainty to them when seeking to comply.

Figure 10: Commission's powers under reform proposals



(iii) Pillar 3: Enhancing access to justice



Recommended actions under Pillar 3 are:

Reform 16: Parties bearing their own costs in discrimination law proceedings should be the default position. Courts should retain discretion to award costs and mandatory criteria should be developed for courts to make this assessment.

Reform 17: The evidentiary burden in relation to unlawful discrimination matters should be shifted to align with the approach taken in the Human Rights and Anti-Discrimination Bill 2012.

Reform 18: Guidance material to be developed on the type of matters relevant to discharging the shifting burden.

Reform 19: The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the *Evidence Act 1995* (Cth) s 140.

Reform 20: Unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the AHRC Act.

Reform 21: The President's discretion to terminate a complaint is 24 months after the alleged acts and is applicable across federal discrimination laws.

Reform 22: Consideration be given to reintroducing an intermediate adjudicative process into the federal discrimination system.

Reform 23: The intermediate adjudicative process could be, a tribunal-like body, the restoration of hearing and determination functions of the Commission or the creation of an arbitral process.

ADR is often an effective tool for generating positive outcomes for rights-holders in unlawful discrimination matters. However, not all complaints resolve at conciliation.

If a matter does not resolve at conciliation, then a complainant's only option is to bring an action to the Federal Circuit Court or the Federal Court. Proceeding to court can be extremely resource- and time-intensive. A number of meritorious complainants may decide not to pursue their claims because of this.

Pillar 3 considers how to improve access to justice for complainants who fail to reach a suitable outcome at the conciliation phase, yet who have a meritorious case.

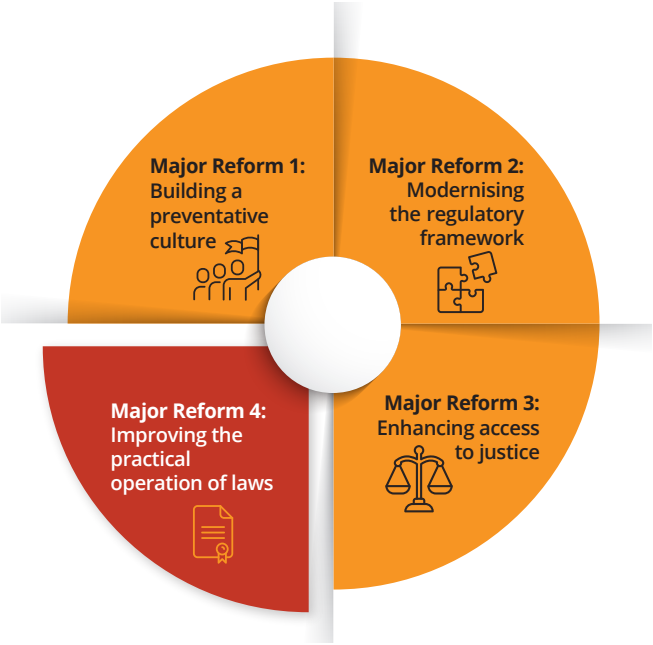
Key recommendations relate to costs, onus of proof, standing provisions and timeframes.

The Commission also proposes that serious consideration be given to reintroducing an intermediate adjudicative process into the federal discrimination law system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.

This could take a range of options: a tribunal-like body; the restoration of hearing and determination functions to the Commission; the creation of an arbitral process or a different mechanism. The consideration of such mechanisms would benefit greatly from public consultation and expert advice about the best options available in today's legal landscape, and consideration of how to address constitutional issues to ensure that any such option does not amount to an exercise of judicial power.

This intermediate step would address the concerns of business and other respondents about the cost of federal litigation by providing a quicker and less costly alternative to court proceedings in circumstances where parties are unable to reach agreement themselves in a conciliation process.

(iv) Pillar 4: Improving the practical operation of laws



Recommended actions under Pillar 4 are:

Reform 24: Volunteers and interns should be protected across all discrimination laws.

Reform 25: Extend protections against family and carer responsibility discrimination under the SDA to, indirect as well as direct, discrimination and all areas of public life.

Reform 26: The right to freedom of thought, conscience and religion should be considered as a protected attribute. There is a current review of this being conducted by the Australian Law Reform Commission.

Reform 27: Discrimination on the basis of irrelevant criminal record should be included as a protected attribute in the 'unlawful discrimination' jurisdiction of the Commission.

Reform 28: Subject to the inclusion of irrelevant criminal record and freedom of thought, conscience and religion as a protected attribute, the ILO complaints jurisdiction of the Commission should be repealed.

Reform 29: All permanent exemptions under federal discrimination law should be reviewed on a periodic basis.

Reform 30: The test for direct discrimination should be simplified by removing the 'comparator test'.

Reform 31: The reasonable adjustments assessment currently in the DDA, should be clarified as a standalone obligation. The concept of reasonable adjustments should be considered beyond the DDA.

Reform 32: Amend the definition of indirect discrimination to remove the requirement that the aggrieved person 'does not comply or is not able to comply'.

Reform 33: Any conduct that amounts to victimisation should form the basis of a civil action for unlawful discrimination, across all federal discrimination Acts.

Reform 34: The term 'special measure' should be clarified so that it aligns with the understanding of this measure under international law.

Reform 35: A new provision should be added across all federal discrimination laws which identifies that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes'.

Reform 36: Remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents, in the AHRC Act.

Reform 37: Amend the AHRC Act as a matter of priority to ensure the Commission is in compliance with the Paris Principles.

Reform 38: Once the reforms to federal discrimination law have been made, there should be a review of reforms after 5 years, to consider their effectiveness.

Australia's discrimination laws are complex and include some operational quirks; have gaps in their coverage; and, in some cases, have been limited or further complicated by judicial decisions.

Proposals put forward under this pillar seek to enhance the operation of discrimination laws as they currently are, but also pave the way for further consideration of long term and substantial reforms.

Several are technical in nature, designed to improve clarity and consistency across the various discrimination laws and in their practical applications, and to reduce the level of complexity across the system overall.

Importantly, the Commission also proposes measures to close the existing gaps in discrimination law coverage to ensure that everyone is protected from discrimination. This includes by supporting the introduction of a new federal ground of unlawful discrimination based on freedom of thought, conscience and religion, to be appropriately balanced alongside existing discrimination grounds in accordance with Australia's international obligations, as illustrated in **Text Box 3**.

Text Box 3: The need for religious discrimination protection

The Commission has publicly called for protections against discrimination and vilification on the basis of religious belief for over 25 years. For example, a recommendation for religious discrimination protections was presented to the Parliament in 1998.[17]

In May 2018, an independent expert panel finalised a Religious Freedom Review which recommended that the Australian Government should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief.[18]

Various drafts of Religious Discrimination bills have been developed since 2018 and have been open to public consideration through consultation processes. The Commission has contributed views on each draft Bill.[19]

A Bill protecting against religious discrimination has yet to be passed by the federal Parliament.

While there are some protections against religious discrimination in federal, State and Territory law, these protections are incomplete. In some situations, such as complaints to the Commission of religious discrimination in employment, existing legal protections do not provide for enforceable remedies where discrimination is established.

Just as Australians are provided with statutory protection against discrimination on the grounds of race, sex, disability and age, so too should they be provided with equivalent protection against discrimination on the ground of religious belief or activity. This reinforces the idea, reflected in Article 2 of the Universal Declaration of Human Rights, that human rights are indivisible and universal.

Prohibiting discrimination on the ground of religious belief or activity (including beliefs about religion held by people who are atheists or agnostics) is consistent with, and supports, the tolerant, pluralistic nature of Australian society.

Box continued over ▶

The Commission continues to encourage the Australian Government to enact religious discrimination protections. The Commission supports legislation that is consistent with the objective of providing protection against discrimination on the ground of religious belief or activity that is equivalent to the protection against discrimination on other grounds such as race, sex, disability and age in existing Commonwealth laws. This would include protection against direct and indirect discrimination on the ground of religious belief or activity in areas of public life covered by other Australian discrimination laws.

The Commission has also urged the Australian Government to ensure that protections of religious belief or activity are not codified in a way that limits other human rights in a way that is unnecessary and disproportionate, or in a manner that is otherwise inconsistent with international human rights law.

The Commission is ready to consider the appropriateness of the next iteration of a Religious Discrimination Bill.

The Commission notes that there remain other outstanding recommendations from the 2018 Religious Freedom Review that warrant action. These include:

- the commissioning of prevalence research to understand the experience of freedom of religion at the community level, including the extent of harm experienced on this basis
- the development of a religious engagement and public education program about human rights and religion in Australia
- consideration of amendments to existing exemptions in discrimination laws nationally, including in the Sex Discrimination Act, relating to schools and also marital status.

The Commission notes that the Australian Law Reform Commission is due to report on this latter issue in December 2023, following a national inquiry into religious exemptions under discrimination laws.

The Commission also proposes a ground to prevent discrimination based on a person's irrelevant criminal record. This is one of the grounds of discrimination in the Australian Human Rights Commission Act relating to the Internal Labour Organization Discrimination (Employment and Occupation) Convention (ILO 111), 1958. As the ground is not, currently, 'unlawful discrimination', there is no pathway to judicial consideration, or enforceable remedies. And yet, the Commission receives a significant number of complaints on this ground each year and it is an area that has a disproportionate impact on some groups.

Other proposed changes would close gaps to make laws more inclusive of volunteers and interns in the workplace, and those with family responsibilities. These modest changes would reflect the realities of the modern world of work.

The Commission makes a number of specific proposals in relation to

- ensuring discrimination laws protect everyone in the world of work
- reforming ILO 111 discrimination as unlawful discrimination
- reviewing all permanent exemptions
- defining discrimination and related concepts
- managing intersectionality.

4.4 A roadmap to implement reforms to federal discrimination law

Some of the 38 proposals from the Commission's first Position Paper, *Free & Equal: a reform agenda for federal discrimination laws* (2021) were implemented in whole or in part in the legislative responses to the Respect@Work report in 2022.

A number of the reform proposals also intersect with recommendations of the Disability Royal Commission (in September 2023).

To assist with implementation, the Commission developed the roadmap for reform in **Table 6** below, which identifies:

- outstanding reforms that should be undertaken immediately (referred to as **stage 1** reforms) as priority actions that fix longstanding problems in the operation of federal discrimination law
- a series of more ambitious and substantive reforms (referred to as **stage 2** reforms) to be undertaken over a longer-term timeframe
- reforms that have now been implemented in whole.

Table 6: A staged approach to federal discrimination law reform

Reform proposal	Proposed reform (as identified in the Commission's Position Paper)	Relevant recommendation of Disability Royal Commission
Stage 1: Outstanding reforms that should be undertaken immediately		
Amending secrecy provisions NB: AGD is currently conducting a Review of Secrecy Provisions[20] due to report to the Australian Government in 2023.	5	
Costs NB: AGD conducted a Review into an appropriate cost model for Commonwealth anti-discrimination laws[21] in response to recommendation 25 of the Respect@Work report.	16	
Protection of volunteers and interns NB: Volunteers and interns were provided with protection against sexual harassment through changes to the Sex Discrimination Act in September 2021: *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (First Respect@Work Act). This was done through applying the protections against sexual harassment to 'workers' and applying the prohibitions to 'persons conducting a business or undertaking' (PCBUs). These changes should also apply to sex discrimination and be rolled out to each of the other Discrimination Acts.	24	
Protections for family and carer responsibilities extended to: • indirect as well as direct discrimination • all areas of public life, not just in the area of work.	25	
Introduction of religious discrimination protections	26	
Change to meaning of reasonable adjustment under Disability Discrimination Act	31	4.25 and 4.26; also 4.32 re unjustifiable hardship

Table continued over ▶

Reform proposal	Proposed reform (as identified in the Commission's Position Paper)	Relevant recommendation of Disability Royal Commission
Stage 2: Longer-term reforms		
Introduce positive duty across all protected attributes in federal discrimination laws NB: Positive duty introduced into the Sex Discrimination Act for sexual harassment and related grounds in December 2022 by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth). Review to be conducted in 2026.	1–4	4.26–4.28
Supporting trend analysis of discrimination complaints	6	
Supporting better guidance materials and information about complaints outcomes	8	
Revamped processes for Disability Discrimination Act action plans, and expansion of use of these across all discrimination laws. New powers for the Commission to conduct voluntary audits and special measures certifications. Review of Disability Standards and potential development of new standards.	9–13	7.3, 7.6 and 7.10 re Education Standards
New regulatory powers, including compliance notices, enforceable undertakings, civil penalties and injunctive powers	15	
Reform to the processes for evidencing discrimination	17–19	4.23
Consideration of introducing an intermediate adjudicative process	21–23	
Irrelevant criminal record is included as unlawful discrimination ground; ILO complaint jurisdiction is consequently repealed	27–28	
Regular review of all permanent exemptions in federal discrimination law	29	4.31 (migration) and further discussed at page 329, Volume 4 Final Report
Removal of comparator test for proving discrimination	30	4.23
Amend test for indirect discrimination	32	4.24
Clarify meaning of special measures in Racial Discrimination Act	34	
Notification obligations: Amend s 46PF(7)(c) AHRC Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.	36	
Amend Australian Human Rights Commission Act to address Paris Principles: • include a definition of 'human rights' that includes all of Australia's international human rights obligations • refer to Paris Principles in objects • regular re-baselining of Commission's funding.	37	

Table continued over ▶

Reform proposal	Proposed reform (as identified in the Commission's Position Paper)	Relevant recommendation of Disability Royal Commission
Completed actions		
Guidance on use of non-disclosure agreements NB: In December 2022, the Respect@Work Council published Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints[22] in response to recommendation 38 of the Respect@Work report.	7	
Own motion inquiry into systemic unlawful discrimination NB: Div 4B of Part II of the Australian Human Rights Commission Act (ss 35L–35Q) now gives the Commission the function of inquiring into any matter that may relate to systemic unlawful discrimination.	14	
Representative actions NB: New ss 46POA and 46POB were inserted into the Australian Human Rights Commission Act in December 2022 by the Second Respect@Work Act. These provisions permit a representative application to be made to a federal court alleging unlawful discrimination.	20	
Timeframe for lodging complaints NB: Section 46PH(1)(b) of the Australian Human Rights Commission Act was amended in December 2022 by the Second Respect@Work Act to standardise the discretionary termination ground and provide that any complaint of unlawful discrimination may be terminated if lodged more than 24 months after the alleged conduct occurred.	21	
Victimisation NB: The ability to bring civil proceedings alleging victimisation was confirmed through both First Respect@Work Act (in relation to the Sex Discrimination Act) and the Second Respect@Work Act (in relation to the other federal discrimination laws).	33	
Confirming capacity to bring intersectional discrimination complaints	35	
Review of impact of federal discrimination reforms (5 years after implemented)	38	
		4.29, 4.30 re offensive behaviour and vilification
		4.33 and 4.34 to include references to CRPD in objects clause and interpretive provision of the Disability Discrimination Act

Reforms proposed by the Commission that have been implemented already include:

- producing guidance on the appropriate use of non-disclosure agreements (**Reform 7**)
- providing the Commission with the function of conducting systemic inquiries into unlawful discrimination (**Reform 14**)
- permitting representative bodies to make applications to federal courts alleging unlawful discrimination against a group or class of people that they represent (**Reform 20**)
- standardising the timeframe for lodging complaints with the Commission (**Reform 21**)
- confirming that allegations of victimisation can be brought to the Court as civil proceedings if they cannot be resolved through conciliation (**Reform 33**)
- confirming that the selection process for Commissioners must be merit based and involve public advertising (**Reform 37**).

Of the remainder of the recommendations for discrimination law reform, the Commission identifies an initial tranche of reforms that could be implemented relatively easily while maintaining the existing structure of federal discrimination laws. These – referred to as **stage 1 reforms** – are amendments to extend existing protections for vulnerable groups, to protect other important attributes, to address anomalies created by case law and to make important technical amendments.

The Commission anticipates that these changes could be implemented in the short term – within 12 months or the end of 2024.

These reforms are:

- Extend existing protections for vulnerable groups as follows:
  - Extend the new protections for volunteers and interns against sexual harassment introduced in response to Respect@Work, so that they are also protected against sex discrimination and other kinds of discrimination (**Reform 24**).
  - Extend the existing protection in the Sex Discrimination Act against discrimination on the ground of family and carer responsibilities, so that the protection is not limited to direct discrimination in the workplace (**Reform 25**).
- Protect other important attributes:
  - Introduce enforceable protections against discrimination on the ground of religious belief or activity that are equivalent to other discrimination law protections (**Reform 26**).
- Address problematic case law:
  - Clarify that the meaning of 'special measures' in the Racial Discrimination Act is to be interpreted in a way that is consistent with international law, to overcome the findings in *Maloney v The Queen*[23] (**Reform 34**).
  - Introduce a 'standalone' requirement in the Disability Discrimination Act to provide reasonable adjustments (unless it would cause unjustifiable hardship) in order to avoid the problem created by *Sklavos v Australasian College of Dermatologists*[24] that a person claiming that reasonable adjustments were not provided must also establish that they were not provided *because* the person has a disability (**Reform 31**).
- Introduce important technical fixes:
  - Include a definition of 'human rights' in the Australian Human Rights Commission Act that includes all of Australia's international human rights obligations (**Reform 37**).
  - Include a reference in the objects of the Australian Human Rights Commission Act to the Principles Relating to the Status of National Human Rights Institutions (the 'Paris Principles')[25] (**Reform 37**).
  - Introduce a fairer costs model for discrimination law cases in federal courts – this is the subject of a current review being conducted by the Attorney-General's Department (**Reform 16**).

- Amend the secrecy provision in s 49 of the Australian Human Rights Commission Act to confirm that de-identified complaints information can be used for educative purposes, and to clarify its operation – Commonwealth secrecy provisions are currently being reviewed by the Attorney-General's Department (**Reform 5**).
- Repeal s 46PF(7)(c) of the Australian Human Rights Commission Act so that the Commission is not required to notify people who are not parties to a complaint, merely because there has been an adverse allegation made against them (**Reform 36**).

The balance of the Commission's reform agenda for discrimination laws is likely to require more substantive and holistic changes to legislation, potentially by way of consolidation of discrimination laws. The Commission considers that these are reforms that could be implemented in the medium term, over the next 2 to 3 years. These are identified as **stage 2 reforms**.

Key elements of this future reform program include:

- Extend the positive duty across all protected attributes in federal discrimination laws, beyond those provisions in the Sex Discrimination Act (**Reforms 1–4**).
- Simplify the test for direct discrimination by removing the 'comparator test' (**Reform 30**).
- Simplify the test for indirect discrimination (**Reform 32**).
- Amend the evidentiary burden for matters particularly within the knowledge of respondents (**Reform 17**).
- Review permanent exemptions to discrimination in existing laws (**Reform 29**).
- Clarify the operation of 'intersectional' discrimination on grounds currently covered by different laws (**Reform 35**).
- Extend or introduce co-regulatory mechanisms to promote compliance with discrimination laws (**Reform 16**).
- Reintroduce an intermediate adjudicative process between the Commission and the courts (**Reforms 22–23**).
- Make 'irrelevant criminal record' an enforceable ground of discrimination. (**Reform 27**)

Chapter 4: Endnotes

1. For example, the *Sex Discrimination Act 1984* (Cth) 'helped redefine the role of women in Australian society': 'Defining Moments: Sex Discrimination Act', <Sex Discrimination Act | National Museum of Australia (nma.gov.au)>. The framework of setting up standards was 'innovative': Ronalds C and Raper E, (2012), *Discrimination Law and Practice*, Federation Press, 4th edition. Extract in Rees N, Rice S and Allen D, (2018), *Australian Anti-Discrimination and Equal Opportunity Law,* Federation Press, 3rd edition, pp. 5–6.
2. In June 2008, the Senate referred an inquiry to the Standing Committee on Legal and Constitutional Affairs into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality. See: Parliament of Australia, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, 2008, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/sex_discrim/report/index>.
3. In 2004, the Productivity Commission released its report on the inquiry into the *Disability Discrimination Act 1992* (Cth). See: Australian Government, (2004), Productivity Commission, *Review of the Disability Discrimination Act 1992*, <https://www.pc.gov.au/inquiries/completed/disability-discrimination/report>.
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9. *Equal Opportunity Act 2010* (Vic) s 15(2).
10. Belinda Smith, (2008), 'It's about Time: For a new Regulatory Approach to Equality', *Federal Law Review 117*, *vol. 36*(2), p. 132, <http://classic.austlii.edu.au/au/journals/FedLawRw/2008/5.html#Heading3>.
11. *Brandy v HREOC* (1995) 183 CLR 245.
12. Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014 (Cth).
13. Australian Government Attorney-General's Department, *Regulatory powers*, <https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers>.
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16. Belinda Smith, (2014), 'How might information bolster anti-discrimination laws', *Journal of Industrial Relations*, *vol. 56*(4), pp. 547–565, <https://doi.org/10.1177/0022185614540128>.
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5. Enhancing the role of Parliament in protecting human rights

5.1 Overview

This chapter includes a set of reforms that focus on strengthening the role of Parliament in protecting human rights. The Commission proposes reforms that would enhance the effectiveness of the Parliamentary Joint Committee on Human Rights and the associated process for analysing the human rights impact of proposed laws and regulations; and enhance parliamentary oversight of decision-making in relation to the scope of Australia's international human rights obligations, and actions to be taken to respond to breaches of our international human rights obligations.

This chapter sets out actions to:

- publicise and consider the findings of periodic reviews by UN treaty committees
- respond to complaints that have been considered by human rights committees
- a more systemic approach to the role of Parliament in considering the appropriateness of the scope of Australia's human rights obligations – such as through consideration of taking on new UN treaty obligations (through the ratification process) and the reducing of 'exceptions' to our existing obligations (through reservations and interpretative statements).

Recommendation 5

Parliamentary scrutiny and the role of the Parliamentary Joint Committee on Human Rights (PJCHR)

The Commission recommends:

A. Amendments be made to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.

B. Amendment of section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), along the lines of the power of the UK Human Rights Committee, to allow it to 'make special reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases). The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.

C. Amendment of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to require Statements of Compatibility for all legislative instruments.

D. That the range of matters to be addressed in a Statement of Compatibility should include consideration of consultations undertaken.

E. That Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.

F. That with the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is amended, or an accompanying legislative instrument drafted, to provide greater clarity on expectations in Statements of Compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.

G. A public sector human rights education program be introduced, to provide training and resources to public servants to understand and scrutinise human rights.

