

Human Rights for Everyone: Why We Need a Human Rights Act for Western Australia Now



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Human rights are inherent to all people everywhere. They are often described as being universal, indivisible, and interdependent upon one another. At a practical level, this means that in order to ensure proper protection of human rights, we need comprehensive legal protection of our rights across Australia. However, at the moment, only certain human rights are protected across an inconsistent patchwork of federal and state laws, and many human rights are not protected at all, leaving gaping holes in human rights protection which further entrench inequality, discrimination, and the risk of human rights abuse.

Momentum for comprehensive legislative protection for human rights across Australia has been building over the past several years. Queensland, the ACT and Victoria have all had human rights legislation for many years and there are active campaigns led by civil society coalitions calling for the introduction of Human Rights Acts in Western Australia, South Australia, New South Wales and Tasmania, as well as a campaign for a Federal Human Rights Act. Since 2018, the Australian Human Rights Commission

(‘AHRC’) has been running the Free and Equal Consultation, a wide-reaching project designed to comprehensively review Australia’s existing human rights frameworks and set an agenda for the future of human rights in Australia. After years of extensive consultations with the Australian community, the AHRC produced several reports on different human rights issues, including a comprehensive position paper recommending that the Federal Government enact a Federal Human Rights Act (‘AHRC Position Paper’).¹

Following the release of the AHRC Position Paper, in March 2023 the Federal Attorney General announced that the Parliamentary Joint Committee on Human Rights (‘PJCHR’) would conduct an inquiry into Australia’s human rights framework, with a specific focus on whether a Federal Human Rights Act should be introduced. After receiving over 300 submissions, 4000 letters and holding six public hearings, the PJCHR released its report on 30 May 2024. The report makes a number of important recommendations including that the Federal Government enact a comprehensive Federal Human Rights Act that follows a similar legislative model to

that implemented in the United Kingdom, New Zealand and in the ACT, Victoria and Queensland.²

The significant support gathering behind a Federal Human Rights Act raises the question of the position of the states and territories, and what we need to do to ensure that human rights protections apply at all levels of government decision making across Australia, to ensure that human rights are truly universal, indivisible and interdependent. This article will explore the realities of human rights legislative protection in a federalist system and the need for a Federal Human Rights Act as well as Human Rights Acts in each of the states and territories, including Western Australia.

Human rights and federalism

Australia’s federal system of government poses some unique challenges for ensuring consistent human rights protection across the country, which have not been encountered by other common law jurisdictions with Human Rights Acts, such as the United Kingdom and New Zealand. Whilst Australia owes obligations to respect, protect and promote the

human rights of everyone within its jurisdiction under the international human rights treaties it has ratified, it needs to enact domestic laws to implement those obligations. However, Australia's federal system of government means that the federal government does not have the power to address issues which fall within the remit of the states and territories.

The recommendations of both the AHRC and the PJCHR are that a Federal Human Rights Act should therefore only apply to federal public authorities. This means that a Federal Human Rights Act will provide protection to people who are engaging with government agencies that fall within the jurisdiction of the Federal Government: for example, Centrelink, the Immigration Department, the National Disability Insurance Scheme, and Medicare. Conversely, this means that the Federal Human Rights Act will not protect people who are dealing with government agencies which fall within the jurisdiction of the states, such as public health services, public housing services, the public primary and tertiary education system, the police, and prisons and youth detention centres.

This means that there is important work to be done to clarify how a Federal Human Rights Act will work in practice and what it means for the protection of human rights in the states and territories. Significant consideration will have to be given in the drafting and implementation of a Federal Human Rights Act when considering how to clarify the many areas in which no clear divides can be drawn between federal and state responsibility, for example where there are shared responsibilities in particular matters as between the federal and state governments, shared funding arrangements, or where state authorities exercise public functions on behalf of the Federal Government. There is also the question of how to ensure consistent protection across each of the Australian jurisdictions, and how to manage any inconsistencies as between federal and state laws that arise.

There are some ready solutions for many of these challenges. For example, the AHRC proposes that uniform and federal-state cooperative schemes, and state authorities that exercise public functions on behalf of the Federal Government, could be dealt with on a case by case basis. For example, memorandums of understanding could be entered into or regulations could be enacted to clarify the relevant obligations and any delineations as between the Federal and State agencies concerned.³ To that end, the Commission has recommended that when enacting a Federal Act there should be a yearlong

transitional implementation period, which could be used to resolve some of these issues.⁴

Another proposal that has been put forward by human rights organisations is that the Federal Act should specifically address some of these situations. For example, the Act could expressly provide that it applies to services which receive federal funding to perform a public function, such as disability care, schools and hospitals.⁵ This would ensure the Federal Government retains important responsibility in ensuring human rights compliance for programs that it funds and supports.

