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NSWCCL SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

1 July 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights (**Committee**) Inquiry into Australia's Human Rights Framework.

1 Introduction

1.1 The NSWCCL fundamentally supports enhanced and enforceable protections for human rights in Australia. The NSWCCL is a member of the Charter of Rights (**Charter**) campaign coalition, an alliance of 90 organisations across the Australian community and endorses the Charter campaign submission to this Inquiry.

1.2 Ideally, the most robust protections would be provided by a constitutionally entrenched Bill of Rights for Australia. Constitutional entrenchment would guard the rights against attack from opponents when governments change, and affirm in Australia's foundational legal document the importance of human rights to our democratic system of government.

1.3 Short of a constitutionally entrenched Bill of Rights, the NSWCCL supports the introduction of a federal Human Rights Act which protects human rights and provides enforceable remedies for each contravention. Crucially, an enhanced human rights framework will:

a. protect equality before the law;

b. reinforce freedom from discrimination;

c. support humane treatment of those deprived of liberty;

d. protect cultural rights;

e. protect those who are vulnerable and belong to minority groups; and

f. preserve the right to life, liberty, security of person, social security, education, health and an adequate standard of living for all Australians.

1.4 This submission will address the shortcomings of Australia's existing human rights framework across the following areas:

a. Australia's current 'patchwork' of human rights legislation, which offers limited protection through a number of legal instruments, including the Constitution, various Acts and the common law;

b. inadequate enforcement, focusing most closely on the Australian Human Rights Commission (**AHRC**), which has no power to enforce remedies in relation to individuals subject to human rights abuses; and

c. insufficient parliamentary oversight, in particular focusing on the regrettable ineffectiveness of the Committee in ensuring compliance with human rights.

1.5 This submission will then address the requirements for a federal Human Rights Act that meaningfully, universally and consistently protects human rights in Australia.

1.6 In short, we submit that Australia's current human rights framework is insufficient. We need a federal Human Rights Act, together with reforms to the AHRC and the Committee, to improve the protection of human rights for all individuals across Australia.

2 Summary of Recommendations

2.1 The Australian Government should enact a comprehensive federal Human Rights Act to ensure that all Australians have consistent, accessible and effective means to enforce their human rights. Related legal mechanisms should be consolidated and made coherent to ensure adequate protection and enforceability. **See Section 3**.

2.2 A federal Human Rights Act should be implemented to replace Australia's current 'patchwork' of disjointed common law, statutory and constitutional human rights protections which comprises:

a. inconsistent State and territory laws;

b. limited Constitutional protections over a few discrete aspects of human rights; and

c. insufficient common law protections that often cannot be effectively relied upon or enforced by individuals.

2.3 A federal Human Rights Act will ensure that all Australians – including minorities and people experiencing vulnerability, who routinely experience discrimination, disadvantage and marginalisation – have the equal opportunity to seek redress if their human rights are violated.

2.4 The result of Australia's current patchwork system is that many who suffer human rights violations have no tangible means to seek redress. This is especially detrimental to minorities and people experiencing vulnerability, who routinely experience discrimination, disadvantage and marginalisation.

2.5 The Australian Human Rights Commission should be upgraded in the following ways:

a. (**Complaints Jurisdiction**) The complaints jurisdiction of the AHRC should be updated so that:

i. complaints are referred to the Court if conciliation fails;

ii. the AHRC's can accept complaints made under international instruments to which Australia is a signatory; and

iii. the AHRC is empowered to initiate court proceedings for the enforcement of conciliation agreements that arise from their complaint-handling function.

b. (**Reporting, Reviews and Oversight**) The AHRC should have the power to exercise all its functions on its own initiative, and not only when requested by the Minister, or upon receipt of an individual complaint. This includes conducting own motion inquiries for all areas of unlawful discrimination and breaches of human rights in the prospective federal Human Rights Act.

c. (**Intervention Power**) The AHRC's power to intervene and make submissions or act as *amicus curiae* in cases involving discrimination issues should be adopted and extended under a federal Human Rights Act.

d. (**Resourcing and Education**) While the AHRC should work with public bodies, its research and education function should be regarded as independent to the Commonwealth. Similarly, the AHRC's functions and powers more broadly ought to be exercised independently. The AHRC must therefore be adequately funded. **See Section 4.**

2.6 Resourcing for the Committee should be increased to enable it to better perform its role.

2.7 House and Senate Standing Orders should be amended so that, barring limited exceptions for urgent matters, Bills must not be passed unless and until the Committee's final report has been tabled in Parliament. **See Section 5**.

2.8 To promote transparency and accountability, clear reporting processes should be implemented to indicate which Bills have been reviewed for human rights compliance, and how Parliament has considered relevant Committee reports.

