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Ms Anita Coles
Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament House, Canberra 2601

<Human.rights@aph.gov.au>

Dear Ms Coles,

INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Thank you for extending the time to receive my submission, which I set out below.

On 15 March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights has been asked to inquire into and report on the following matters:

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

and in particular:

5. whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);
6. whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
    i. to the remit of the Parliamentary Joint Committee on Human Rights;
    ii. the role of the Australian Human Rights Commission;
    iii. the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
7. the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

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At the outset I make the following observations:

1. the matters that the Committee has been asked to inquire into and report on have been inquired into and reported on repeatedly over many years
2. the Committee's report should be informed by and take account of the extensive work already done by committees, scholars and – over and over again – submitters
3. it would be a waste of public resources, and of extensive volunteer private effort in the public interest, to ignore the work that has already been done to thoroughly if not comprehensively address this issues.

Detailed below, I make these submissions:

1. that the Committee have regard to research by Professor Kieran Tranter and his colleagues on the failure of reform agencies to use scholarly research in their work.
2. that an evaluation of national action plans is an essential part of any Australian human rights regime.
3. that the 2010 *Human Rights Framework* has no continuing relevance.
4. that the Committee's report take full account of previous extensive and thorough answers to the same questions about a Human Right Acts are that being asked again.
5. that the Committee's inquiry and report be supported by a comprehensive literature review on whether the Australian Parliament should enact a federal Human Rights Act.
6. that the Committee recommend that the Australian Parliament enact a federal Human Rights Act as a necessary complement to parliamentary scrutiny to protect human rights in Australia.
7. that a Human Rights Act defines, promotes and enforces human rights standards only in the same way that legislation, and courts, commonly promote and enforce expected standards of behaviour in society.
8. that the Committee recommend that the guaranteed human rights of a Human Rights Act are necessarily justiciable and enforceable.
9. that a Human Rights Act in Australia include economic, social and cultural (ESC) rights as justiciable and enforceable rights.
10. that the four federal anti-discrimination statutes be consolidated into a single statutes that is drafted to give effect to the human rights guarantee of non-discrimination.

11. that the Committee's report take full account of previous extensive and thorough answers to the same questions about parliamentary scrutiny that are being asked again.
12. that the Committee recommend that reforms to parliamentary scrutiny proposed by various scholarly researchers be enacted.
13. that the Committee recommend that the Australian Human Rights Commission's shortcomings against the Paris Principles be rectified.
14. that the Committee recommend that the Australian Human Rights Commission be provided with the resources necessary to carry out its functions.
15. that the Committee recommend that the Government seek legal advice on how a different response to the decision in *Brandy* could re-establish the AHRC's power to make a determination that is enforceable through Federal Court.
16. that the Committee's report take full account of previous extensive and thorough answers to the same questions on the effectiveness of existing human rights Acts/Charters are that being asked again.
17. that promotion and protection, and the very credibility, of human rights in Australia is undermined until and unless Australia engages with the international human rights system honestly, reflectively, maturely and responsively.
18. that the Committee recommends that Australia ratify, withdraw its reservations to, and withdraw its declarations on various human rights treaties.
19. that the Committee recommends that Australia accept and give effect to the views of human rights treaty bodies on communications against Australia.
20. the Committee recommends that Australia incorporate its international human rights obligations into domestic law, through a national Human Rights Act and in legislation and practice.

Importance of scholarship, and caution with submissions

I submit that the Committee have regard to research by Professor Kieran Tranter and his colleagues on the failure of reform agencies to use scholarly research in their work.

From Kieran Tranter and Rodney Meyer, 'The Use of Journal Articles by the Queensland Law Reform Commission' (2015) 27(1*) Bond Law Review* 57, 79:

> … academic literature has played limited role in the QLRC's approach to law reform. By failing to balance its analysis of cases and legislation with material from academic literature, QLRC reports could be criticised as one-sided.

It cannot be said of human rights protection, as Professor Tranter said generally, that it is possible that 'relevant and useful academic literature on topics that the QLRC is asked to report on, does not exist'.

From Kieran Tranter, 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992-2012' (2015) 38(1) *University of New South Wales Law Journal* 323, 361:

> … in its final reports the sources that the ALRC most cited were submissions and consultations. This finding substantiates the ALRC's claim that its approach to law reform is through community engagement. However, this approach also has its risks. The study also found that a low citation count to secondary academic material. The challenge for the community engagement model is the problem of the anecdotal becoming prioritised over representative data.

