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1 July 2023

The Secretariat
Parliamentary Joint Committee on Human Rights
By email: human.rights@aph.gov.au

Dear Committee Members,

INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

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1. Thank you for the opportunity to provide a submission to this important inquiry.

2. This is a public submission and is not confidential.

ABOUT LIBERTY VICTORIA

3. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for the better protection and promotion of civil liberties and human rights. More information about our organisation and activities can be found at: libertyvictoria.org.au.

TERMS OF REFERENCE

4. On 15 March 2023, pursuant to s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Attorney-General the Hon Mark Dreyfus KC referred to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report by 31 March 2024:

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

5. The Committee invited submissions by 1 July 2023 in relation to these matters, and in particular:

    - 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);
    - whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
        - to the remit of the Parliamentary Joint Committee on Human Rights;
        - the role of the Australian Human Rights Commission;
        - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
    - the effectiveness of existing human rights legislation in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant case law, and relevant work done in other states and territories.

6. These issues will be considered in turn, and this submission is structured as follows:

(1) **Part A: The need for a Federal Human Rights Act**. This section will explain why Australia is in need of substantive human rights protections at the Federal level given the many and ever-increasing threats to human rights in Federal legislation. This will focus on the demonstrated erosion of human rights with regard to secrecy laws and journalistic freedom, the treatment of refugees and people seeking asylum, and improper prosecutions. In will also consider the Australian experience in the context of the evolution of international human rights law;

(2) **Part B: The Adequacy of existing mechanisms to protect human rights in the federal context and the potential for improvements**. This section will explain why existing mechanisms are inadequate, with a focus on statements of compatibility and the limitations of the Parliamentary Joint Committee on Human Rights (PJCHR); and

(3) **Part C: The effectiveness of existing human rights legislation in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant case law, and relevant work done in other states and territories**. This section will focus on the Victorian experience since the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Liberty Victoria submits that the Victorian experience demonstrates that the enactment of human rights legislation has seen a careful and principled development of human rights jurisprudence that has improved access to justice for many people, particularly those in vulnerable cohorts. The concern by some that human rights legislation would lead to 'activist judges' and undermine parliamentary sovereignty has been unfounded, and fails to understand how the 'dialogue model' of the *Charter* expressly protects parliamentary sovereignty. This section will also consider how the *Charter* could be improved, influenced by the key recommendations of the 2015 *Charter* review, which may be valuable when considering how a Federal human rights statute should be drafted.

Recommendations

7. For the reasons that follow, we recommend to the Inquiry:

   (1) The enactment of a federal Human Rights Act which codifies human rights protections in Australia and sets clear remedies and consequences for breaches of human rights;

   (2) The introduction of minimum standards for Statements of Compatibility, including but not limited to:

      i. Proper analysis of the degree to which a bill will impact upon, and limit, human rights; and

      ii. Explanation of the necessity and proportionality of any such limitations, including how the limitations comply with human rights as protected by the relevant international treaties ratified by Australia.

   (3) A requirement that bills and legislative instruments may not be passed until a final report of the PJCHR has been tabled in Parliament, unless there are exceptional circumstances.

Part A: The Need for a Federal Human Rights Act

8. It is often said by those who oppose a federal Human Rights Act that there is no need for one. They argue that the human rights of Australians are more than adequately protected by the common law and statute. Anyone remaining of that view will be hard pressed to retain it should they read the comprehensive report on the subject prepared by the Australian Law Reform Commission (ALRC) entitled 'Traditional Rights and Freedoms: Encroachments by Commonwealth Law' (December 2015). The report identifies hundreds of provisions in Commonwealth law that may constitute incursions on human rights and freedoms. The nature and extent of the legislative provisions that may be in breach of fundamental rights and freedoms will come as a shock to anyone who cares to delve into the ALRC's first class report. No report in recent decades has come close to providing such a detailed enumeration, description and analysis of statutory infringements of human rights.

9. For example, Commonwealth laws that may prohibit or restrict freedom of speech have been identified in criminal laws, secrecy laws, contempt laws, media and telecommunications laws, intellectual property laws, information privacy laws and anti-discrimination laws. Not all of these restrictions are unjustified, but the ALRC has identified many that are likely to be. These include provisions in the *Crimes Act 1901* (Cth), *Aboriginal and Torres Strait Islander Act 2005* (Cth), *Aged Care Act 1997* (Cth), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), *Australian Securities and Investments Commission Act 2001* (Cth), *Australian Security Intelligence Organisations Act 1979* (Cth) and the *Australian Border Force Act 2015* (Cth).

10. Statutory encroachment upon the right to procedural fairness is a hugely important class of potential rights violations. Procedural fairness is the entitlement that every person whose rights are affected by a government decision has the right to a fair hearing before an independent and impartial court, tribunal or administrative decision-maker. It also provides the right to respond to information or findings that may be adverse before a decision is made. Procedural fairness has not infrequently been denied in the spheres of corporate and commercial regulation, national security legislation and migration law. In recent years, there has been tidal wave of denials of procedural fairness in the latter category.

11. There are four key areas of concern in relation to migration law. These relate to the mandatory cancellation of visas (on character, security or other grounds); the 'fast-track' process for assessing applications for refugee status; changes to the *Maritime Powers Act 2013 (Cth)* (the legislation which authorises boat turn-backs); and ASIO assessments in relation to refugees and other non-citizens. In each category the right to procedural fairness has been swept away.

12. It is already apparent from the work of the ALRC that Australia's protection of traditional rights and freedoms can at best be characterised as piecemeal and haphazard. Given the numerous examples of statutory infringements of rights and freedoms that have been identified, it is clearly time seriously to consider the most comprehensive and sensible solution to this mishmash: that is, the enactment of an Australian Charter of Human Rights.

13. There are three issues that illustrate the failure of human rights protections in Australia even more clearly. The first relates to secrecy laws, journalists and media freedom. Secondly, there are concerns about the treatment of refugees and people seeking asylum. Thirdly, there is the problem of improper prosecutions.

Press Freedom

14. In part due to the proliferation of counter-terrorism legislation, the civil liberties of Australians have been greatly diminished. Media freedom has been similarly curtailed. It is time for a comprehensive review of counter-terrorism laws to be undertaken, particularly insofar has these have infringed upon press freedom. The greater the incursion is upon the rights and entitlements of journalists, the weaker the underpinnings of democracy become. Here are two illustrations of the journalistic freedoms at stake.

15. The first concerns relevant provisions of the *Commonwealth Criminal Code Act 1995* (Cth) (the *Code*), introduced by amendments in 2018. Division 122 of the *Code* deals with the secrecy of government information. This creates a series of crimes related to the improper disclosure of 'inherently harmful information'. The first type of these crimes is well understood and accepted. It is a crime for a Commonwealth government official to disclose information classified as secret or top secret.[1]

16. It is the second crime that should worry the media, not least because of the severity of its penalty. Here, a person, other than a Commonwealth official, commits an offence if he or she comes into possession of confidential information created, or dealt with, by a Commonwealth official and then communicates that information to an individual or organisation outside government.[2] The kind of information concerned is information that, among other things, has been classified as secret, or damages the security or defence of Australia.

17. In other words, if classified information has been communicated to a journalist by a Commonwealth officer, and the journalist or their media organisation elects to publish

1 *Code* s 122.1. See also ss 122.2, 122.3, 122.4.
2 *Code* s 122.4(1).

a related article, incorporating or quoting that information, the journalist is exposed to a maximum penalty of five years' imprisonment. The key problem here is that the classification of governmental information as secret or top secret is essentially arbitrary. So, the more broadly that secrecy is defined, the wider the scope of the crime of disclosure becomes.

