THE LAW SOCIETY
OF NEW SOUTH WALES

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22 May 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: adam.fletcher@lawcouncil.asn.au

Dear Dr Popple,

National Human Rights Framework Review

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Human Rights (**PJCHR**) in accordance with the terms of its inquiry into Australia's Human Rights Framework 2010. The Law Society's Human Rights Committee has contributed to this submission.

The Law Society supports the enactment of a Commonwealth Human Rights Act, including for the reasons set out in the Law Council's *Human Rights Charter: Policy Position* of November 2020, as well as the Australian Human Rights Commission's (**AHRC**) recent position paper, *A National Human Rights Act for Australia* (**AHRC Position Paper**).[1]

In the context of this discussion, we draw your attention to the Law Society's publication of December 2022 arising from our Thought Leadership series. While the paper focuses on the need for human rights legislation in NSW, the insights of our panellists also spoke to federal issues, and may be of assistance to the Law Council in the development of its submission.

For the purposes of this submission, we have focused on the unresolved issues around a Commonwealth Human Rights Act, including those identified in the Law Council's memorandum of 6 April 2023.

1. **Interaction of a Commonwealth Human Rights Act with related legislation such as the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)**

Since its enactment, there has been significant critique of the *Human Rights (Parliamentary Scrutiny) Act 2011* as well as of the performance of the PJCHR itself. George Williams and Daniel Reynolds have noted the lack of effectiveness of statements of compatibility, citing 'evidence that recent years have seen extraordinarily high numbers of rights-infringing Bills

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

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passed into law'.[2] Further, Adam Fletcher and Phillip Lynch have noted that, while statements of compatibility 'have from time to time prompted the executive to provide a policy rationale for legislation', research has shown that such statements are 'often prepared towards the end of the legislative development process, and as a justificatory exercise'.[3] They cite rights-infringing legislation, including in the areas of counter terrorism, national security and intelligence and cybersecurity, that passed during recent sessions of Parliament without adequate human rights safeguards.[4]

In our view, it would be preferable to repeal the Parliamentary Scrutiny Act and instead embed a more effective approach to scrutiny and accountability within a Commonwealth Human Rights Act. We note that such an approach would need to address some of the deficiencies of the current regime, including delays resulting in legislation being passed without the PJCHR review being complete, as well as a lack of detail around what a statement of compatibility should contain, or the consequences of incompatibility.

2. Remedies for human rights' violations, including whether the courts may be empowered to make 'declarations of inconsistency' in a constitutionally acceptable manner

The AHRC Position Paper acknowledges that, in contrast to complaints brought under federal discrimination laws, human rights complainants under federal laws do not have recourse to enforceable remedies through the courts. We agree with the principle expressed in the AHRC Position Paper that 'remedies should be available where human rights have not been considered or have been breached without justification'.[5]

Unlawful action in relation to any rights contained in a Commonwealth Human Rights Act should create standing for a standalone action with appropriate relief. In the context of human rights legislation in Victoria and Queensland, the need to 'attach' or 'piggyback' a claim under the respective legislation to another claim may reduce the capacity for an individual to obtain effective relief. This was acknowledged in the 2015 independent review of the operation of the Victorian Charter, which recommended changes to the remedies provisions, which it described as giving rise to 'confusion and uncertainty' and 'undermining the effectiveness' of the Victorian Charter as a human rights instrument.[6] This included a recommendation to amend the Charter 'to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground'.[7]

In addition to a stand-alone cause of action, we consider that any Commonwealth Human Rights Act should provide for a process of conciliation, an example of which is contained in Queensland's Human Rights Act. A complaints process of this kind facilitates greater accessibility for members of the community to be heard on human rights issues and contributes to a living human rights culture. However, as some commentators have pointed out, there is no binding outcome from a conciliation, and even in cases where a public entity has acknowledged that it has acted unlawfully under the Act, the Queensland Human Rights Commission is not vested with the power to compel the entity to address or remedy the

[2] Daniel Reynolds and George Williams, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.
[3] Adam Fletcher and Philip Lynch, 'Australia's Human Rights Framework: Has It Improved Accountability?' in Gerber and Castan, *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters 2021, Vol 1), 23.
[4] Ibid., 36-37.
[5] AHRC Position Paper, 13.
[6] M Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (1 September 2015), 126.
[7] Ibid., viii.

breach.[8] A stronger Commonwealth model than that which exists in Queensland may therefore be preferable.