From Lyria Bennett Moses, Nicola Gollan and Kieran Tranter, 'The Productivity Commission: A Different Engine for Law Reform' (2015) 24(4) *Griffith Law Review* 657, 681:

> … there is a tendency to treat submissions as evidence, even where they contain bare assertions or nonempirically tested anecdotes. We are … not suggesting that a detailed and rigorous engagement with submissions is inappropriate… [however] this material … can be sectorial, anecdotal and unverifiable.

1. The scope and effectiveness of Australia's 2010 *Human Rights Framework* and the *National Human Rights Action Plan*

These two documents are separate and different, and have to be addressed accordingly.

The ***National Human Rights Action Plan*** came first.

Australia's first human rights national action plan in 1994, and its updates in 1995 and 1996, were pioneering documents. As the Office of the United Nations High Commissioner for Human Rights 2002 *Handbook on National Human Rights Plans of Action* makes clear, Australia's plans set a benchmark for the plans that followed from other countries.

Australia's first three human rights national action plans gave a clear account of how and when steps would be taken to address human rights issues in Australia. After a brief preamble and overview they ran through a series of issues, identifying in each case current policy, challenges ahead and proposed national action. They gave a clear account of how and when steps would be taken to address human rights issues in Australia.

A new, fourth, plan in 2004 failed to meet these standards. After a wholly inadequate preparation, that plan failed to describe the then situation drawing on a baseline study, failed to set out proposed action within short, medium and long timeframes, failed to set out institutional responsibility for proposed action, failed to identify resources, and failed to describe monitoring and evaluation processes.

In its 2010 report to the United Nations Universal Periodic Review, the Australian Government committed to 'develop a new National Action Plan on Human Rights, working with States and Territories to outline future action for the promotion and protection of human rights'.

Australia's 2012 human rights national action plan returned to the earlier standards, having been developed after consultation on a background paper, a baseline study and a draft plan. By 2015, however, the plan had been disowned by the Australian Government and was not replaced; it continues to be shown on the website of the Office of the United Nations High Commissioner for Human Rights as 'no longer current'. In September 2015, when I asked about the whereabouts of the plan, the federal Attorney-General's Department advised me in writing that '[t]he National Action Plan 2012 was a policy priority of the former Government'.

In 2010, Australia's *National Human Rights Action Plan* was a basis for Australia's reporting to its first Universal Periodic Review; it was not referred to in its reports for either its second (2015) or third (2021) review.

As for its effectiveness, who can say? There was never an evaluation of the national action plans, nor any measurement of their effect and effectiveness. There is extensive literature on, and international practice of, the metrics of human rights legislation and **I submit** that an evaluation of national action plans is an essential part of any Australian human rights regime.

The 2010 ***Human Rights Framework*** included a commitment to a new *National Human Rights Action Plan*, which eventuated in 2012.

The *Human Rights Framework* was the then Government's response to the report of the National Human Rights Consultation, and was said to be based on 'five key principles':
reaffirming a commitment to our human rights obligations
the importance of human rights education
enhancing our domestic and international engagement on human rights issues
improving human rights protections, including greater parliamentary scrutiny, and
achieving greater respect for human rights principles within the community.

The *Framework* was a very limited response to the National Human Rights Consultation report. It largely drew attention to and relied on the efficacy of established institutional mechanisms such as the Australian Human Rights Commission, anti-discrimination law, administrative law and courts' statutory interpretation.

The report recommended that 'education be the highest priority for improving and promoting human rights in Australia', and the *Framework* resulted in a short but unsustained increase in funding for human rights education. Reporting to the Universal Period Review in 2010, Australia identified the 'measures to make information about human rights more readily available across the Australian community' as the 'centrepiece of the *Framework*'.

The *Framework* did not respond to and impliedly rejected the Consultation report's recommendation that the government should 'compile a definitive list of Australia's international human rights obligations' and that it conduct an 'audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations'.

The *Framework* did not respond to and impliedly rejected the Consultation report's recommendation that the government should develop 'a whole-of-government *Framework* for ensuring that human rights … are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally'.

The *Framework* did not respond to and impliedly rejected the Consultation report's recommendation that 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 Australia's human rights obligations.

The *Framework* did not respond to the Consultation report's recommendation that it enact a national Human Rights Act. The Government explicitly rejected the recommendation; the Attorney-General said that 'the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community'. In case this statement is relied on in future to resist enactment of a national Human Rights Act, I say that it is a meaningless evaluation of the worth of a human rights statute, disregarding local and international experience, and seeming to rely on an untenable principle that no legislation ought be passed against which there is opposition.