18. Section 122.5(6) contains a limited defence for journalists. It is a defence if, in disclosing the information, a journalist is engaged in reporting the news, presenting current affairs or expressing editorial content, and the journalist reasonably believed that the disclosure was in the public interest. The defence is fragile, because the meaning of the terms 'reasonable belief', and 'public interest' is inherently vague. And the evidential burden as to the existence of a reasonable belief of a public interest lies upon the journalist. Many journalists will think twice about risking court and prison upon such an uncertain legal foundation. The division is likely to have a significant chilling effect on press freedom as well as whistle-blowers.

19. The second example concerns the terms of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). This legislation provides intelligence and law enforcement agencies a number of ways to uncover the identity of journalists' sources. For example, an intelligence or law enforcement agency can issue a notice to a 'designated communication provider' requiring that provider to assist with a criminal investigation. Every major media organisation and any individual journalist in the country could fall within the definition of a communication provider.

20. The definition of the assistance that could be required is very broad. It may include, for example, the removal of the electronic protection of data by such means as encryption, the provision of technical information governing access to data, and the facilitation of access to electronic devices. These and similar powers must be seen in light of the capacity of law enforcement agencies to obtain 'computer access warrants'. Such warrants permit intelligence and law enforcement officers to intercept any communication passing over a telecommunications system. To enable interception, the warrants may authorise the examination and use of any individual's or organisation's computer to access relevant data.

21. Further, in order to access and use relevant data, the authorities may a*dd, copy, alter or delete* computerised data and any electronic communication in transit. This is an unprecedented and incredibly broad power. The Act provides further that if anything has been done to an individual's or agency's computer, the investigating authority may take any steps reasonably necessary to conceal the fact that the targeted device has been tampered with. This kind of warrant was issued to the ABC in the search and seizure raid executed by the Australian Federal Police in 2019.[3] The warrant was ruled by the Federal Court to be lawfully obtained,[4] which prompted calls for an overhaul of these laws.[5]

22. The danger inherent in such powers for the confidentiality of journalists' sources is likely to stifle press freedom and public interest journalism. The Fourth Estate is a fundamental part of a healthy democratic society and is vital to hold Parliament and the Executive to account. At this stage journalists cannot, with any confidence, assure their sources that their identity will not be disclosed.

The Treatment of Refugees and People Seeking Asylum

23. The second issue provides a dramatic illustration of cruel, inhuman and degrading treatment. The details are provided in Behrouz Boochani's political biography describing his incarceration on Manus Island entitled 'No Friend But the Mountains.'

24. Boochani's first shock arose when he arrived on Manus to discover the appalling conditions in which he had been condemned to live. He describes the searing heat and the tiny fibro room in which four men slept in two bunks, face to face. He writes that the dirt floors were filthy and sand stuck to detainees' feet. Toilets were filled with excrement and half-functional.

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3 See, eg, *The Guardian* 'ABC raid: how the AFP's search warrant played out, one tweet at a time (5 June 2019) https://www.theguardian.com/media/2019/jun/05/abc-raid-how-the-afps-search-warrant-played-out-one-tweet-at-a-time.

4 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133.

5 The Age, 'Search warrant authorising AFP raid on ABC valid, court rules' (17 February 2020) https://www.smh.com.au/national/search-warrant-authorising-afp-raid-on-abc-valid-court-rules-20200213-p540h5.html.

25. The Manus prison authorities, under the overarching control of the Australian government, caused terrible cruelties. Boochani describes how scarcity was manipulated and there was not enough food. Detainees were living on the edge of starvation. At every meal, queues formed. They were not orderly. The strongest, most intimidating detainees grabbed the front spot for food and fights broke out frequently.

26. There was an occasion where Boochani had a toothache and was told to take anadol. It got worse so he approached the clinic and asked to see a dentist. He knew very well that there was no dentist at the clinic. A week later he presented again in front of the clinic gate, respectfully, despite the inutility of requesting a dentist. This was to advance through the bureaucratic process necessary to obtain more specialised treatment; "In other words, the system would cordially invite me inside itself''. Hundreds of people had been registered before him. In time, his number (detainees were not given the respect of having their names used) advanced from Schedule C to Schedule B. However, he said that no-one got to Schedule A. Each sickness had its own schedule. No dentist ever arrived. He asked two local guards whether they could help. One inserted a red-hot wire into the hole in his tooth. It was agony.

27. Boochani writes:

> *It isn't as though it is impossible to believe/*
>
> *It's just extremely hard to believe/*
>
> *It is painful to be in a situation where it is difficult to believe so many things/*
>
> *When an individual is in a situation in which it is difficult to believe*
>
> *that so many things are a certain way/*
>
> *…that situation becomes a source of suffering.*

28. All this was not just cruel, it disgraced our nation.

Improper Prosecutions

29. The third instance is a case that represented one of the most serious attacks upon freedom of speech. This was the prosecution of the former ASIS officer, Witness K, and his legal representative Bernard Collaery, the former ACT Attorney-General.

30. Both were charged under Section 39 of the *Intelligence Services Act 2001 (Cth) (the Intelligence Services Act)*. Under this section it is a criminal offence for a person to communicate any information that was acquired or prepared by the Australian Secret Intelligence Service in pursuit of its functions. As is well known, the prosecutions arose from the alleged disclosure by Witness K and Collaery of information related to a covert Australian spying operation. That involved ASIS bugging the offices of the Cabinet of East Timor, whilst Australia was negotiating with East Timor over oil and gas fields in the Timor Gap.

31. Witness K and Collaery were notified in 2013 that consideration was being given to prosecuting them for purported breaches of the *Intelligence Services Act*. But then nothing happened. That is, until 2018 when newly appointed Attorney-General the Hon Christian Porter decided that the prosecution should proceed. The real problem for Witness K and Colleary was that s 39 of the *Intelligence Services Act* contained no public interest defence. And, of course, there is no Human Rights Act which would confer a right of freedom of expression upon whistle-blowers and their lawyers even when the exercise of that freedom would, as in this case, clearly be in the public interest.

32. The two people who acted in the national interest by disclosing the unlawful activity undertaken by Australia's overseas intelligence service became the accused in a criminal case. The State that had initiated the unlawful, covert operation then brought the prosecution. Something had gone badly wrong.

33. In the end, Witness K pleaded guilty to a lesser charge and was given a suspended sentence of three months' imprisonment. Bernard Collaery decided to fight the prosecution. There were no less than 50 pre-trial hearings. The most concerning included attempts for Collaery's trial to be held in secret. This was a flagrant attack on the fundamental principle of open justice. In 2022 the new Attorney-General, the Hon Mark Dreyfus KC, discontinued the prosecution.

Legal Advocacy and Judicial Discretion

34. Not only do serious abuses of human rights occur in this country, but the Australian government has also engaged in the intimidation of lawyers and advocates who seek to protect and promote human rights. Some of the most concerning examples include:

- Independent Office-holders, whose task it is to provide impartial advice and to hold government to account, have been subjected to sustained governmental attacks. Consider, for example, the treatment of Gillian Triggs, the former President of the Australian Human Rights Commission, the circumstances which led to the resignation of Justin Gleeson SC from the office of Solicitor-General of the Commonwealth, and the undermining of Professor John McMillan AO, the former Information Commissioner;

- Commonwealth and State Governments have passed legislation designed to block environmental activists' access to the courts, especially in cases concerned with mining and forestry activities;

- Access by refugee lawyers to their clients, particularly in offshore detention centres, has been discouraged and prevented. There were attempts to ban access to mobile phones for detainees; telephone calls and visits to detention facilities are hard to arrange or, in the case of people seeking asylum offshore, forbidden;

- 'Gagging clauses' in government funding agreements with social welfare NGOs have become more common, which prevents them from conducting effective representation and advocacy for their clients. Such clauses forbid agencies funded by government from engaging in any criticism of government decisions or actions; and

- Judges have found their discretions heavily restricted, particularly in refugee and terrorism cases, and there has been an expansion of mandatory sentencing provisions.

