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Submission to Australian Parliamentary Joint Committee: Inquiry into Australia's Human Rights Framework

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ABOUT US

The Bonavero Institute is a research institute within the Faculty of Law at the University of Oxford. It is dedicated to fostering world-class research and scholarship in human rights law, to promoting public engagement in and understanding of human rights issues, and to building valuable conversations and collaborations between human rights scholars and human rights practitioners.

Since opening in October 2017, the Institute has been housed in a new building at Mansfield College. The Institute's home at Mansfield is central to its identity as inclusive and welcoming and is an important factor in the Institute's ability to attract scholars and to host important symposia and conferences. The Bonavero Institute seeks to ensure that the research is of contemporary relevance and value to the promotion and protection of human rights.

As part of its mission, the Institute has nurtured a vibrant community of graduate students, hosted outstanding scholars of law and other disciplines, and collaborated with practitioners engaged in the most pressing contemporary human rights issues around the world. The Bonavero Institute adopts a broad definition of human rights law to include international human rights law and practice, domestic human rights, the rule of law, constitutionalism, and democracy.

The Bonavero Reports Series is the flagship outlet for the scholarship produced at the Institute. It presents cutting-edge research in a straightforward and policy-ready manner, and aims to be a valuable source of information for scholars, practitioners, judges, and policymakers alike on pressing topics of the current human rights agenda. For more information, please visit our website.

AUTHORS' BIOGRAPHICAL NOTES

Professor Kate O'Regan

Professor Kate O'Regan is the founding Director of the Bonavero Institute of Human Rights (since 2016). From 1994 – 2009, she served as one of the first judges of the South African Constitutional Court. She has also served as an ad hoc judge of the Namibian Supreme Court (2010 – 2016), as inaugural chairperson of the UN Internal Justice Council (2008 – 2012), and as the chairperson of a Commission of Inquiry into policing in Khayelitsha in Cape Town (2012 – 2014).

Professor Martin Scheinin

Professor Martin Scheinin is a British Academy Global Professor at the Bonavero Institute of Human Rights, where his research project "Addressing the Digital Realm through the Grammar of Human Rights Law" is running from 2020 to early 2025. Before joining the Bonavero Institute, Martin was Professor of International and Human Rights at the European University Institute, a position he had held since 2008. Martin has had extensive experience in international human rights law having served as a member of the UN Human Rights Committee from 1997 to 2004, as UN Special Rapporteur on human rights and counter-terrorism from 2005 to 2011, and as a member of the Scientific Committee for the EU Fundamental Rights Agency from 2018 to 2023.

John Croker

John is a Master of Philosophy (MPhil) in Law student at the University of Oxford, and is an Australian human rights lawyer advising government of their obligations under the *Charter of Human Rights and Responsibilities Act*. John was previously responsible for managing the project to implement the recommendations of the 8-year review into the operation of the Charter in Victoria, and led a team that trained over 10,000 public servants in tailored human rights training over a two year period in Victoria,

including through the delivery of training to 14 prisons across the state; to school principals; to hospitals; to police; and to policy officers. John is currently the Managing Principal Solicitor responsible for Human Rights within Victoria Police.

Ashleigh Barnes

Ashleigh is a Doctor of Philosophy (DPhil) in Law student at the University of Oxford, a Lecturer at Macquarie University and an Australian lawyer. Ashleigh researches the nature, identification, and role of constitutional values in Australian constitutional adjudication generally, with a particular emphasis on the value of dignity. Ashleigh was previously chair of Oxford Pro Bono Publico, an organisation responsible for contributing pro bono legal research in human rights and public law matters.

28 June 2023
Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament of Australia

Dear Committee Secretary,

Inquiry into Australia's Human Rights Framework

Thank you for the opportunity to provide a submission on the current human rights framework in Australia and potential reforms to strengthen the protection, promotion, and fulfilment of human rights for people across Australia.

We applaud the deliberate, thoughtful, and wide-reaching process the Committee is undertaking and consider that the process adopted recognises the significance of public participation in considering the importance of questions relating to the protection of human rights in Australia.