The *Framework* did respond to and thereby accept the Consultation report's recommendation on statements of compatibility and parliamentary scrutiny, enacting the *Human Rights (Parliamentary Scrutiny) Act* 2011.

That was the extent of the effectiveness of the *Framework*. The Government said the *Framework* would be reviewed in 2014, but no review took place, presumably because the *Framework*, like the National Action Plan, was seen as the now-irrelevant concern of the previous Government.

2. Whether the *Framework* should be re-established, as well as the components of the *Framework*, and any improvements that should be made

I submit that the *Framework* has no continuing relevance. It was a politically driven response to report recommendations that the Government preferred not to follow. It has only one continuing legacy, parliamentary scrutiny. Most of its components were established and continuing institutional mechanisms. A credible, contemporary '*Framework* for human rights protection in Australia would be an entirely new document.

3. Consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law

It's hard to know what to make of a standalone direction to 'consider developments'. Presumably it is picked up by the particular request to consider 'existing mechanisms to protect human rights in the federal context', and 'the effectiveness of existing human rights Acts/Charters … and relevant work done in other states and territories'. I address these in '6' and '7' below.

4. Consider any other relevant matters.

See '8' below, 'International treaty compliance'.

5. Whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper)

I note that the then Government rejected a human rights statute recommended by the National Human Rights Consultation Committee, the Attorney-General saying only that 'the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community'. This is a meaningless evaluation of the worth of a human rights statute, seeming to rely on an untenable principle that no legislation ought be passed against which there is any opposition.

I submit that, quite apart from the Australian Human Rights Commission's recent Position Paper, the Committee's report take full account of previous extensive and thorough answers to the same questions are that being asked again. For previous reports, see:

> Standing Committee on Law and Justice, *A NSW Bill of Rights*, *Committee Report 17*, NSW Parliament, October 2001
>
> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Australian Capital Territory, May 2003
>
> Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Department of Justice, State of Victoria, November 2005
>
> Western Australian Government, *A WA Human Rights Act; Statement of Intent,* May 2007, and *Human Rights Bill 2007, Draft Bill for Comment*, May 2007
>
> Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report 10, October 2007
>
> National Human Rights Consultation, *Report on Consultation into Human Rights in Australia*, Commonwealth of Australia, September 2009
>
> Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* Report No. 30, 55th Queensland Parliament, June 2016.

I submit that the Committee's report be supported by a comprehensive literature

review on whether the Australian Parliament should enact a federal Human Rights Act; here is a small sample, just as a start:

James Allan, 'A Defence of the Status Quo', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights*, Oxford University Press, Oxford, 175–94

Dominique Allen, 'Voices In The Human Rights Dialogue: The individual victim and the Australian Human Rights Commission', (2010) 35(3) *Alternative Law Journal*, 159

Frank Brennan, *Legislating Liberty A Bill of Rights for Australia*, University of Queensland Press, Brisbane, 1998

Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195

Hilary Charlesworth, 'Who wins under a bill of rights?' (2006) 25(1) *University of Queensland Law Journal*, 39

Hilary Charlesworth, 'Democratic Objections To Bills Of Rights', (2008) Winter *The Sydney Papers*, 125

Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument', in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1*, 2021, Thomson Reuters, 39-78

Rosalind Dixon, 'An Australian (partial) bill of rights', (2016) 14(1) *International Journal of Constitutional Law*, 80

David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs*, 359

Jeffrey Goldsworthy, 'Against a Constitutional Bill of Rights in Australia', in Matthew Groves, Janina Boughey and Dan Meagher (eds), The Legal Protection of Rights in Australia, 2019, Hart Publishing, 393-410

Michael Kirby, 'A bill of rights for Australia – but do we need it? (1995) (21)(1) *Commonwealth Law Bulletin*, 276

Julian Leeser and Ryan Haddrick (eds) *Don't leave us with the Bill : the case against an Australian Bill of Rights*, Menzies Research Centre, Barton, ACT, 2009

David K Malcolm, 'The Garran Oration' (2001) 60(3) *Australian Journal of Public Administration*, 3–10

Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights in Australia*, 2nd ed, Federation Press, Annandale, 2004, 88–92

Scott Stephenson, 'Designing an Australian Bill of Rights: The Normative Trade-offs', in Matthew Groves, Janina Boughey and Dan Meagher (eds), The Legal Protection of Rights in Australia, 2019, Hart Publishing, 411-430

Bruce Stone and Nicholas, 'Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights' (204) 47(4) *Canadian Journal of Political Science* 767

Various, 'Special Edition: A Bill of Rights for Australia?' (2003) 9(1) *Australian Journal of Human Rights*:

Larissa Behrendt, 'It's Broke So Fix It: Arguments For A Bill of Rights'

Rodney Croome, 'Do Lesbian, Gay, Bisexual and Transgendered People Need A Bill of Rights?'