35. These examples of threats to human rights make it clear that additional protections for human rights are urgently needed.

International Obligations

36. Led by Dr H V Evatt, then President of the United Nations General Assembly, Australia was a leading actor in the drafting of the Universal Declaration of Human Rights (UDHR) adopted soon after the Second World War in 1948. The Australian Government immediately signalled its support for the Declaration. Every international and national human rights instrument created and ratified since has been founded upon the UDHR's values and the rights for which it provides. It is significant to note that the Declaration was endorsed by all 57 member nations of the UN Commission on Human Rights without dissent. Nations of East and West united. This should be a great source of pride for Australia, but it only makes it even more remarkable that we do not have a Federal Human Rights Act.

37. As a Declaration, the UDHR is not enforceable.[6] So, the UN Commission on Human Rights set to work to produce two international covenants built on the UDHR. These covenants would have the force of international law. The covenants are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). These came into effect in 1966. Australia ratified both covenants in 1975. The act of ratification meant that Australia agreed to be legally bound by the terms of each. The Australian debate about the protection of civil and political rights has been conducted almost entirely in relation to the question of whether the ICCPR should be incorporated into domestic law in terms directly reflecting the Covenant's provisions.

38. The UN General Assembly has adopted several additional human rights conventions that relate to the human rights of specific classes of people whose rights require special protection. The most significant of these are *The International Convention on the Elimination of All Forms of Racial Discrimination (1965), The Convention on the Elimination of All Forms of Discrimination against Women (1979), The International*

[6] Though many of its provisions enjoy such undisputed recognition as to be considered part of customary international law.

Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (1984), The Convention on the Rights of the Child (1989), and The Convention on the Rights of People with Disabilities (2006). Australia is also a party to the *Genocide Convention (1948).* Australia has ratified every one of these conventions, and agreed, thereby, to conform with protection of the rights and freedoms each sets down.

39. Ratification is not the problem, implementation is. None of these conventions is incorporated into Australian law unless the Parliament of Australia enacts their provisions in domestic legislation. The Australian Parliament has enacted segments of each in law, but the coverage in Commonwealth legislation is partial and haphazard. The Australian Parliament enacted the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth). The *Age Discrimination Act 2004* (Cth) and the *Disability Discrimination Act 1992 (Cth)* are more recent pieces of legislation that incorporated aspects of treaties that Australia has ratified.

40. The international covenants, however, travel far more widely than just discrimination, and this means that despite this nation's ratifications, large tracts of international human rights law remain outside the boundaries of national law. Australians are greatly limited in accessing their protections.

41. The lack of a Federal Human Rights Act has had deleterious effects, including that Australia has been criticised by the UN Human Rights Council in respect of its compliance with international human rights standards.

42. In 2016, Australia had its second review of its human rights record at the UN Human Rights Council in Geneva, a process known as Universal Periodic Review (UPR). With the agreement of all UN member states, every country submits its human rights performance for review once every four years. Over four hours in the review, more than forty nations took the opportunity to question, criticise and occasionally commend many different aspects of Australia's performance in protecting human rights. The criticisms, which were serious, were largely consistent with the UN High Commission for Human Rights' (OHCHR) own analysis of Australia's actions in responding to the reports of UN Human Rights Treaty Body Committees in the previous four years since the last UPR evaluation.

43. The OCHCR advisory report to the Council contained several positive comments concerning Australia's recent record. It welcomed the Parliament's commitment to recommend a constitutional amendment that recognised Australia's First Peoples (a process which has now been replaced by the proposed referendum to add into the Constitution of an Aboriginal and Torres Strait Islander Voice). It praised Australia's concerted efforts to combat people trafficking and trafficking related exploitation. It applauded the introduction of the National Disability Insurance Scheme. It commended Australia's advocacy for the abolition of the death penalty globally and new legislation that had introduced an offence of torture into the Australian Criminal Code.

44. However, despite Australia having taken some good steps in respect of respecting human rights, the 2016 UPR was also sharply critical. The Council noted that UN Treaty Bodies had recommended consistently that the Australian Government do much more to close the inequality gap between Indigenous and non-Indigenous peoples. The Council expressed concern regarding the health disparities of children living in rural and remote areas, children in out-of-home care, children with disabilities and in particular about the gap in health status between Indigenous and non-Indigenous children. It expressed alarm at the levels of domestic violence against Indigenous women and women more generally. It was deeply concerned about the sexual abuse of children, not least in religious institutions.

45. Its principal reservation, however, related to Australia's treatment of people seeking asylum. The report's introductory paragraph on the issue read:

> The response of Australia to migrant arrivals had set a poor benchmark for its neighbours in the region. The authorities had also engaged in the 'turn around' and 'push-back' of boats in international waters. Asylum seekers were incarcerated in centres in third countries where they faced conditions that the UN Special Rapporteur on Torture had reported as amounting to cruel, inhuman and degrading treatment… and which also violated the Convention on the Rights of the Child. Even recognised refugees in urgent need of protection were not permitted to enter Australia which had set up relocation arrangements with countries that might be ill-prepared to offer those refugees any durable solution. Such policies should not be considered a model by any country.

46. In discussion, France recommended that Australia strengthen measures to eliminate discrimination against Indigenous peoples. The USA urged Australia to consult Indigenous peoples when considering the viability of remote communities. New

Zealand asked that Australia address inequalities affecting health, education, employment and income that disproportionately affect indigenous peoples and other minorities. Hungary suggested that Australia should develop, in partnership with Indigenous communities, a national strategy to implement the UN Declaration on the Rights of Indigenous Peoples.

47. Germany strongly condemned Australian refugee policy saying that children, families and other individuals at risk, in particular survivors of torture and trauma, should be removed from immigration detention centres. Sweden urged Australia to ensure that relevant measures should conform fully with international law and human rights, including the principle of non-refoulement and that the detention of people seeking asylum should only occur when absolutely necessary and for a minimal time. Norway insisted that independent judicial review of detention and its conditions should be ensured.

48. Iceland, and many other countries, recommended that Australia fully incorporate its international human rights obligations in domestic law by introducing a comprehensive, judicially enforceable Human Rights Act. This had been the consistent recommendation of the UN Human Rights Council and every UN Human Rights Treaty Body Committee for almost two decades. Australia has not complied.

49. It should also be of great concern that the UN Subcommittee on Prevention of Torture (SPT) recently concluded its latest session with a decision to suspend and then terminate its visit to Australia, where it had intended to visit prisons and immigration detention centres. It is unthinkable that we have reached a point where a lack of co-operation with a United Nations body would lead to this outcome, and where our places of detention, where human rights abuses are all too common, are placed outside the reach of international human rights protections.

50. Apart from the partial and haphazard protection of human rights, the absence of comprehensive human rights legislation has other deleterious effects. Having become unmoored legally from every other Western nation that has a Bill or Charter of Human Rights, Australia finds its laws and legal system drifting steadily away from valuable sources of law in comparable legal jurisdictions, because those jurisdictions have

enforceable human rights acts and Australia does not. This has been a source of concern for some of the highest judicial officers in the country and for the legal profession more broadly. The former Chief Justice of New South Wales, the Hon JJ Spigelman AC KC, has remarked, in the context of the adoption of human rights charters in Canada, New Zealand and the UK that:

> I noted that one of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration.
>
> This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.