2.9 It is essential that the Australian Government legislate for greater clarity on the expectations for Statements of Compatibility, both with regard to rights and freedoms set out in a prospective Human Rights Act, and according to Australia's obligations under international treaties. This could be supplemented by a public sector human rights education program to improve understanding of human rights at both the Federal and State levels.

2.10 With regard to the content of the Human Rights Act, each right protected should be amenable to enforcement by the courts of competent jurisdiction, and relevant complaints bodies, providing access to appropriate remedies. **See Section 6**.

2.11 Unlawful actions and decisions in relation to all rights in the Human Rights Act should give rise to an independent cause of action. It should be possible to raise Human Rights Act rights in the context of independent legal proceedings, and the Human Rights Act should give the courts broad discretion as to an associated range of remedies for each cause of action.

2.12 The Human Rights Act should allow a person to make a human rights complaint to the Commission and other relevant public sector bodies. There should be a requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complainant should then be able to make an application to a court for adjudication.

3 Shortcomings of human rights protection in Australia

Australia's 'patchwork' legal human rights protections

3.1 Australia has been a key participant in international fora and the development of human rights instruments since World War II.[1] Despite this, the Australian Government has been inert when it comes to developing a comprehensive and enforceable human rights framework domestically. Traditionally, the focus has been on targeting particular types of unfair discrimination in certain areas of public life (e.g., education and employment) experienced by cohorts identified by specific attributes (e.g., age, disability, race, sex, intersex status, gender identity and sexual orientation), rather than to legislate comprehensively and positively for the rights of all.

3.2 The Australian Government's domestic participation in the human rights arena has included making voluntary pledges to the people of Australia, as well as other countries, to uphold the basic human rights of all people through the ratification of major international human rights treaties.[2] These include the International Covenant on Civil and Political Rights (**ICCPR**) , International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and five further treaties that either seek to protect specific groups of marginalised or vulnerable people or prohibit conduct that compromises the rights of individuals.

3.3 Although the ratification of these treaties ostensibly shows the Australian Government's commitment to observing and protecting human rights and freedoms, the relevant obligations and protections those treaties provide have never been fully implemented into domestic law.[3] Instead, legal human rights protections in Australia are incoherent and piecemeal. The current framework is a 'patchwork' of disjointed common law, statutory and constitutional protections with noticeable and significant gaps in both protection and enforceability.[4]

3.4 For instance, only three Australian States and Territories have passed Human Rights Acts (being the ACT, Victoria and Queensland).[5] While this legislation does protect individual rights within those jurisdictions, the lack of a federal Human Rights Act means that the ability of the Australian public to access and enjoy legislated human rights protections is wholly contingent upon where people reside.[6] There are also inconsistencies between the legislation in the ACT, Victoria and Queensland, resulting in varying levels of human rights protection between those jurisdictions. If federal legislation were enacted, individuals could enjoy equal human rights protections at the national level, meaning that Australians living in NSW, SA, WA, Tasmania and the NT would have equal access to rights and remedies as their counterparts in the ACT, Victoria and Queensland.

3.5 Additionally, the Constitution only offers limited, express protection over a few discrete aspects of human rights relating to the franchise, property, religion, location, and trial by jury for federal criminal offences.[7] Consequently, the Constitution provides very limited safeguards against the contravention of individual rights and freedoms. For the most part, the few protections provided for by the Constitution are also not 'personal' rights. They are better described as limitations on Parliamentary power.

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1 Australian Human Rights Commission, *Free & Equal – Position paper: A Human Rights Act for Australia* (2022) (**Free & Equal Report**), 45.
2 Ibid.
3 Ibid, 46.
4 Australian Human Rights Commission, *Inquiry into Australia's Human Rights Framework* (Submission to the Parliamentary Joint Committee on Human Rights, May 2023) (**AHRC Inquiry**), 28.
5 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).
6 Free & Equal Report, 57.
7 *Commonwealth of Australia Constitution Act 1900* (Cth) ss 41, 51(xxxi), 80, 116, 117.

3.6 The fact that the High Court has determined that the Constitution contains certain 'implied' freedoms and rights (e.g. freedom of political communication) highlights the narrow scope of the limited express human rights protections provided. Those implied rights are, in themselves, also extremely limited, given the High Court has narrowly construed them. The High Court has also:

a. rejected the suggestion that further basic rights, such as the right to equality, are implicit in the Australian Constitution;[8] and

b. rejected the proposition that the Constitution should be interpreted consistently with human rights in cases of ambiguity.[9]

3.7 In summary, there are very few meaningful, constitutionally entrenched or even firmly legislated human rights protections in Australia. A corollary to this is that there are also insufficient constraints on the federal government's ability to pass laws that are inconsistent with human rights.