Megan Davis, 'Civics Education and Human Rights'

Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection'

Elizabeth Evatt, 'Bill of Rights and International Standards'

Brian Greig, 'Political Leadership on A Bill of Rights'

Kenneth Keith, 'The New Zealand Bill of Rights Experience: Lessons For Australia'

Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture'

Robert McClelland, 'How Is A Bill of Rights Relevant Today?'

Sev Ozdowski, 'The Content of an Australian Bill of Rights'

Jeremy Webber, 'Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons From Canada (and Elsewhere)'

Daryl Williams, 'Against Constitutional Cringe: The Protection of Human Rights in Australia'

George Williams, 'National Security, Terrorism and Bills of Rights'

George Williams and John Pace, 'Introduction'

Murray Wilcox, *An Australian Charter of Rights?*, Sydney, Law Book Co, 1993

George Williams, *A Bill of Rights for Australia*, Sydney, UNSW Press, 2000.

I submit, in light of the reports and research above, that the Committee recommend that the Australian Parliament enact a federal Human Rights Act as a necessary complement to parliamentary scrutiny to protect human rights in Australia.

In relation to parliamentary scrutiny below, I point out that the Parliamentary Joint Committee on Human Rights has no part in ensuring that executive action – the way

that legislative instruments are given effect by government officers – is human rights compliant. This is the work a Human Rights Act does.

The human rights that matter to people are the human rights that are in the actions, decisions and discretions of those who act under the legislative instruments. A Human Rights Act is concerned with that people are concerned with: human rights in their daily lives.

In the National Human Rights Consultation, Colmar Brunton conducted Devolved Consultations to better understand the experiences and opinions of groups who are marginalised in society or are specifically vulnerable to their rights being threatened or violated. Colmar Brunton reported that 'Service delivery was seen as a major area where improvements were possible – largely because this is where the actual day to day experience often derives from'.

Colmar Brunton reported that the vast majority of participants referred 'not to human rights *per se*, but to service providers', and that there was a feeling that 'when rights were not upheld it was often due to systemic problems with service delivery.

Colmar Brunton further reported that

> A fundamental, written document outlining the rights of all groups in society was seen by many of the marginalised and vulnerable groups to be a necessary step before any rights could be consistently protected. Although most generally agreed that Australian culture and society usually sought to uphold human rights, most felt that it was necessary to commit to the protection of human rights in writing so that this good intent had some specific guidance.

> *government departments but all NGO's would have to follow that legislation*
>
> Drug user group

> *We as individuals don't have to educate the doctor, the legislation does it for us....Makes it a level playing field. Then they've got no defence*
>
> Aged group

> *I just want something that tells me what rights I have when I get to Australia*
>
> Immigrant detention group

> *A human rights act would be ideal - so that department agencies have a framework in which they can manage homeless person's situation.*
>
> Homeless NGO

"Australian society is generally about getting a fair go...it's the systems in society where we generally come unstuck"

Physical disability group

The adequacy of human rights protection in Australia must be measured first against the needs of disempowered people: people who do not gain the benefits of full participation in our liberal-democratic-market society, who do not enjoy the protection that comes from having ready access to established institutions, complex systems and a dominant culture; from being able to exercise and influence power; from being able to participate in public debate and political life; and from engaging in and profiting from the market economy.

It is glib and self-serving for those who do enjoy these benefits to analyse the adequacy of human rights protection in Australia by reference only to the very institutions and systems of which they are a part, or to which they have ready access.

When we do not address the inadequacies and failures of institutions, we abandon children and young people, casual workers, debtors, defendants, elderly people, homeless people, illiterate people, indigenous peoples, migrants, people with disabilities, people of different sexualities, poor people, prisoners, refugees, rural residents, single parents, tenants, under-educated people, and unemployed people.