51. From a different perspective, it is also highly likely that, federally, Australian jurists will play a lesser role in participating in important international legal debates and developments. They will find it very difficult to play a constructive role because federally there is no Human Rights Act to consider, interpret and apply. Australian federal courts will not be in a position to fulfil their proper role in promoting the observance of human rights across the globe. It may be denied the opportunity to make a small contribution to making the world safer.

52. Without an enforceable Federal Human Rights Act, Australians do not enjoy the same measure of protection of their human rights and freedoms as citizens of other countries. The lack of an enforceable act will also mean that Australia will continue to receive the stridently critical reviews of its human rights record from United Nations human rights bodies and from many of our most friendly nation states. This is not just embarrassing, it also undermines any criticism Australia may have of human rights breaches committed by other nations.

53. Without a Federal Human Rights Act an individual cannot go before a court and secure a remedy based on a human right, unless the breach fits into the narrow protections contained in anti-discrimination legislation. He or she cannot go before the courts and complain that his or her freedom of speech has been denied, unless the prohibition on

the freedom fits within the narrow judicial consideration there has been of the implied right to political communication. Instead, a person must complain that a public body has failed to comply with some legal duty or otherwise has acted unlawfully. Then, if the complaint is made out, the courts, usually on an application for judicial review, may take the necessary action to ensure that the public body complies with the law. This is often a complex, arduous and costly process where the outcome, in any particular case, is uncertain. Often the decision is remitted to the original decision-maker, to make a decision in accordance with the law, which may end in the same result.

54. Former Justice of the High Court, the Hon Michael McHugh AC KC, wrote the following about this lack of Federal human rights protection:

> There is clearly a need within Australia for an increased focus on human rights. Recent High Court decisions have highlighted gaps in our existing system of rights protection. They have also highlighted the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent…A national Bill of Rights would change this. As I noted in *Al-Kateb*:
>
> > 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.'
>
> The debate about an Australian Bill of Rights can no longer be considered simply an academic or abstract debate in a country that boasts an exemplary human rights record. In light of current deficiencies it is, instead, increasingly becoming a debate that holds great practical significance for all Australians.

55. The time has come for the enactment of a Federal Human Rights Act.

Part B: The Adequacy of existing mechanisms to protect human rights in the federal context and the potential for improvements

56. An assessment of the efficacy of existing mechanisms must begin with consideration of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the *Scrutiny Act*) which came into force on 4 January 2012. The Act provides for the implementation of two key mechanisms:

    (1) the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR); and

(2) the requirement that all government and non-government Bills and disallowable legislative instruments must be accompanied by a Statement of Compatibility.

57. The introduction of these two mechanisms has provided some oversight of legislative compliance with international human rights law. However, the variable quality of Statements of Compatibility, and the passage of legislation notwithstanding findings of incompatibility by the PJCHR, demonstrate significant barriers to effective compliance with Australia's human rights obligations.

The remit of the Parliamentary Joint Committee on Human Rights

58. The PJCHR has three functions as set out in section 7 of the *Scrutiny Act*:

(a) To examine Bills and legislative instruments coming before 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.

59. Notwithstanding that the PJCHR has been in operation for over a decade, there has not yet been a formal review in relation to the efficacy of the committee's remit and its functions.

60. The AHRC, in its *Free and Equal Position Paper* (March 2023), conducted a review of the effectiveness of this parliamentary scrutiny regime. While the AHRC found that the PJCHR has established itself as a "valuable scrutiny and accountability mechanism for human rights at the federal level", it is suggested that a number of improvements could be made to further enhance the effectiveness of the PJCHR.

61. Liberty Victoria echoes the views expressed by the AHRC in its *Position Paper* and its Submission to this Inquiry and adopts the eight recommendations proposed to strengthen the remit of the PJHCR.[7]

62. Since its inception, the PJCHR has scrutinised thousands of Bills and legislative instruments. According to data collected by Professor George Williams and others, between 4 January 2012 and 11 April 2019, the PJHCR produced a total of 88 reports assessing 1,495 Bills and 10,336 legislative instruments. In that same period the PJCHR found a total of 233 instances where proposed legislation was or was likely to be incompatible with human rights.[8]

63. Of those 233 instances where an incompatibility finding was made by the PJCHR, on 147 occasions (or about 63% of the time) the finding of incompatibility had no discernible impact on the passage of the legislation. Professor Williams and his colleagues go on to note that "[o]ut of those 147 occasions, 139 of them are explained by the delay factor, as the PJCHR had not yet handed down its concluded report on the relevant Bill or legislative instrument by the time it came to a final vote. The remaining eight Bills were passed without amendments after the PJCHR's report".[9]

64. These statistics suggest that a recurring issue undermining the effectiveness of the PJCHR, and its scrutiny function, is the delay in publishing its incompatibility findings prior to passage of the legislation.[10] This is particularly acute in circumstances where the government rushes a Bill through Parliament within a few days or weeks, which means the PJCHR will be unable to adequately discharge its scrutiny function before Parliament votes on the proposed Bill.

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7 Australian Human Rights Commission, *Submission to the Inquiry into Australia's Human Rights Framework*, 83-84.

8 Reynolds, Daniel; Hall, Winsome; Williams, George, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) Monash University Law Review 256, 263.

9 Ibid, 274.

10 Ibid, 264.

65. In some cases, the PJCHR also defers its consideration of Bills and legislative instruments until *after* they have been enacted which undermines the efficacy of an incompatibility finding in terms of shaping appropriate amendments prior to passage into law.

Statements of Compatibility

66. As noted above, the *Scrutiny Act* also requires that all Bills and legislative instruments must be accompanied by a Statement of Compatibility. A Statement of Compatibility is required to contain an assessment of the Bill or legislative instrument's compatibility with the rights and freedoms recognised in the seven 'core international human rights treaties' which Australia has ratified. The Statement of Compatibility is an expression of opinion by the relevant Minister or sponsor of the Bill or by the rule-maker in the case of legislative instruments about the instrument's compatibility with human rights. Significantly, it does not limit the ability of Parliament to express a different view, nor is it binding on a court or tribunal.[11]

67. However, studies have found that the quality of Statements of Compatibility is in many cases sub-standard, with some not meeting acceptable standards of analysis with respect to the instrument's impact upon human rights.[12]

68. The lack of consequences for failing to prepare an adequate Statement of Compatibility represents a weakness in the efficacy of existing mechanisms. Mandated standards should be imposed with clear expectations of what the Statement of Compatibility must contain. There should be clear consequences for failure to comply with these mandated standards. This will hopefully allow for a more rigorous and thorough consideration of human rights implications prior to passage of legislation.

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11 Australian Government, Attorney-General's Department, Statements of Compatibility (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>.

12 Reynolds, Daniel; Hall, Winsome; Williams, George, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) Monash University Law Review 256, 261; Fletcher, Adam; Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing? (Melbourne University Publishing, 2018), 102, 116.

A case study – Pearson and the Migration Amendment

69. A recent example of the PJCHR's inability to respond quickly to rushed legislation occurred during the passage of the Migration Amendment (Aggregate Sentences) Bill 2023 (Cth), which was in direct response to the Full Court of the Federal Court's decision in *Pearson v Minister for Home Affairs* (*Pearson*).[13]

70. In *Pearson*, the Full Court held that aggregate sentences of imprisonment did not constitute a 'term of imprisonment of 12 months or more' and therefore would not result in a mandatory visa cancellation under s 501(3A) of the *Migration Act 1958* (Cth) (*Migration Act*).