3.8 On a related note, it has fallen to the common law to indirectly protect several rights and freedoms. However, these safeguards are similarly insufficient, and often cannot be effectively relied upon or enforced by individuals in the absence of legislation. This is because protections under the common law are fragile, since Parliament may at any time (and routinely does) pass laws that restrict or override common law rights. For example, concerning steps have been taken by Parliament since 2001 to limit freedom of expression in Australia through "*overly broad national security laws [that] are open to misuse*".[10] Finally, many of the human rights protections to which the Australian Government has committed are not protected by the common law.[11] That is because the common law is responsive, and only develops as issues are put before the courts.

The need for overarching human rights legislation.

3.9 As outlined above, Australia's human rights protections are derived from a complex mixture of legislation, Constitutional provisions and common law principles, which collectively only protect some basic human rights. We submit that the current patchwork model is legally incoherent, incomprehensible and inaccessible to many Australians.

3.10 This is also inconsistent with the basic principle of the rule of law, being that the law should be equally applicable to, accessible by and easily understood by, all persons to whom it applies.[12] It is practically impossible for a person to advocate and enforce their human rights if corresponding legal protections are fragmented and unclear.

3.11 The result of Australia's current patchwork system is that many who suffer human rights violations have no tangible means to seek redress. This is especially detrimental to minorities and people experiencing vulnerability, who routinely experience discrimination, disadvantage and marginalisation. For example, the lack of legal human rights protections in Australia has a disproportionate effect on First Nations peoples, who experience legal discrimination and enduring social, health and justice disparities.[13] First Nations people comprise an alarmingly

8 *Hilary* Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, 198, 210.
9 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–225.
10 Free & Equal Report, 73 citing Human Rights Watch, *World Report 2020* (January 2020) https://www.hrw.org/worldreport/2020/country-chapters/australia (**World Report**).
11 AHRC Inquiry, 46.
12 See, e.g., 'Rule of Law' *Law Council of Australia* (Web Page) <https://www.lawcouncil.asn.au/policy-agenda/international-law/rule-of-law>.
13 See, e.g. 'Social determinants and the health of Indigenous peoples in Australia – a human rights based approach' *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/about/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based>.

disproportionate percentage of Australia's prison and youth detention populations,[14] and the death of First Nations people in custody is a continuing human rights travesty.

3.12 Australia's treatment of refugees and asylum seekers and the lack of protections for people with disabilities – who experience significant rates of exploitation, abuse and neglect – represent other areas of clear concern with respect to the Australian Government's commitment to genuine human rights protection.[15]

3.13 A federal Human Rights Act would ensure that all Australians have an accessible and effective means to enforce the basic human rights to which we are all entitled, by creating a coherent and comprehensive human rights framework.

14 UN Office of the High Commissioner for Human Rights (OHCHR), 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Corpuz on her Visit to Australia' (Statement, 2 April 2017).

15 World Report, 47-51.

4 Reforms required to the Australian Human Rights Commission

4.1 Throughout its evolution, the AHRC has maintained two distinct roles: the *promotion* and *protection* of human rights. *Promotion* encompasses education, advocacy and advice to government, Parliament and the broader community.[16] The individual complaint-handling functions of the AHRC embody the *protection* aspect. Overtime, however, the AHRC has been increasingly limited by budgetary constraints and deficiencies in the way the complaint processes operate.[17]

4.2 Without a federal Human Rights Act, the AHRC is still "unfinished legal architecture", best described as "a doughnut - with a hole in the middle."[18] While the framework for the AHRC to be effective certainly exists, we submit that access to the complaint mechanisms vested in the AHRC appear relatively meaningless in the public eye. Complaints are not justiciable, and enforceable remedies are not practically available.[19]

4.3 One of the key impacts that a federal Human Rights Act will have from the perspective of the AHRC jurisdiction is that it will frame rights and freedoms as positive obligations, and provide a clear avenue for decision-making.[20] Until then, the AHRC will continue to face a litany of challenges due to the inconsistencies between international expectations and domestic law, which are often "at loggerheads".[21] That is because certain acts or practices which may be lawful under domestic law can constitute a violation of international human rights obligations.[22] A prime example of this is arbitrary detention. Under the *Migration Act 1958* (Cth), indefinite detention may, in principle, be considered lawful.[23] Conversely, article 9 of the ICCPR provides that "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In the absence of a federal Human Rights Act addressing such principles, how is the AHRC meant to practically tackle this conundrum?[24]

4.4 We also submit that the present functions of the AHRC are inadequate. For example, at present:

a. the AHRC can only provide recommendations to the Minister, and has no power to provide effective and enforceable remedies to individuals who are the subject of human rights abuses;[25] and

b. the AHRC's functions are limited by the definition of "*human rights*" in section 3 of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). Human rights are defined as "rights and freedoms recognised" in specific international instruments that are scheduled to, or declared under, the AHRC Act. However, the following international instruments have not been scheduled to, or declared under, the AHRC Act, notwithstanding