H. Consideration be given to having designated human rights advisers in Departments.

Recommendation 6

Parliament's role in reviewing Australia's implementation of our international human rights obligations

The Commission recommends:

A. The Attorney-General reinstate the practice of tabling Concluding Observations of human rights treaty committees in both houses of Parliament.

B. The Australian Government should maintain a publicly available and up-to-date database about the Concluding Observations made by each UN human rights treaty committee and their status.

C. The Government reform the Standing National Mechanism for Treaty Body Reporting to include public reporting on treaty bodies and individual communications.

D. The Attorney-General table information about individual communications in Parliament on an annual basis, along with the Australian Government's response to these.

E. The Parliamentary Joint Committee on Human Rights be empowered to review the adequacy of the Australian Government's response to individual communications and/or Concluding Observations from time to time.

F. The Joint Standing Committee on Treaties conduct a review of all existing reservations and interpretive declarations under UN human rights treaties.

5.2 Introduction

In this Final Report, the Commission recommends that Parliament take a greater role in overseeing how human rights are protected in Australia.

The Commission proposes reforms that would:

- enhance the effectiveness of the Parliamentary Joint Committee on Human Rights (PJCHR) and the associated process for analysing the human rights impact of proposed laws and regulations, and
- enhance parliamentary oversight of decision-making in relation to the scope of Australia's international human rights obligations, and actions to be taken to respond to breaches of our international human rights obligations.

The PJCHR has been in operation for just over a decade and has made a significant contribution to the consideration of human rights in the lawmaking process. This is considered in detail in the Commission's Position Paper, *A Human Rights Act for Australia* (released 2023).

Eight recommendations in this chapter seek to enhance the Committee's operating legislation and practices to further improve its effectiveness, while also ensuring other improvements in the consideration of human rights impacts of laws and regulations.

The Commission noted that the work of the PJCHR is inherently constrained due to the limited legal protection of human rights under Australian law. The single biggest change that can improve the effectiveness of the PJCHR's work is for its work to occur in conjunction with a Human Rights Act. This would:

- provide stronger accountability measures for public servants to fully consider human rights (in accordance with the proposed positive duty)
- ensure that laws, policies and programs are developed with the full engagement of affected communities (in accordance with the proposed participation duty and the role of the PJCHR to assess the adequacy of this participation)
- ensure there is domestic guidance on human rights standards and obligations over time, that can assist in the quality of consideration of human rights issues
- increase the weight that public servants and parliamentarians attach to human rights considerations due to the possibility of those whose rights are restricted having a cause of action to have those impacts addressed.

These proposed reforms to the parliamentary review of human rights are complementary to the need for a Human Rights Act. They are not a substitute for a Human Rights Act. Similarly, a Human Rights Act is not a substitute for these reforms also being undertaken.

Other reforms proposed in this chapter seek to enhance the oversight role of parliamentary decision-making in relation to Australia's internal human rights obligations. Mechanisms for such oversight have regressed over the past decade, undermining this process.

There is currently limited transparency and accountability for how governments make decisions in response to Australia's human rights obligations. At the most basic level, governments have stopped the practice of tabling Concluding Observations of human rights treaty committees in Parliament.

Concluding Observations are the outcomes of a periodic review of how Australia can better meet its human rights obligations under a particular treaty it has ratified. These reviews occur approximately every 5 to 7 years under each treaty. Tabling them in Parliament with a statement of response from the Government is not onerous.

Australia also has a responsibility to disseminate information about its human rights obligations. The UN human rights committees in their Concluding Observations routinely recommend the dissemination of the review outcomes across the community. The failure to table them in Parliament potentially puts Australia in breach of its human rights obligations at the most rudimentary level.

5.3 Parliamentary scrutiny and the PJCHR

(a) Context

Parliamentary scrutiny in Australia has a long history. The creation of the PJCHR in 2011 added to the number of committees established since 1932 that consider whether Commonwealth laws encroach upon rights.[1]

The Senate Standing Committee on Regulations and Ordinances was established in 1932 to review delegated legislation.[2] In 2009, the National Human Rights Consultation, chaired by Fr Frank Brennan SJ, showed support for greater parliamentary scrutiny in relation to human rights, and the limited capacity of the existing scrutiny committees 'to engage in comprehensive human rights scrutiny'.[3]

Consequently, the PJCHR was established to examine all bills and legislative instruments – including legislative instruments exempt from disallowance – that come before either House of Parliament, for compatibility with human rights as set out in the ICCPR,[4] the ICESCR,[5] and a number of other international instruments.[6]

The PJCHR seeks to determine whether identified limitations on rights are justifiable through a limitation assessment, including that of necessity and proportionality.

The PJCHR was modelled on the UK Joint Committee on Human Rights, which was established at the time of the passage of the UK Human Rights Act in 1998, which is the Committee's principal point of reference.[7]

The PJCHR is an important scrutiny mechanism that enables pre-legislative consideration of human rights and may prevent breaches. It is a key component of the dialogue model (see **chapter 4**), and aims to enhance human rights protection in Australia. It will improve parliamentary deliberation with respect to human rights and enhance the quality of legislation itself – especially at the policy-making or legislative drafting stage.[8]

(b) Functions

The PJCHR has 3 functions as set out in s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth):

(a) to examine bills and legislative instruments coming before the Parliament for compatibility with human rights

(b) to examine current Acts for compatibility with human rights

(c) to inquire into any matter relating to human rights that is referred to the Committee by the Attorney-General.

The vast majority of the PJCHR's work has fallen under the function in s 7(a), the scrutiny function, of examining bills and legislative instruments.[9] In its first 10 years of operation, from 2011–2021, the PJCHR considered 2,254 bills and more than 18,000 legislative instruments.[10] Until July 2021, the PJCHR was the only parliamentary committee able to conduct routine scrutiny of exempt delegated legislation.[11]

As explained in the Committee's 2020 Annual Report:

> The committee's main function of scrutinising legislation is pursued through dialogue with ministers. Accordingly, where legislation raises a human rights concern which has not been adequately explained in the relevant Statement of Compatibility, the committee's usual approach is to publish an initial report setting out the human rights concerns it has in relation to the legislation and advising that it intends to seek further information from the minister. Any response from the minister is subsequently considered and published alongside the committee's concluding report on the matter. As well as making concluding remarks on the human rights compatibility of the relevant legislation, the committee may make recommendations to strengthen the compatibility of the legislation with Australia's human rights obligations.[12]

In an analysis on the 10th anniversary of the committee, Charlotte Fletcher and Anita Coles summarise that:

> Overall, the committee has considered that three-quarters of bills do not raise human rights concerns requiring the committee's comment. This is because the bills may not have engaged any human rights, they may have promoted rights, they may have limited rights but it appeared these were permissible limits, and/or they raised only marginal human rights concerns.[13]

A key aspect of the scrutiny process is the consideration of a Statement of Compatibility with human rights for all bills and disallowable legislative instruments introduced into the Commonwealth Parliament.[14] The 'primary function' of these Statements of Compatibility is 'to assist the Committee when it considers relevant human rights issues and to inform parliamentary consideration and debate'.

Over its 10 years of operation from 2011, the PJCHR has had an increasingly important educative role – 'enhancing the understanding of, and respect for, human rights in Australia, and facilitating the appropriate recognition of human rights issues in legislative and policy development'.[15] It has produced and revised explanatory material and other resources.[16]

(c) Assessing effectiveness of parliamentary scrutiny

The following strengths of the parliamentary scrutiny role of the committee have been identified:

> - the requirement to produce [Statements of Compatibility] for all proposed legislation, with which there has been formal compliance by the executive
> - the industriousness of the PJCHR, as evidenced by the significant volumes of analysis it has conducted
> - the consultative approach adopted by the PJCHR, whereby proponents of legislation are afforded an opportunity to provide further justification for their proposals beyond that contained in the Statement of Compatibility, and
> - the regime's success in achieving its stated aim of limiting the scope for litigation arising under the Act.[17]

However, as Professor George Williams and Lisa Burton observed in 2013, the 'ultimate efficacy' of the committee's work 'will depend on Parliament's ability to self-regulate its own compliance with the regime'.[18] What 'ultimately matters', said Michael Tolley, is 'whether rights are adequately protected'.[19]

A number of commentators have identified challenges to the effectiveness of parliamentary scrutiny, and human rights scrutiny.[20]

In 2014, UK research by Dr Phillipa Webb and Kirsten Roberts of King's College London identified challenges to parliamentary oversight of human rights including political realities, lack of independence, shifting national priorities, the existence of a multiplicity of actors, the unavailability of sufficient resources and varying levels of human rights expertise.

They also noted what they termed the 'iceberg phenomenon', whereby the visible impacts of parliamentary human rights activity may not be in the public domain, potentially impacting the legitimacy and promotion role of the parliament.[21]

In a series of articles, Professor George Williams and a number of co-authors have contributed empirical assessments of the effectiveness of Australia's human rights scrutiny regime, by looking at: the deliberative impact of the regime within Parliament; the legislative impact of the regime, in the extent to which it results in improvements from a rights perspective to the legislative output of Parliament or the executive; judicial impact; media impact and international impact.[22]

Associate Professor Laura Grenfell and Dr Sarah Moulds have analysed effectiveness in terms of:

- the adequacy of time to conduct formal parliamentary scrutiny
- the attributes of particular committees that lead to greater legislative influence
- the power and willingness of committees to facilitate public input
- a culture of respect for the value of formal parliamentary scrutiny including rights scrutiny
- the generation of a rights discourse in parliamentary debates.[23]

Measuring effectiveness in terms of legislative impact may provide only a limited indicator for assessment. The ALRC for example, stated that:

> [D]etermining the efficacy of scrutiny Committees solely, or even primarily, by reference to the number of amendments resulting from consideration of Committee reports is not necessarily appropriate. As noted by political scientists Meghan Benton and Meg Russell, 'take-up by government of recommendations is only one form of Committee influence and arguably not even the most important'. Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the Committee, are all examples of other important functions of scrutiny Committees.[24]

Such aspects of influence may be considered part of the 'iceberg phenomenon' referred to by Webb and Roberts.[25]

Academic commentators and submissions to the Commission have identified a range of areas for improvement in the processes that provide checks on legislative encroachment on human rights:

- timeliness of the scrutiny process
- improved capacity to undertake thematic inquiries
- improving the scope of Statements of Compatibility
- improving the quality of Statements of Compatibility
- coordination of the work of scrutiny committees.

(d) Improving effectiveness

(i) Timeliness of the scrutiny process

Recommendation 5A: The Commission recommends amendments to House and Senate Standing Orders requiring that bills may not be passed until a final report of the PJCHR has been tabled in Parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.[26]

The need for adequate time for deliberation and reporting has been a common theme among commentators and in submissions. The timely delivery and consideration of reports is a function of several elements:

- the volume of the matters for scrutiny and the time allowed in the parliamentary process
- the width of the scrutiny task
- the working methods of the committee.

As the PJCHR itself observed in its *Annual Report 2020*, the committee's ability to inform the legislative deliberations of the Parliament is 'dependent on Parliament's legislative program and the timeliness of responses to the committee's inquiries'.[27]

The volume of bills and legislative instruments has an impact on the adequacy of time to conduct formal parliamentary scrutiny.

A number of suggestions have been made to address concerns about the passage of bills before proper consideration of the PJCHR's scrutiny of them.

A common suggestion for reform was to amend the *Human Rights (Parliamentary Scrutiny)*

Act 2011 (Cth) to provide a minimum time period for the PJCHR to consider each Bill. This would ensure that a Bill could not be enacted as law before the PJCHR had an opportunity to table its report;[28] and would stipulate that legislation cannot be passed until the Committee has considered the Bill,[29] outside of a 'clearly defined emergency'.[30]

In such circumstances, the Commission has previously suggested that Parliament should be required to review that legislation after a fixed period of operation (for example, 2 years): '[t]his would encourage public debate on the impacts of that legislation upon human rights'.[31]

Hutchinson suggests there is scope for improvement through consideration of additional procedural or other mechanisms, including those currently available in respect of other parliamentary committees:

> Newly permanent Senate Standing Order 24(1)(e)–(h) enables Senators to ask the responsible minister why the Senate Scrutiny of bills Committee has not received a response if that committee has not finally reported on a bill because a ministerial response has not been received. In reflecting on the effectiveness of this mechanism in its first year in operation, the Senate Scrutiny of bills Committee noted that the proportion of ministerial responses that were received late had reduced from 44 percent to 22 percent. This approach could similarly further improve the timeliness of responses to the PJCHR. A more far-reaching solution would be to introduce an equivalent to Senate Standing Order 115(3) that would have the effect of preventing the passage of legislation prior to the PJCHR's final report. This would also address issues of timeliness of reporting and also might allow further time for the PJCHR to consider legislation raising human rights concerns.[32]

With respect to a requirement for review of legislation passed without proper initial human rights scrutiny, the PJCHR could undertake such review under its existing functions.

(ii) Capacity to undertake thematic inquiries

Recommendation 5B: The Commission recommends that s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended, along the lines of the power of the UK Human Rights Committee, to allow it to 'make special reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases). The Commission recommends that the resourcing of the PJCHR be increased to enable it to perform the wider inquiry role.

The Commission considers that the undertaking of thematic inquiries and the presentation of the reports in a thematic way are good illustrations of the educative role of the PJCHR.

However, the ability to undertake a wider range of thematic inquiries is constrained by the limits on the Committee's powers, as the PJCHR cannot self-initiate general inquiries, unlike its UK counterpart. The UK Human Rights Committee has broader powers to undertake thematic inquiries on human rights issues, not tied to a specific Act or Bill, or dependent on referral by the relevant Minister.

The Commission considers that the PJCHR should have a similarly broad power. Enabling the Committee to identify key areas of concern appropriate for a wider inquiry, would enhance its contributions to human rights deliberations in the parliamentary context.

While adding this power would expand the ability of the PJCHR to contribute to wider human rights discussions, the Commission acknowledges that the ability for the Committee to do so is dependent on its capacity – namely, its staff resources to support such inquiries, as they require 'significant effort' by committee members and the secretariat,[33] as demonstrated in relation to the exercise of its existing inquiry powers.

Given the volume of bills and legislative instruments being introduced and made, it is not surprising that the existing inquiry power is one that has not been historically drawn upon very frequently to conduct standalone examinations.

(iii) Improving the scope of Statements of Compatibility

Recommendation 5C: The Commission recommends that s 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to require Statements of Compatibility for all legislative instruments.

Recommendation 5D: The Commission recommends that the range of matters to be addressed in a Statement of Compatibility should include consideration of consultations undertaken, reflecting the participation duty in the Commission's Human Rights Act model.

Recommendation 5E: The Commission recommends that Statements of Compatibility include consideration of compliance with the United Nations Declaration on the Rights of Indigenous Peoples.

Statements of Compatibility are a fundamental element of the dialogue process between the Executive and the Parliament.

The implementation of an Australian Human Rights Act would further enhance the effectiveness of these statements as a tool, by increasing the understanding, awareness and importance of human rights processes across the public service, with a consequent improvement in Statements of Compatibility. The introduction of a positive duty in a Human Rights Act would also be a powerful requirement for Statements of Compatibility to be more compelling.

There is one current limit in relation to requirements for Statements of Compatibility. They are not required for non-disallowable instruments. This became especially evident in relation to COVID-19 responses, many of which were made by way of legislative instruments under the *Biosecurity Act 2015* (Cth) and were exempt from disallowance.

There is value in requiring a Statement of Compatibility for all legislative instruments, including those exempt from disallowance.

The Commission recommends that a consultation section should be included in Statements of Compatibility for legislative proponents to articulate what consultations were undertaken in light of a potential direct or disproportionate impact on the human rights of a group. The adequacy of consultations engaged should be assessed by the PJCHR, in the same manner as human rights impacts are currently considered by this committee.

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Statements of Compatibility are required to be assessed against the 7 human rights treaties that Australia has ratified. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is not included in that list and the PJCHR may only consider the Declaration informally when carrying out its scrutiny functions.

The Commission has long recommended that the Committee be formally empowered to consider compatibility of laws and regulation with the UNDRIP.

(iv) Improving the quality of Statements of Compatibility

Recommendation 5F: The Commission recommends that with the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could be amended or an accompanying legislative instrument drafted to provide greater clarity on expectations in Statements of Compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.

Recommendation 5G: The Commission recommends that a public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.

Recommendation 5H: The Commission recommends that consideration be given to having designated human rights advisers in Departments.

Over time, the PJCHR's Annual Reports have highlighted the Committee's concerns about inadequacies of Statements of Compatibility.

As the Committee observed, where Statements of Compatibility were not comprehensive, 'this creates further work for the committee and ministers and their departments, and makes it more difficult to assess whether legislation raises human rights concerns'.[34]

The PJCHR itself has taken 'a robust stance' on the quality of Statements of Compatibility, frequently demanding more and better details.

It has been suggested that the PJCHR's role could be enhanced if it were stipulated in (primary or delegated) legislation, what must be included in Statements of Compatibility. The ALRC suggested that one approach may be 'to incorporate the Committee's expectations into pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)'.[35]

With the introduction of a Human Rights Act, and in working towards a deeper embedding of human rights understanding within departments, a constructive strategy may also be to have specific advisers in the departments, to assist the internal processes of building understanding about developing proportionate policies and legislation.

In 2018, in light of concerns the PJCHR had identified with Statements of Compatibility, the Committee itself commenced a project to improve them, recognising that:

> [W]hile the committee's scrutiny reports are a key mechanism for improving Statements of Compatibility, this project has sought to augment this reporting with additional approaches and mechanisms for improving Statements of Compatibility. These include liaising with legislation proponents and government departments about areas of concern, supplementing and developing further guidance materials and resources to assist in the preparation of Statements of Compatibility and providing targeted training to departmental officials regarding the committee's expectations. It has also involved preliminary discussions to explore options for collaboration with the Attorney-General's Department, in relation to guidance materials, as well as the Australian Human Rights Commission.[36]

The Commission encourages and supports this work of the PJCHR and commends the 'behind the scenes' work of the Secretariat, authorised by the Committee, to increase the upstream engagement with proponents of legislation and departments.[37]

An aspect of the project to improve Statements of Compatibility could include the development of an accessible register, to accompany guidance material.[38] The development of comprehensive templates and further guidance notes were advocated by the Law Council of Australia.[39]

The Commission acknowledges that, while such resources add to the educative contributions that the PJCHR can make to deepening the understanding of departmental officers and legislative proponents, the primary role of the committee is a scrutiny one. The development and maintenance of resources for the public service sits properly with the Attorney-General's Department.

The Commission notes that the quality of Statements of Compatibility and associated legislation could also be improved by ensuring there is regular education and training support for public servants on human rights.

When the requirement for Statements of Compatibility was introduced, there was also a suite of education resources developed. All public servants were required to complete a mandatory training module on human rights, with supporting toolkits, fact sheets and other guidance resources. As noted in **chapter 2**, this initial resourcing under Australia's Human Rights Framework was not maintained after 2013.

The Australian Human Rights Commission also hosted a federal Public Service Human Rights Network to create a forum for public servants to network and share information as they met their legislative responsibilities. These initiatives were funded under the Australian Human Rights Framework. The Commission continued to fund the network until 2017 without funding.

Text Box 4: How would parliamentary scrutiny work alongside a Human Rights Act?

The Commission recommends in this report the introduction of a Human Rights Act. The work of the PJCHR will then complement this legislation in its role of review. The range of matters to be addressed in a Statement of Compatibility will principally focus on the rights and freedoms in the Human Rights Act.

The Commission also considers that while the principal focus of scrutiny should be on the rights and freedoms in the Human Rights Act, there is value in maintaining the range of rights and freedoms under all the treaties as reflecting the commitment of the Australian Government through all of the international instruments ratified. Given that the educative value of Statements of Compatibility starts with the drafting of policy and laws in departments, the Commission considers that it would be detrimental to the outcome of improving human rights literacy – rights-mindedness – overall, if that list were to be limited.

5.4 Enhancing parliamentary oversight of international human rights treaty engagement

(a) Context

Like all other Nation States of the United Nations, Australia has voluntarily committed to meet the human rights standards set out in the international human rights treaties we have ratified.[40] This is, first and foremost, a commitment to all people in Australia that they will be treated in accordance with fundamental human rights standards. It is, secondly, a commitment to every other nation in the world about the values and standards that Australia is committed to.

In Australia, treaty obligations may not be entered into without a rigorous process of oversight by Parliament, through what is known as a National Interest Analysis by the Joint Standing Committee on Treaties.[41]

But once a treaty is ratified, engagement with Parliament is more limited.

As part of Australia's first Universal Periodic Review at the United Nations Human Rights Council in 2011, the then Government undertook to table the Concluding Observations of all human rights treaty body appearances in Parliament. This simple step ensures visibility within the Parliament of the occurrence of these significant scrutiny processes and provides an opportunity for the Government to set out its future plans in response to the observations.

There was no announcement to cease this practice, but it was discontinued at some time around 2013.

There is also no process for routinely tabling in Parliament the outcomes of individual communications brought before the UN treaty committees.

An individual communication is essentially a complaint that is heard by the relevant UN treaty body committee. Such complaints may only be brought where there has

been an exhaustion of domestic remedies within Australia (i.e. no further pathway to consideration of the alleged breach of rights).

The process of individual communications has added significance for Australia due to the limits of the domestic system for human rights protections and absence of a Human Rights Act. This means it is relatively simple to exhaust your domestic remedies, and pursue protection of your rights internationally, as there is a lack of remedial processes in Australia.

The Government responds to individual communications and publishes these responses on the website of the Attorney-General's Department.[42] The Government does not routinely table these responses in Parliament or otherwise notify the public about the existence of these communications or the government's response.

Remedy Australia, an NGO that monitors compliance with the recommendations arising from individual communications, notes that Australia's implementation of recommendations from these communications is extremely low at approximately 12%.[43] There is limited transparency and accountability for this.

From time to time, the Australian Government also commits to reviewing the scope of its treaty obligations. This occurs through processes such as the Universal Periodic Review at the United Nations Human Rights Council, and treaty body periodic reviews. This includes by considering:

- whether to ratify additional treaties – including Optional Protocols to existing human rights treaties
- whether to remove reservations or alter interpretive statements to existing treaties.

Australia has made a series of commitments across 3 cycles of the Universal Periodic Review to review reservations and consider the ratification of further instruments. There is a lack of transparency around how such review occurs.

To date, there is no public consultation to review reservations, nor parliamentary engagement on this. A National Interest Analysis was undertaken in 2017 to meet a commitment made in the 2nd UPR cycle to remove some reservations under the CEDAW, but there has been no further consultation or parliamentary engagement on other reservations.