Reliance is commonly placed on education and awareness activity as a means of achieving community-wide attitudinal change particularly, in recent years in Australia, in relation to human rights. But in the absence of laws and their enforcement, no amount of education and awareness activity will achieve lasting change. Education and awareness activity alone do not prevent false and misleading commercial conduct, which is why we have fair trading laws, or prevent race discrimination, which is why we have anti-discrimination laws, or prevent erroneous decisions by bureaucrats, which is why we have laws that permit review.

For the disempowered – for those to whom a guarantee of human rights has real meaning – law is a last but necessary resort when advocacy, persuasion, campaigning, shaming, and pleading fail to alleviate harm being done, or unfairness being perpetrated. Legal remedies are a part of the liberal-democratic package of protecting people and controlling the state.

It is often the case that no law has been written to address a person's situation, and creative use of existing laws is futile. What is missing – the tool that the disempowered need for access to equal treatment and equal opportunity – is a law that is designed to address their circumstances, a law that shows that their elected parliament knows, cares and is prepared to act, that gives them the same entitlement to fairness regardless of their status, that sets universal expectations of behaviour, that speaks to and for all people in all circumstances, and that guarantees minimum standards of respect, decency, and regard for human dignity.

In the absence of such a law, the legal system and the society whose standards the legal system reflects, fail to protect the disempowered.

A piecemeal approach to protecting interests will always exclude some and privilege others. A single law that guarantees the same standards to all is a unique statement of

equity, inclusiveness and respect, and an essential means of directing society's attention to the needs of the disempowered.

In Australia, we are engaged in a continuing project to achieve a fair and inclusive society. We have developed policies, practices and complementary laws that offer protection and promise in many areas of life, to many people. None, yet, offers protection and promise to all. A law that guarantees respect for human rights, by everyone for everyone, is an essential step towards completion of the project, and achieving a fair and inclusive Australian society.

It is self-evidently the case that the human rights of the disempowered are not sufficiently protected, that people in Australia live today, and tonight, in poverty, fear, hunger, homelessness, ignorance, confusion, pain, powerlessness and despair is confronting evidence of the inadequacy of human rights protections in Australia.

Our democratic institutions are not designed or operated to extend human rights protection to all members of society. Reliance on those institutions alone suits principally people with the power – usually derived from wealth, social position, education, family, friendships, and simple good fortune – to influence public affairs. Measures such as legislative scrutiny, along with public policy and practice, political and community leadership, public education and awareness campaigns, education and training of professionals and the bureaucracy, and community education and development – if they were to all to happen – would contribute to protecting and promoting human rights.

I submit that all such measures need to be supported by complementary legislation – a Human Rights Act – that defines, promotes and enforces human rights standards only in the same way that legislation, and courts, commonly promote and enforce expected standards of behaviour in society.

I submit that for a Human Rights Act to play this role means, necessarily, that the guaranteed human rights are justiciable and enforceable.

The 'dialogue model' is not an effective guarantee of people's human rights. The dialogue model's deference to 'parliamentary sovereignty' is misguided. To quote Associate Professor Ryan Goss: 'There is no Australian legislature that is sovereign or supreme'. ('What Do Australians Talk About When They Talk About 'Parliamentary Sovereignty'? [2022] *Public Law* 55). As Goss points out, it is unremarkable that 'substantive legal limits apply to Australian legislatures' legislative power, and the Australian courts enforce those limits'. A Human Rights Act would only be such an enforceable limit.

I submit that a Human Rights Act in Australia include economic, social and cultural (ESC) rights as justiciable and enforceable rights.

Apprehension that economic, social and cultural rights are not justiciable are unfounded.

Analysing the 2009 National Human Rights Consultation report, Professor Andrew Byrnes criticised the report on the basis that it 'restates the traditional position, assumes that ESC rights invariably and only involve major distributional choices, and fails to respond to the many arguments that have shown that such a simplistic dichotomy does not represent current thinking or practice in relation to ESC rights.

There is extensive scholarly literature on the justiciability and enforceability of economic, social and cultural rights in theory and in practice around the world. There is, for example, extensive experience – researched and reported on – of the justiciability and enforceability of economic, social and cultural rights in South Africa. However, to the extent that it makes a substantive difference, the South African experience can be distinguished for the fact that the rights are constitutional.