This submission draws on the expertise of senior scholars and graduate research students from the Bonavero Institute of Human Rights at the University of Oxford, a research centre based in the Faculty of Law, which fosters world-class research and scholarship in human rights law, promotes public engagement in and understanding of human rights issues, and builds collaborations between human rights scholars and practitioners.

We comment on the specific questions asked by the Australian Parliamentary Joint Committee on Human Rights (**the PJCHR**). Further submissions and advice can be provided to the Committee on request. Biographical details of the authors of this submission and their relevant experience are extracted below for the assistance of the Committee.

Should the Australian Parliament Enact a Federal Human Rights Act?

We strongly support the recommendation of the Australian Human Rights Commission (**the Commission**) in its Position Paper[1] that the Commonwealth Parliament should enact a federal Human Rights Act. We consider that this would build on the successful introduction of Charters protecting human rights in the Australian Capital Territory (ACT), Victoria, and Queensland.

It is a strength of a federal system that it is possible to experiment with, or 'test', law reform in a jurisdiction before the same reform is applied at a national level. There are now, and have been for some time, multiple jurisdictions in Australia with significant human rights legislation. These initiatives have contributed to building an emerging human rights culture. Communities within Australia have over the last few decades begun to understand the protection afforded by human rights legislation and what it can, and cannot, do. Public administrators have become familiar with the need to take human rights into account in their decision-making processes and to act compatibly with human rights. This has led at least in Victoria to better governance.[2]

Enacting a federal Human Rights Act would build on these strengths and assist in achieving uniform human rights protection and foster a culture of human rights across Australia.

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[1] Australian Human Rights Commission, 'Position Paper: A Human Rights Act for Australia', 2022 (**Position Paper**).

[2] The review into the Victorian *Charter of Human Rights and Responsibilities Act 2006* after eight years of operation found that the enactment of the Charter was a positive step to strengthen the protection of human rights in Victoria, but that concerted further work by the Victorian Government was required to build a stronger human rights culture and culture of justification in government, which in turn would facilitate better government decision making: Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', September 2015, State of Victoria (**2015 Charter Review**).

Many comparable countries in Europe, including all Nordic Countries, have gradually learned the benefits for effective human rights protection and the rule of law of formally incorporating some or all of their international human rights treaties into the framework of applicable and justiciable domestic law.[3]

[3] In this process, Finland early on adopted the model of continental Europe where important international treaties, including human rights treaties, are routinely incorporated into domestic law, while Norway, Sweden, Denmark, and Iceland later on in the 1990s adopted the same solution in respect of the European Convention of Human Rights and Norway chose to incorporate also many of the United Nations human rights treaties. Three of the Nordic countries have inserted in their Constitutions clauses that make direct reference to international human rights treaties, thereby giving them quasi-constitutional status. See, Chapter 2, Article 19, of the Constitution (Form of Government) of Sweden; Article 92 of the Constitution of Norway, Article 22 of the Constitution of Finland. Notably, Finland's Constitution also includes Article 74 that institutionalizes a formal mechanism for the review of Government Bills for their compatibility with the Constitution and international human rights treaties. See, also, Article 112 of a Draft Constitution for Iceland. https://www.constituteproject.org/?lang=en

What Elements Should be Included in a Federal Human Rights Act?

A federal Human Rights Act should adopt the key elements and features outlined in the Position Paper.

We make some specific comments on:

- Economic, Social and Cultural Rights;
- General Limitations Clause;
- The Interpretive Obligation and International Law;
- Duties of Public Authorities;
- Review and Redress in the Courts.