For example, in the 3rd UPR cycle in 2021, the Australian Government committed to reviewing the reservation under Article 20 of the ICCPR. It is unclear what has been done in this regard in the the last 2 years.

All of this suggests a need for a more systematic approach to be taken to our international human rights treaty engagement so that there is greater transparency and public engagement. The Commission considers that Parliament should have a role in this.

This is also fundamental if we are to close the implementation gap between our international obligations and our domestic system of protecting rights. The lack of transparency that currently exists contributes to the separateness of the international engagement processes from our domestic processes for law, policy and practice. It would build greater 'rights mindedness' among public officials and government about human rights to close this gap.

(b) Treaty body reviews

Recommendation 6: Parliament's role in reviewing Australia's implementation of our international human rights obligations

The Commission recommends that:

A. the Attorney-General reinstate the practice of tabling Concluding Observations of human rights treaty committees in both houses of Parliament.

B. the Australian Government maintain a publicly available and up-to-date database about the Concluding Observations made by each UN treaty committee and their status.

C. the Government reform the Standing National Mechanism for Treaty Body Reporting to include public reporting on treaty bodies and individual communications.

Australia is a party to 7 of the major international human rights treaties. Under each of these treaties exists an independent expert committee, made up of individuals who are elected by the governments (states parties) that have signed or ratified the treaty. The treaties and their corresponding treaty bodies are set out in **Table 7**.

Table 7: Human rights treaties and corresponding treaty bodies to which Australia is a party[44]

Treaty	Treaty bodies
International Covenant on Civil and Political Rights (ICCPR, 1966)	The ICCPR aims to promote and protect human rights in a civil and political space. Its monitoring body is the Human Rights Committee and it has 2 Optional Protocols.
International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)	The ICESCR aims to protect and promote human rights in an individual's economic, social and cultural life. Its monitoring body is the Committee on Economic, Social and Cultural Rights and it has 1 Optional Protocol.
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)	The ICERD aims to eliminate racial discrimination based on a person's race, colour, descent, national origin or ethnic origin. Its monitoring body is the Committee on the Elimination of Racial Discrimination.
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)	The CEDAW aims to advance the realisation of fundamental rights and freedoms for women. Its monitoring body is the Committee on the Elimination of Discrimination Against Women and it has 1 Optional Protocol.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)	The CAT aims to protect all persons from torture and degrading punishment, as well as strengthen the rights of those deprived of liberty. Its monitoring body is the Committee Against Torture. It has 1 Optional Protocol, which also has a monitoring body known as the Sub-Committee on the Prevention of Torture.
Convention on the Rights of the Child (CRC, 1989)	The CRC sets out the special rights that apply to children. Its monitoring body is the Committee on the Rights of the Child and it has 3 Optional Protocols.
Convention on the Rights of Persons with Disabilities (CRPD, 2006)	The CRPD aims to protect the rights of persons with disabilities. Its monitoring body is the Committee on the Rights of Persons with Disabilities and it has 1 Optional Protocol.

As a party to each treaty, a country commits to submitting a periodic report of its progress in meeting the treaty's provisions. The country then undergoes a periodic review of its implementation of the treaty. This review is undertaken by an independent expert committee established under the treaty. Reviews routinely occur every 5 to 7 years, with the timeframe depending in part on the resourcing of the committee and how timely countries are in submitting their periodic reports.

At the conclusion of a periodic review, which takes place over 2 days in person, the Committee will issue a set of Concluding Observations as noted in **Table 8**. These include positive reflections on the country's compliance with the treaty and matters of concern. Recommendations are made to improve compliance. When the next periodic review arises, the committee focuses on how the country has addressed the recommendations from the previous appearance.

Treaty body reviews are an important 'state of the nation' review of Australia's human rights performance in relation to specific human rights standards included in each treaty under review. They contribute to Australia's reputation among the community of nations and in its multilateral and bilateral relations.

Table 8: Human rights latest treaty body Concluding Observations to Australia

Treaty title	Date of report	Hyperlink to report
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)	5 December 2022	CAT/C/AUS/CO/6[45]
Convention on the Rights of the Child (CRC, 1989)	01 November 2019	CRC/C/AUS/CO/5-6 (un.org)[46]
Convention on the Rights of Persons with Disabilities (CRPD, 2006)	15 October 2019	G1930705.pdf (un.org)[47]
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)	25 July 2018	N1823818.pdf (un.org)[48]
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)	26 December 2017	1723242 (un.org)[49]
International Covenant on Civil and Political Rights (ICCPR, 1966)	1 December 2017	1721414 (un.org)[50]
International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)	11 July 2017	1711585 (un.org)[51]

Responsibility for leading Australia's engagement with the treaty committees is split between different government departments, depending on the treaty. Engagement across government is coordinated by an inter-departmental committee, known as the Standing National Mechanism on Human Rights, that is led by the Attorney-General's Department.

This committee was established in response to a recommendation in the second Universal Periodic Review of Australia. Such committees were recommended as an important institutional tool for implementing human rights by the United Nations High Commissioner for Human Rights in a landmark 2012 report on strengthening the United Nations human rights treaty body system.[52]

The Standing National Mechanism on Human Rights does not conduct the full role that is recommended for such bodies by the Office of the High Commissioner for Human Rights.

Following a 2016 study on government engagement with international human rights mechanisms, the Office of the High Commissioner for Human Rights released guidance on what such national mechanisms

should do.[53] The emphasis of the role of these committees is in the title they are given by the High Commissioner's Office: a national mechanism for reporting and follow-up.

The Australian mechanism has been operating almost entirely behind closed doors, with very occasional engagement with the NGO sector ahead of specific treaty body reviews. There is little documented about its operation and no public facing role.

The Office of the High Commissioner for Human Rights suggests that such mechanisms should have capacity across 4 areas as follows:

- engagement capacity across the federal,state and territory governments
- coordination capacity across governments
- consultation capacity
- information management capacity.[54]

From the Commission's engagement with the standing national mechanism, we can see that it has these capacities in terms of the work of government preparing and engaging with the treaty system.

The mechanism is limited in promoting a more systemic and transparent approach to follow up and monitoring. The Australian mechanism does the following things, within government:

- tracks the issuance of recommendations and decisions by international human rights mechanisms
- systematically captures and thematically clusters these recommendations and decisions in a user-friendly spreadsheet or database
- identifies responsible government ministries and/or agencies for their implementation.[55]

What they do not do, is make this information public, monitor implementation and engage with civil society on prioritising future actions. The High Commissioner for Human Rights recommends that such mechanisms should:

- regularly update a database of recommendations from human rights treaty bodies and make it public
- issue an annual report, with updated implementation status
- publish on a website and or social media
- also consider implementation through a national action plan or other implementation planning tool.[56]

As the High Commissioner for Human Rights noted in 2016,

> National mechanisms for reporting and follow-up have the potential to become one of the key components of the national human rights protection system, bringing international and regional human rights norms and practices directly to the national level. The essence of the reporting process is nationally driven. National mechanisms for reporting and follow-up build national ownership and empower line ministries, enhance human rights expertise in a sustainable manner, stimulate national dialogue, facilitate communication within the Government, and allow for structured and formalized contacts with parliament, the judiciary, national human rights institutions and civil society. Through such institutionalized contacts, the voices of victims and their representatives will also increasingly be heard. National mechanisms for reporting and follow-up would furthermore enhance the coherence and impact of each State's human rights diplomacy.[57]

The Commission sees much potential in the existing national standing mechanism for treaty body engagement. The seriousness and responsiveness of government to treaty body observations could be significantly enhanced with the standing mechanism having additional public facing functions.

The Australian Government should routinely table Concluding Observations made by UN treaty committees in Parliament, thereby bringing directly to the attention of the Parliament important scrutiny of the country's performance on human rights matters.

Under each human rights treaty, the Australian Government is obliged to promote awareness

of the treaty and disseminate the outcomes of periodic reviews by the treaty committees.

At present, this is done by placing Concluding Observations on the website of the Attorney-General's Department.[58] This practice goes no further than what is already done by the Office of the High Commissioner for Human Rights, which maintains a homepage for treaty obligations for every country in the world.[59]

As noted above, a previous practice of tabling each set of Concluding Observations in Parliament was discontinued some time ago.

Similarly, a public database of recommendations made by the treaty body committees is also no longer available from the Attorney-General's Department website.

In the National Human Rights Action Plan 2012, the Australian Government committed to 'continue to maintain a publicly accessible database of United Nations human rights treaty body recommendations' and for it to be 'updated on a regular basis'.[60]

Such a database does exist in relation to recommendations of the Universal Periodic Review process.[61]

Concluding Observations will often relate to matters that are complex, that involve longstanding challenges, cross government departments and for which responsibility may exist at different levels of government.

The Commission accepts that responding to Concluding Observations can be a complex task. However, this complexity is not a reason not to respond to the observations at all.

The Commission therefore recommends that the Australian Government maintains a publicly available and up to date database about the Concluding Observations made by each UN treaty committee and their status. This would include at minimum:

- the Department at which level of Government is responsible for each recommendation
- proposed actions to implement recommendations
- timeframes and measurable outcomes for implementation and responses.

Such a database would require the above elements to ensure it provides robust, measurable information for which Government can be accountable. To date, public information has tended to indicate who in Government is responsible for implementation of recommendations but has not set out proposed actions, timeframes and outcomes.

The Commission considers that the standing national mechanism on human rights treaties provides an important mechanism to contribute and indeed lead the above recommendations. It would meet best practice international guidance to revise the existing mechanisms with these public facing responsibilities.

The Commission recommends that the Government reform the Standing National Mechanism for Treaty Body Reporting to include public reporting on treaty bodies and individual communications.

A response to Concluding Observations in these terms will ensure that the Government has an implementation plan for each of the seven human rights treaties to which Australia is a party. It will integrate the accountability mechanisms that Australia has committed to under each of the treaties into our domestic system for law, policy and practice.

(c) Individual communications

Recommendation 6 (continued).

The Commission recommends that:

D. The Attorney-General table information about individual communications in Parliament on an annual basis, along with the Australian Government's response to these

E. The Parliamentary Joint Committee on Human Rights be empowered to review the adequacy of the Australian Government's response to individual communications and/or Concluding Observations from time to time.

Each of the 7 human rights treaties to which Australia is a Party has a committee or 'treaty body' that monitors compliance with its treaty obligations as set out in **Table 7**.

Individuals who claim that they have suffered a violation of their rights may submit complaints/individual communications to the relevant treaty body where Australia has accepted the complaints jurisdiction.

For the complaint mechanism to operate, the jurisdiction of the committee must be accepted by the government through either becoming party to the Optional Protocol that establishes the mechanism, or by agreeing to a mechanism contained within the treaty itself.[62] Australia is a party to the complaints (or 'individual communications') mechanisms in relation to 5 of the human rights treaties.[63]

Through the individual communications mechanism, committees can issue decisions determining whether there has been a breach of the treaty or not, and recommend remedies, including compensation to the aggrieved party and recommend changes to laws or policies to address the violation. While these recommendations are not legally binding, countries are under an obligation to give them considerable weight in deciding how they should act.

In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction.[64] However, the decisions of such bodies can, and have been, ignored by government.[65]

Notably, some matters proceed to the individual communications stage after they have been considered by the Commission. For example, the Commission considered the situation of persons with disability found unfit to plead who were indefinitely detained. Due to the lack of remedy and response to this issue, the matter was considered at the individual communication stage – such as in the example case study in **Text Box 5.**

Text Box 5: *Noble v Australia* (2016)

On 23 September 2016, the UN Committee on the Rights of Persons with Disabilities found that Australia had breached its obligations under the UN Convention on the Rights of Persons with Disabilities for the indefinite imprisonment of Marlon Noble, an Aboriginal man with an intellectual disability who had been found unfit to plead under the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) – renamed the *Criminal Law (Mentally Impaired Accused) Act 1996* (CLMIA Act).[66]

Mr Noble was imprisoned in Western Australia in 2001 without trial. After 10 years and 7 months in prison (including 17 months on remand), he was released on restrictive conditions of unlimited duration, with no avenue of appeal to have them lifted. Mr Noble was imprisoned for a far greater period of time than he would have been had he been found guilty of the original charges. According to Remedy Australia, court statistics suggest that, had he been tried and convicted, Mr Noble's sentence would have likely been between 2 and 3 years, with time spent on remand deducted from the sentence.[67]

The UN Committee on the Rights of Persons with Disabilities found that Australia failed to fulfil its obligations under articles 5(1) and (2), 12(2) and (3), 13(1), 14(1)(b) and 15 of the Convention.

In response, the Australian Government admitted some failures, but did not agree that it had violated Mr Noble's rights. The Western Australian Government committed to providing Mr Noble with supports to help him live independently in the community, as well as to review the CLMIA Act and undertake training of the judiciary. In April 2023, the Western Australian Government passed the Criminal Law (Mental Impairment) Bill 2022 to make some amendments to the CLMIA Act.[68]

Where there is a finding by one of the UN human rights committees in response to individual communications, the Australian Government publishes responses on the website of the Attorney-General's Department. Government responses are also published in the human rights database of the Office of the High Commissioner for Human Rights.

This minimal approach limits awareness of the Government's perspective on important human rights matters and does not ensure sufficient scrutiny or transparency of the response.

It is critical to recall that the only circumstances in which people can take individual communications to the UN human rights committees is when there are no domestically available processes to remedy human rights breaches. It is intended as a process of last resort.

It can be anticipated that fewer communications would progress to UN committees if Australia had domestic processes to consider human rights breaches in the first place.

The Australian Government should routinely inform the Parliament of the outcomes of individual communications.

Mandating parliamentary oversight of individual communications should be considered.

(d) Reservations and interpretive declarations

Recommendation 6F: The Commission recommends that the Joint Standing Committee on Treaties conduct a review of all existing reservations and interpretive declarations under human rights treaties.

When a country enters into a treaty it can, within limits, make a reservation to the treaty. This is a statement that certain provisions in the treaty are not of legal effect in the country due to operational characteristics in the country that results in non-compliance. Similarly, countries sometimes will issue an interpretative statement or declaration on how they interpret particular provisions as operating.

A reservation or interpretive declaration has the effect of limiting the obligation on all Australian governments to comply with human rights. This can constrain protections by removing the applicability of the relevant human rights when developing laws, policy and practice. It sends a message to the Australian community and internationally that Australia does not intend to fully meet that human rights standard.

Such reservations and declarations are often 'point in time' decisions when a country enters into binding obligations under a treaty, to signal that the country's law, policy and practice is not yet in compliance. Ideally, the country would progressively take steps to address this non-compliance such that the reservation or declaration would become unnecessary over time.

Indeed, when Australia entered a reservation to Article 10 of the ICCPR in 1980 it did so on the basis that compliance with the right would be 'achieved progressively' and stated in 1975 that the obligations in Article 4 of the ICERD would be legislated for 'at the first suitable moment'. Both reservations remain in place 43 and 48 years after they were set into place on a short-term basis. Australia's current reservations to human rights treaties are set out in **Text Box 6**.

Text Box 6: Australia's reservations to human rights treaties[69]

The following reservations continue to operate in relation to Australia's human rights treaty obligations.

ICCPR

Art 10(2)(a) and (3): The obligation to segregate juveniles from adults in prisons and while awaiting court was accepted in 1980 'as an obligation to be achieved progressively' and on the understanding of relevant officials that the obligation to segregate is considered to be beneficial to the juveniles or adults concerned.

Article 14: Interpretation of how the obligation to provide compensation for miscarriage of justice will be met.

Article 20: The obligation to prohibit propaganda for war and the incitement of national, racial or religious hatred is interpreted as being met by provisions relating to freedom of expression, association and peaceful assembly.[70]

ICERD

Article 4(a): The Government entered a declaration in 1975 that it intended to legislate 'at the first suitable moment' to meet the obligations in this article to declare as offences 'the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts'.[71]

CEDAW

Article 11(2): Limits on the provision of paid maternity leave for women across Australia.[72]

CRC

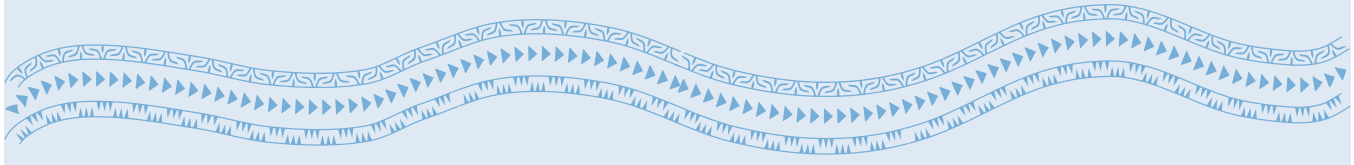
Article 37(c): The obligation to separate children from adults in prison is not accepted to the extent that geographic factors would prevent children from maintaining contact with their families.[73]

CRC, Optional Protocol

Article 3(5): Australian Defence Force to continue to allow voluntary recruitment of children aged 17 years to military schools and the defence forces, with requirements that such recruitment is voluntary.[74]

CRPD

The treaty was ratified with a declaration that substituted decision making arrangements and compulsory medical treatment can continue in limited circumstances; and that rights to liberty of movement and nationality do not extend to rights for non-nationals to enter or remain in Australia, or impact on Australia's health requirements for non-nationals.[75]



The human rights treaty committees will routinely request that countries review any reservations on a regular basis and consider removing them.

Australia has, through the Universal Periodic Review process, committed to review existing reservations on several occasions.

As noted in **chapter 2**, the National Human Rights Action Plan 2012 included a commitment to review existing reservations under international human rights instruments and committed to this review being on the agenda of the Standing Council of Treaties.[76]

In the most recent Universal Periodic Review in 2021, the Government committed to review the reservation under Article 20 of the ICCPR but not to consider other reservations.

It is unsatisfactory that there has been no formalised approach to reviewing reservations and interpretive declarations on a periodic basis to ensure their relevance to modern Australian life.

The Australian Government should ultimately strive to ensure that it can meet all human rights standards to the fullest extent and be open to scrutiny for how it is seeking to do so. Reservations and interpretive declarations work against this outcome and should only be maintained for the shortest time necessary and in the narrowest form possible.

The Commission therefore considers it appropriate that an inquiry be referred to the Joint Standing Committee on Treaties to undertake a review of all existing reservations and interpretive declarations as an action under a new national framework on human rights.

The recommended actions in this chapter are about ensuring appropriate levels of accountability and transparency exist in relation to Australia's international human rights obligations.

These recommendations sit within a wider context in which the Commission is recommending a significant set of reforms to domestic legal protections, the provision of human rights education and training, and national indicators to measure human rights performance.

In short, these recommendations to ensure appropriate oversight of Parliament are about domesticating our accountability mechanisms for our human rights treaty obligations alongside new mechanisms and more effective legal protections of human rights in Australia.

International scrutiny has a role to play, but it should not be instead of, or in the place of, effective domestic scrutiny.

Chapter 5: Endnotes

1. Australian Law Reform Commission, (December 2015), *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129). Chapter 3 provides a summary and analysis of the various Commonwealth scrutiny mechanisms. The section from [3.21]–[3.49] summarises the scrutiny committees.
2. Australian Law Reform Commission, (December 2015), *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129), [3.23]–[3.27]. The establishment of this Committee is described in Grenfell L, (2015), 'An Australian spectrum of political rights scrutiny: "Continuing to lead by example?"', *Public Law Review 19*, *vol. 26*, pp. 21–24.
3. National Human Rights Consultation Committee, (September 2009), *National Human Rights Consultation Report*, pp. 168–160.
4. *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), <https://www.ohchr.org/sites/default/files/ccpr.pdf>.
5. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR), <https://www.ohchr.org/sites/default/files/cescr.pdf>.
6. Namely: the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); Convention on the Rights of the Child, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). See ALRC, Freedoms Report, [3.32]–[3.36].
7. Sakaria A and Aiyagari S, (2007), *The Parliamentary Committee as Promoter of Human Rights: The UK's Joint Committee on Human Rights,* (Commonwealth Human Rights Initiative), <https://www.humanrightsinitiative.org/publications/hradvocacy/parliamentary_committee_as_promoter_of_hr.pdf>. The authors point out that while at around the same time, it was through a separate process.
8. Williams G and Reynolds D, (2015), 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights, *Monash University Law Review*, *vol. 41*(2), pp. 469–471.
9. Reynolds D, Hall W and Williams G, (2021), 'Australia's Human Rights Scrutiny Regime', *Monash University Law Review, vol. 46*(1), p. 256. *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(b).
10. Hutchinson Z, (2018), 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review, vol. 33*(1), p. 72, p. 89, nn p. 73, p. 74. Hutchinson, a Principal Research Officer of the PJCHR Secretariat, pointed to the workload during the 45th Parliament, from August 2016 to March 2018, with the tabling of 20 scrutiny reports examining 463 bills and 3,286 instruments of delegated legislation. Earlier statistics are considered in Williams G and Burton L, (2013), 'Australia's Exclusive Parliamentary Model of Rights Protection', *Statute Law Review, vol. 34*(1), pp. 58–62.
11. The Senate Standing Committee on Delegated Legislation was given authority to scrutinise exempt delegated legislation. This took place following an own-motion inquiry into exempt delegated legislation. See, Commonwealth of Australia, (16 March 2021), *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight,* (Final Report), Rec 10.
12. Commonwealth of Australia, (13 May 2021), Parliamentary Joint Committee on Human Rights, *Annual Report 2020*, [2.11], [2.12].
13. Fletcher C and Coles A, (August 2022), 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights', *Senate Lecture Series*, p. 4.
14. *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8, 9. This was recommended by the National Consultation: Rec 6.
15. Fletcher C and Coles A, (August 2022), 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights', *Senate Lecture Series*, p. 2.
16. Parliament of Australia, *Guidance Notes and Resources*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.
17. Williams G and Reynolds D, (2015), 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review, vol. 41*(2), p. 469, pp. 498–499.
18. Williams G and Burton L, (2013), 'Australia's Exclusive Parliamentary Model of Rights Protection', *Statute Law Review, vol. 34*(1), p. 58, p. 93.
19. Tolley M, (2009), 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights', *Australian Journal of Political Science, vol. 44*(1), p. 41, p. 53.
20. Reynolds D, Hall W and Williams G, (2021), 'Australia's Human Rights Scrutiny Regime', *Monash University Law Review, vol. 46*(1), p. 256, p. 259. Note 10 provides a list of examples. See also the collection of essays in Debeljak J and Grenfell L (eds), (2020), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*, Lawbook Co. Human Rights Law Centre, (2022), 'Human Rights Scrutiny in the Australian Parliament: are new Commonwealth laws meeting Australia's international obligations?'.
21. Webb P and Roberts K, (June 2014), *Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness*, Kings College, London, [9].
22. Williams G and Burton L, (2013), 'Australia's Exclusive Parliamentary Model of Rights Protection', *Statute Law Review, vol. 34*(1), p. 58; Williams G and Reynolds D, (2015), 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review, vol. 41*(2), p. 469; Reynolds D, Hall W and Williams G, (2021), 'Australia's Human Rights Scrutiny Regime', *Monash University Law Review, vol. 46*(1), p. 256; Reynolds D and Williams G, (2020), 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Debeljak J and Grenfell L (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*, Lawbook Co, p. 67.
23. Grenfell L and Moulds S, (2018), 'The role of Committees in Rights Protection in Federal and State Parliament in Australia', *UNSW Law Journal, vol. 41*(1), p. 40, p. 44.