Of clear relevance to this inquiry, Hilary Charlesworth, Andrew Byrnes, Renuka Thilagaratnam and Katharine Young examined a non-entrenched *legislative* Human Rights Act, and recommended that the ACT *Human Rights Act 2004* be amended to include economic, social and cultural rights (*Australian Capital Territory Economic, Social and Cultural Rights Research Project Report*, Australian Research Council Linkage Project LP0989167, September 2010).

A legal opinion obtained by the Human Rights Law Centre on the justiciability of social and economic rights under a Commonwealth Human Rights Act (https://www.hrlc.org.au/news/esc-rights-legal-opinion-on-justiciability-of-esc-rights-in-an-australian-human-rights-act-dec-2009) advises that

- there is no necessary constitutional objection to including economic and social rights in any federal Human Rights Act
- economic and social rights are no more broadly expressed than civil and political rights, which are capable of being interpreted and applied in the exercise of federal judicial power
- decisions about social and economic rights may have implications for the allocation of budgetary resources, however the same is true for all human rights, and
- it is an overstatement to say that ICESCR rights do not contain judicially manageable standards.

I submit that to complement a Human Rights Act, the four federal anti-discrimination statutes would be consolidated into a single statutes that is drafted to give effect to the human rights guarantee of non-discrimination.

6. Whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made

The only formal federal human rights mechanisms are the Parliamentary Joint Committee on Human Rights, the Australian Human Rights Commission, the Office of the Australian Information Commissioner, the Independent National Security

Legislation Monitor, and Australia's international treaty obligations. I discount administrative law and courts' statutory interpretation as human rights 'mechanisms'.

6.i The remit of the Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (PJCHR) is only one part of comprehensive human rights protection in Australia, concerned only with the human rights compatibility of legislative instruments and has no part in ensuring that executive action – the way those legislative instruments are given effect by government officers – is human rights compliant.

Even if the PJCHR could be relied on to ensure that legislative instruments are compatible with human rights – and, through no fault if its own, it cannot be – the human rights that matter to people in Australia are the human rights that are in the actions, decisions and discretions of those who act under the legislative instruments. The PJCHR thus has only marginal relevance to whether the Government's conduct towards people, through its agencies and staff, is human rights compatible. The remit of the PJCHR must be assessed not in isolation but in the context of what else is done to protect human rights in Australia.

I submit that the Committee's report take full account of previous extensive and thorough answers to the same questions are that being asked again, and recommend the enactment of reforms proposed by Mulcahey and Seear (2022), Reynolds, Hall and Williams (2020), Fletcher (2018), and the Australian Law Reform Commission in Chapter 3 of its *Traditional Rights and Freedoms* report (ALRC 129, 2016).

On the role and operation of the PJCHR, research reported in the literature details its inadequacies and failings; see, for example, the list below, alphabetically by first author.

> Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 143-162
>
> Carolyn Evans and Simon Evans, 'Evaluating the human rights performance of legislatures', (2006) 6(3) *Human Rights Law Review*, 545
>
> Adam Fletcher, *Australia's Human Rights Scrutiny Regime*, 2018, Melbourne University Press
>
> Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', Ch 2 in Julie Debeljak and Laura Grenfell (eds) Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions, 2020, Thompson Reuters
>
> Adam Fletcher, *Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's international human rights obligations?*, Human Rights Law Centre and RMIT, 2022

Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?', (2015) 26(1) *Public Law Review* 19

Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia', (2018) 40 *UNSW Law Journal Volume*

Bryan Horrigan, 'Improving legislative scrutiny of proposed laws to enhance basic rights, parliamentary democracy, and the quality of law-making', in Jeffrey Goldsworthy (ed.), *Protecting rights without a bill of rights: Institutional performance and reform in Australia*, 2006, Taylor & Francis, 61–100.

Sarah Moulds, 'From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law-making' (2020) 31 *Public Law Review* 264

Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', (2020) 45(3) *Alternative Law Journal* 180

Sean Mulcahy and Kate Seear, 'On tables, doors and listening spaces: Parliamentary human rights scrutiny processes and engagement of others', (2022) 28(2-3) *Australian Journal of Human Rights*, 286

Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime', (2020) 46(1) *Monash University Law Review* 256

Simon Rice, 'Allowing for dissent: opening up human rights dialogue in the Australian parliament', in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*, 2020, Thompson Reuters, 99-134

George Williams and Daniel Reynolds, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', Ch 3 in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*, 2020, Thompson Reuters

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*, 469

6.ii The role of the Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is significantly hampered in fulfilling its role by its inadequate resourcing, to the extent of risking its relevance.