16 Rosalind Croucher, '"Seeking Equal Dignity without Discrimination" – The Australian Human Rights Commission and the Handling of Complaints' (2019) 93 *Australian Law Journal* 571, 571 (**Croucher 2019**).
17 Free & Equal Report, 45**.**
18 Rosalind Croucher, '"The Perils of Independence: The Australian Human Rights Commission's Role in Protecting Human Rights in Australia": Sir Ronald Wilson Lecture 2021' (2022) 23 *International Trade and Business Law Review* 145, 163 (**Croucher 2022**).
19 Croucher 2022,163.
20 Croucher 2022,164.
21 Croucher 2022, 166.
22 Croucher 2022, 165.
23 *Al-Kateb v Godwin* [2004] HCA 37.
24 See Australian Human Rights Commission, Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth) (Report, 2021), a grouped report involving a number of complainants raising similar issues.
25 Jim McGinty, 'A human rights act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1,15.

that Australia has agreed to be bound by them because they have been signed by the government:

i. International Covenant on Economic, Social and Cultural Rights (ICESCR);

ii. Convention on the Prevention and Punishment of the Crime of Genocide;

iii. Convention on the Political Rights of Women;

iv. International Convention on the Elimination of all forms of Racial Discrimination;

v. Convention on the Elimination of all forms of Discrimination against Women;

vi. Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;

vii. Convention on the Reduction of Statelessness;

viii. Convention relating to the Status of Stateless Persons;

ix. Convention Relating to the Status of Refugees;

x. Slavery Convention of 1926;

xi. Supplementary Convention on Slavery; and

xii. Convention on the Rights of Persons with Disabilities.

4.5 If the AHRC is to be an institution which promotes and enforces the "indivisibility and universality of human rights",[26] then its special status should be properly recognised and protected. The AHRC cannot operate effectively in circumstances where we have a piecemeal human rights framework within which international *commitments* and domestic *policies* are in conflict.[27] We submit that a federal Human Rights Act together with a reformulation of the AHRC's functions is necessary to adequately address these shortcomings.

4.6 This includes reform to the four core functions of the AHRC, as follows:

a. **(Complaints jurisdiction):** We submit that if the AHRC cannot conciliate a human rights complaint (with the exception of unlawful discrimination allegations), then an individual effectively has no means to seek redress for human rights violations that they have experienced.[28] If a federal Human Rights Act is enacted, then we submit that the present complaints jurisdiction of the AHRC should be replaced with one prescribed in a Human Rights Act. This would mean individuals are no longer limited by having to lodge a complaint that aligns with the definition of human rights under one of the international instruments that Parliament has elected to annex or declare for the purposes of the AHRC Act.

We submit that under a new Human Rights Act jurisdiction:

i. complaints should be referred to Court if conciliation fails;

26 *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), s 10A.
27 Croucher 2019, 583.
28 Free & Equal Report, 11.

ii. the AHRC's jurisdiction should be broader and accept complaints made under the international law instruments listed in paragraph 4.4 above;[29] and

iii. the AHRC should be compliant with the ICCPR and Principles relating to the Status of National Institutions (**Paris Principles**), which set out internationally accepted standards that must be met by National Human Rights Institutions (**NHRIs**) like the AHRC, and require such bodies to have the power to initiate court proceedings for the enforcement of conciliation agreements that arise from their complaint-handling function.[30]

b. **(Reporting, reviews and oversight):** We submit that the AHRC should have the power to exercise *all* its functions on its own initiative, and not only when *requested* by the Minister,[31] or upon receipt of an individual complaint. By way of example, the AHRC should be empowered to make inquiries where it suspects significant breaches of federal discrimination law, without the need for an individual complaint.[32] We support the examples identified in the Free & Equal Report in this regard, and specifically the following:[33]

i. empowering the AHRC to conduct *own motion* inquiries in relation to all areas of unlawful discrimination, and breaches of human rights in a Human Rights Act that are of a systemic nature, with effective mechanisms attached; and

ii. vesting specific power in the AHRC, including to require the production of documents, witnesses or other information necessary to review the policies and practices of public authorities to assess their compatibility with the Human Rights Act and make recommendations to relevant public authorities after conducting reviews that require responses from those authorities.

c. **(Intervention power):** With leave of the Court, the AHRC presently has power to intervene and make submissions or act as *amicus curiae* in cases involving discrimination issues "where it considers it appropriate to do so".[34] We submit that this same power should be adopted and extended under a federal Human Rights Act, in a manner which empowers the AHRC to exercise it independently and with leave of the Court.

d. **(Resourcing and education):** Currently, the AHRC's research and education function is framed so that it is performed *on behalf of the Commonwealth*. We submit that whilst education programs and the work of the AHRC should be undertaken in cooperation with public bodies, it is critical for the AHRC not to be viewed as a mouthpiece for the Australian Government's agenda or representative only of the Government.