24. Australian Law Reform Commission, (December 2015), *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, (Final Report No 129), [3.86]. Benton M and Russell M, (2013), 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons', *Parliamentary Affairs, vol. 66*, pp. 772–774.
25. Webb P and Roberts K, (June 2014), *Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness*, Kings College, London, [9].
26. The Committee still considers legislation passed before it has reported, although it may not seek to engage in dialogue with Ministers at that point.
27. Commonwealth of Australia, (13 May 2021), Parliamentary Joint Committee on Human Rights, *Annual Report 2020,* [2.3].
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6. Accountability and Human Rights indicators

6.1 Overview

This chapter outlines how additional measures to properly measure and track Australia's human rights performance are critical to the success of the Human Rights Framework proposed in this report.

It recommends a new Human Rights Indicator Index and an annual National Human Rights Statement to Parliament to maximise the effectiveness of a Human Rights Act and in moving from standard setting to effective implementation.

Recommendation 7

A National Human Rights Indicator Index

The Commission recommends that the Australian Government introduce a National Human Rights Indicator Index that can measure progress on human rights over time.

Recommendation 8

A National Human Rights Statement

The Commission recommends that the Australian Government commit to an annual National Human Rights Statement to Parliament.

6.2 Introduction

There is a significant gap between human rights standards that Australian governments have committed to uphold, and the actual protections in our laws, policies and processes of government.

Of particular concern is the lack of robust, cohesive processes to set national priorities, measure progress in the achievement of human rights and to monitor compliance with international standards.

The previous chapter outlined measures to strengthen parliamentary accountability for human rights. But in the absence of a current National Human Rights Action Plan, or national human rights indicator framework, Australia is limited in its ability to publicly monitor its progress in implementing rights.

What Australia does have is a variety of thematic, sector and issues-based national action plans and national frameworks – for example, on closing the gap for First Nations people, protecting Australia's children, eliminating family violence and on the rights of people with disability. These plans and frameworks are significant tools to advance human rights – although they are generally not framed in terms of meeting human rights obligations.

As a result, there are significant gaps in the incorporation of human rights into Australian law, policy and practice.

Given this gap in implementation, a major focus of the Free & Equal Inquiry has been examining the need for accountability to advance human rights at the national level.

Critical to a new National Human Rights Framework recommended by this report is the ability to properly measure and track Australia's human rights performance.

Measurement and accountability require evidence. The Commission therefore proposes a National Human Rights Indicator Index, to play a key role in tracking Australia's performance in key areas over time.

The Human Rights Indicator Index and an annual statement to parliament, in conjunction with reforms to enhance the effectiveness of the Parliamentary Joint Committee on Human Rights and parliamentary oversight of decision-making, are required to maximise the effectiveness of a Human Rights Act and in moving from standard setting to effective implementation.

This chapter draws from the experience of Australia's human rights policy frameworks over decades, along with international good practice. It makes recommendations which the Commission considers to be effective and implementable in the current political and policy environment.

6.3 Ensuring effective national accountability for human rights

The issue of accountability for human rights outcomes has been a key focus of Free & Equal from the outset.

On 15 August 2019, the Commission and the Australian Human Rights Institute of the University of New South Wales hosted a technical workshop – 'Ensuring Effective National Accountability for Human Rights' (Workshop).

The Workshop participants were invited to consider, among other things, how progress in respecting, protecting and fulfilling human rights should be measured; and how government should be held to account for its actions or omissions in protecting human rights.

The Workshop conclusions were that:

- National action plans and other national frameworks can be a useful tool for driving change, but they must do more than describe the current state of affairs and must include a commitment to serious action. These documents will only have the effect of advancing rights if they include clear and measurable indicators, are adequately funded, are monitored on an ongoing basis, and there is strong political, bureaucratic and community commitment to the implementation of their goals.
- Good data is critical to measuring, monitoring and implementing human rights. Greater use of existing databases and the creation of new disaggregated databases are essential to understanding the extent of human rights violations and measuring performance.
- Accountability mechanisms and procedures for obtaining remedies for human rights violations need to be strengthened and better resourced. Political decision makers need to take current and rigorous research into account when making decisions that could have an adverse impact on human rights.
- Public servants, community workers, teachers, artists and others can play an important role in advocating for and protecting human rights. Community members who take on this role should be adequately supported, including through appropriate human rights training.

The workshop outcomes and deliberations have been built on in this chapter, and the recommendations of this report.

6.4 Existing accountability mechanisms for human rights in Australia

Australia currently does not have a robust system for prioritising human rights issues at the national level, nor for ensuring accountability for progress in advancing and protecting human rights.

The absence of accountability mechanisms leaves international human rights scrutiny processes as the default review processes for adequacy of national efforts to protect human rights.

Reviews of Australia's performance by UN human rights treaty committees and engagement in the Universal Periodic Review process provides a level of international monitoring and accountability. These are not, however, a substitute for a domestic, government-led process for considering and identifying priorities for human rights protection, and publicly monitoring progress against those priorities.

a) Domestic mechanisms

(i) Human Rights Actions Plans

As noted in **chapter 2**, the idea of a national action plan for human rights was first put forward by Australia during the June 1993 Vienna World Conference on Human Rights. It was adopted as a recommendation in the *Vienna Declaration and Programme of Action*.[1]

The most recent national plan was developed over 10 years ago in 2012 – the National Human Rights Action Plan – as part of the Australian Human Rights Framework, as outlined in **chapter 2** of this report.

The plan followed a baseline study identifying priority areas, including:

- international human rights commitments;
- access to justice
- legal protections; workers' rights
- climate change, and poverty
- specific population groups such as Aboriginal and Torres Strait Islander peoples, women, children and young people, gay, lesbian, bisexual and sex and/or gender diverse people, and carers.[2]

The plan was not implemented following a change of government, and there has been no national action plan or alternative since.

There has been no adequate/comprehensive evaluation on the efficacy of these plans in Australia. However, the Commission notes that some general features of these plans have been that:

- they have listed *existing* government initiatives rather than genuinely setting priorities for the future
- they have lacked dedicated funding to advance human rights priorities
- some plans have lacked community engagement to build consensus and partnerships for key human rights priorities
- the split of responsibilities between the Australian and State and Territory Governments has tended to make the plans complex and require long timeframes for their development
- monitoring processes for these plans have been lacking or deficient.

While a potentially worthwhile concept, the experience of poor implementation of National Action Plans in Australia has resulted in the Commission forming the view that it is time to try other alternatives, based on best practice within Australia and globally.

(ii) Issue-specific national action plans and frameworks

Australia has in place a number of national frameworks and inter-governmental agreements that prioritise action on certain issues. These are important mechanisms for realising human rights in Australia, however they do not always explicitly promote human rights.

Some examples include:

- National Framework for Protecting Australia's Children[3]
- National Plan to Reduce Violence against Women and their Children[4]
- National Action Plan to Combat Human Trafficking and Slavery[5]
- Australian National Action Plan on Women, Peace and Security[6]
- Australia's National Action Plan for Health Security[7]
- National Disability Strategy[8]
- National Agreement on Closing the Gap.[9]

Common features to these, and other, national plans are that they:

- are multi-year in commitment, often for a decade at a time and broken down into smaller action plans (over 3–5 years)
- are agreed to by all Australian governments, and identify actions that are to occur at each level of government
- are resourced
- have monitoring and evaluation mechanisms
- are developed with community engagement.

But national frameworks are not in themselves a solution. Key factors in their effectiveness include whether they:

- are sufficiently resourced
- have sufficient community engagement in design and implementation
- are aspirational and result in change to existing approaches, or simply detail existing policies and programs
- outline clear and measurable indicators
- are rigorously and regularly monitored.

Despite the limitations of these plans, particularly when the above factors are not followed, they are highly significant programs that advance important human rights issues in the community. But, they can be improved.

(iii) Contributions of the Australian Human Rights Commission to National Plans

The Commission has also been funded from 2022 by the Department of Social Services to lead child engagement processes under the National Framework for Protecting Australia's Children and the National Framework on Early Childhood Development.

In 2022, the Australian Government also funded the National Children's Commissioner to develop an integrated child engagement strategy to be implemented over 4 years across 5 national frameworks. This project is intended to provide a process to ensure the co-design and effective participation of children, especially those who are marginalised, in the design and implementation of policy and services that affect them.

The Commission has also promoted the establishment of additional national frameworks to provide an implementation framework for the United Nations Declaration on the Rights of Indigenous Peoples and for the Convention on the Rights of the Child, and on business and human rights.

Additionally, the Commission has advocated for the following 2 frameworks as set out in **Text Box 7** and **8,** and has been funded by Government to advance consideration of them.

Text Box 7: National Anti-Racism Framework

In March 2021, the Commission released a proposal for a National Anti-Racism Framework in response to enduring community calls for national action after heightened experiences of racism and racial inequality in recent years, particularly during the COVID-19 pandemic.[10]

The proposal contained guiding principles, outcomes and strategies to begin a national conversation about anti-racism action.

Following the commitment of government funding in October 2022, in December of the same year, the Commission released a scoping report for a National Anti-Racism Framework. This report provides an initial evidence-based summary of what the Commission heard about a national anti-racism framework from communities, sector organisations, government, scholars, and expert knowledge holders. It draws from significant community consultations from March 2021 to April 2022, including more than 100 consultations in 48 locations across Australia and 164 public submissions.

As the culmination of these consultations and submissions, the scoping report identifies key considerations for the principles that should underpin a framework, the cross-cutting themes consistently raised by participants, and the sector-specific priority areas to guide this work moving forward.

The Australian Government provided initial funding for the Commission to continue to scope a national framework and to conduct relevant research on key issues. This commitment of funding to a National Anti-Racism Strategy will allow for further comprehensive consultations and co-design processes in advancing a National Anti-Racism Framework. It is anticipated that a revamped proposal for a National Anti-Racism Framework will be presented to the Australian Government in the first half of 2024.

Text Box 8: Framework for Action on First Nations Gender Justice and Equality

Led by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Wiyi Yani U Thagani* (Women's Voices) is a multi-year initiative set out to capture what Aboriginal and Torres Strait Islander women and girls consider to be their strengths, challenges and aspirations for change.

Informed by findings from engagements and submissions, the *Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future* report was published in December 2020.[11] The report is an extensive whole-of-life report that captures the needs of Aboriginal and Torres Strait Islander women and girls, the principles they think ought to be enshrined in the design of policy and programs, and the measures they recommend ought to be taken to effectively promote the enjoyment of their human rights in the future.

Following the report, the *Wiyi Yani U Thangani Implementation Framework* was developed, through a series of dialogue papers, workbooks and roundtables, to provide guidance for translating the substantial findings of the report into meaningful action.[12] The Implementation Framework takes a gender-responsive, systems-change approach across 4 thematic areas to progress First Nations gender justice and equality.

A national summit for this project was held on 8–12 May 2023, and will lay the foundation for a national Framework for Action on First Nations Gender Justice and Equality for consideration by the Australian Government in the near future.

The Commission has also set out an implementation plan for the human rights contained in the Convention on the Rights of the Child. The National Children's Commissioner's statutory report to Parliament, the *National Children's Report 2019 – In their own right*, set out recommendations to implement all areas of the Convention on the Rights of the Child.[13] The report was completed after Australia's most recent periodic review under the Convention on the UN Committee on the Rights of the Child, and involved extensive consultation with government, NGOs and children.

The Child's Rights NGO sector has consistently called for the Government to adopt a national plan to incorporate the CRC into Australian law, policy and practice.

(iv) Measuring what matters

In July 2023, the Australian Government released the first iteration of a national wellbeing framework. The framework. *Measuring What Matters*,[14] illustrated in **Figure 11**, utilises 50 indicators across 5 themes, to ensure people and communities are: Healthy, Secure, Sustainable, Cohesive and Prosperous.

In introducing the overarching framework tracking wellbeing outcomes, the Government expressed the hope 'that this statement will underpin the broader efforts of business, community groups and others, to deliver better outcomes and opportunities for Australians'.[15]

In January 2022, the Commission provided a submission to the Department of Treasury's *Measuring What Matters* inquiry.[16] The Commission supported Australia implementing a national framework or centralised set of indicators and urged the Department of Treasury to consider that the process adopt a human rights-based approach. The Commission's submission focused on some key considerations when developing an indicator framework, rather than an individual critique on each indicator, or suggestions for additional ones.

As the Department of Treasury is taking an iterative approach to the framework, the Commission's recommendations are still relevant to subsequent versions of the framework, and include the following:

- a human rights-based approach should underpin all aspects of the framework
- specific child wellbeing indicators should be included, incorporating the child perspective and grounded in our obligations under the CRC
- data disaggregation in the indicators should be utilised to create a more nuanced picture
- data practices that are integrated, culturally safe and respectful of data sovereignty should be used
- participatory methods of data collection should be utilised, including qualitative data collection, to ensure that the right questions are being asked and to inform data conclusions.[17]

Measuring What Matters will be an important tool in policy making and tracking Australia's progress across several domains.

However, that it does not take an explicitly human rights-based approach limits its utility for holistically tracking Australia's progress against human rights obligations.

Figure 11: Measuring What Matters framework

Inclusion, fairness and equity

Overall life satisfaction

Healthy	Secure	Sustainable	Cohesive	Prosperous
Healthy throughout life • Life expectancy • Mental health • Prevalence of chronic conditions	**Living peacefully and feeling safe** • Feeling of safety • Experience of violence • Childhood experience of abuse • Online safety • National safety • Access to justice	**Protect, repair and manage the environment** • Emissions reduction • Air quality • Protected areas • Biological diversity • Resource use and waste generation	**Having time for family and community** • Time for recreation and social interaction • Social connections • Creative and cultural engagement	**Dynamic economy that shares prosperity** • National income per capita • Productivity • Household income and wealth • Income and wealth inequality • Innovation
			Valuing diversity, belonging and culture • Experience of discrimination • Acceptance of diversity • First Nations languages spoken • Sense of belonging	**Access to education, skills development and learning throughout life** • Childhood development • Literacy and numeracy skills at school • Education attainment • Skills development • Digital preparedness
Equitable access to quality health and care services • Access to health services • Access to care and support services	**Having financial security and access to housing** • Making ends meet • Homelessness • Housing serviceability	**Resilient and sustainable nation** • Fiscal sustainability • Economic resilience • Climate resilience	**Trust in institutions** • Trust in others • Trust in key institutions • Trust in Australian public services • Trust in national government • Representation in parliament	**Broad opportunities for employment and well-paid, secure jobs** • Wages • Job opportunities • Broadening access to work • Job satisfaction • Secure jobs

(v) Challenges of federation

The governance arrangements that flow from our status as a federation complicate accountability for human rights implementation. When accepting international human rights treaty obligations, the Australian government undertakes that all governments in Australia will respect, protect and fulfil human rights. Responsibility for ensuring this actually occurs, however, is shared between the federal, state and territory governments.

It is well established as a matter of international law, that such internal divisions of responsibility are not an excuse for non-compliance with human rights standards. Article 27 of the Vienna Convention on the Law of Treaties, for example, states that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

Article 50 of the ICCPR also states: 'The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.

(b) Existing international scrutiny processes

At the international level, there are a range of accountability processes within the UN system that assess Australia's compliance with international human rights standards. These include periodic reporting, individual treaty body complaints mechanisms and other procedures.

These UN processes provide a framework for Australia to report to the international community on the implementation, benchmarking and monitoring of human rights in Australia and provide individual complainants with an international avenue for having their concerns heard.

A detailed outline of these international scrutiny processes and how to improve accountability for them is in **chapter 5.**

6.5 Human rights indicators and accountability frameworks

In recent years, clear guidance on the necessary elements of human rights indicators has been developed at the international level. This provides greater clarity on the necessary elements of any accountability framework.[18] Today, there is much good practice that Australia can draw from.

(a) Indicator indexes

Indicators are tools to help translate human rights standards into tangible and operational goals that mean something in their country of use. They can be used to measure progress towards the fulfillment of rights over time.[19]

There is extensive international guidance on what makes an effective human rights indicator framework. In 2012, the Office of the High Commissioner for Human Rights published *Human Rights Indicators: A guide for Measurement and Implementation* which provides guidance on the development and implementation of indicator indexes and frameworks.[20]

The Commission's Workshop considered some international examples, such as the *Is Britain Fairer?* model, which is led by the Equality and Human Rights Commission in the United Kingdom (the UK equivalent to the Australian Human Rights Commission).[21]

Other examples from New Zealand include the National Action Plan model and, more recently, the 2019 National Child and Youth Wellbeing Strategy.[22]

To develop indicators, we can look to Australia's international human rights obligations, but must also be mindful of the things that Australians see as important to helping them live the lives they desire.

Indicators must be specific to an issue and measurable in a consistent way over time.

They must be designed in partnership with the community for the community to use, but also have relevance for law and policy makers.

Human rights indicators can use quantitative or qualitative data as their evidence base. Data sources should be available, or the ability to collect data that is relevant to the indicators, should be possible so that progress can be measured against the indicators. This data must be able to be disaggregated based on different characteristics such as gender, ethnicity, and socio-economic status.

There are data gaps in some areas. However, in many areas we already have much of the relevant data to assess whether rights are being enjoyed.

For example, regular surveys of homelessness in the community permit us to identify the number of persons who are homeless in Australia and the groups to which they belong. We have data on how many people are living in poverty in Australia measured by reference to the OECD standard. We know how many people in each age group spend years receiving unemployment benefits, as a result of discrimination in the labour market.

The challenge is in many cases to persuade policymakers and politicians to respond to what are clear failures to respect, protect or promote human rights.

When developing an indicator-based measurement framework, thought must also be given to the theoretical concepts that will underpin it. Is the framework being used to measure equality across different areas of life? What kinds of inequality or equality matter?

Many measurement frameworks, such as the UN Development Programme's Human Development Index, use Amartya Sen's 'capability' approach as the basis for their analysis. This approach uses the concept of 'capability' or the actual valuable freedoms and opportunities that people have access to – the key things that people are actually able to do or be.

(b) International Examples of Indicator Indexes

(vi) Is Britain Fairer?

The *Is Britain Fairer?* model provides a constructive example of what such an indicator index should look like.

Under the *Equality Act 2006* (UK), the UK Equality and Human Rights Commission has a statutory duty to monitor and report on social outcomes from an equality and human rights perspective. The most recent iteration of the Measurement Framework was released in 2019, *Is Britain Fairer?* 2018.[23]

The Measurement Framework, as illustrated in **Figure 12**, covers 6 domains which have been chosen because they 'reflect the things or areas in life that are important to people and enable them to flourish'.[24] These are: education, work, living standards, health, justice and personal security, and participation.

Each domain contains 3 'core' indicators, and some have additional 'supplementary' indicators. The indicators have been chosen, among other reasons, for their relevance for human rights, equality and non-discrimination and for their relevance for duty-bearers. The indicators are also specific, measurable, relevant over the long term, flexible, and the best possible options in each given domain.[25]

Each indicator is monitored by looking at structures, or what the standards actually st, processes, or how the standards are implemented, and outcomes, or what people actually experience.

Figure 12: *Is Britain Fairer?* Measurement Framework[26]

Education

The capability to be knowledgeable, to understand and reason, and to have the skills and opportunity to participate in the labour market and in society

- Educational attainment of children and young people
- School exclusions, bullying and NEET
- Higher education and lifelong learning

Work

The capability to work in just and favourable conditions, to have the value of your work recognised, even if unpaid, to not be prevented from working and to be free from slavery, forced labour and other forms of exploitation

- Employment
- Earnings
- Occupational segregation
- Forced labour and trafficking*

Living standards

The capability to enjoy a comfortable standard of living, with independence and security, and to be cared for and supported when necessary

- Poverty
- Housing
- Social care

Health

The capability to be healthy, physically and mentally, being free in matters of sexual relationships and reproduction, and having autonomy over care and treatment and being cared for in the final stages of your life

- Health outcomes
- Access to healthcare
- Mental health
- Reproductive and sexual health*
- Palliative and end of life care*

Justice and personal security

The capability to avoid premature mortality, live in security, and knowing you will be protected and treated fairly by the law

- Conditions of detention
- Hate crime, homicides and sexual/ domestic abuse
- Criminal and civil justice
- Restorative justice*
- Reintegration, resettlement and rehabilitation*

Participation

The capability to participate in decision-making and in communities, access services, know your privacy will be respected, and express yourself

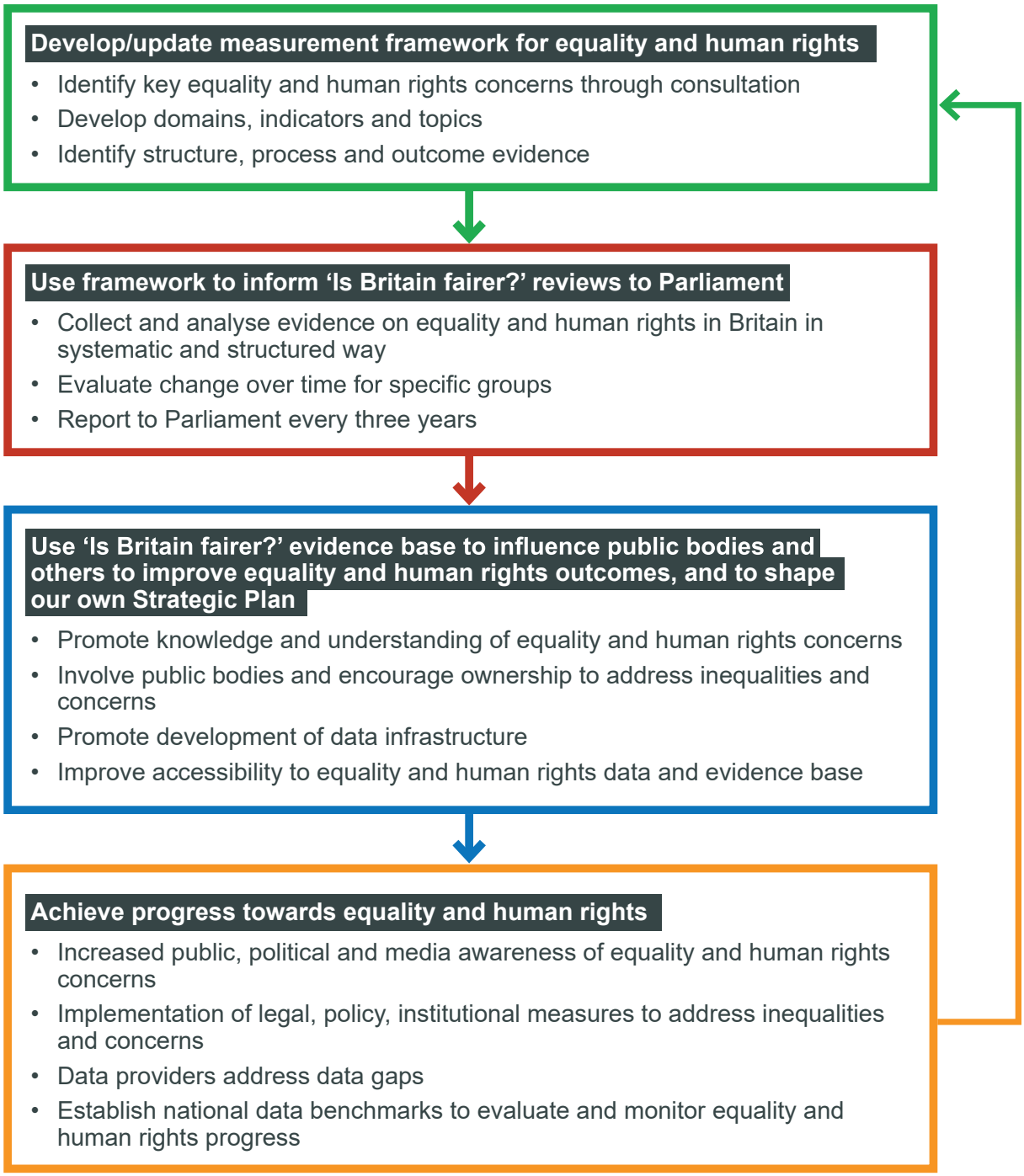
- Political and civic participation and representation
- Access to services
- Privacy and surveillance
- Social and community cohesion*
- Family life*

* Supplementary indicators

The Measurement Framework draws on the best available qualitative and quantitative evidence to examine the structures, processes and outcomes that make up each indicator and incorporates the concepts of 'vulnerability' and 'intersectionality'. This evidence is then disaggregated based on 5 components. These are: protected characteristics (such as age, sex, race and disability), socio-economic group, geographical location, people at higher risk of harm, abuse, discrimination or disadvantage and intersectionality.