Economic, Social, and Cultural Rights

We welcome the Commission's proposal to incorporate a range of economic, social, and cultural rights in addition to a range of civil and political rights in the legislation. We note that the Commission recommends that the immediately realisable aspects of those rights would be enforceable, and that their progressive realisation would be achieved by Parliamentary scrutiny and monitoring and reporting by the Commission.[4]

We acknowledge that there are a range of ways in which the progressive realisation of economic, social, and cultural rights can be achieved. What mechanisms are appropriate to protect these rights may vary considerably from country to country depending upon history, institutional structures, constitutional design, political and legal culture. There is not a 'one size fits all' model for fulfilling international obligations with respect to economic, cultural, and social rights. Direct legal enforcement is not the only option.

[4] Position Paper, 128.

In its report, *The Development and Application of the Concept of Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership*,[5] after a comparative review of the different institutional mechanisms for the protection of economic, social, and cultural rights in Colombia, Finland, and South Africa, the Bonavero Institute identified five key principles to guide a government seeking to provide for the domestic protection of economic, social, and cultural rights to fulfil its international human rights obligations.

The first principle is that, in the case of those human rights that impose positive obligations, legislation should be passed stipulating the benefits that will be provided by government to fulfil the rights and a process provided through which those benefits can be obtained.

The second principle is that government needs to ensure that state agencies tasked with fulfilling human rights are properly resourced and function responsively, effectively, and openly.

The third principle is that government needs to provide an effective process for monitoring the implementation of the rights and the budgetary allocation for that implementation.

The fourth principle is that government should consider a pluralistic model for rights enforcement involving parliamentary committees, courts, tribunals, and integrity institutions such as ombuds and human rights commissions.

The fifth principle is for government to identify what institutional provision will be made for circumstances where government fails to act progressively to realise rights.

[5] Professor Manuel Cepeda, Professor Kate O'Regan, and Professor Martin Scheinin, *The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership*, 2021, Bonavero Report 01/2021, available online: https://www.law.ox.ac.uk/sites/default/files/migrated/bonavero_report_12021_1.pdf

We recommend that these five principles inform the approach to be adopted to the progressive realisation of the economic, social, and cultural rights to be included in a federal Human Rights Act.

General Limitations Clause

We note the proposal that a general limitations clause should be included in a federal Human Rights Act and that it should adopt all of the elements identified to assess whether the limitation on the right is reasonable and justified, including 'whether there are safeguards or controls over the means adopted to achieve the purpose'.[6]

A general limitations clause has both its merits and demerits. It does provide a basis for clearer and better integrated domestic jurisprudence on the way in which interferences with rights can be justified than a piecemeal approach involving the variable justification of limits on specific rights. That said, it may not be easily harmonized with international human rights standards that typically include some differentiation as regards legitimate aims that may justify restrictions upon specific rights. Some countries have therefore adopted a model where compliance with international human rights obligations is one criterion for the permissibility of limitations.

In addition to the general limitations clause, the Commission treats some rights as absolute, namely, freedom from torture and other cruel, inhuman, or degrading treatment or punishment, freedom from forced work, freedom from imprisonment for inability to fulfil a contractual obligation, the prohibition against retrospective operation of criminal laws, and the right to recognition before the law.[7] The absolute

[6] Position Paper, 25. This is in addition to: (1) whether the limitation has a legitimate purpose; (2) whether the limitation is necessary to achieve the legitimate purpose and whether it adopts a means rationally connected to that purpose; (3) the extent of the interference with the right; and (4) whether there are any less restrictive and reasonably available means to achieve the purpose.
[7] Position Paper, 255.

status of those rights means that they must not be subject to any exceptions or limitations.

We query this aspect of the Commission's approach, because accepting a right as absolute might lead to its scope becoming unduly narrowed. This would be an unfortunate consequence, particularly with respect to freedom from slavery where a broad understanding of the scope of the right should be adopted. However, we note that the Commission proposes to define slavery as including 'modern slavery' within the *Modern Slavery Act 2018* (Cth) and this may avoid a restrictive understanding in respect of that right. Nevertheless, the general concern remains.