As regards the question of whether courts may be empowered to make 'declarations of inconsistency', we note that, given doubts over the constitutionality of a Chapter III court to make such declarations (see *Momcilovic v The Queen* (2011) 280 ALR 221), and the need to preserve the separation of powers, it would be inadvisable for any Commonwealth Human Rights Act to provide that courts are empowered to issue such declarations, as occurs in the state courts of Queensland and Victoria. It should be noted, however, that the issues raised in *Momcilovic* would not appear to prevent a Commonwealth Human Rights Act from requiring federal courts to interpret statutory provisions in a way compatible with human rights. We agree with the views set out in the AHRC Position Paper that a strong interpretive clause that is 'conceptually distinct from the principle of legality'[9] is preferable for inclusion in any federal legislation.

The AHRC has suggested that 'where a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question'.[10] In our view, this function, which essentially involves the monitoring of judicial decisions, should sit outside government with an independent body such as the AHRC, rather than with the Attorney General. Furthermore, we suggest that the AHRC should have the power to make a declaration of inconsistency that would also trigger such a review, with this power not being required to depend on any court finding.

3. Costs orders for litigation in the public interest

The Law Society considers that human rights legislation should contain appropriate protections against adverse costs orders for matters brought in the public interest. We are of the view that an 'equal access' approach to costs would be the most appropriate model for a Commonwealth Human Rights Act. Under this model, respondents may be ordered to pay applicants' costs in the event the application is successful, but applicants are protected from adverse costs in the event that their application is unsuccessful, as each party would bear their own costs, unless the application is vexatious or the applicant behaved unreasonably.

In the case of anti-discrimination matters, it has become clear that adverse costs risk creates uncertainty for parties and represents a significant barrier to applicants accessing protection under this regime. We consider it likely that such a 'chilling effect' would be replicated if costs were not explicitly addressed in a Commonwealth Human Rights Act, and its strength as a practical instrument to enforce individual and collective rights would be diminished.

As set out in our correspondence to the Law Council on 29 March 2023 regarding costs in anti-discrimination matters, there are significant benefits of an 'equal access' approach. These include promoting compliance with the law, and addressing in a more nuanced way the economic and power disparities that often exist between applicants and respondents.

The Law Society supports further consideration of costs arrangements in other jurisdictions that support access to justice. In this context, we refer to litigation undertaken by the Civil Rights Division of the United States Justice Department on behalf of applicants in various matters.[11] We also draw attention to the Court Challenges Program in Canada which funds

[8] Louis Schetzer, 'Queensland's Human Rights Act: Perhaps Not Such a Great Step Forward?' (2020) 45(1) Alternative Law Journal 12.
[9] See discussion in the AHRC Position paper on s 32(1) of the Victorian Charter as compared with s 3 of the UK Human Rights Act, as well as discussion of interpretive approaches in *Momcilovic* at 248-252.
[10] AHRC Position Paper, 26.
[11] Ibid., 286.

test cases of national significance on constitutional human rights and official language rights matters and is administered by the University of Ottawa. We acknowledge, however, that any such litigation funding programs would need to be in addition to an appropriate costs model in the Commonwealth Human Rights Act itself.

4. International law and jurisprudence

A further issue for consideration is whether a Human Rights Act should impose an obligation or option to take into account international law and judgments from foreign and international courts and tribunals in undertaking the task of statutory interpretation. In this context, we refer to s 32 of the Victorian Charter which is set out in the following terms:

> 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.

The Law Society supports the inclusion of such a clause in a Commonwealth Human Rights Act to encourage court, tribunals and public authorities to consider international jurisprudence in their decision-making. In this context, we refer to analysis of French CJ in *Momcilovic* in relation to s 32 of the Victorian Charter at [22]-[23]:

> Section 32(2) does not authorise a court to do anything which it cannot already do. The use of comparative materials in judicial decision-making in Australia is not novel. Courts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision. If such a judgment concerns a term identical to or substantially the same as that in the statutory provision being interpreted, then its potential logical or analogical relevance is apparent. The exercise by a court of its capacity to refer to such material does not require the invocation of principles of interpretation affecting statutes giving effect to international treaties or conventions or specifically adopting their terminology. Nor does it involve the application of the common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party. Section 32(2) does not create a mechanism by which international law or interpretive principles affecting international treaties become part of the law of Victoria. On the other hand, it does not exclude the application of common law principles of interpretation relevant to a statute which adopts, as the Charter has, the terminology of an international convention.

5. Funding for the AHRC

It is important to emphasise that if the AHRC were to be given additional powers as a result of the introduction of a Commonwealth Human Rights Act, it would need to be given sufficient resources to exercise such powers in an appropriate and timely manner. It is a matter of significant concern that in recent years, the effectiveness of the AHRC as an independent national human rights institution appears to have been compromised by inadequate resourcing.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President