Figure 13 outlines the theory of change for the operation of the 'Is Britain Fairer' framework.[27]

Figure 13: Model for change: *Is Britain Fairer?*



The *Is Britain Fairer?* reporting framework adopts a human rights perspective through which to look at equality in Britain. The report and associated data is widely used across parliamentary committees, government departments, statutory bodies and policy makers, economists, statisticians, social researchers and academics, media, charities, third-sector organisations and campaign groups, non-governmental organisations (NGOs) and by National Human Rights Institutions and National Equality Bodies in other countries.

Complementary to this framework, the Equality and Human Rights Commission also publishes a Human Rights Tracking Tool. This is an online tool which catalogues recommendations from UN treaty bodies and the Universal Periodic Review and provides an assessment of progress against them.

(vii) New Zealand initiatives

New Zealand's first Child and Youth Wellbeing Strategy, in 2019, has 6 wellbeing outcomes, and indicators for measuring progress that are embedded into the core work of government agencies.[28] New Zealand is one of the first countries not only to include wellbeing measurement, but to integrate this into its budget and policy-making processes.

It is underpinned by the *Child Poverty Reduction Act 2018* and amendments to the *Children's Act 2014*. Accompanying the Strategy is a Programme of Action, which sets out the Government's policies and actions, including significant new investments from its first 'Wellbeing Budget' in 2019, to help achieve the vision and outcomes.

An annual Child Poverty Budget report, released alongside the May 2020 Budget, provides a summary of the initiatives taken by the Government to reduce child poverty and mitigate the impacts of socio-economic disadvantage.

(viii) Human Rights Measurement Initiative's Rights Tracker

Created by the Human Rights Measurement Initiative (HRMI), the Rights Tracker is a global project to systematically track the human rights performance of countries.[29] The Rights Tracker measures the performance of each country by producing metrics that cover a range of human rights from the ICESCR and ICCPR, and refers to related treaties such as the Convention against Torture, and General Comments of treaty bodies. HRMI is working towards measuring all human rights that are contained in the international human rights framework.

Measurements are quantified in order to track progress and deterioration over time, and the methodologies provide scores that are comparable between countries, and over time.

The Rights Tracker has been developed using 2 different measurement methodologies for economic and social rights, and civil and political rights. There are 5 economic and social human rights metrics, which are constructed from publicly-available data, such as statistics on infant mortality and school enrolment. Measurement methodology shows progress relative to what is feasible for the country's level of economic resources, and examines disparity in rights fulfilment between regions, or between racial, ethnic, gender, and other population sub-groups. There are 8 civil and political human rights metrics, using peer-reviewed methodology to collect information directly from human rights practitioners monitoring the human rights situations in each country.

c) Lessons to be considered when developing indicator frameworks

Critiques of indicator frameworks focus on the nature of power dynamics in the creation of frameworks, the risks of data reductionism, concerns about the validity of data being used, and questions about accountability. These critiques should be considered and addressed when developing a measurement framework for human rights.

Power-based critiques focus on who is involved in the construction of indicators and decisions about what measures are used. Indicator frameworks appear to present technical and objective measures and often fail to highlight the political nature of the decisions behind their construction.

Decisions to include one measure over another or to leave out particular indicators are political decisions. The focus on technical measurement can also disguise how political factors shape the realisation of rights in the first place.[30]

These criticisms highlight the importance of a robust and inclusive consultation process and the transparent use of data and choice of indicators.

Some people have concerns about the use of data in indicator frameworks. A number of these critiques focus on the overwhelming use of quantitative data and question its ability to capture complex social realities. Others have expressed concerns about the validity of the data used to draw conclusions about broader phenomena.

Due to a lack of reliable or comprehensive data, some frameworks use poor proxies for the indicator they are attempting to measure. There must be a strong link between the indicator being measured and the data being used.

Finally, accountability-based critiques explore whether indicator frameworks without accountability mechanisms achieve meaningful results. The expectation is often that the demonstration of poor realisation of rights through an indicator framework will result in considerable changes to law and policy making. Indicator frameworks need to be tied to strong accountability processes to ensure it is not 'business as usual' if results are unsatisfactory. The level of political support will greatly affect the level of effectiveness of any indicator and accountability framework.

These critiques demonstrate the care that must be taken when an indicator-based measurement framework is developed.

There are ways that the concerns expressed can be mitigated. For example, those developing indicators can ensure that participatory and co-design approaches are used in the building of any framework, with particular emphasis on including the voices of the most vulnerable in our community. A mix of qualitative and quantitative data can be used to measure against indicators.

6.6 A National Human Rights Indicator Index

The legal foundations in a Human Rights Act should be complemented by a national set of measurable indicators assessing human rights performance over time.[31]

Translating human rights from standard setting to effective implementation depends heavily on the access to appropriate tools for policy design and evaluation.[32] Indicators are one important tool in this regard. Indicators provide concrete and practical ways to measure the realisation of human rights and track progress on implementation.

Indicator-based measurement frameworks turn complex concepts and standards into tangible and measurable outcomes. They can help law and policy makers more easily to identify where gaps in implementation are occurring and help advocates for human rights to use the language of technical measurement and science to ground their feedback to governments.[33]

(a) The development of a National Human Rights Indicator Index

Recommendation 7: A National Human Rights Indicator Index

The Commission recommends that the Australian Government introduce a National Human Rights Indicator Index that can measure progress on human rights over time.

The Commission recommends that the Government commit to the development of a National Human Rights Indicator Index. The National Human Rights Indicator Index should guide priority setting and measure progress over time. Such an index should be developed by the Commission as an independent statutory agency, in conjunction with data and social policy experts.

Drawing on international examples, such as those discussed above, as key elements the index should:

- have a legislative basis for the production of the index
- be human rights based, including in its development and implementation
- include the work of issue-specific frameworks, without duplication of data collection
- be developed with sufficient engagement with communities and be responsive to the importance of data sovereignty
- take an intersectional approach and ensure it reflects the realities of people from all backgrounds and experiences.

The Indicator Index should be developed in line with the key principles of the capability approach, including:

- the evaluation of substantive freedoms and opportunities
- a positive interpretation of freedom – 'freedom to', not just 'freedom from'
- distinguishing between means and ends
- recognising diversity in people's circumstances, characteristics and goals
- acknowledging the role of structures and processes in enabling or constraining people's capabilities
- recognising the role of individuals as agents, including in defining their own objectives, and being involved in decisions that affect them.

The development of such a framework would be a significant undertaking, involving complex research and consultation across all Australian governments and the community. The Commission considers that a framework would take approximately 3–4 years to fully design and implement.

(b) Overlap with existing frameworks

As outlined above, Australia has a variety of thematic, sector and issues-based national action plans and national frameworks – for example, on closing the gap, protecting Australia's children, eliminating family violence and on disability. The newly introduced Measuring What Matters framework attempts reasonably comprehensively to measure national wellbeing across thematic areas.

These plans and frameworks are significant tools to advance human rights – although they are generally not created or based around human rights considerations.

A National Human Rights Indicator Index should ensure that it avoids duplication with existing frameworks in benchmarking and monitoring human rights, including data collection or reporting requirements.

It would be suitable for a Human Rights Indicator Index to report data collected or utilised by these frameworks.

For it to be comprehensive, the index should measure human rights across all domains, not just those which are not covered by other plans or frameworks. This way, the existing and any subsequent frameworks with a particular issue focus can continue to perform their specific functions while contributing to, and being represented in, the overarching Human Rights Indicator Index. This will avoid duplication and ensure that resources are prioritised appropriately.

6.7 An annual National Human Rights Statement to Parliament

Recommendation 8: A National Human Rights Statement

The Commission recommends that the Australian Government commit to an annual National Human Rights Statement to Parliament.

A National Human Rights Indicator Index will provide the evidence base for the Government to periodically identify priority actions for human rights protection and advancement at the national level. But it will not provide the mechanism through which the Government commits to these priority actions on a regular basis.

Accordingly, the Commission recommends that the Government also introduce a new mechanism by which it announces key human rights priorities on an annual basis through a statement to Parliament.

Such a statement would provide a basis for the Government to:

1. identify its priorities both within Australia and internationally for the protection of human rights
2. report on and celebrate the progress that it has made over the course of each year, as well as reflect on key human rights challenges.

This would mirror the approach currently taken in Parliament with the annual Closing the Gap report and statement, usually done in the early sittings of each calendar year. It identifies the progress made and priorities for closing the gap in terms of Indigenous disadvantage.

Such a statement might appropriately be made to coincide with Human Rights Day in December each year.

The combination of a National Human Rights Indicator Index and a simplified process for the Government to commit to key human rights priorities on a regular basis, would significantly shift the current approach to human rights at the federal level.

It would also play a significant role in building awareness of human rights among the community and form a basis for community debate on human rights.

In addition, the annual statement should report on progress against commitments and priorities announced in previous statements.

(a) A Human Rights Indicator Index and parliamentary statement strengthen accountability in the Human Rights Framework

The Commission envisions the Human Rights Indicator Index and annual parliamentary statement working in conjunction with strengthened parliamentary oversights and transparency of UN treaty body reporting to significantly strengthen the accountability for human rights in Australia.

The suite of accountability measures will enhance transparency and accountability for how governments make decisions in response to Australia's human rights obligations.

It also ensures that different arms of government have responsibility for oversight and realising human rights protection. This would represent a significant shift in the current approach to human rights at the federal level.

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7. Human Rights Education

7.1 Overview

This chapter sets out the Commission's proposed approach to human rights education at the national level. Educative and awareness raising measures are needed across all areas of the proposed National Human Rights Framework set out in this report.

Recommendation 9

A National Human Rights Education Action Plan

The Commission recommends that the Australian Government develop a National Human Rights Education Action Plan, targeted to the Australian Public Service, primary and secondary schools, workplaces and the general community.

7.2 Introduction

Throughout the Free & Equal project, the Commission has emphasised the importance of building 'rights-mindedness' so that there is greater understanding and awareness of human rights.

Such understanding is fundamental if we are to achieve better protection of people's human rights in Australia.

At its simplest, human rights education is about ensuring that people understand human rights concepts, consider the human impact of their actions and decisions on others, and can also have awareness about their own rights and the community expectations of how they will be treated.

Education is needed to support businesses, community organisations, service providers and individuals to understand their obligations under discrimination laws. It is needed for public servants and politicians so that they are aware of the human rights impacts of their actions and decisions. It is needed among the general community so that we treat each other with respect and dignity.

7.3 A priority of a Human Rights Framework – building rights-mindedness

Human rights education aims to improve knowledge, shift attitudes, and change behaviours, ultimately shifting the culture of workplaces, communities and the nation. It is critical to building awareness and understanding of human rights.

In 2009, as noted in **chapter 2**, the National Human Rights Consultative Committee recommended that education be 'the highest priority for improving and promoting human rights in Australia'.[1] The Government subsequently made educative measures the 'centrepiece' of the 2010 *Australia's Human Rights Framework*:

> The Framework encompasses a comprehensive suite of education initiatives to ensure all Australians are able to access information on human rights. This includes the development of human rights education programs for primary and secondary schools, the community and the Commonwealth public sector.[2]

The Commission reiterates the fundamental importance of advancing 'rights-mindedness' through a focused program of human rights education and awareness raising measures as part of a reinvigorated National Human Rights Framework.

7.4 What is human rights education?

The *United Nations Declaration on Human Rights Education and Training*, adopted by the General Assembly on 19 December 2011, states that human rights education encompasses:

- education *about* human rights: what human rights are, why they matter, and how they are protected
- education *through* human rights: education delivered in a way that respects the rights of educators and learners
- education *for* human rights: empowering learners to enjoy and exercise their rights, and to respect and uphold the rights of others.[3]

The *United Nations Declaration on Human Rights Education and Training* (article 7) recognises human rights education as an obligation on state parties.

National Human Rights Institutions (such as the Australian Human Rights Commission) have responsibilities under the Paris Principles to educate about human rights in 'schools, universities and professional circles' as well as to raise public awareness more broadly.[4]

As an independent statutory institution, the Commission has a leadership role to play in developing, delivering, promoting and supporting human rights education in Australia.

a) The World Programme for Human Rights Education

Following the United Nations Decade for Human Rights Education (1995–2004), the UN General Assembly established the World Programme for Human Rights Education on 10 December 2004.

The aims of the World Programme are:

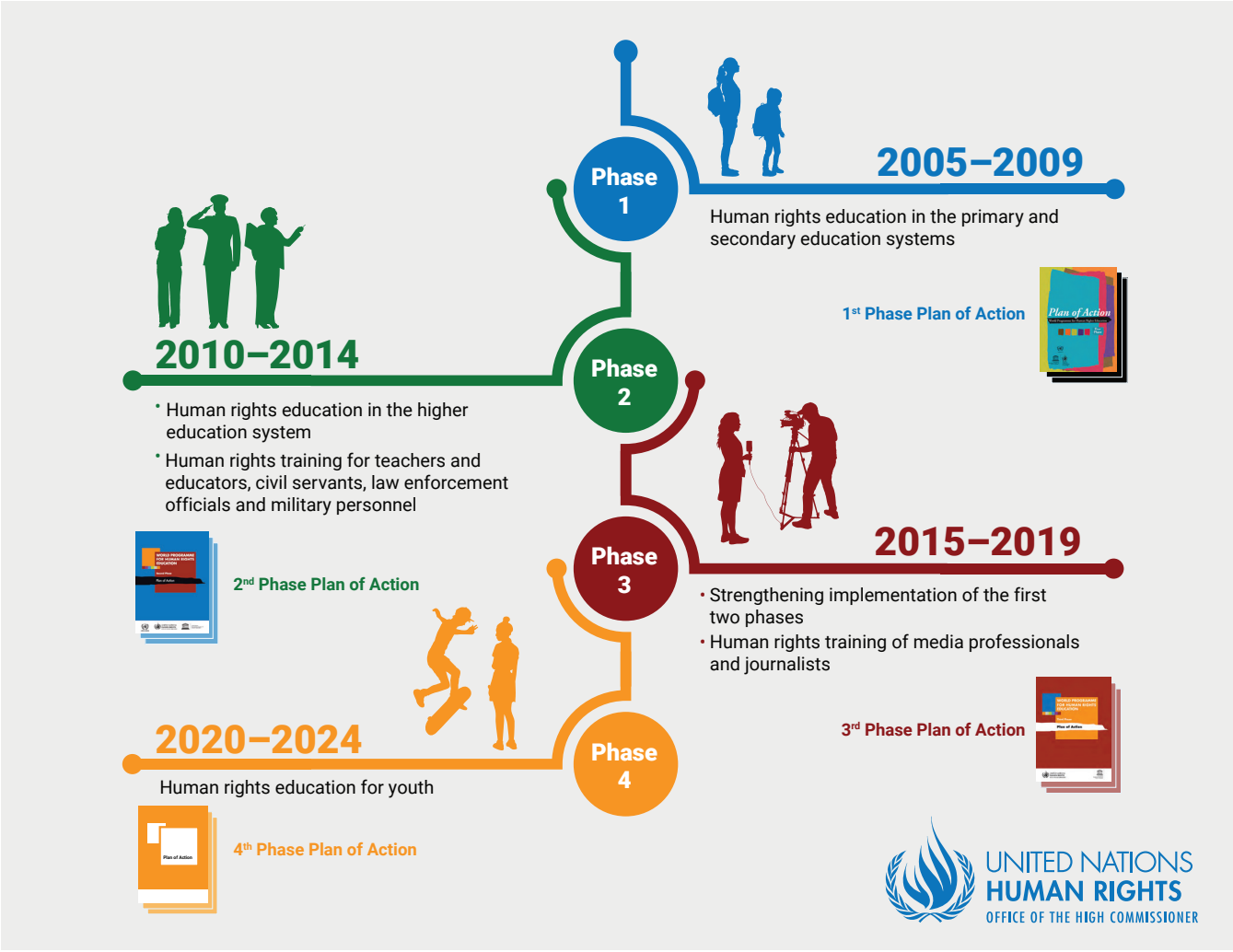
- to promote a common understanding of basic principles and methodologies of human rights education
- to provide a concrete framework for action and
- to strengthen partnerships and cooperation from the international level down to the grass roots.[5]

Structured in 4-year phases, the program is now in its fourth phase, with each phase having a specific focus:

- First phase (2005–2009): primary and secondary school systems
- Second phase (2010–2014): higher education, teachers and educators, civil servants, law enforcement officials, and the military
- Third phase (2015–2019): media professionals and journalists, and consolidation of phases 1 and 2
- Fourth phase: (2020–2024): youth empowerment.

The 4 phases are illustrated in **Figure 14**.[6]

Figure 14: World Programme for Human Rights Education (2005–ongoing)



The recent report on consultations conducted in preparation for the fifth phase of the World Programme for Human Rights Education[7] noted the need to retain the focus on the sectors covered by the 4 phases implemented to date, as well as the need to prioritise marginalised groups and individuals in vulnerable situations. The importance of adopting an intersectional lens was also highlighted.

(b) Audiences for human rights education

Human rights educational literature identifies 3 different audiences for human rights education:

- *rights holders*: those most vulnerable to human rights violations
- *duty bearers*: those most able to defend or violate others' rights
- *influencers*: those most able to influence other's opinions and actions.

A person may potentially fill any one of these positions, however, the dynamics of a particular context tend to determine which position they hold in that situation.[8]

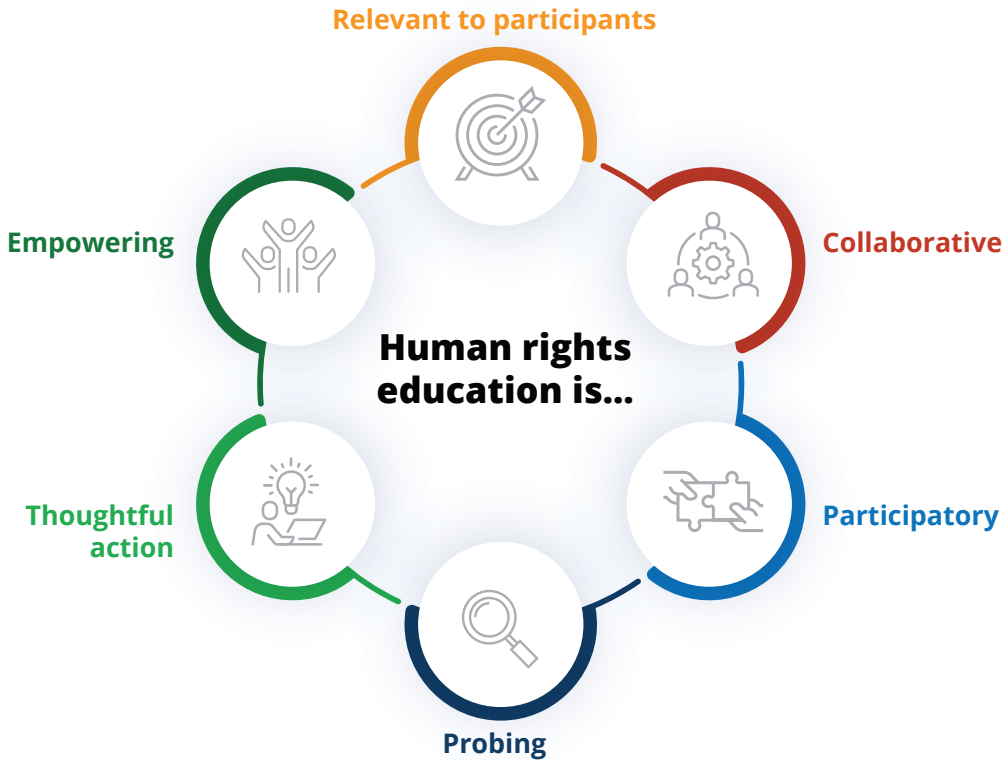
7.5 Principles for human rights education

A number of principles for human rights education have been identified. The Asia-Pacific Forum's *Manual for National Human Rights Institutions on Human Rights Education* (2019) lists the following 6 principles, that human rights education:

- is participant-centred and relevant
- is enhanced by partnerships and collaborations
- acknowledges participants as educators
- deepens knowledge and experience
- recognises that societal change comes from thoughtful action
- is empowering, guided by human rights principles of non-discrimination, equality and inclusion.[9]

The 6 principles are illustrated in **Figure 15**.[10]

Figure 15: The 6 principles of human rights education



a) Good practice in human rights education

The Asia-Pacific Forum's manual identifies the following elements of good practice in human rights education:

- demonstrates human rights principles of equality, human dignity, inclusion and non-discrimination
- uses facilitative and participatory methods, processes and techniques
- is participant-centred
- engages 'hearts, minds and hands'
- is innovative and adaptable to a wide range of learning environments
- is relevant to the physical, emotional, social, intellectual, spiritual and cultural contexts of participants
- respects and is enriched by the diversity of participants
- aims at reflecting on lived experience through a human rights viewpoint
- prioritises the specific challenges and barriers faced by, and the needs and expectations of, people who experience human rights violations because of the situations they live in or how they identify, or how they are identified.
- encourages critical thinking and problem solving
- takes into account wider national and international human rights circumstances, while promoting local initiatives.[11]

Understanding is growing about what makes human rights education effective and impactful. In 2019, the UN Office of the High Commissioner for Human Rights published *From planning to impact: a manual on human rights training methodology*,[12] with detailed practical guidance on the planning, design and delivery of human rights education. Also of note is the 2022 publication *Bridging Our Diversities: A Compendium of Good Practices in Human Rights Education*.[13]

(b) Evaluation practice

Human rights evaluation practice is increasingly becoming more sophisticated in aiming to move beyond immediate changes in individual knowledge, skills or attitudes to assess what impact human rights education has had on individual action, and even what contribution it might have made to systemic or cultural change. This longer-term evaluation can be challenging and resource-intensive.