The Interpretive Obligation and International Law

The Commission accepts that it will be important for courts, tribunals, and public authorities when interpreting the human rights legislation to consider Australia's international legal obligations under international human rights treaties and conventions.[8] Accordingly, we suggest that any human rights legislation should include a provision providing that courts or tribunals, when interpreting the human rights legislation, should take into account international human rights law. We also suggest that the legislation make clear that courts and tribunal may also consider relevant judgments of domestic, foreign and international courts.

In making this recommendation, we note that this would differ from the provisions in the State and Territory human rights legislation. In our view, this is appropriate, given that the Commonwealth is the pre-eminent jurisdiction in Australia and ought to show leadership on this issue, especially given that it is the Commonwealth of Australia that has ratified the relevant treaties and undertaken the international obligations.

We note in this regard that s 2 of the *Human Rights Act 1998* (UK) (**the UK HRA**) imposes a mandatory obligation on courts and tribunals to take into account relevant

[8] Position Paper, 247.

judgments of the European Court of Human Rights (ECtHR).[9] A recent comprehensive and careful review of the UK HRA by a distinguished independent panel appointed by the UK government contains a valuable account of the changing approach to the interpretation of s 2 by UK courts over the last thirty years. The panel proposed a small amendment to the provision but recommended the retention of the formulation that the UK courts must take the jurisprudence of the ECtHR into account.[10]

Duties of Public Authorities

One of the key gaps in the protection of human rights at the federal level in Australia currently is the absence of an enforceable legal obligation on the executive arm of government to 'properly consider' and 'act compatibly' with human rights in drafting policy, making decisions, and implementing laws. The model proposed by the Commission, based upon the legislation in the ACT, Victoria, and Queensland, would address this gap.

We endorse the recommendation of the Commission that a federal Human Rights Act build upon the experience of the other Australian jurisdictions by introducing a 'participation duty', namely, an obligation on public authorities to engage in decision making processes for First Nations peoples, children, and persons with disability in relation to policies and decisions that directly or disproportionately affect their rights.[11] In the context of Aboriginal and Torres Strait Islander people we see this as an important aspect of ensuring meaningful self-determination by communities that have been marginalised or excluded.

[9] UK HRA, s 2(1).

[10] See the Report of the Independent Panel Review of Human Rights Act, available online https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[11] Position Paper, 161.

We also support the imposition of a positive duty on public authorities to facilitate access to justice in the form of legal assistance, interpreters, and disability support to those who face barriers in navigating the legal system.[12]

Review and Redress in the Courts

An essential foundation for the effective protection, promotion, and fulfilment of human rights in any jurisdiction is the accessibility of review and redress for human rights breaches. The three Australian jurisdictions to have human rights laws have complex and costly avenues available for individuals who seek review. The pathways suggested in the Position Paper avoid the complexity in the human rights legislation of the other Australian jurisdictions and are aimed at providing the required mechanisms by which an individual can challenge actions that adversely affect them in a timely and cost effective manner.[13]

[12] Position paper, 215.

[13] Position Paper, Chapter 11.

What Improvements Could be Made to Protect Human Rights in the Federal Context?

The UK Parliamentary Joint Committee on Human Rights, the equivalent to the PJCHR, undertakes important parliamentary scrutiny of statements of compatibility, similarly to the PJCHR. It also monitors the UK government's response to the Universal Periodic Review (UPR) process, undertaken by the UN Human Rights Council. The UPR process has been used effectively to strengthen human rights protections around the world.[14]

We recommend that the PJCHR monitor Australia's progress in implementing changes to which it has committed in the UPR process and, in turn, the PJCHR's reports could inform subsequent reviews of Australia's in the UPR process.

[14] Hilary Charlesworth & Emma Larking, 'Human Rights and the Universal Periodic Review: Rituals and Ritualism' (2014) Cambridge University Press.

Conclusion

The model of rights protection afforded by the ACT, Victoria, and Queensland has been recognised as a successful accommodation of the need to respect, protect, and fulfil human rights and, at the same time, preserve parliamentary sovereignty. We applaud the Commission's recognition that this is the time for the federal government to build upon the success of those jurisdictions and adopt a similar framework.

Yours sincerely,

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