4.7 We also submit that the AHRC should be adequately funded so that it can perform its functions independently. The AHRC itself has publicised the significant challenges it has faced in effectively performing its functions due to a lack of funding, including: [35]

a. Commissioners not being able to appropriately support their roles;

b. funding for anti-discrimination complaint handling not keeping pace with public demand, which has led to a significant backlog;

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29 Free & Equal Report, 278.
30 National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009), 194 <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>.
31 See e.g., AHRC Act, ss 11(1)(c), 11(1)(e) and 32.
32 AHRC Inquiry, 100.
33 See Free & Equal Report, 335-336.
34 Free & Equal Report, 336; AHRC Act, s 11(1)(o).
35 AHRC Inquiry, 21-22.

c. efficiency dividends and budget savings disproportionately impacting the AHRC as a small agency; and

d. difficulties on achieving regular, new budget funding and that funding being tied to particular activities within the AHRC.

4.8 The Paris Principles set out the minimum standards NHRIs must meet to be considered credible and to operate effectively. The Paris Principles require NHRIs to be "independent in law, membership, operations, policy and control of resources", and have "a broad mandate; pluralism in membership; broad functions; adequate powers; adequate resources; cooperative methods and engage with international bodies".[36] The Global Alliance of National Human Rights Institutions monitors such compliance by conducting reviews of NHRIs every 5 years.

4.9 The AHRC's "A status" accreditation was reviewed in March 2022 and deferred for 18 months over concerns that the operation of the AHRC may not be compliant with the Paris Principles, primarily because of the selection and appointment process for Commissioners.[37] This has created a level of concern for the AHRC, given its status accreditation signifies to the intentional community whether it operates with the necessary level of institutional independence to ensure the effective promotion and protection of human rights. In a statement to the Government, Emeritus Professor Rosalind Croucher AM explained implications of the ARHC losing its A-Status accreditation:

> "*Advocating for all nations to establish and maintain A status NHRIs has been a key pillar of the Australian Government's own foreign policy for many decades, including by Australia's leading the resolutions in the UN General Assembly and UN Human Rights Council on the importance of such institutions. It was one of the five pillars of the Australian Government's voluntary commitments when seeking membership of the UN Human Rights Council and is a key signifier of Australia's commitment to human rights, democracy and the rule of law. A downgrade in status of Australia's NHRI would have a marked impact on Australia's standing as a leader in human rights internationally and in our own region.*
>
> *The Department of Foreign Affairs and Trade has emphasised the importance of the Commission's international engagement to Australia's foreign policy priority of advancing human rights globally, including the Commission's role with UN reporting processes as an A status institution. The Australian Government's work with, and accommodation of, an independent NHRI is the most powerful example Australia can provide to other countries to advance global human rights.*
>
> *A downgrade to B status would mean that the Commission will lose participation rights in UN fora – such as human rights treaty committees, the UN Human Rights Council, its subsidiary bodies and some General Assembly bodies and mechanisms. This would likely be a significant focal point for international criticism in UN treaty body reviews, the Universal Periodic Review and the UN Human Rights Council*."

4.10 In an effort to ensure compliance with the Paris Principles, the AHRC has itself recommended amendments that are required to the AHRC Act, with which we agree, including:[38]

a. clarifying that all Commissioner appointments undergo a clear, transparent, merit-based and participatory selection process;

b. inserting a reference to the Paris Principles in the preambulatory clauses of the AHRC Act to highlight that it intends to be a Paris Principles compliant human rights institution;

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36 Global Alliance of National Human Rights Institutions, 'National Human Rights Institutions' (2023) <https://ganhri.org/nhri/>.
37 AHRC Inquiry, 93.
38 Free & Equal Report, 337.

c. expanding the definition of “human rights” in the AHRC Act so that it references all of Australia’s international obligations, including ICESCR; and

d. specifying that all AHRC functions be exercised independently of government authorisation.