HRE2020, the Global Coalition for Human Rights Education, has compiled an Indicator Framework (2015)[14] identifying key indicators to monitor and assess the implementation of human rights education and training. This indicator framework considers suitable indicators across human rights education in specific contexts, including in national planning for human rights education.

Human rights education under a new National Human Rights Framework should be accompanied by long term monitoring and evaluation activities, with national indicators to measure how a human rights culture is supported through educational activities.

7.6 Reflections on past experience and on emerging good practice

(a) Human rights education in Australia's Human Rights Framework 2010 – funding for human rights education

As noted in **chapter 2**, Australia's Human Rights Framework 2010 had a strong focus on human rights education. Initiatives funded under the Framework included:

- enhancements to human rights education in primary and secondary schools (coinciding with the introduction of a national curriculum in Australian schools)
- funding to the Australian Human Rights Commission ($6.6 million over 4 years) to expand the Commission's community education role
- a community grants program for non-government organisations to deliver human rights education across Australia
- human rights training for all federal public servants.[15]

For public servants, human rights education was focused on supporting the then newly introduced obligations to develop Statements of Compatibility for new legislation and legislative instruments, as well as to adopt human rights-based approaches in policy design and implementation.

For the community generally, the focus was supporting community initiatives to build greater knowledge and awareness of human rights at the community level.

For school students at the primary and secondary levels, the focus was on including understanding of human rights in curriculum materials to build awareness of human rights as a contribution towards engaged citizenship and the development of respectful behaviours.

For the business community and in workplace settings, human rights awareness was aimed at the prevention of workplace discrimination and

harassment, ensuring suitable internal response mechanisms to complaints of discrimination or harassment, and building employees' confidence to stand up for their rights and respect the rights of others.

(b) The Commission's human rights education under the 2010 Framework

With the funding provided to it, the Commission established a community education team which led its activities under the 2010 Framework. These activities included:

- engaging with the Attorney-General's Department as it developed mandatory human rights training for all federal public servants (as well as fact sheets on human rights to assist with the development of Statements of Compatibility with human rights for legislative proposals)
- engaging with the Australian Curriculum, Assessment and Reporting Authority (ACARA) to consider options for human rights to be reflected in the national school curriculum that was also being introduced at that time
- developing resources for primary and secondary school children and teachers under the national curriculum, as well as resources targeted to early childhood education services and for the vocational education and training system
- developing resources for the business sector, primarily on the operation of federal discrimination law
- research and partnerships with the business community, such as through the Australian Global Compact, to build awareness and understanding of the UN Guiding Principles on Business and Human Rights
- establishing and convening a Human Rights Network for federal public servants – which took the form of regular panel sessions convened in Canberra on contemporary human rights issues and networking events to build relationships across government departments among public servants tasked with undertaking Statements of Compatibility
- undertaking a program of work on violence, harassment and bullying, including the highly successful Back Me Up campaign[16] on countering cyber-bullying
- undertaking community education on human rights through the expansion of the Commission's Face the Facts[17] resources, as well as 2 digital engagement resources: the *Something in Common* website and *Tell Me Something I Don't Know* micro-site.[18]

These resources were unable to be maintained once funding ceased.

(c) Human rights education under the 2010 Framework

The investment in human rights education under the 2010 Framework showed positive results while it lasted. However, without sustained and ongoing resourcing, the initiatives generally lapsed.

For example, human rights were embedded in the history, geography and civics curricula in secondary schools, and have continued to be maintained in subsequent iterations of the national curriculum across a range of learning areas through capabilities such as intercultural understanding, ethical understanding and personal and social capability.[19] However, the dedicated community education team at the Australian Human Rights Commission could not be maintained due to lack of funding, and curriculum-linked resources developed by the Commission for teachers and students fell out of date.

The community grants program allocated funding in 2 grant rounds to 30 community organisations. In its submission to the PJCHR Inquiry,[20] the Attorney-General's Department noted that recipients were based across Australia, including in remote areas; that projects targeted a range of minority groups, and involved a wide range of activities such as the development of web-based resources and educational videos, and delivery of information sessions, self-advocacy training, conferences, interactive games and workshops for children.

Some of the successful projects identified in the Attorney-General's Department submission included:

- human rights education and skills development workshops for Aboriginal women in North-West New South Wales
- an interactive program using the language of sport to teach human rights principles to children and young people
- workshops engaging with individuals, local government and non-government organisations to adopt a human-rights approach to community work in Victoria
- human rights workshops and resources to empower people with a disability from non-English speaking backgrounds, run by the National Ethnic Disability Alliance
- human rights education through multi-lingual story telling for immigrant and refugee women in up to community languages run by the Multicultural Centre for Women's Health.

With only half of the assigned funding allocated, the program was cut with the change of government in 2013.

In the public sector education program, over 20 face-to-face workshops were held in Canberra, with over 700 public sector officials from 35 departments and agencies being trained to understand what human rights are, their origins under international law, and how they inform the work of the public sector.[21] Feedback surveys showed that the training was effective and appropriate, however, the rollout was not continued after the initial training phase.

A key focus for public sector education is ensuring public servants understand their legal obligation to prepare of Statements of Compatibility for all federal legislation and are skilled to develop Statements of Compatibility to a high standard. Education to support the preparation of Statements of Compatibility was developed in e-Learning format and was hosted by the Attorney-General's Department from 2012 to 2015.[22]

The e-Learning module was promoted widely,[23] however no evaluation of its effectiveness appears to have been conducted. Access to the e-Learning module ceased when the contract with the eLearning provider ended.[24]

Despite ongoing legal obligations to develop Statements of Compatibility, there has been limited ongoing support for public servants in this area. Measures to improve the quality of Statements of Compatibility are considered in **chapter 5** of this report.

(d) Human rights education conducted under Victoria's Charter of Human Rights and Responsibilities

With the passage of Victoria's Charter of Human Rights and Responsibilities in 2006, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) took on the role of educating public servants about their responsibilities under the Charter, and of promoting a culture of human rights within state government agencies. The task of building a culture of rights-mindedness was approached seriously, as a long-term program of work against which measurable progress could be made, given sufficient investment.

VEOHRC produced an indicator framework, identifying 6 influences on human rights culture, with a practical roadmap to guide agencies to take action against each of these influences.

These influences are:

- Engaged leadership
- Attitudes and values of employees
- Transparency and accountability
- Community engagement and participation
- Operational capability – knowledge and resourcing
- Systems and processes.[25]

Under each influences is a measure or measures along with an identified data source to allow and assessment of performance under each indicator. This is demonstrated in **Figure 16**.[26]

Figure 16: The human rights culture indicator framework

The human rights culture indicator framework

Victorian Equal Opportunity & Human Rights Commission

	Engaged leadership	Attitudes and values of employees	Transparency and accountability	Community engagement and participation	Operational capability – knowledge and resourcing	Systems and processes
INFLUENCE						
INDICATOR	• Leaders demonstrate their commitment to human rights and the Charter both publicly and within their respective organisations • Discussions on human rights are included at leadership forums (including at business and branch planning forums) • Executive performance review documents include metrics on human rights	• People feel safe to raise issues and call out problems • The organisation is genuinely diverse and inclusive and reflects the communities it serves	• Organisations encourage good human rights practice • Organisations know what they have achieved and what still needs to be done to embed a positive human rights culture • The organisation understands and complies with human rights reporting mechanisms	• Community participation has informed key work and feedback is regularly sought from the community • Improvements and interventions are made based on community feedback • Tools and information are available for the community about their human rights • The organisation has structured and effective processes to ensure accessibility • Complaint mechanisms are available and accessible to the community	• Victorian Public Service staff understand the Charter and how to apply it in their work • Relevant human rights days and achievements are articulated and celebrated • The organisation has dedicated resources (both time and funding) to embed human rights • Champions or influencers of human rights are empowered and resourced	• The Charter is included in legal compliance frameworks • The organisation embeds human rights into key processes and tools • The organisation delivers available, accessible, adaptable, acceptable, inclusive and quality services
MEASURE	• External commitment measured by how often and in what context human rights and the Charter are promoted externally (e.g. whether referenced in every speech, report and web page or just the human rights ones)	• Measure inclusive and diverse culture • Measure attitudes and values with questions: "In my workgroup, human rights are valued" and "People in my workgroup are able to bring up problems and tough issues", available in the People Matter Survey	• Number of organisations completing the Commission's survey to public authorities • Reporting of qualitative case studies of good human rights practice	• Have a process to identify groups in the community to consult with and how often they were consulted on key work and whether feedback is regularly sought from the community • How did the community engagement or participation impact on the decision/policy?	• Measure the percentage of staff completing Charter training programs • Measure engagement with awareness raising activities, such as human rights days celebrated • Measure awareness of the Charter and application to work: "I understand how the Charter of Human Rights and Responsibilities applies to my work" available in People Matter Survey	• Measure whether the Charter is included in legal compliance frameworks • Human rights are embedded into decision-making tools and/or processes, which are used across the organisation and are applied consistently and meaningfully from contracting through to service delivery.

Figure continued over ▶

INFLUENCE	Engaged leadership	Attitudes and values of employees	Transparency and accountability	Community engagement and participation	Operational capability – knowledge and resourcing	Systems and processes
MEASURE (CONTINUED)	• Internal commitment measured by how often and in what context human rights and the Charter are promoted internally (e.g. in leadership forums or executive meetings or via internal staff communication) • Measure whether executives' performance reviews include metrics for embedding a positive culture of human rights	• Measure how examples of behaviours or decisions consistent with human rights and the Charter are shared at team planning forums or significant staff-wide forums	• Measure with question: "My organisation encourages employees to act in ways that are consistent with human rights" available in the People Matter Survey	• Measure whether information about the Charter and human rights is clear and accessible to the public • Measure whether a diverse cross section of the community accesses services • Increased awareness in the community about how to use complaints processes • Measure whether a diverse cross section of the community is using complaints processes • The number of community submissions to the Scrutiny of Acts and Regulations Committee • Reporting of qualitative case studies	• Measure the number of dedicated resources (both time and funding) responsible for embedding positive human rights culture • Human rights and the Charter are embedded in professional development • Measure whether staff performance reviews include metrics for embedding a positive culture of human rights	• Measure human rights breaches in risk management registers • Measure service improvements that stem from complaints (internal or external) • Measure number of investigations undertaken by external independent bodies • Volume of complaints, number of complaints resolved within the specified timeframe and any changes in complaint themes • Reporting of qualitative case studies – constructive stories about the value the Charter has brought – are told regularly and ongoing • Measure whether services are meeting the needs of the communities they serve
DATA SOURCE	• Question in the Commission's survey to public authorities • Community survey/ interviews • Internal data	• Question in the Commission's survey to public authorities • People Matter Survey • Internal data	• Question in the Commission's survey to public authorities • People Matter Survey • Annual reports and corporate material • Internal data	• Question in the Commission's survey to public authorities • Internal data • Community survey/ interviews • Scrutiny of Acts and Regulations Committee reports	• Question in the Commission's survey to public authorities • People Matter Survey • Internal data	• Question in the Commission's survey to public authorities • Internal data • External complaints data • Community survey/ interviews

Training delivered by VEOHRC is tailored to the needs of the public authorities being trained, with case studies being modified to reflect workplace scenarios realistic to the particular audience.[27]

Evaluation of the program to date shows that awareness and understanding of human rights has been building through this effective and targeted human rights education.

For example, in 2019, 866 public sector staff completed one of the VEOHRC's suite of eLearning modules relating to the Charter.[28] More than 90% of users surveyed found the Charter modules assisted with their understanding of the rights protected and their duties under the Charter, and 88% felt the modules helped them understand how and when rights can be limited.[29] In 2022, public sector staff completed 31,649 Charter eLearning modules.[30]

7.7 Emerging good practice

As part of the Free & Equal project, consultations were conducted with the Education and Training Network of the Australian Council of Human Rights Agencies. This network comprises educators across the AHRC and all state and territory human rights and anti-discrimination commissions. These consultations served to expand the understanding presented above of good practice in human rights education, adding nuanced insights into emerging good practice in the field. Elements emerging as central to good practice are described below.

(a) The value of lived experience

Increasingly there is recognition of the value of centring the lived experiences of individuals and communities whose human rights have been breached, or who are most at risk. This applies to educational practice as it does to research and policy development.

Lived experience has power to engage hearts and create attitudinal change.

Learning from lived experience also breaks down the barriers created by siloed service systems and encourages intersectional ways of thinking.

(b) Strengths-based, community-centred and trauma-informed approaches

Centring the lived experience of the people who are most at risk aligns with the strengths-based and community-centred approaches. These approaches can minimise the chances that human rights education will adopt deficit-based accounts of groups who experience significant disadvantage in our society, and in doing so can minimise the risk of further stigmatisation.

Working with communities to develop educational materials is one way to ensure that the materials developed are strengths-based and community-centred. Good practice recommends that, at a minimum, draft materials are reviewed by members of affected communities and focus-tested with the target audiences.

Trauma-informed approaches recognise that education includes a risk of re-traumatisation (for people who have experiences of discrimination or harassment similar to those being described in an educational program) and of vicarious trauma (for people exposed to the traumatic experiences of others, including through written or multimedia accounts of their stories). Trauma-informed approaches remain alive to these risks and aim to prioritise safety, trustworthiness, choice, collaboration and empowerment.[31]

(c) Ensuring accessibility

Accessibility is of critical importance in the delivery of human rights education. Educational materials and approaches must be accessible to all learners, and accessibility must be considered at all stages of planning, development, delivery and evaluation.

Different learner groups will have different accessibility needs. The framework of Universal Design for Learning[32] is a useful approach to achieving accessibility.

Some particular groups and accessibility issues to consider include:

- people with disabilities, and whether education is accessible to the range of assistive technologies they use
- Aboriginal and Torres Strait Islander communities, and the need to consider cultural safety and to tailor materials to meet their needs
- culturally and racially marginalised communities, and the need to tailor materials to meet their needs, which may include developing translated resources
- neurodiverse people, and the need to tailor materials to meet their needs.

Materials are most likely to be accessible and appropriate when they are co-designed with communities. This collaborative engagement process is *necessarily* resource intensive. Adequate funding must be provided, and adequate timeframes allowed.

In planning human rights educational projects, budget line items should be allocated (where relevant) for professional accessibility testing (particularly of digital content) and for the development and focus-testing of translated resources.

Accessibility is a way of ensuring *reach* in human rights education. It is essential to consider ways of maximising reach to different audiences. For example, it is important to maintain an awareness of 'the digital divide', so that in projects that capitalise on the educational opportunities afforded by multimedia approaches, audiences who have limited access to computers or internet will not be overlooked.

Considering the reach of human rights education could also mean considering audiences who are time-poor. Their needs could be accommodated by creating more 'bite-sized' resources such as infographics or micro-eLearnings.

(d) Supporting longevity

A great deal of resourcing goes into the development and initial promotion of new educational materials. However, it is rare that there are sufficient funding and staffing structures in place to permit longevity of resource usage.

This is a serious shortcoming, since there is strong potential to draw ongoing value from already-existing resources.

With sufficient ongoing funding and staffing, human rights educational materials could be regularly reviewed, a system could be put in place to allow relevant legislative changes to be flagged for the attention of educators, updates to resources could be made for currency and improved accessibility. Existing materials could be regularly promoted to the relevant audiences, and community partnerships could be nurtured to allow for the continued uptake and use of materials.

7.8 A national program on Human Rights Education for Australia

Recommendation 9: A National Human Rights Education Action Plan

The Commission recommends that the Australian Government develop a National Human Rights Education Action Plan, targeted to the Australian Public Service, primary and secondary schools, workplaces and the general community.

The Commission recommends that the new national framework on human rights includes a significant focus on human rights education. This is foundational to improving the understanding of human rights nationally, building a culture of rights-mindedness, and in implementing the other elements of this proposed framework.

(a) National Human Rights Education Action Plan

The Commission considers that the Australian Human Rights Commission should coordinate the development of a National Human Rights Education Action Plan, in conjunction with the Attorney-General's Department. The action plan should be developed with input from the community, and from across government to ensure that it builds on existing educative measures (for example, such as those undertaken by the APS Academy, DFAT and the Border Force Academy).

To avoid the limitations of the past, and consistent with guidance from the World Programme on Human Rights Education, this action plan should involve:

- a baseline study to analyse the current situation with regards to human rights education
- the setting of national priorities for human rights education, and a national implementation strategy to deliver on these
- a monitoring and evaluation framework, with indicators.

This action plan should be adequately resourced, including so that it accessible, centres lived experience, and has longevity.

While priority areas for human rights education should be determined through the consultative processes established when setting up the national action plan on human rights education, the Commission has the following preliminary views on potential priority target groups.

(b) Public servants

Human rights education is essential to support public servants in all state institutions to fulfil their role as duty-bearers. Education supports public servants to adopt rights-based approaches in policy design and implementation. As well, (as described above), a sustained program of education is necessary to ensure that Australian public servants meet their obligation to develop Statements of Compatibility for new legislation and legislative instruments.

With the implementation of a Human Rights Act, human rights education would be vital to support public servants' compliance with the Act. As has been demonstrated in Victoria, a Charter provides the basis for public servants to have buy-in to human rights education and training.

(c) Schools

In order to develop a culture of rights-mindedness in Australia, human rights education should start early – in primary school if not pre-school – and continue into high school.

As rights-holders, children need to learn about human rights, including their own special rights under the Convention on the Rights of the Child. Human rights education supports school students to understand the responsibilities associated with rights, develop respectful behaviours and become engaged citizens.

A meta-analysis conducted by the Danish Institute for Human Rights on the effectiveness of human rights education in schools found that human rights education increases individual learners' knowledge, often leads to a positive

change in values and attitudes, and can lead to an increase in 'rights-respecting' behaviours.[33]

Teachers should also be a focus of human rights education in schools. Teachers play a powerful role as influencers, both within the classroom and more broadly within the school community. As educators, they are also in a position to educate *through* human rights, no matter what subject matter they are teaching. Human rights education can emphasise the significance of this aspect of a teacher's role.

(d) Employers and workplaces

As duty-bearers, employers are a key audience for human rights education. Employers need to understand their responsibilities under the law to create safe workplaces free from discrimination, and be guided in effective ways to achieve this.

More broadly, the workplace is an important avenue for human rights and anti-discrimination education. Education can help to prevent workplace discrimination and harassment, ensure suitable internal complaints mechanisms are in place, and build the confidence of employees' (as rights-holders) to stand up for their rights.

(e) Community

Human rights education can empower people to be active participants in our democracy. Education assists individuals to better understand their responsibilities to respect the rights of others. It also helps ensure that individuals are aware of the expectations they can have of duty-bearers (such as their employers or government).

For rights-holders who belong to groups marginalised in society, education is particularly important, to ensure people have the knowledge and tools they need to stand up for their own rights.

The Human Rights Framework proposed in this report aims to build a culture of rights-mindedness in Australia, requiring not only that duty-bearers understand and fulfil their duty to protect and promote human rights, but that rights-holders understand the responsibilities of duty-bearers and know how to hold them to account. Civil society has a role to play in influencing duty-bearers and representing rights holders, and civil society organisations are therefore also a priority for human rights education.

Chapter 7: Endnotes

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8. A sustainable human rights community

8.1 Overview

The chapter outlines that critical to the success of the National Human Rights Framework is a properly resourced and appropriately independent Australian Human Rights Commission and a vibrant and robust civil society.

A sustainable Australian Human Rights Commission will play a central role in the framework and in achieving significant improvements in the protection of human rights in Australia.

An engaged and supported civil society can help to ensure accountability for human rights and embedding a societal culture of human rights.

Recommendation 10

An appropriately resourced AHRC

The Commission recommends that the Australian Government ensure the Australian Human Rights Commission is appropriately and sustainably resourced to perform its functions, including supporting the Human Rights Framework, in accordance with the UN Paris Principles.

Recommendation 11

A robust civil society to protect human rights

The Commission recommends that the Australian Government support measures that invest in and build community capacity to realise human rights and freedoms, including by:

- instituting regular forums for dialogue with the NGO sector on human rights
- providing funding support for NGOs to advance human rights protection
- supporting the independent participation of NGOs in UN human rights processes
- maintaining and re-establishing programs that build capacity and support the participation of Indigenous peoples and persons with disability in UN human rights mechanisms.

Recommendation 12

The role of business in protecting human rights

The Commission recommends that the Australian Government develop a National Action Plan on Business and Human Rights.

8.2 National Human Rights Institutions (NHRIs)

National Human Rights Institutions (NHRIs) such as the Commission, play a critical role in promoting and monitoring the effective implementation of international human rights standards at the national level.