The AHRC is Australia's national human rights institution (NHRI). Under a 1991 resolution of the United Nations Commission on Human Rights, adopted by the UN General Assembly, international standards for the structure and operation of NHRIs are known as the Paris Principles. The Paris Principles require a state to ensure that its NHRI is autonomous, that its independence is guaranteed by statute and that it has a

broad mandate based on universal human rights standards with adequate powers and sufficient resources.

It is notorious that in 2022 the General Assembly and the Human Rights Council Sub-Committee on Accreditation deferred its accreditation decision for the AHRC because of the inadequacy of arrangements for selection and appointment of Commissioners. Clearly urgent measures must be taken to meet the SCA requirements and comply with the Paris Principles.

At the same time the SCA recorded its concerns with the unlimited terms for which a Commissioner can be appointed, the absence of an explicit mandate for the *Convention against Torture* and the *International Covenant on Economic Social and Cultural Rights*, and the inadequacy of funding.

I submit that that the Committee recommend that the Australian Human Rights Commission's shortcomings against the Paris Principles be rectified. I welcome the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022 as a step in that direction.

I note that Australia's disregard for compliance with the Paris Principles is chronic. As long ago as 2000, an independent report by the International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions*, queried whether the AHRC at the time met the Paris Principles' requirements for independence: sufficiency and security of funding.

For want of resources, the AHRC is currently unable or unable adequately to carry out its functions under s11(1) *Australian Human Rights Commission Act 1986* (Cth) to:

1. inquire into, and attempt to conciliate, complaints of unlawful discrimination the AHRC's procedures are slow, inexpert and of limited effectiveness
2. inquire into any act or practice that may be inconsistent with or contrary to a human right
3. undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights
4. report to the Minister on laws that should be made or action that should be taken on matters relating to human rights
5. report to the Minister on the action that needs to be taken by Australia in order to comply with its international human right treaty obligations
6. prepare and publish guidelines for the avoidance of acts that may be inconsistent with or contrary to a human right
7. intervene in proceedings that involve human rights issues.

I submit that the Committee recommend that the Australian Human Rights Commission be provided with the resources necessary to carry out its functions.

A significant part of protection of human rights in Australia is the operation and enforcement of Australia's four federal anti-discrimination laws. This protection was and continues to be compromised by the loss – because of the High Court decision of *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 – of the AHRC's power to make a determination under a discrimination Act which could then be lodged with the Federal Court for enforcement.

Whether the arrangements that were made after the decision in *Brandy* were necessary is open to doubt. It may be that the new arrangements went further than was necessary to redress the Chapter III difficulty posed by the previous arrangements, with the result that a relatively expert and accessible system for dealing with discrimination complaints was lost when it could have been saved. It is desirable that thought be given to how to redress the Chapter III difficulty of the previous arrangements, so as to re-establish the AHRC's power to make a determination that is enforceable through Federal Court.

I submit that the Committee recommends that the Government seek legal advice on how a different response to the decision in *Brandy* could re-establish the AHRC's power to make a determination that is enforceable through Federal Court.

6.iii the process of how federal institutions engage with human rights, including requirements for statements of compatibility

As the research on parliamentary scrutiny (above) shows, statements of compatibility are often poorly prepared. At times they betray any of ignorance, defensiveness or hostility. They do not reflect well on the culture or understanding of human rights in government departments and Minister's offices.

More broadly, it is not apparent whether and how federal institutions do engage with human rights, but the reasonably available inference is 'scarcely at all'. As an indicator of the absence of human rights awareness and sensibilities in federal institutions:

- no portfolio legislation or instruments refers to human rights
- human rights compliance is not an object (s 5) of the *Public Governance, Performance and Accountability Act 2013* (Cth), and human rights are not referred to in the Act
- the *Australian Public Service Framework for Engagement and Participation* makes no reference to human rights
- the *Commonwealth Procurement Rules* make no reference to human rights.
- respect for human rights is not a stated Australian Public Service Value in s 10 of the *Public Service Act 1999* (Cth)
- when s 10(3) of the *Public Service Act 1999* (Cth) is read with cl 15(c) of the *Australian Public Service Commissioner's Directions 2022*, the most that is expected of an Australian public servant is 'recognising the importance of human

rights and understanding Australia's human rights obligations'; recognising and understanding is no guarantee of respect and compliance.

7. The effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

The effectiveness of existing human rights legislation in protecting human rights in the Australian Capital Territory, Victoria and Queensland has been researched and reported on. **I submit** that the Committee's report take full account of previous extensive and thorough answers to the same questions are that being asked again.