4.11 We submit that the AHRC’s independence is imperative not only for the proper fulfilment of its functions, but also for the way the AHRC is viewed internationally. The need for independence will be heightened if the AHRC is assigned additional functions under a federal Human Rights Act.[39]

4.12 We further submit that the AHRC’s independence is, to a large extent, dependent on the funding it receives from Government. Whilst this issue cannot be overcome by the drafting of a federal Human Rights Act, it can and should be addressed directly as part of the overall policy objectives of the proposed Act. Moreover, the Government should take immediate steps to review the AHRC’s funding to ensure it is adequately resourced.[40]

39 Ibid.
40 Ibid.

5 Shortcomings of the Parliamentary Joint Committee on Human Rights

5.1 The Committee came into force on 4 January 2012. It serves three functions:

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; and

c. to inquire into any matter relating to human rights that is referred to the Committee by the Attorney-General.[41]

5.2 In essence, the Committee's role is to scrutinise Australian legislative instruments to ensure compliance with human rights obligations under the seven core United Nations human rights treaties to which Australia is a party and, where the proposed legislation imposes limitations on human rights, to assess whether these limitations are justifiable on the grounds of necessity and proportionality.[42]

5.3 Although the Committee has served some utility in protecting human rights, we submit its function is inherently limited due in part to the absence of clearly enshrined human rights in Australian law.

5.4 Our democratic system of government relies on a system of constraints placed on executive power, established by the legislature and enforced by the judiciary. However, in practice, there are few legislative and judicial safeguards on the exercise of discretionary executive power. This means that there are few restrictions on the Australian Government's power to enact legislation which grants broad ministerial power,[43] with the potential to undermine individuals' fundamental human rights. To the contrary, Parliament has routinely legislated to give expression to such broad powers which infringe human rights.

5.5 For instance, under Australia's migration and counter-terrorism laws,[44] the unconstrained actions of the executive have had vast impacts on human rights and freedoms. Section 189 of the Migration Act says that officers must detain any person they know or suspect to be in Australia unlawfully,[45] allowing immigration officers to detain immigrants, including children, indefinitely until they are granted a valid visa or leave the country. Shockingly, the majority are detained for over 365 days.[46] Too often the government relies on a sense of emergency, fear or political pressure as excuses to enact rushed and disproportionate laws whilst silencing healthy debate around human rights.[47]

5.6 Under the current framework, the efficacy of the Committee largely depends on Parliament's ability to self-regulate its compliance with the regime, which we submit falls well short of the standard of scrutiny that is required. In turn, the Committee faces several challenges such as:

a. dealing with difficult political realities (e.g., time constraints, power dynamics and appeasing the majorities);

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41 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7.
42 Free & Equal Report, 297.
43 Ibid, 72.
44 Found in *Migration Act 1958* (Cth) and Part 5.3 of the *Criminal Code Act 1995* respectively.
45 *Migration Act 1958* (Cth), s 189.
46 UNSW, '*Factsheet: Immigration Detention in Australia*' (2021).
47 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93.

b. strains on resourcing;

c. a lack of true independence;

d. shifting national priorities; and

e. varying levels of human rights literacy within government departments.[48]

5.7 These obstacles manifest in delays in the review process, poor enforcement and accountability, and inadequate Statements of Compatibility (**SOC**).

Delays in the review process

5.8 For legislative scrutiny to be meaningful and effective, timing is critical. We submit that the Committee simply has insufficient resources to carry out its role in an effective and timely manner.

5.9 First and foremost, the under-resourcing of the Committee combined with the volume of legislation considered by the Committee makes genuine scrutiny almost impossible.[49] The Committee members share a significant burden in the volume of legislation reviewed, communicating with the legislature, and writing reports. Despite its limited resources, on average, the Committee considers 225 Bills and 1,827 legislative instruments each year, and is required to publish detailed reports on potentially incompatible laws.[50] These figures are astounding considering the Committee currently has only 10 members.[51]

5.10 The inadequacy of SOCs provided by Parliament and the working practices of the Committee compound this issue. On occasions, the Committee will correspond with lawmakers in the pre-reporting stage to clarify the expected impact of the legislation, to best inform itself of any human rights impact (which informs assessment as to compatibility). However, political realities and time pressures mean that timelines for the enactment of legislation are not adjusted for this deliberation process and laws are often enacted before the Committee has had an opportunity to conduct a complete review.[52]

5.11 Under-resourcing and poor cooperation from the legislature frustrate the pre-reporting phase and, ultimately, the outcome is that the Committee's findings are published too late to have any tangible effect on the law-making process. In fact, in some circumstances, the legislature may avoid human rights scrutiny altogether by expediting the passage of a Bill through Parliament.[53]

5.12 The breadth of the scrutiny task undertaken by the Committee is also substantial. The Committee is charged with assessing the legislation against the seven human rights treaties to which Australia is party. The broad scope of this process affects the timeliness and impact of its reports. As a consequence, the Committee's reports are necessarily long and this further reduces the likelihood of timely reporting and engagement with lawmakers.[54]

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48 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Kings College London, June 2014) [9].

49 Fergal Davis, 'Political Rights Review and Political Party Cohesion' (2016) 69 *Parliamentary Affairs* 213, 221, as cited in Free & Equal Report, 303 (**Davis**).

50 Free & Equal Report, 303.

51 PJCHR Committee Membership <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Membership>

52 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review 4* 469, 478 (**Williams and Reynolds**).