To operate with the necessary level of institutional independence and credibility, NHRIs are rated against the Principles relating to the Status of National Human Rights Institutions (Paris Principles).[1]

(a) Genesis of NHRIs

The genesis of national human rights institutions (NHRIs) is linked to the history of the UN itself.

The UN Commission on Human Rights, the predecessor from 1946 to 2006 of the UN Human Rights Council, has always encouraged such mechanisms. In 1946, the Economic and Social Council (ECOSOC), under which the UN Commission on Human Rights sat, invited Member States:

> … to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission of Human Rights.[2]

In 1978, the UN Commission on Human Rights convened a seminar in Geneva and encouraged the establishment and strengthening of national institutions for the protection and promotion of human rights.[3] At this time, such institutions were understood to be any government agencies or public organisations concerned with human rights, rather than independent institutions with a specific legislative mandate to promote and protect human rights (as NHRIs are now understood).[4]

In 1986, the UN General Assembly resolved to encourage all Member States to establish or, where they already existed, strengthen national institutions for the protection and promotion of human rights.[5] The UN *Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* emphasised 'the importance of developing, in accordance with national legislation, effective national institutions for the protection and promotion of human rights, and of maintaining their independence and integrity'.[6]

(b) Paris Principles relating to the status of NHRIs

Adopted by resolution of the UN General Assembly in 1993, the Paris Principles set out the necessary conditions for a national human rights institution to be considered robust and credible:

- a sufficiently broad mandate to protect and promote human rights
- the necessary independence from government to hold it to account
- the resources to perform its functions appropriately.[7]

NHRIs that meet these standards are accredited as 'A status' and accorded participation rights in UN human rights processes. The existence of an A status NHRI is an international marker of a government's commitment to promoting and protecting human rights, with over 120 nations having such institutions across the globe.

8.3 Australian Human Rights Commission

The Commission is a longstanding, small independent statutory agency, established in 1981 and put on a permanent footing in 1986. The Commission is Australia's NHRI. It is a collegiate body made up of a President and seven Commissioners.

The Commission is established and operates under the *Australian Human Rights Commission Act 1986* (Cth), as well as under federal laws to ensure freedom from discrimination on the basis of age, disability, race, sex, sexual orientation, gender identity or intersex status. The Commission also has specific responsibilities under the *Native Title Act 1993* (Cth) and the *Fair Work Act 2009* (Cth).

The Commission works to promote and protect the human rights of everyone in Australia:

- through advising all arms of government and a range of public and private institutions
- contributing to stronger laws, policy and practice; delivering an accessible and effective investigation and conciliation service
- engaging inclusively with civil society, communities and the private sector
- raising human rights awareness and providing human rights education; and working with partners to build a stronger culture of respect for human rights.

(a) Functions

The Commission's statutory functions include:

- promoting understanding, acceptance and public discussion of human rights in Australia (including through the Commission's special purpose Commissioners)
- improving access to justice for all by investigation into, and attempt to conciliate, complaints of unlawful discrimination, or breaches of human rights or discrimination in employment
- promoting strengthening of, and compliance with, human rights and federal discrimination law (including through the preparation of guidelines, developing and monitoring disability standards, our intervention function and considering applications for exemptions under relevant discrimination laws)
- undertaking research, educational and other programs for promoting human rights, including by reporting to Parliament on the status of enjoyment of human rights by children and Aboriginal and Torres Strait Islander peoples
- conducting inquiries into acts or practices that may be contrary to human rights, report on laws that Parliament should make, or actions that the Commonwealth should take, to meet Australia's international human rights obligations
- examining laws and proposed laws for consistency with human rights.

As Australia's NHRI, the Commission has over 40 years of experience in analysing, applying and promoting international human rights standards in the Australian context. This makes the Commission ideally placed to play a significant role in the implementation of a Human Rights Act; and to undertake various ongoing functions in relation to the Human Rights Act.

(b) Key challenges

The Commission regularly faces funding challenges including:

- For statutory Commissioners to be appropriately resourced to fulfil their mandates.
- For complaint handling under federal discrimination laws and the *Australian Human Rights Commission Act 1986* (Cth) to keep pace with public demand – the Commission's complaint-handling service are currently operating with a significant backlog.
- To undertake community education and awareness raising activities on human rights and discrimination law, and to conduct outreach nationally, including regionally and remotely and among marginalised communities.
- Facing government-wide efficiency dividends and budget savings that disproportionately impact the Commission, as a small agency, over time.
- Facing difficulties in achieving new budget funding on a regular basis, other than for specified project work. This is due in part to the small size of the Commission, meaning budget proposals are too small to be considered through regular budget processes. However, the provision of funding tied to particular activities has the potential to limit the Commission's ability to independently and strategically set its key activities, especially when it becomes dependent on new funding to have sufficient resources to operate.
- Difficulties in accessing funding for corporate support services, such as the regular and timely upgrade of information and communication technology systems.

The Commission is currently facing the following ongoing funding challenges:

- The current core funding for the Commission is well below the level that the Commission has benchmarked as necessary to discharge its statutory functions properly.
- This shortfall of funding is assessed against the Commission's functions and roles as they currently exist under its operating legislation. It does not include estimated funding for new statutory functions or activities as proposed in this report.
- There continues to be a necessity to rely on externally-funded partnerships to fully implement comprehensive work programs for Commissioners.

A sustainable Commission is critical to deliver on the proposed approach to a new National Human Rights Framework, and to achieve significant improvements in the protection of human rights in Australia.

Recommendation 10: An appropriately resourced AHRC

The Commission recommends that the Australian Government resource the Australian Human Rights Commission so that it is appropriately and sustainably resourced to perform its functions, in accordance with the Paris Principles.

(c) Paris Principles and accreditation review 2022

These issues also raise challenges for the Commission in meeting the Paris Principles. The Commission has achieved and maintained its 'A' status since its first assessment in 1999 – despite political controversy and decline and reductions in funding to the Commission over time.

The Commission underwent its latest 5-yearly accreditation review as an 'A status' NHRI in March 2022.

On 29 March 2022, the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA) deferred its review of the Commission for 18 months on the basis of concerns with the operation of the Commission that may not be Paris Principles compliant.

A deferral is an indication that the Commission is at risk of being downgraded to a 'B status' institution without reforms identified by the SCA being addressed.

This deferral was on the basis that the Government's appointment process for Commissioners' appointment process did not comply with the Paris Principles. This was

due to an absence of publicly advertised, merit-based selection processes for all appointments over time. The SCA also put forward a view that in order to promote institutional independence, it would be preferable for the term of office to be limited to one reappointment.

The SCA raised 2 other concerns, although these were not the basis for the deferral: funding and coverage of rights.

The Sub-Committee on Accreditation noted the Commission's funding as an issue of concern. The SCA emphasised that:

> to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.[8]

The SCA encouraged the Commission to continue to advocate for an appropriate level of funding, to ensure the sustainability of the Commission's funding base in carrying out its mandate.

The SCA also noted that *Australian Human Rights Commission Act 1986* (Cth) does not include explicit references to CAT or ICESCR rights.[9]

The Commission interprets its mandate to encompass all human rights and provided examples to the SCA of how it regularly conducts work directly in relation to instruments that are not scheduled to the Commission's legislation.

(i) Reforms to the Commission in response to the 2022 SCA review

On 27 July 2022, the Attorney-General introduced the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022.[10] The Bill was passed on 27 October 2022, amending the *Australian Human Rights Commission Act 1986* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).

The amendments address the SCA's concerns about the rigour of the selection and appointment process, and require that President and Commissioner appointments are made through a merit-based and transparent process that is publicly advertised, and removing the possibility of direct appointments.

The appointment and selection process had previously been conducted in accordance with the Government's Merit and Transparency Policy developed by the Australian Public Service Commission.[11] This process allows for appointments to be made without publicly advertised processes in 'special circumstances'.[12] This did not meet the Paris Principles standard in relation to appointments.

The Government committed to the introduction of a specific appointments guideline for the Commission that does not contain the ability to appoint without merit-based processes in special circumstances.

Those guidelines were finalised by the Attorney-General's Department in September 2023 and are available publicly.[13]

The above amendments also clarified that the President and Commissioners could be appointed for terms totalling 7 years maximum, inclusive of any re-appointments.

(ii) 2023 Accreditation review

The Commission underwent its deferred re-accreditation review on 26 October 2023. The outcome of this review was received on 1 November 2023, with the Commission being re-accredited with A status.

The full findings of the SCA are set out in **Text Box 9**.

Text Box 9: Findings – Accreditation review of Australian Human Rights Commission, October 2023

Australian Human Rights Commission (AHRC)

Recommendation: The SCA recommends that the AHRC be re-accredited with A status.

The SCA acknowledges the advocacy of the AHRC for changes to its selection and appointment process to strengthen compliance with the Paris Principles. The SCA recognises that the Federal Parliament has passed the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022, which amends the AHRC's enabling legislation, to provide that all appointments for commissioners and the President must be publicly advertised and merit-based. The SCA welcomes the supplementary Policy and Guidelines on Appointments to the AHRC which further strengthens the selection process. The SCA notes that these instruments collectively address its previous concerns on the selection and appointment process.

NHRIs that have been accredited A status should take reasonable steps to enhance their effectiveness and independence, in line with the Paris Principles and the recommendations made by the SCA during this review.

The SCA encourages the AHRC to continue to actively engage with the OHCHR, GANHRI, APF, other NHRIs, as well as relevant stakeholders at international, regional, and national levels, in order to continue strengthening its institutional framework and working methods.

The SCA notes:

1. Human Rights Mandate

The SCA notes that the recent amendments to the Australian Human Rights Commission Act (AHRC Act) did not address its recommendation to provide for an explicit reference to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in the mandate of the AHRC.

The SCA notes that despite the lack of explicit reference, the AHRC considers that some rights contained in CAT and ICESCR are covered in the other human rights instruments scheduled to the AHRC Act. The SCA also acknowledges that the AHRC continues to broadly interpret its mandate to encompass all human rights and conducts work directly in relation to instruments that are not scheduled to its legislation.

The SCA notes that the AHRC has conducted research and advocacy on Australia's ratification of OPCAT, conducts immigration detention inspections, handles complaints under the AHRC Act that relate to torture, cruel, inhumane and degrading treatment and reports to Parliament on these matters.

Further, that the AHRC handles discrimination complaints and has conducted advocacy related to economic, social and cultural rights, which has included submissions to the Federal Parliament on welfare reforms, social support for children and Indigenous peoples, exploitation of peoples with disabilities, domestic and sexual violence, and mental health.

Text box continued over ▶

The SCA encourages the AHRC to advocate for the CAT, ICESCR and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to be scheduled to the AHRC Act to ensure all core international human rights instruments and standards are provided for in the

AHRC's mandate. In this context the SCA acknowledges the AHRC's recent advocacy for a national Human Rights Act.

The SCA also encourages the AHRC to continue to advocate for the Federal Government to implement the recommendations of the Commission's Free & Equal project to modernise federal discrimination laws and introduce new human rights protections. Such implementation will further strengthen the Commission's mandate to promote and protect human rights.

The SCA refers to Paris Principles A.1, A.2, and A.3 and to its General Observation 1.2 'Human rights mandate'.

2. Adequate funding

The AHRC received an additional A$38 million (USD 24.08 million) of Federal Government funding in October 2022 over the next 4 years, including A$16 million (USD 10.14 million) for 2 new responsibilities, A$18 million (USD 11.41 million) for core appropriation, and a one-off increase of A$3.6 million (USD 2.28 million), to address a backlog in complaints. This is in addition to a A$16.050 million (USD 10.17million) equity injection from Government in 2022 to restore the Commission's financial stability.

While acknowledging the additional funding the Federal Government has provided to the AHRC to address its financial situation, the SCA notes that, to function effectively, an NHRI must be provided with an appropriate level of ongoing funding in order to guarantee its independence and its ability to freely determine its priorities and activities.

The SCA recommends that the AHRC continue to advocate for an appropriate level of funding to carry out the full breadth of its mandate. Such appropriate level of funding shall ensure sufficient ongoing resources to:

- enable statutory commissioners to fulfil their mandates;
- ensure the timely handling of complaints and inquiries;
- undertake its human rights education and awareness raising functions;
- engage with communities nationally, including in regional and remote areas, and with marginalised groups and communities; and
- ensure sufficient corporate support resources, including for updated ICT infrastructure, to support these functions and outreach.

The SCA refers to Paris Principle B.2 and to its General Observation 1.10 on 'Adequate funding of NHRIs'.

The Commission notes that implementation of recommendation 3 of this Final Report would meet the SCA's first recommendation 'for the CAT, ICESCR and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to be scheduled to the AHRC Act.' The second recommendation of the SCA is consistent with recommendation 10 of this Final Report.

The Commission will be due to report on progress in implementing these recommendations in its next accreditation review in 2028.

8.4 Support for vibrant and robust civil society organisations to protect human rights

(a) Everyone has a role to play

Recommendation 11: A robust civil society to protect human rights

The Commission recommends that the Australian Government support measures that invest in and build community capacity to realise human rights and freedoms, including by:

- **instituting regular forums for dialogue with the NGO sector on human rights**
- **providing funding support for NGOs to advance human rights protection**
- **supporting the independent participation of NGOs in UN human rights processes**
- **maintaining and re-establishing programs that build capacity and support the participation of Indigenous peoples and persons with disability in UN human rights mechanisms.**

In the Issues Paper that commenced the Free & Equal project, the Commission noted that it would seek to identify options to invest in and build community capacity to realise human rights and freedoms.[14]

This recognises that everyone in the community has a role to play in achieving respect for human rights.

The Terms of Reference for the Free & Equal project noted the importance of having in place measures that ensure:

- the community understands human rights and is able to protect them (for themselves and others)
- communities are resilient and a protective factor against human rights violations
- robust institutions exist to promote and protect human rights
- government and the community can work together to fully realise human rights – understanding the respective role of each other.[15]

The various measures identified in the Commission's renewed Human Rights Framework will contribute to these objectives. For example, by ensuring there is broad-based human rights education for the community, through the operation of modernised discrimination laws focused on preventing discriminatory treatment and requiring proactive community approaches to such prevention, and through the data that a National Human Rights Indicator Index would provide to guide public awareness and policy development processes to advance human rights protection.

Consideration should also be given by Government to other measures that will support a vibrant and robust civil society engagement with human rights issues.

(b) 2010 Framework measures – the right direction

The Commission supports measures that related to such engagement in the Australian Human Rights Framework 2010, namely:

- processes for regular dialogue between the government and NGOs on human rights – such as through human rights forums
- funding support for NGOs to conduct activities relating to human rights education and the promotion of human rights.

The Commission also supports further practices that have been implemented by the Government since 2010, including:

- support for the independent participation of NGOs in the UN human rights mechanisms, such as attendance at the UN Human Rights Council and to coordinate domestic engagement on, and participation at the UN, in treaty review processes

- support for disability people's organisations and Indigenous peoples' organisations in UN engagement through dedicated participation programs (such as the existing program for persons with disability that is supported through the Department of Social Services and Australian Human Rights Commission,[16] and which was modelled on a previous program that had applied to indigenous peoples).[17]

Concurrent to the development of the 2010 Framework, the Government committed to the development of a national compact with the third sector, which committed Government and civil society organisations:

> to work together to improve social, cultural, civic, economic and environmental outcomes, building on the strengths of individuals and communities. This collaboration will contribute to improved community wellbeing and a more inclusive Australian society with better quality of life for all.

The National Compact included priorities including:

- protect the sector's right to advocacy irrespective of any funding relationship that might exist
- recognise sector diversity in consultation processes and sector development initiatives.[18]

Whether these priorities have been addressed fully or remain to be implemented is a matter for the NGO sector.

(c) Business and human rights

Recommendation 12: The role of business in protecting human rights

The Commission recommends that the Australian Government develop a National Action Plan on Business and Human Rights.

In 2011, the Australian Government co-sponsored the UN Human Rights Council resolution endorsing the UN Guiding Principles on Business and Human Rights (UNGPs). The Commission welcomes steps the Australian Government has made towards implementation of the UNGPs since the last UPR, including:

- reform of the Australia OECD National Contact Point
- passing the *Modern Slavery Act 2018* (Cth)
- other efforts to combat modern slavery such as the regionally-focused Bali Process.

The Human Rights Council and UN Working Group on Business and Human Rights (WGBHR) have called on States to adopt a National Action Plan on Business and Human Rights (NAP) as a means of implementing the UNGPs within their respective territories and jurisdictions.

The WGBHR has stressed that while legislative and other efforts to eliminate modern slavery are laudable they are not a substitute for full implementation of the UNGPs, including through developing a NAP. In October 2017, the Australian Government decided not to proceed with the development of a NAP.

A NAP would help clarify the expectations on business in relation to respecting human rights in Australia and overseas, highlight the role of government in supporting business, address policy and legal gaps and ensure there is a plan for implementation of the UNGPs that is targeted, transparent, measurable and informed by relevant stakeholders.

Chapter 8: Endnotes

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9. Looking forward: A revitalised National Human Rights Framework to better protect human rights in Australia

9.1 Overview

This chapter outlines how the structural reforms required to establish the National Human Rights Framework will operate to provide significant benefits in realising additional human rights protections for distinct groups in our community in most need of protection.

9.2 Better protecting human rights

The Commission's overarching finding in this Inquiry is that Australia can, and should, do better in protecting human rights.

Our federal system of law, policy and practice needs significant reform and modernisation in order to serve the needs of 21st century Australia.

It is time to put into place appropriate transparency and accountability for human rights at the national level, supported by the tools to rigorously monitor our progress in protecting human rights.

Crucially, we need the right tools to have national conversations about human rights. This is at a time where the fragmentation of media makes such conversations harder than ever to conduct.

That is why the measures proposed in this report focus on large, structural reforms at the national level through the creation of a clearly articulated National Human Rights Framework.

The focus of this report has been on how to reform the federal government's overall approach to human rights protection for the maximum benefit of all people in Australia.

The measures contained in this report are intended to:

- benefit all people in Australia
- ensure government decision making contributes positively to a human-centred world, where reforms will contribute to enabling a better Australia into the future, for example:
  - where technological advances are beneficial to the community

  - where decision making responds to the challenges for sustainable development and environmental concerns
- promote awareness of human rights among the community, and strengthen dialogue about human rights
- centre dialogue about human rights protections within our domestic, democratic institutions – particularly the Parliament
- ensure that there is rigorous evidence about who is experiencing human rights violations in Australia and then focusing action on addressing this
- ensure that no one is left behind: the National Human Rights Framework focuses on ensuring equal enjoyment of rights, tracks progress towards this and seeks to shift focus where this is not the case
- promote a broad-based partnership across government, business, the community sector and general community centering the importance of protecting human rights
- facilitate better compliance with international treaty obligations.

In preparing this report, the Commission has not focused its recommendations on the specific needs of distinct groups in the community.

This is not because of a lack of need for better approaches – whether for Aboriginal and Torres Strait Islander peoples, persons with disability, older persons, children, culturally and racially marginalised communities, women or based on a person's sexuality or gender identity.

There are many additional recommendations that the Commission could have made in relation to these and other affected groups in the community. We do regularly make such recommendations in submissions to the federal Parliament, in reports and in the Commission's engagement with United Nations human rights treaty bodies.

The Commission is confident that the implementation of a new National Human Rights Framework would provide significant benefit in realising additional human rights protections for distinct groups in our community in most need of protection.

It will do so by creating the basis for these conversations to be had within a coherent national framework that is transparent and for which there is genuine accountability for outcomes. This broad human rights approach would also ensure that all Australians can see themselves respected and valued in this Framework.

Text Box 10 provides an example of how the National Human Rights Framework would operate in this manner in relation to Aboriginal and Torres Strait Islander peoples.

Text Box 10: The rights of Aboriginal and Torres Strait Islander peoples under the proposed National Human Rights Framework

1. A national Human Rights Act will provide recognition of the cultural rights of Aboriginal and Torres Strait Islander peoples.
2. The voices of Aboriginal and Torres Strait Islander peoples will matter in decision making about them. The positive duties under the Human Rights Act will hold government to account for this.
3. The Human Rights Act's access to justice duty will improve the fairness and operation of decision making processes that involve Aboriginal and Torres Strait Islander peoples.
4. The impact of laws, policies and programs on Aboriginal and Torres Strait Islander peoples will be better considered, with reference to the right to self-determination and the rights as set out in the United Nations Declaration on the Rights of Indigenous Peoples.
5. There will be remedies for Aboriginal and Torres Strait Islander peoples where their rights are breached by the Australian Government.
6. Federal discrimination laws will be more accessible to Aboriginal and Torres Strait Islander peoples, by simplifying their operation, reducing costs barriers, and shifting the focus of the laws to proactively preventing discrimination in the first place.
7. Reform to the Racial Discrimination Act will better support the implementation of special measures to address inequality experienced by Aboriginal and Torres Strait Islander peoples (by building confidence to undertake such measures and by ensuring that such measures are truly beneficial and do not negatively discriminate against Aboriginal and Torres Strait Islander peoples).
8. Federal discrimination laws will better recognise the intersectional experiences of Aboriginal and Torres Strait Islander peoples and the multiple bases of discrimination that is experienced.
9. There will be pathways for direct dialogue between Aboriginal and Torres Strait Islander peoples and the Parliamentary Joint Committee on Human Rights at the stage that draft legislation is scrutinised for its human rights compliance.
10. Parliament's oversight of how Australia implements its human rights obligations will create better scrutiny and avenues for dialogue with Aboriginal and Torres Strait Islander peoples about measures to protect their rights. This will be reflected in greater accountability for action in implementing obligations under human rights treaties, as identified through periodic reviews of progress.
11. Human rights indicators will identify progress, or lack thereof, in addressing human rights issues facing Aboriginal and Torres Strait Islander peoples. Independent reporting will hold government to account for its progress on a regular basis.
12. Data from the National Human Rights Indicator Index will be available to Aboriginal and Torres Strait Islander peoples to support their advocacy for better protection of human rights.
13. There will be broad-based community awareness and understanding of human rights right across the community. This will include better understanding of the experiences of Aboriginal and Torres Strait Islander peoples and their unique cultural contribution to Australia.
14. Better understanding of human rights and discrimination among law enforcement, media, government, service providers and others who interact with Aboriginal and Torres Strait Islander peoples will contribute to greater respect and dignity of treatment.
15. An Australian Human Rights Commission that is properly resourced with enhanced scrutiny and regulatory functions will be better placed to engage with Aboriginal and Torres Strait Islander communities and highlight the human rights issues faced within these communities.
16. The community sector will be better equipped to promote the protection of human rights of Aboriginal and Torres Strait Islander peoples.