71. The Bill aimed to reverse the effect of the *Pearson* decision, retrospectively validating past decisions (including mandatory visa cancellation decisions) that were rendered invalid on the basis of the Full Court's decision in *Pearson*.

72. A Statement of Compatibility was prepared by the Minister which stated that, while the Bill affected numerous rights (including prohibition on the expulsion of aliens without due process, rights of children, prohibition on torture and ill-treatment, freedom of movement, protection of family, prohibition on non-refoulement), it was nevertheless necessary and proportionate in order to return persons who were released from detention as a result of *Pearson* to immigration detention because these persons presented a considerable risk to the community and needed to be in immigration detention in order to progress their removal from Australia.

73. The Bill was introduced into Parliament on 7 February 2023 with great haste. It passed both Houses only 6 days later on 13 February 2023 and received Royal Assent on 16 February 2023. However, it wasn't until 8 March 2023 – three weeks *after* the Bill had been formally enacted into law – that it was considered by the PJCHR.

13 [2022] FCAFC 203.

74. Ultimately, the PJCHR found the Bill did not appear to address a pressing and substantial need as required by international human rights law, that the measures did not appear to be a proportionate limitation on rights, and there was a significant risk that the measures proposed were incompatible with international human rights.[14]

75. The PJCHR noted that there were no safeguards identified in the Statement of Compatibility and that access to review of decisions was unlikely to be effective in practice, particularly given the limitations of judicial review in *Migration Act* matters.

76. The PJCHR specifically noted their concern that the short timeframe between introduction and the Bill passing both Houses meant that the committee was not provided with adequate time to scrutinise the legislation and provide appropriate advice to Parliament as to the human rights compatibility of the Bill.[15]

77. Further, the Senate Standing Committee for the Scrutiny of Bills is generally of the view that laws should only operate prospectively in accordance with the rule of law. That this Bill was to have *retrospective* application, resulting in about 100 recently released individuals being returned to immigration detention, should have given Parliament pause before passing it into law.

78. While existing mechanisms have been established for the purpose of increasing legislative compatibility with human rights obligations, there are no legal consequences for failing to comply with these processes or recommendations of PJCHR. This represents a fundamental flaw in the efficacy of existing mechanisms.

79. A Federal Human Rights Act, in combination with improvements to the remit of PJCHR and mandated standards for Statements of Compatibility, would result in much greater protection of human rights in Australia.

14 PJCHR Report 2 of 2023
15 Ibid, 32-33 [1.51]

Part C: The effectiveness of existing human rights legislation in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant case law, and relevant work done in other states and territories

80. Contrary to some of the warnings of those who have riled against the enactment of human rights legislation,[16] the experience in the Australian Capital Territory (ACT), Victoria and Queensland demonstrates that human rights legislation has not weakened parliamentary sovereignty or led to judicial activism. Instead, judicial officers have employed a careful, principled methodology when considering the operation and effect of human rights legislation.

81. The enactment of the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*) and the *Human Rights Act 2019* (Qld) have, however, resulted in significant decisions that have demonstrated the effectiveness of human rights legislation and improved access to justice.

82. Some of these cases are powerfully demonstrated by the Human Rights Law Centre's report '101 cases: how Charters of Human Rights make our lives better'. These cases, involving topics as diverse as mental health legislation, children in detention, the operation of the criminal law, freedom of religion, and tenancy law, demonstrate that human rights instruments not only foster the development of carefully evolved human rights jurisprudence, they are effective.

83. Importantly, these cases do not arise in a vacuum; Australian human rights legislation inherits learnings from comparable jurisdictions with human rights legislation, including the United Kingdom, New Zealand and Canada.

[16] See Michael Stanton, "Fighting Phantoms: A Democratic Defence of Human Rights Legislation" (2007) 32(3) Alternative Law Journal 22.

The Victorian Experience of Human Rights Legislation

84. By way of background, it should be briefly explained how the *Charter* works in Victoria.[17]

85. The most important thing to understand about the *Charter* is that it underpinned by a 'dialogue model'.[18] This provides for a dialogue between the legislature and the judiciary, whilst preserving parliamentary sovereignty. That is, Parliament remains the supreme law maker.

86. This means that while courts and tribunals must interpret laws, consistently with their purpose, compatibly with the human rights protected by the *Charter*, if a statutory provision cannot be interpreted consistently with the *Charter* then this does not invalidate the law in question. In such circumstances, the Supreme Court of Victoria is empowered to make a declaration of inconsistent interpretation.[19] If such a declaration is made, then Parliament is required to prepare a written response,[20] but no remedial legislative action is required. This contrasts with guarantees protected by the Australian *Constitution*, where the High Court is empowered to invalidate unconstitutional legislation.

87. The *Charter* also requires the legislature to make 'statements of compatibility' when new bills are introduced into Parliament.[21] These statements outline whether the new law is compatible with human rights and, if not, the nature and extent of the incompatibility.

88. In order to understand the operation and effect of the *Charter*, it is important to consider the interplay between its four cornerstones: ss 32, 38, 7 and 36.

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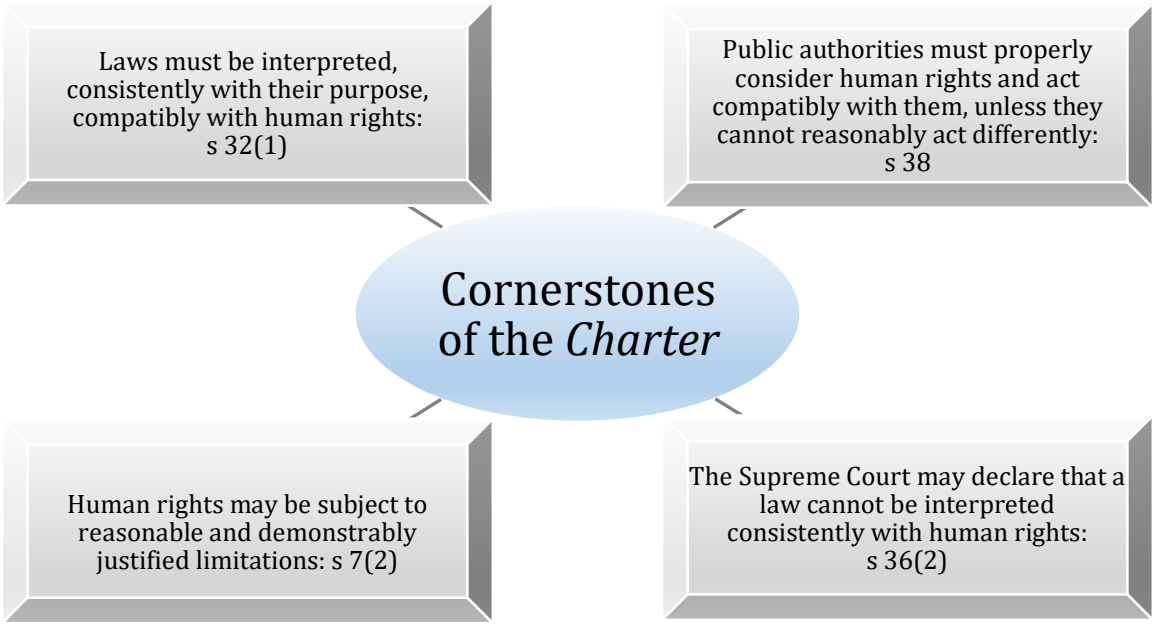
17 Much of the following is drawn from a paper prepared by Michael Stanton and Katharine Brown, "The Convention on the Rights of the Child and Domestic Human Rights Legislation: Opportunities and Future Directions", presented as part of the Diplomacy Training Program of the Faculty of Law of the University of New South Wales in October 2021.