For reports, see (chronologically):

ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT), The First Five Years of Operation: A Report To The Act Department of Justice and Community Safety*, Australian National University, May 2009

ACT Human Rights and Discrimination Commissioner, *Look who's talking: A Snapshot of Ten Years of Dialogue under The Human Rights Act 2004*, 2014

Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, State of Victoria, 2015

Victorian Equal Opportunity and Human Rights Commission, annual reports 2015-2021 on the operation of the *Charter of Human Rights and Responsibilities*.

For scholarly research and commentary on the effectiveness of existing domestic human rights legislation, see, for example:

Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 207-228

Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade on*, 2017, Federation Press

Sean Mulcahy & Kate Seear, 'A culture of rights finding its feet: parliamentary human rights scrutiny in the Australian Capital Territory', (2023) *The Journal of Legislative Studies*, DOI: 10.1080/13572334.2023.2185357

Simon Rice, ''Culture, What Culture?' Why We Don't Know if the ACT Human Rights Act is Working', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 185-205.

8. International treaty compliance

In the absence of a national human rights law, a measure of Australia's commitment to human rights is how serious it is in giving domestic effect to its international human rights treaty obligations.

Commencing in 1996, successive federal governments have taken what Professor Hilary Charlesworth described as 'a combative approach' to the international human rights system (H Charlesworth, 'Human rights: Australia versus the UN', Discussion Paper 22/06, RegNet, Australian National University, 2006, 3) questioning its integrity and rejecting the validity of its oversight of Australia's performance against human rights standards.

Professor David Kinley has described Australia's attitude as 'politics of denial … evident in … decidedly petulant and self-righteous statements of the … government regarding the actions and activities of the various human rights organs of the UN that dare to question Australia's compliance with its international human rights obligations' (D Kinley, 'Human Rights Fundamentalisms' (2007) 29(4) *Sydney Law Review* 545, 570).

Despite a period of a more cooperative attitude to the UN and its human rights mechanisms, between about 2007 and 2011, Australia has persistently dispute the views of the treaty monitoring bodies.

Madelaine Chiam is damming of Australia in the observations she makes based on her research ('International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 229-246, footnotes omitted):

> In 1995, Hilary Charlesworth described as ' Janus-faced ' the Australian practice of presenting itself as committed to human rights protections internationally, while failing to protect those same rights domestically. In the decades since then, observers of human rights protections in Australia have made similar critiques, including describing Australia ' s commitment to international human rights standards as embodying exceptionalism, or as an ' ornament of foreign policy '. International bodies too have noticed this characteristic of Australian human rights practice. In 2018, the report of the Special Rapporteur on the Situation of Human Rights Defenders in Australia expressed astonishment at what he described as ' the increasing discrepancy and incoherence between the Government ' s external pronouncements … and the domestic implementation of its human rights obligations'.
>
> … Australian governments have [not] improved records of compliance with international human rights standards. Rather, Australian governments' skepticism of the application of international human rights standards domestically has resulted in repeatedly hostile responses to the views of international human rights bodies. Australian governments have minimised the Janus-faced approach through their open rejection, both internationally and domestically, of the views of international human rights bodies. This attitude has meant that the determinations and recommendations of these international bodies have had minimal impact in Australia.

I submit that promotion and protection, and the very credibility, of human rights in Australia is undermined until and unless Australia engages with the international human rights system honestly, reflectively, maturely and responsively.

I submit that, to this end, the Committee recommends that Australia:

1. ratify
    i. the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and its individual complaints procedure
    ii. the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*
    iii. the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*
2. withdraw its reservations to
    i. art 37(c) of the *Convention on the Rights of the Child*
    ii. arts 10, 14 and 20 of the *International Covenant on Civil and Political Rights*
    iii. art 11(2) *Convention on the Elimination of All Forms of Discrimination against Women*
3. withdraw its declarations in relation to
    i. art 4(a*) International Convention on the Elimination of All Forms of Racial Discrimination*
    ii. the *Convention on the Rights of Persons with Disabilities*
4. accept and give effect to the views of human rights treaty bodies on communications against Australia
5. incorporate Australia's international human rights obligations into domestic law, through a national Human Rights Act and in legislation and practice.

I am happy to elaborate on this submission further, and wish the Committee well with its deliberations.

Yours sincerely,

Professor Simon Rice, OAM

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