We live in increasingly uncertain times, where:

- global challenges to democracy and the rule of law are real
- a largely unregulated online media industry has not come to terms with how to address misinformation and disinformation
- new technologies have capabilities never before dreamed of, and which are beyond the scope of existing regulatory approaches to ensure that they operate for the benefit of humanity
- the challenges of climate change are impacting more substantially and more regularly, and in increasingly severe ways.

Ultimately, the reforms proposed in this report will contribute to a better quality of life for all Australians.

They will embed safeguards for people's human rights, ensuring that dignity and respect are at the centre of government actions and decision making.

The Commission anticipates that a new National Human Rights Framework will achieve benefits across the community, as well as at the individual level.

It will assist in embedding participatory approaches to policy design and service delivery, such as through various national frameworks: with better targeted programs and an increased focus on localised, community led initiatives. This should contribute to better outcomes in key indicators of wellbeing, such as increased participation in education and employment, and a reduction in rates of violence.

At a more individual level, mechanisms such as a Human Rights Act will improve protections in aged care and disability care settings.

Examples from the operation of Human Rights Acts in other countries shows improvements to people's daily lives in settings relating to important personal issues such as access to religious observance, the quality of food and care, and the circumstances in which family visits can occur.

Positive duties in discrimination law and a Human Rights Act will also ensure, amongst other things, that persons with a disability are able to participate in key decisions in their lives (through requirements to ensure supported, rather than substitute, decision making). The legal protections proposed in this national framework should filter through the decision making of key agencies such as the NDIA and NDIS Quality and Safeguarding Commission, resulting in better tailoring of services and supports to assist persons with a disability to live independently, be supported into education and employment pathways, and to be safe from violence and mistreatment.

And the measures proposed should also have a material impact on those most vulnerable in the Australian community.

If we look to the situation of asylum seekers and refugees, there are a multitude of areas where a human rights lens to decision making could result in significant improvements. For example, in considering whether:

- asylum seekers are able to live in the community while their claims for protection are assessed
- asylum seekers without a visa should be held in immigration detention beyond a brief initial period to document their entry and identity, assess their health and determine any security risks (as is standard in many countries globally)
- people who have a visa refused or cancelled are held in immigration detention as a matter of course – any administrative detention based on risk to the community is justified based on accurate and validated risk assessment processes that are open to review
- people on bridging visas have the right to work, the right to access the public health system and the right to an adequate standard of living
- people recognised as refugees have timely access to opportunities for family reunion
- children should ever, under any circumstances, be held in immigration detention centres/facilities.

As the Commission noted in the Position Paper on a Human Rights Act for Australia, the introduction of the proposed Human Rights Act would mean that the following are protected in our federal laws:

- assurance of fairness in government, legal and administrative decisions that affect rights
- priority given to respecting and protecting human life
- freedom to speak, create, protest, travel and organise
- freedom to live in accordance with your own beliefs, values and ideals
- freedom to make personal choices without interference, coercion or surveillance, including medical decisions and decisions about your family life
- protections against cruel treatment, arbitrary detention, and unjust court processes
- recognition of the essential standards required for a dignified life – including the provision of access to basic healthcare, housing, education and work; and protections against homelessness, hunger and poor working conditions
- assurance of equal treatment and respect, regardless of your sex, gender, sexual identity, disability, age, nationality, race or religion
- embedding of support to ensure the full autonomy of people with disabilities
- recognition and respect for the self-determination of First Nations peoples
- ensuring that the best interests of children are prioritised in decisions that affect them
- opportunities for disadvantaged, disenfranchised and vulnerable people and groups to participate more fully in the democratic process.

These are protections worth fighting for.

The time has come for Australia to revitalise its National Human Rights Framework, for the benefit of all people in Australia.

Appendix 1: Recommendations of the National Human Rights Consultation Committee report

A1.1 NHRCC report recommendations[1]

Recommendation 1

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

Recommendation 2

The Committee recommends as follows:

- that the Federal Government develop a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally
- that human rights education be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights
- that the Federal Government publish a readily comprehensible list of Australian rights and responsibilities that can be translated into various community languages
- that any education and awareness campaign incorporate the experiences of Indigenous Australians—with a particular focus on recent and historical examples of human rights concerns
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national plan for human rights education.

Recommendation 3

The Committee recommends that its proposed readily comprehensible list of Australian rights and responsibilities include commitments such as the responsibility:

- to respect the rights of others to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable
- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

A1.2 Human rights in policy and legislation

Recommendation 4

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas: – anti-discrimination legislation, policies and practices – national security legislation, policies and practices – immigration legislation, policies and practices – policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

Recommendation 5

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced.

The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within 2 years of the publication of the interim list.

Recommendation 6

The Committee recommends that a Statement of Compatibility be required for all bills introduced into the Federal Parliament, all bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth).

The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

Recommendation 7

The Committee recommends that a Joint Committee on Human Rights be established to review all bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

A1.3 Human rights in practice

Recommendation 8

The Committee recommends as follows:

- that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia's international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally
- that the Federal Government nominate a Minister responsible for implementation and oversight of the framework and for annual reporting to parliament on the operation of the framework.

Recommendation 9

The Committee recommends that the Federal Government incorporate human rights compliance in the Australian Public Service Values and Code of Conduct.

Recommendation 10

The Committee recommends that the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports.

Recommendation 11

The Committee recommends that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making.

Recommendation 12

The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

Recommendation 13

The Committee recommends that the functions of the Australian Human Rights Commission be augmented to include the following:

- to expand the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth) to include the following instruments: – the International Covenant on Civil and Political Rights – the International Covenant on Economic, Social and Cultural Rights – the Convention on the Elimination of All Forms of Racial Discrimination – the Convention on the Elimination of All Forms of Discrimination against Women – the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment – the Convention on the Rights of the Child – the Convention on the Rights of Persons with Disabilities – the Declaration on the Rights of Indigenous Peoples
- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia's human rights obligations
- to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia's human rights obligations
- to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed. The Federal Government should be required to table a response to any Australian Human Rights Commission report on complaints within 6 months of receiving that report.

Recommendation 14

The Committee recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

Recommendation 15

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

Recommendation 16

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

A1.4 A Human Rights Act

Recommendation 17

The Committee recommends that the Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

Recommendation 18

The Committee recommends that Australia adopt a federal Human Rights Act.

Recommendation 19

The Committee recommends that any federal Human Rights Act be based on the 'dialogue' model.

Recommendation 20

The Committee recommends that any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities—including federal Ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.

Recommendation 21

The Committee recommends that any federal Human Rights Act protect the rights of all people in Australia and all people who are overseas but subject to Australian jurisdiction.

Recommendation 22

The Committee recommends that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission. Priority should be given to the following:

- the right to an adequate standard of living – including adequate food, clothing and housing
- the right to the enjoyment of the highest attainable standard of physical and mental health
- the right to education.

Recommendation 23

The Committee recommends that a limitation clause for derogable civil and political rights, similar to that contained in the Australian Capital Territory and Victorian human rights legislation, be included in any federal Human Rights Act.

Recommendation 24

The Committee recommends that the following non-derogable civil and political rights be included in any federal Human Rights Act, without limitation:

- *The right to life*. Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence.
- *Protection from torture and cruel, inhuman or degrading treatment*. A person must not be
  - subjected to torture

  or
  - treated or punished in a cruel, inhuman or degrading way

  or
  - subjected to medical or scientific experimentation without his or her full, free and informed consent.
- *Freedom from slavery or servitude*. A person must not be held in slavery or servitude.
- *Retrospective criminal laws*.
  (a) A person must not be found guilty of a criminal offence as a result of conduct that was not a criminal offence when the conduct was engaged in.
  (b) A penalty imposed on a person for a criminal offence must not be greater than the penalty that applied to the offence when it was committed.
  (c) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, the reduced penalty should be imposed.
  (d) Nothing in the foregoing affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time the act or omission occurred.
- *Freedom from imprisonment for inability to fulfil a contractual obligation*. A person must not be imprisoned solely on the ground of inability to fulfil a contractual obligation.
- *Freedom from coercion or restraint in relation to religion and belief*. No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

The right to a fair trial should also not be limited.

Recommendation 25

The Committee recommends that the following additional civil and political rights be included in any federal Human Rights Act:

- the right to freedom from forced work
- the right to freedom of movement
- the right to privacy and reputation
- the right to vote
- the right to freedom of thought, conscience and belief
- freedom to manifest one's religion or beliefs
- the right to freedom of expression
- the right to peaceful assembly
- the right to freedom of association
- the right to marry and found a family
- the right of children to be protected by family, society and the State
- the right to take part in public life
- the right to property
- the right to liberty and security of person
- the right to humane treatment when deprived of one's liberty
- the right to due process in criminal proceedings
- the right not to be tried or punished more than once
- the right to be compensated for wrongful conviction.

Recommendation 26

The Committee recommends that any federal Human Rights Act require Statements of Compatibility to be tabled for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the Legislative Instruments Act 2003.

Recommendation 27

The Committee recommends that any federal Human Rights Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act.

Recommendation 28

The Committee recommends that any federal Human Rights Act contain an interpretative provision that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation. The interpretative provision should not apply in relation to economic, social and cultural rights.

Recommendation 29

The Committee recommends that any federal Human Rights Act extend only to the High Court the power to make a declaration of incompatibility. (Should this recommendation prove impractical, the Committee recommends alternatively that any federal Human Rights Act not extend to courts the formal power to make a declaration of incompatibility.)

Recommendation 30

The Committee recommends that any federal Human Rights Act require Commonwealth public authorities to act in a manner compatible with human rights (other than economic and social rights) and to give proper consideration to relevant human rights (including economic and social rights) when making decisions.

Recommendation 31

The Committee recommends that under any federal Human Rights Act an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies—including damages, as is the case under the UK Human Rights Act. The independent cause of action should not be available in relation to economic, social and cultural rights.

Appendix 1: Endnote

1. For an online version of the report see: <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.

Appendix 2: Summary – Model Human Rights Act for Australia

1. The HRA should be a 'dialogue' model

- A positive duty on the Executive ('public authorities') to consider human rights and act compatibly with human rights
- Parliament required to consider human rights in the HRA when making and debating laws, through existing parliamentary scrutiny measures
- The judiciary required to interpret laws in a way that is compatible with the Human Rights Act where it is reasonably possible to do in light of Parliament's intention. The judiciary would also review the executive's compliance with the positive duty in relation to particular decisions and issue remedies for breaches of the Human Rights Act.
- When a court, in the course of making a judgment, has found a parliamentary intention to override human rights contained in the HRA, the Attorney-General should be required to trigger a process for reviewing the law in question.

2. The HRA should primarily incorporates rights derived from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Commission's proposed Human Rights Act includes the following rights:

- Recognition and equality before the law; and freedom from discrimination
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Protection of children
- Protection of families
- Privacy and reputation
- Freedom of movement
- Freedom of thought, conscience, religion and belief
- Peaceful assembly and freedom of association
- Freedom of expression
- Taking part in public life
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings
- Compensation for wrongful conviction
- Right not to be tried or punished more than once
- Retrospective criminal laws
- Freedom from forced work
- Cultural rights

- Cultural rights – First Nations peoples
- Right to education
- Right to health
- Right to an adequate standard of living
- Right to a healthy environment
- Right to work and other work-related rights
- Right to social security.

The Commission's proposal also includes the following cross-cutting procedural duties:

- Participation duty
- First Nations peoples (embedding UNDRIP principles)
- Children (embedding CRC principles)
- Persons with disability (embedding CRPD principles)
- Equal access to justice duty.

3. The HRA should reflect key rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP should be reflected in the following manner, subject to further consultations with First Nations peoples:

- A 'participation duty' applicable to the executive, to reflect principles of self-determination through practical measures by public authorities, to complement a Voice to Parliament mechanism.
- The inclusion of cultural rights, non-discrimination rights and ICESCR rights, alongside the participation duty. These should be included with a standalone cause of action, and representative standing.
- First Nations participation reflected in parliamentary scrutiny processes through the requirement to list in Statements of Compatibility steps taken to ensure that participation of First Nations peoples has occurred
- A clause enabling human rights in the Human Rights Act to be interpreted in light of UNDRIP in cases where the rights of First Nations peoples have been affected.
- The right to self-determination articulated in a preamble to the Human Rights Act as an overarching principle of the instrument.

4. There should be a positive duty on public authorities

- A Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act and to give proper consideration to human rights when making decisions.
- Public authorities would also be required to engage in participation processes where the 'participation duty' is relevant, as part of the 'proper consideration' limb (see below)
- Compliance with the positive duty would be reviewable by courts.

5. The scope of public authorities should include core executive bodies and contractors/entities providing public services

- The scope of public authorities with obligations to comply with the positive duty should include 'core' executive bodies, such as government departments, agencies and offices, and the police.
- It should also include 'functional' public authorities, which are private businesses, non-government organisations and contractors that have functions of a public nature and are exercising those functions on behalf of government. This would include, for example, Medicare funded healthcare services.
- Not included in the scope of public authorities are the Parliament of Australia, except when acting in an administrative capacity; the courts, except when acting in an administrative capacity and where the Human Rights Act applies to the court's own procedures; and entities declared by Human Rights Act regulations not to be a public authority.
- The Commission also proposes including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act.

6. The positive duty should be implemented alongside a comprehensive education and training program for public authorities

- There should be a transition period pre-introduction (1 year) to develop proficiency within the public service.
- HRA implementation should include an initial whole-of-government education program, followed by permanent routine educational requirements at all levels of government.
- There should be permanent, dedicated internal departmental teams with human rights expertise and responsibility for consultation and education on Human Rights Act matters; the development and implementation of human rights action plans by federal departments and agencies; the development of tailored guidelines, checklists and resources; and respect for human rights included within public sector codes of conduct.
- The Commission considers that it would have a central role in providing tailored and general education to public authorities, and would require dedicated ongoing resourcing to do so.

7. The HRA should include key procedural duties – a 'participation duty' and an 'access to justice' duty. It should also account for technological decision-making

Participation duty

- There should be an overarching 'participation duty' be introduced into a Human Rights Act. The participation duty would primarily operate as an aspect of the binding positive duty on public authorities. It would also apply to proponents of legislation in a non-binding respect, reflected in Statements of Compatibility and assessed by the PJCHR
- International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would require public authorities to ensure the participation of these 3 groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights in the HRA.

- The Commission has developed a set of guidelines that encompass key considerations for determining the quality of a general participation process. Such objective criteria can be applied by the courts when determining whether the Human Rights Act was breached due to failure to consult in relation to particular right(s).
- As with substantive rights in the Human Rights Act, the participation duty could be justifiably limited through the application of the limitations clause.

Equal access to justice duty

- In addition to an overarching participation duty, the Commission proposes a complementary 'equal access to justice duty' for public authorities
- This duty would mean that public authorities have a positive duty to realise access to justice principles – that is, to meet minimum requirements associated with the right to a fair hearing, overlayed by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law
- It would be the role of public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.
- The duty may arise as part of a consideration of whether related Human Rights Act rights were breached by public authorities due to a failure to implement minimum justice guarantees.

Technology and decision-making

- Increasingly, public authorities are utilising technology, such as artificial intelligence, when making decisions, including decisions that directly affect people's rights.
- The same procedural fairness principles and rights consideration apply to all decisions made by public authorities, regardless of how the decision is made

8. The HRA should apply to all within Australia's federal jurisdiction

- The HRA should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination
- This includes individuals under Australia's 'effective control' overseas
- A federal Human Rights Act should be restricted in scope to federal laws and federal public authorities.
- States that do not have an HRA could be encouraged to adopt a HRA that mirrors the federal HRA

9. The HRA should provide guidance about how rights in the HRA should be interpreted

- The Human Rights Act should include a clause that references the seven core treaties that Australia has ratified and requires the rights in the Human Rights Act to be interpreted in light of those treaties.

10. The HRA should provide guidance to courts about how they should interpret legislation in light of the human rights contained within the HRA.

- The interpretive clause should provide that courts are to prefer an interpretation that is compatible with human rights, provided that this is consistent with the intention of Parliament, as expressed through the statute under analysis.
- The Commission's approach to the interpretive clause is designed to chart a middle ground between a constitutionally suspect approach that would grant too much interpretive power to the courts to alter the meaning of legislation; and an approach that would simply be akin to the existing common law principle of legality.
- The following wording is recommended: 'All primary and subordinate Commonwealth legislation to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.'
- The clause should also clarify that courts cannot declare that Acts of Parliament are invalid on the ground that they are incompatible with human rights. However, a statutory instrument that is not compatible with human rights may be invalid if it goes beyond what is authorised by the empowering Act.

11. The HRA should include a limitations clause describing the circumstances in which human rights may be permissibly limited

- The limitations clause should be based on the 'proportionality' test that is strongly established in international law and applicable to human rights instruments.
- A clause of this kind should incorporate an overarching statement to the effect that the rights and freedoms contained in the Human Rights Act may be subject only to such reasonable limits as are prescribed by law and can be demonstrably justified in a free and democratic society.
- When deciding whether a limit is reasonable and justifiable, the following factors are relevant:
  - whether the limitation is in pursuit of a legitimate purpose
  - the relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
  - the extent of the interference with the human right
  - whether there are any less restrictive and reasonably available means to achieve the purpose
  - whether there are safeguards or controls over the means adopted to achieve the purpose.
- The limitations clause should prescribe that absolute rights such as freedom from torture and freedom from forced work must not be subject to any limitations.
- The limitations clause should include examples that highlight the minimum core of certain ICESCR rights.

12. The HRA should include a mechanisms to provide notification to Parliament regarding incompatible laws

- State and territory HRAs provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights though applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI). In light of Constitutional concerns, the Commission does not propose incorporating a formal DOI power for the courts to apply and instead suggests an alternative approach.
- In the course of applying the interpretive clause in the HRA, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the HRA or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the HRA, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.
- When a court has found a parliamentary intention to override human rights contained in the HRA, the Attorney-General should be required to trigger a process for reviewing the law in question. This will require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act. It will not require a formal DOI to be issued by the court to Parliament.

13. The HRA should include a standalone cause of action for all rights and flexible remedies

- Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to a standalone cause of action.
- The HRA should also allow for HRA rights to be raised in the context of another legal proceeding
- The Commission proposes that the Human Rights Act give courts discretion over the range of remedies available, noting the range of different kinds of human rights claims and the importance of flexibility. Available remedies may include injunctions, orders requiring action, monetary damages and the setting aside of administrative decisions.

14. The HRA should allow a person to make a human rights complaint to the Commission

- The Human Rights Act complaint system should mirror the discrimination law jurisdiction. This would mean that there would be requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then make an application to a court for adjudication.
- The same processes that currently exist for unlawful discrimination matters would apply in the human rights context (including all the termination grounds, and representative complaints processes).
- The Commission also proposes one additional termination ground. This would enable a claim to be fast tracked to the court where there is an imminent risk of irreparable harm, to circumvent the complaint process when there is urgency.

15. An HRA should apply in the context of administrative law

- Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could have an impact on those mechanisms by supplementing existing bases for challenging government decisions.
- If human rights (either consideration of, or substantive compliance with) were a requirement for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider those human rights issues again independently.
- A person who considers that a statutory decision maker did not give proper consideration to a relevant human right, as required by a Human Rights Act, could seek judicial review of the decision through the courts. Principles of administrative law, and administrative remedies should apply as usual to decisions that require adherence to the HRA.

16. There should be representative standing under the HRA

- Standing under the HRA should be afforded to individuals who claim that their human rights were breached by public authorities, and organisations or entities acting in the interest of a person, group or class affected by human rights breaches (representative standing).
- An additional means of enhancing access to justice is to include protections against adverse cost orders.

17. The HRA should be subject to periodic reviews

- The Human Rights Act should include a provision for a periodic statutory review process within a set timeframe. The Commission proposes that an initial review be undertaken at the 5-year mark, with the timeline for subsequent reviews assessed at that stage.

18. Existing Parliamentary scrutiny mechanisms should be improved alongside the introduction of an HRA

The operation and effectiveness of parliamentary scrutiny of laws for compatibility with human rights should be improved through the following measures:

- Amendments to House and Senate Standing Orders similar to that in the ACT would assist the PJCHR process to ensure that legislation would not be passed prior to the Committee's final report.
- If a Bill proceeded to be enacted by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.
- Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended, along the lines of the power of the UK Human Rights Committee, to allow it to 'make special reports on any human rights issues which it may think fit to bring to the notice of Parliament' (but excluding consideration of individual cases).
- The resourcing of the PJCHR should be increased to enable it to perform the wider inquiry role.
- Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to require Statements of Compatibility for all legislative instruments.
- The range of matters to be addressed in a Statement of Compatibility should include consideration of consultations undertaken in accordance with the participation duty.

- Statements of Compatibility should include consideration of compliance with UNDRIP.
- With the introduction of a Human Rights Act, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) could be amended, or an accompanying legislative instrument drafted to provide greater clarity on expectations in Statements of Compatibility, both in regard to rights and freedoms set out in the Human Rights Act and the remaining obligations under international treaties not expressly included in the Human Rights Act.
- A public sector human rights education program be introduced, to provide training and resources to public servants to understand and analyse human rights.
- Consideration should be given to having designated human rights advisers in Departments.

19. The Commission should be granted additional powers to enable education measures and compliance with the HRA

In addition to complaints powers, the should have the following specific functions in relation to a HRA:

- Reporting, reviews and oversight. This would include powers to conduct own-motion systemic inquiries; and to review the policies and practices of public authorities
- Annual reporting.
- Extension of existing intervention powers to enable the Commission to intervene in court or tribunal proceedings involving the interpretation or application of the HRA.
- Education and public awareness.
- Public sector training and guidance.
- The Commission must also be equipped with the necessary tools and resources to protect and promote human rights in line with the Paris Principles.

FREE+EQUAL
AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

Australian Human Rights Commission

National Human Rights Framework

OBJECTIVES

- Set national priorities
- Benchmark and review progress
- Educate the community about their rights
- Protect human rights in law, policy and practice
- Hold government to account
- Ensure transparency in decision making about human rights

PILLARS

1

Ensure comprehensive and effective protection of human rights in legislation, through establishing a Human Rights Act.

2

Modernise federal discrimination law.

Phase 1: Address long standing problems.

Phase 2: Introduce a new coregulatory approach to shift to a preventative model.

3

Enhance the role of Parliament in protecting human rights.

Reforms to parliamentary scrutiny.

Improve parliamentary oversight of Australian human rights obligations.

4

Development of a national human rights indicator index.

5

Annual Human Rights Statement to Parliament.

FOUNDATIONS

Human rights education for:
- **public service**
- **schools**
- **workplaces**
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