18 *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 462 [93]-[94] (Maxwell P, Ashley and Neave JJA). See further Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 Mon ULR 9.

19 Charter, s 36(2).

20 Charter, s 37.

21 Charter, s 28.



The Interpretive Provision

89. Section 32(1) of the *Charter* (the interpretive provision) provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

90. Section 32(2) of the *Charter* provides:

> International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

91. In the first wave of *Charter* jurisprudence there was significant debate about the appropriate method to be employed when interpreting legislation pursuant to s 32(1). That debate concerned determining the permissible boundaries of interpretation, and how the interpretive provision operates with other sections in the *Charter*.[22]

[22] In particular whether the s 7(2) 'proportionality' considerations affect the interpretive exercise: see *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, overturned in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436.

92. For critics of human rights instruments, the interpretive provision has the potential to be undemocratic due to allowing for the 'reinterpretation' of laws by judicial officers contrary to Parliamentary intent.[23]

93. After the judgment of the High Court in *Momcilovic v The Queen* (*Momcilovic*),[24] it appears clear that the *Charter*'s interpretive provision is not as far-reaching as its counterpart in the *Human Rights Act 1998* (UK).[25]

94. In *Momcilovic,* both the Court of Appeal and the High Court were unanimous that the *Charter* did not permit a reverse-onus provision regarding illicit drug offences to be interpreted as only imposing an evidentiary, rather than persuasive onus (on the balance of probabilities), on an accused person.[26]

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23 See Michael Stanton, 'Fighting Phantoms: A Democratic Defence of Human Rights Legislation' (2007) 32(3) AltLJ 138. See, eg, Heydon J, in dissent in *Momcilovic*, 179-185 [447]-[457], in particular at 184 [455]: "[j]udicial fires which have sunk low may burn more brightly in response to a call to adventure." At the time the *Charter* was enacted there had been particular criticism of the British judgment of *Ghaidan v Godin-Mendoza* (2004) UKHL 30 ('*Ghaidan*'), [2004] 2 AC 557 (concerning inheritance of tenancy with regard to persons in same sex relationships). In *Ghaidan*, Lord Nicholls held at [29]:

> It is now generally accepted that the application of section 3 [the equivalent interpretive provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning.

Lord Millet (in dissent but not on this point) held at [67]:

> [E]ven if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must "strive to find a *possible* interpretation compatible with Convention rights" (emphasis in original).

24 [2011] HCA 34; (2011) 245 CLR 1.

25 Section 3(1) of the *Human Rights Act 1998* (UK) provides:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Note the addition in s 32(1) of the Victorian Charter that "[s]o far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights" (our emphasis added).

26 Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*DPCSA*) provides that when drugs are located at a premises occupied, used, enjoyed or otherwise controlled by a person, that person is deemed to be in possession of the drugs unless he or she "satisfies the court of the contrary". That reverse onus provision has been consistently interpreted by Victorian Courts as requiring that an accused person must prove, on the balance of probabilities, that the drugs were not in his or her effective possession (a persuasive onus); *R v Clarke* [1986] VR 643. It should be noted that *Momcilovic* was decided on a technical point about the relationship between ss 5 and 71AC of the *DPSCA*, with the majority holding that the reverse onus provision did not apply to the expression 'possession for sale'

95. While the High Court in *Momcilovic* was divided on the correct methodological approach to the interpretive provision, the Victorian Court of Appeal has continued to apply an approach whereby:

> Section 32(1) does not create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.[27]

96. This arguably results in an interpretive provision with broad application and limited impact, which has been regarded as comparable to other interpretive principles such as the principle of legality.[28]

97. In *Gebrehiwot v State of Victoria* (*Gebrehiwot*),[29] the Court of Appeal (Tate, Kaye and Emerton JJA) observed:[30]

> As this Court emphasised in *R v DA*,[31] where there is a constructional choice, the interpretive obligation under the *Charter* requires that the construction be adopted that renders the statutory provision compatible with human rights, providing this is consistent with the purpose of the provision. This Court said:
>
> > Where more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the *Charter* is to be preferred.[32]

98. This approach was described in *Gebrehiwot* as the 'better accommodates' test.[33]

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with regard to trafficking offences, and so arguably the analysis about the Charter is *obiter dictum*, albeit considered analysis from the High Court.

27 *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 446 [35] (Maxwell P, Ashley and Neave JJA). See, eg, *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; (2012) 38 VR 569, 576-7 [28]-[31] (Warren CJ and Cavanough JA); 609 [142] (Nettle JA); *Slaveski v Smith and Victoria Legal Aid* [2012] VSCA 25; (2012) 34 VR 206, 215 [23] (Warren CJ, Nettle and Redlich JJA). Cf Tate JA in *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189].

28 See French CJ in *Momcilovic* at 50 [51]: "Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application". The principle of legality is a principle of statutory interpretation that provides that legislation should not be understood to abrogate fundamental rights in the absence of clear and unambiguous language. Justice Tate has criticised a narrow conception of the interpretive provision, see *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189]-[190]; see further her Honour's extra-judicial writing: 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic?', Judicial College of Victoria Online Journal 2 (2014), 68.

29 [2020] VSCA 315; (2020) 287 A Crim R 226 (*Gebrehiwot*).

30 Ibid, 262 [135].

31 *R v DA* [2016] VSCA 325; (2016) 263 A Crim R 429.

32 Ibid, 443 [44] (Ashley, Redlich and McLeish JJA).

33 [2020] VSCA 315; (2020) 287 A Crim R 226, 263 [138], after citing *Nguyen v Director of Public Prosecutions (Vic)* [2019] VSCA 20; (2019) 59 VR 27, 63 [104]-[105] (Tate JA, Maxwell P agreeing at 30 [1], Niall JA agreeing at 74 [151]).

99. It is clear that, at least under the current approach, remedial interpretation which would involve a *departure* from the ordinary rules of statutory interpretation, in order to find a rights-compatible meaning, is not permitted. Thus, the interpretive provision can be useful, but it does not go as far as some of its international counterparts, such as s 3 of the *Human Rights Act 1998* (UK).[34]

The Obligations on Public Authorities

100. Section 38 of the *Charter* places obligations upon public authorities.[35] Section 38(1) of the *Charter* provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

101. Thus, public authorities are required both to act compatibly with human rights and to properly consider them when making decisions. These obligations are often referred to respectively as the 'substantive' and 'procedural' limbs of s 38.

102. Importantly, the obligations are subject to the limitation under s 38(2) where under the relevant law the public authority could not reasonably have acted differently or made a different decision.

103. The second wave of *Charter* jurisprudence has focussed upon the extent and content of such obligations. In *Certain Children v Minister for Families and Children (No 2*),[36] John Dixon J identified a useful roadmap for assessing incompatibility under s 38.[37]

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34 For further consideration of the proper construction of the interpretive provision, see the articles by Bruce Chen: 'Section 32(1) of the Charter: Confining Statutory Discretions Compatibly with Charter Rights?' [2016] MonashULawRw 21; and 'Revisiting s 32(1) of the Victorian Charter: Strained Constructions and Legislative Intentions' [2020] MonashULawRw 6.

35 The term 'public authority' is defined by s 4 of the Charter. Section 4(1)(d) expressly includes Victoria Police. The Director of Public Prosecutions has been regarded as a public authority: *Baker v Director of Public Prosecutions (Vic)* [2017] VSCA 58; (2020) 270 A Crim R 318, 331 [55] (Tate JA). Courts and tribunals are not public authorities except when acting in an administrative capacity: Charter, s 4(1)(j), although some obligations under the Charter (such as the right to a fair hearing as protected by s 24(1) of the Charter) can apply directly to courts and tribunals when exercising their functions pursuant to s 6(2)(b) of the Charter: *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 82 [252] (Tate JA).