53 Ibid, 501.

54 Davis, 221.

Poor enforcement and accountability

5.13 Committee reports on human rights compatibility do not bind Parliament.[55] Whilst it is often hoped that Parliament would consider amending proposed legislation in consideration of the Committee's assessment, in reality, the Committee's reports often have little impact on the legislative outcome. As discussed at paragraph 5.10 above, legislation is regularly enacted before the review process is complete.[56]. Consequently, the scrutiny regime is only very occasionally referred to in parliamentary debate, rendering it often obsolete.

5.14 Further, the current regime does not confer any additional responsibility on the judiciary to uphold or enforce the scrutiny regime. In this regard, the Australian framework sits in contrast with international counterparts, as it leaves no scope for Bills or regulations to be struck down or declared inconsistent by the courts.[57] Without appropriate measures in place to ensure that the review process is taken seriously, and that the legislature is held to account, the Committee's views can be regarded as little more than a box ticking exercise, since ultimately there is no enforceable human rights framework in operation.

5.15 In the Committee's current form, Parliament does not need to consider engagement with human rights for non-disallowable instruments (such as those urgently enacted during the COVID-19 response). Although we see the underlying rationale, it exposes a "human rights blind spot" regarding delegated legislation.[58] This blind spot was leveraged during the pandemic when the Legislature passed delegated legislation which significantly impacted human rights, without the need to communicate how human rights may be affected, whether the measures were necessary or proportionate, or whether human rights had been considered at all.[59] This drastically undermines the very notion of accountability which the Committee is designed to preserve, a consequence which is particularly troubling as government has increasingly sought to give effect to controversial policies via delegated legislation.[60]

Inadequate Statements of Compatibility

5.16 The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) provides that legislative instruments must be accompanied by a SOC. This statement, to be provided simultaneously with the proposed legislation, expresses the lawmaker's opinion of compatibility with human rights. By and large, SOCs provided by Parliament have been inadequate for a number of reasons, including a lack of specificity and insufficient detail when human rights concerns are enlivened, rarely demonstrating a deep and nuanced understanding of human rights issues, particularly in circumstances where there is an apparent need to justify a political imperative to act.

5.17 On many occasions, a SOC will reference the engagement of a human right but not adequately explain how that right is engaged. Where the legislation only marginally affects human rights or contains permissible limits on human rights (and thus can be included in the 'no concerns' category of Bills and instruments), the SOC often does not provide a sufficient assessment of

55 Williams and Reynolds, 472.
56 Ibid, 494.
57 Ibid, 469.
58 Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal 1046*, 1074, as cited in the Free & Equal Report, 315.
59 Free & Equal Report, 315.
60 'Legislative Instruments: 2012–2014' on Renuka Thilagaratnam, *Human Rights Scrutiny Blog* (23 December 2014) <https://hrscrutiny.wordpress.com/2014/12/23/legislative-instruments-2012-2014/>.

whether each of the limitations is actually permissible. And, even where proposed legislation substantially engages human rights, the SOC is often insufficiently detailed to allow the Committee to conduct a complete review.[61]

5.18 In practice, it can be vaguely asserted that legislation is compatible with human rights because it is necessary to meet a perceived urgent threat. Alternatively, an obvious incompatibility may be justified on the basis that there is a political imperative to act.[62] Many SOCs display a disturbing lack of analytical rigour and others, poor literacy or understanding of human rights.[63] As such, the requirement to provide a SOC is largely treated by Parliament as perfunctory and fails to serve its underlying purpose of promoting and protecting human rights.

5.19 In circumstances where the SOC is inadequate, there is an extra burden on the Committee to consult with lawmakers. Not only does this place additional strain on the already stretched resources of the Committee, but it also delays the scrutiny process.

61 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019) [3.62], as cited in the Free & Equal Report.
62 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 93, as cited in the Free & Equal Report, 321.
63 Ibid, 81.

6 Requirements for federal Human Rights Act

6.1 As discussed in **Section 5** above, Australia's current 'patch-work protection' of human rights is inadequate and incomplete. Accordingly, Australia needs a federal Human Rights Act to cohesively govern human rights across all Australian jurisdictions and for all people.

6.2 This Act would facilitate a holistic approach whereby key rights contained in human rights treaties to which Australia is already a party are entrenched into Australia's legal landscape. In doing so, human rights will become part of the foundation for administrative and legislative decision-making,[64] rather than being left to be implied or located amongst our existing "piecemeal framework" of limited application.

6.3 To fulfil these objectives, the Act must provide mechanisms for enforceability that are independent from government. We support the following mechanisms outlined in the AHRC's model for what a federal Human Rights Act might look like.