36 [2017] VSC 251; (2017) 52 VR 441.

37 Ibid, 497 [174]. The roadmap was prepared by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

Limitations on Human Rights

104. The human rights protected by the *Charter* are not absolute,[38] and can be subject to limitations. Some rights also have internal limitations.[39] Section 7(2) of the *Charter* provides:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

105. Once a human right is identified as being limited by the action of a public authority, the onus of 'demonstrably justifying' the limitation in accordance with s 7(2) of the *Charter* resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high.[40]

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38 Even though, under international law, some human rights are absolute and/or non-derogable, such as the freedom from torture, freedom from slavery, and the prohibition against the retrospective operation of criminal laws.

39 For example, the right to privacy protected by s 13(a) of the Charter provides that a person has the right "not to have his or her privacy, family, home or correspondence *unlawfully or arbitrarily* interfered with" (our emphasis added). With regard to the right to liberty protected by s 21 of the Charter, s 21(3) provides that "[a] person must not be deprived of his or her liberty *except on grounds, and in accordance with procedures, established by law*" (our emphasis added).
Under international law, when considering whether there is 'arbitrary' interference with the right, arbitrariness can extend to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful: *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85] (Bell J); cf *WBM v Chief Commissioner of Police* [2012] VSCA 159; (2012) 43 VR 446, 469-73 [102]-[120] (Warren CJ).

40 *Re an application under the Major Crime (Investigative Powers) Act 2004* (Vic); *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381; (2009) 24 VR 415 *('DAS')*, 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 475 [144]. Warren CJ cited with approval the observations of Dickson CJ in the celebrated Canadian judgment of *R v Oakes* [1986] 1 SCR 10, 43 [70]:

> There are… three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense,

Declarations of Inconsistent Interpretation

106. Section 36(2) of the *Charter* provides:

> Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

107. No declaration of inconsistent interpretation has been made in Victoria.

108. In *Momcilovic*, the Court of Appeal proposed to make a declaration of inconsistent interpretation in relation to the reverse onus provision, s 5 of the *DPCSA*.[41] However, the High Court, by majority, held that the declaration of inconsistent interpretation should not be made.[42]

The Charter's Impact

109. Over the past fifteen years the *Charter* has resulted in some significant victories for human rights. However, it has not reached its full potential. Writing extra-judicially in 2014, Justice Pamela Tate noted "[i]t is apparent that the voyage undertaken by the *Charter* has been a choppy one. It has sought to cope as best it can and has demonstrated resilience".[43]

> should impair "as little as possible" the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance" (citations omitted).

41 *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 478 [157]. The Court of Appeal observing at 477 [152]-[153]:

> In our view, there is no reasonable justification, let alone any "demonstrable" justification, for reversing the onus of proof in connection with the possession offence. As we have said, the combined effect of ss 5 and 72(1) is to presume a person guilty of the offence of possession unless he/she proves to the contrary. That is not so much an infringement of the presumption of innocence as a wholesale subversion of it. It was not suggested on the appeal that either the nature of the offence or the exigencies of prosecution could justify such a step.
>
> Nor, in our view, did the arguments advanced come close to justifying the infringement of the presumption in relation to the trafficking offence. As already noted, there was no evidence to support the assertion that the successful prosecution of trafficking offences depended upon the availability of the reverse onus; and the Chief Crown Prosecutor doubted that the reverse onus made much difference at all.

42 Crennan and Kiefel JJ also observed "[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate": *Momcilovic*, 229 [605].

43 Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic?', Judicial College of Victoria Online Journal 2 (2014), 68.

110. The sources of this 'choppiness', or roadblocks to success, are due to a variety of issues such as:

(1) The complexity of the separate reasons for judgment of the High Court in *Momcilovic*;

(2) The fact that some judicial officers and advocates perceive that the interpretive provision adds very little to common law principles such as the principle of legality;

(3) The notice requirements to the Attorney-General (AG) and the Victorian Equal Opportunity and Human Rights Commission (VEHORC) in proceedings in the County Court of Victoria and the Supreme Court of Victoria,[44] and the possibility of delay and possible costs consequences caused by raising the *Charter*;[45]

(4) The perception that, by giving notice to the AG, this may result in an inequality of arms in the proceeding;

(5) The decision by the Court of Appeal that the Victorian Civil and Administrative Appeals Tribunal (VCAT) does not have the power to undertake 'collateral review' of the actions of public authorities under the *Charter*;[46]

44 *Charter*, s 35(1). Notably the 2015 review of the *Charter* recommended, amongst other things:
Section 35 of the *Charter* be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings.

45 See, eg, *Bare v Small* [2013] VSCA 204, where the applicant was granted a protective costs order by the Court of Appeal after agreement could not be reached with the AG as to whether the AG would seek costs if the appeal was dismissed (VEOHRC had agreed not to seek costs).

46 *Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559.

(6) The uncertainty over whether a breach of s 38(1) of the *Charter* by a public authority constitutes a jurisdictional error, which can influence the availability of judicial review and the remedies available under it;[47]

(7) The complexity of the remedies provision, s 39 of the *Charter*;[48] and

(8) The prohibition on the awarding of damages because of a breach of the *Charter*.[49]

111. Notwithstanding those issues, and consistently with the Justice Tate's reference to its 'resilience', there are many examples of the *Charter* having had a powerful impact in litigation. Some cases include:

(1) *Kracke v Mental Health Review Board*:[50] where Bell J as President of VCAT found that that the failure by the Mental Health Review Board to conduct reviews of the patient's compulsory Community Treatment Order (CTO) constituted a breach of his right to a fair hearing (although the CTO was not invalidated as a consequence of the breach);

(2) *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor* (*Taha*):[51] concerning the power of the Magistrates' Court of Victoria to make orders for imprisonment for non-payment of fines under the *Infringements Act 2006* (Vic) (*Infringements Act*). The plaintiffs had an

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47 Left undecided in *Bare v Independent Broad-Based Anti-Corruption Commission* [2015] VSCA 197; (2015) 48 VR 129.

48 Section 39(1) of the *Charter* provides:

> If, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this *Charter*.

See further Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 MULR 101; *Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559, 580 [96] (Maxwell P), 604-5 [267]-[269] (Weinberg JA); *Director of Public Prosecutions v Debono* [2013] VSC 407, [82] (Kyrou J).

49 *Charter*, s 39(3). Although it should be noted that the 2015 review of the *Charter* recommended that this prohibition be retained. See further *Gebrehiwot v State of Victoria* [2020] VSCA 315; (2020) 287 A Crim R 226, 261-2 [133] (Tate, Kaye and Emerton JJA).

50 [2009] VCAT 646; (2009) 29 VAR 1.

51 [2011] VSC 642, upheld on appeal in *Victoria Police Toll Enforcement and Others v Taha and Others* [2013] VSCA 37; (2013) 49 VR 1.

intellectual disability and mental illness respectively.[52] Justice Emerton (now President of the Court of Appeal) held that the Charter, in combination with other principles of interpretation, required s 160 of the *Infringements Act* to be construed in a 'unified fashion' so that there was a duty on the judicial officer to inquire and ensure that the plaintiff's disability and/or illness was considered by the Court before the imprisonment orders were made;

(3) *DPP v Kaba*:[53] where Justice Bell held that it was correct for a Magistrate to find that there had been a breach of the right to privacy of a passenger of a vehicle stopped after a purportedly random interception by police, which had formed a basis for the Magistrate to exclude the evidence of an alleged assault against police pursuant to s 138(1) of the *Evidence Act 2008* (Vic) (exclusion of improperly or illegally obtained evidence);[54]

(4) The *Certain Children* litigation:[55] concerning the treatment of child detainees and where it was found that there had been several breaches of human rights under the *Charter*;

(5) *PBU & NJE v Mental Health Tribunal*:[56] where Justice Bell held that VCAT erred when confirming orders for compulsory electroconvulsive therapy (ECT) for the plaintiffs by failing to apply the capacity test under s 68(1) of the *Mental Health Act 2014* (Vic) compatibly with human rights protected by the *Charter*; and

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52 Pursuant to s 160(2)(a) of the *Infringements Act*, both plaintiffs would have been eligible to have had their fines in respect of which imprisonment orders were made waived or reduced, a lesser term of imprisonment imposed or measures other than imprisonment imposed. In neither case did the Magistrate consider the plaintiffs' eligibility for such orders or measures.

53 [2014] VSC 52; (2014) 44 VR 526.

54 Although the matter was remitted because of an error in relation to the construction of s 59(1) of the *Road Safety Act 1986* (Vic) regarding the 'stop and check' powers of police in relation to motorists.

55 *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors* [2016] VSC 796; (2016) 51 VR 473 (*Certain Children No 1*); *Minister for Families and Children v Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur)* [2016] VSCA 343; (2016) 51 VR 597; *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors (No 2)* [2017] VSC 251; (2017) 52 VR 441 (*Certain Children No 2*).

56 [2018] VSC 564; (2019) 56 VR 141.

(6) *Minogue v Thompson*:[57] where Justice Richards held that correctional authorities at Barwon Prison had failed to give proper consideration to, and had acted incompatibly with, the plaintiff's human rights to privacy and dignity in detention when conducting urine tests and strip-searches.[58]

112. It is clear that the *Charter* has had a moderate but significant impact in Victoria. There are, however, lessons from Victoria about how human rights instruments can be improved. Many of these lessons were documented in the 2015 Charter Review, led by Michael Brett Young, which sadly remains unactioned in Victoria.

113. This submission will not consider all of those issues, but should there be a decision made to enact a Federal Human Rights Act, as noted above there are some areas that, from the Victorian experience, could be improved, including:

(1) **The Notice Provision**: the requirement under s 35 of the *Charter* that the Attorney-General of Victoria and the Victorian Equal Opportunity and Human Rights Commission be notified of any human rights matter arising in a case in the County Court or Supreme Court has had a chilling effect on the use of the *Charter*. While there may be an arguable basis for such a provision in the early stages of the employment of human rights legislation, it should be sunsetted so that, after key cases have been determined in the first few years, notice is not required;

(2) **The Remedies Provision**: s 39 of the *Charter* is notoriously complex.[59] In essence it means that there is not a free-standing cause of action in the *Charter*, rather it must be tied to some other cause of action. This requirement should be removed – there is no reason why a person seeking protection of their rights should not be able to rely on breach of the human rights instrument as an independent cause of action;

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57 [2021] VSC 56.

58 On appeal it was held that the urinalysis testing was not in breach of the *Charter*, but that the manner strip-searching was in breach; *Thompson v Minogue* [2021] VSCA 358; (2021) 67 VR 301.

59 See Jeremy Gans, "The Charter's Irremediable Remedies Provision" (2009) 33(1) Melbourne University Law Review 105.

(3) **Definition of 'Public Authorities':** There are effectively two types of 'public authorities' which owe obligations under s 38 of the *Charter*: core public authorities; and functional public authorities (entities conferred with functions under statute, or who perform functions of a public nature). The vagueness around whether functions are public has produced anomalous results. For example, while Homes Victoria when providing public housing under the *Housing Act 1983* (Vic) is a public authority,[60] entities registered to provide housing under that same Act have been found not to be public authorities.[61] Moreover, some functions performed by public authorities which may have significant human rights implications have been found not to be functions of a public nature because private entities can exercise those same functions.[62] Any definition of 'public authority' should remove these vagaries so that all functions of a public nature, and those ancillary to them, are to be discharged compatibly with human rights obligations whether by a government or non-government entity;

(4) **Private entities:** The human rights proposed to be protected under Federal Human Rights legislation can be harmed by private entities just as easily as they can be by public authorities. The United Nations Guiding Principles on Business and Human Rights (UNGPs) have provided an effective mechanism by which States, including Australia, can fulfil their obligations at international law to protect human rights abuses within their territory and/or jurisdiction by third parties — including business enterprises. However, more can be done. Restricting human rights obligations to only public authorities, and excluding private entities from similar duties, would be a missed opportunity. Attempts to encourage private entities to abide by these duties, such as 'opt-in' models

60 *Burgess v Director of Housing* [2014] VSC 648.

61 *Durney v Unison Housing Ltd* [2019] VSC 6; c.f. *Metro West Housing Services Ltd v Sudi (Residential Tenancies)* [2009] VCAT 2025.

62 See, e.g., *Sudi v Director of Housing* (2011) 33 VR 559, [73]. In this case, the Director of Housing was found not to be exercising a function of a public nature when applying for a possession order because the ability to make such a power is available to both public *and* private landlords.

in the ACT and Queensland, have been unsuccessful. Indeed, to date, not a single private entity has opted in to the scheme;

(5) **Jurisdictional Error**: it should also be made clear that a breach of the human rights statute by a public authority may constitute jurisdictional error. As noted above, there has been considerable uncertainty about this in Victoria; and

(6) **Methodology**: there is also considerable uncertainty, after the High Court judgment of *Momcilovic*, about the correct methodology when considering the interplay between the interpretative provision (s 32(1) of the *Charter*) and the limitations provision (s 7(2) of the *Charter*). This issue has, itself, had somewhat of a chilling effect on the use of the *Charter* in Victoria. In essence, that dispute concerns whether issues of proportionality should be considered at the outset when interpreting a provision in a *Charter* complainant manner, or whether (as the Victorian Court of Appeal decided and continues to apply) the interpretive provision is a rule of broad interpretation at the outset when considering the meaning of legislative provisions. There should be clear guidance in any Federal Human Rights legislation about the favoured methodological approach. One option would be to reflect the language of s 48 (read with ss 8 and 13) of the Queensland *Human Rights Act*, which operates much more clearly than its Victorian counterpart.

114. It can be seen from the above that the Victorian experience of having enacted human rights legislation has largely been a positive one. Further, it is clear that the *Charter* has often been invaluable when the legislature and the executive have considered law reform well before Bills are introduced to Parliament. It has helped to foster a culture that seeks to protect and promote human rights.

Conclusion

115. This Inquiry provides a vital opportunity to improve Australia's democracy.

116. A Federal Human Rights Act would strengthen our institutions and improve access to justice whilst preserving parliamentary sovereignty. It would see us join comparable jurisdictions with a rich history of carefully evolved and principled human rights jurisprudence. It would address the continuing erosion of human rights standards and protections in Australia.

117. Thank you for the opportunity to make this submission. We would welcome any opportunity to give evidence to the Inquiry.

118. Thanks also to the people who assisted Liberty Victoria to prepare this submission, including Julia Kretzenbacher (Immediate Past President), Professor Spencer Zifcak (Past President), Gregory Buchhorn, Katharine Brown, Gabriel Chipkin, and Yvonne Kushnir.

119. If you have any questions regarding this submission, please do not hesitate to contact Michael Stanton, President of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

Michael Stanton

President, Liberty Victoria

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