Independent cause of action

6.4 For a federal Human Rights Act to be enforceable, it should provide for an independent cause of action. This means that individuals will be empowered to bring a claim before the courts for breaches of human rights without having to rely upon a cause of action arising externally to the Human Rights Act (i.e. a discrimination claim under State and or Federal Discrimination Acts). A discrete cause of action offers a straightforward enforcement mechanism, ensuring actual protection of human rights and bringing the Australian human rights regime into closer alignment with international obligations to which the Australian Government has subscribed.[65]

6.5 Importantly, a federal Human Rights Act should also enable enforcement of human rights in the context of other legal proceedings. This is commonly referred to as a "piggy-back" cause of action. This flexible approach, allowing for both a direct and indirect cause of action, recognises the practical reality that human rights may be relevant to a range of issues including, for example, discrimination, tort and criminal claims.

6.6 However, it is crucial to note that restricting human rights claims only to "piggy-backing", as seen in the Victorian and Queensland jurisdictions, is problematic. This is because there are no corresponding remedies for human rights claims. Therefore, the protection of human rights in the Victorian and Queensland jurisdictions is only enforceable when raised alongside other claims. Not only does this create unnecessarily complex jurisdictional and procedural questions regarding the application of various laws when human rights arguments are raised,[66] but also, perhaps most crucially, each Act is a mirage, rendered ineffective without a mechanism to enforce the human rights which it purports to protect.

6.7 There are concerns that introducing an independent cause of action will open "floodgates" to litigation. However, evidenced by the experience in other jurisdictions, these fears are unwarranted. Specifically, in the ACT and UK, figures show that while the number of human rights legal actions initially increased following the introduction of an independent cause of action, this number significantly reduced in subsequent years. Additionally, in support of the 2015 Victorian Charter Review which recommended that Victoria adopt a direct of cause of

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64 Australian Human Rights Commission, 'Making rights a reality – the need for a Human Rights Act for Australia' (speech by Rosalind Croucher) 10 December, 2022 <https://humanrights.gov.au/about/news/speeches/making-rights-reality-need-human-rights-act-australia>.

65 Free & Equal Report, 268.

66 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127 in Free & Equal Report, 270.

action, Michael Brett Young stated that an independent cause of action should actually "reduce unnecessary litigation that occurs because the current remedies provision is obscure".[67]

Available remedies

6.8 The right to an effective remedy is central to enforcement and accountability. The remedies available under a federal Human Rights Act should be broad and non-exhaustive to adequately reflect the range of different kinds of human rights claims, and varying degrees of severity. For the reasons proposed by the AHRC, we support the inclusion of a range of remedies including but not limited to:

a. injunction;

b. orders requiring action;

c. declaratory relief;

d. monetary damages; and

e. administrative law remedies.

Complaints process

6.9 Another important feature of a federal Human Rights Act is an avenue for complaints. Specifically, the Act should allow a person to make a human rights complaint to the Human Rights Commissioner. This process can be adapted from the AHRC's existing processes in relation to complaints brought under the four federal Discrimination Acts. The success of the AHRC's existing complaints processes for unlawful discrimination demonstrates the potential of this alternative dispute mechanism to resolve disputes between complainants and public authorities in a quick, accessible, cost-efficient and effective manner.

6.10 Furthermore, other complaints avenues should be utilised and embedded into the public sector to complement the Commissioner's human rights complaints processes. This is intended to alleviate the strain and demand on the Commissioner that may result from an expansion of the Commissioner's existing human rights jurisdiction under the new federal Human Rights Act. For example, public authorities, including other regulators and Ombudsmen, could be required to establish internal human rights complaints mechanisms. This may provide recourse for individuals if they would like to make an internal complaint before proceeding to the Commission. Furthermore, public sector oversight bodies, such as the Australian Public Service Commission, should be required to consider human rights issues that arise within their jurisdiction when dealing with instances of relevant misconduct.[68]

67 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127.

68 Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127 in Free & Equal Report, 280.

7 Conclusion

7.1 In summary, we submit that a federal Human Rights Act is necessary (together with further funding and reforms to the AHRC) to darn the existing inadequate 'patchwork' of human rights protections in Australia, ensure that fundamental human rights are protected and enforceable under Australian law, for all.

7.2 A federal Human Rights Act would enable federal and State governments to cohesively govern and enforce human rights across all of Australia, weaving fundamental human rights into the fabric of government decision-making.

7.3 A federal Human Rights Act would provide more robust protection for all individuals, especially benefiting people experiencing marginalisation and vulnerability, who may be more susceptible to the kinds of violations the Act would be designed to address.

7.4 For these reasons, and as further explained throughout this Submission, the NSWCCL supports the enactment of a federal Human Rights Act in Australia, and proposes the recommendations set out above.

Yours sincerely,

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President
NSW Council for Civil Liberties