As to consistency of human rights protections across all Australian jurisdictions, one option would be to introduce uniform human rights legislation at the Federal level and across the states and territories. However, this is complicated by the fact that three jurisdictions already have established human rights legislation and by political divisions between the states and territories. This means that from a practical perspective, it is unlikely we would be able to achieve unanimity across governments in the short to medium term. Given this reality and the fact that debates around human rights legislation have already gone on for a long time, the more pragmatic proposal supported by many is to focus on having a Federal Act passed and ensuring that it is drafted with a view to it becoming the gold standard – that then every other state and territory should meet.⁶ The introduction of a Federal Act should be accompanied by encouragement to the remaining states and the Northern Territory to adopt human rights acts which mirror the Federal Human Rights Act. In this regard the AHRC has pointed to a previous proposal for the Federal Government to use fiscal means to encourage the states to adopt equivalent legislation – for example by issuing grants that are tied to human rights compliance.⁷

In terms of resolving any direct inconsistency between pre-existing state and territory laws, the proposal put forward by the AHRC and human rights organisations is that the risk of any inconsistency can be dealt with by the use of a concurrency provision. Provisions of this nature make it clear that the relevant Federal Act does not 'cover the field' and is intended to operate concurrently with state law, which is similar to provisions found in federal anti-discrimination legislation.⁸ As noted by then Solicitor-General Stephen Gageler AC to the National Human Rights Consultation in 2009, the result of this would be 'effectively to limit situations of inconsistency under section 109 of

the Constitution: where the State law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the Act... in a case of direct inconsistency, the State law would be invalid to the extent, but only to the extent, of the direct inconsistency.'⁹ As noted in the PJCHR report, further inconsistency between federal and state based Human Rights Acts could be limited by encouraging those remaining states and territories to adopt mirror legislation for national consistency.¹⁰

The need for a Western Australian Human Rights Act, right now

The encouraging developments towards the introduction of Federal Human Rights Act have important flow on effects for the need to introduce state and territory based human rights legislation. Both the AHRC and the PJCHR have emphasised that each of the states and territories needs to move towards introducing their own human rights legislation to ensure that all Australians receive the same protection of their rights, no matter where they live.¹¹

There are countless examples of how human rights legislation in other jurisdictions has made lives better and has helped us to navigate some of the most difficult challenges we face in society. One of the most urgent crises we are currently facing is the continuous and growing incidents of violence against women. Human rights legislation has been used successfully in a range of different contexts to help in providing better supports and access to justice for victims of domestic violence. For example, the Queensland Human Rights Act was successfully used by Tenants Queensland to help a single mother who had experienced domestic violence to avoid eviction from her home.¹² In the United Kingdom, which has had a Human Rights Act for almost 25 years, there is jurisprudence that supports the interpretation of the right to freedom from cruel, inhumane and degrading treatment as compelling the police service to undertake effective investigations into allegations of domestic violence.¹³

Human rights legislation has also been used by many people to achieve better outcomes in their everyday lives. It has been used by Aboriginal and Torres Strait Islander people to ensure cultural matters are considered when making judicial decisions¹⁴ and to ensure Aboriginal and Torres Strait Islander significant dates and events are recognised at schools.¹⁵ People with a disability have successfully advocated for their human rights to ensure accessibility measures are put in place

in public places and social housing.¹⁶ Human rights legislation has also resulted in outcomes such as ensuring that same sex couples are not unfairly excluded from superannuation entitlements¹⁷ and providing people with free access to interpreters in tribunal proceedings.¹⁸

Western Australia is in the perfect position to introduce a Human Rights Act. In 2007 a far reaching and independent community consultation into a Western Australian Human Rights Act found strong community support and did extensive work on what a Human Rights Act should look like.¹⁹ We also have the benefit of being able to learn from and improve upon the legislation in the ACT, Victoria, and Queensland given their many years of operation. And we now have the benefit of the incredibly extensive consultations and breadth of work carried out by both the AHRC and by the PJCHR, who have both recommended the enactment of human rights legislation at both the federal and state levels. The blueprints have been set, and we should seize the momentum and act now to ensure that Western Australians finally have protection of their human rights.

The [Western Australia for a Human Rights Act Coalition \(WA4HRA\)](#) was formed in

February 2020 and now consists of a coalition of over 25 leading social services organisations, legal bodies, universities and human rights organisations who have come together to support the call for a Human Rights Act for Western Australia. We are seeking a commitment from the Western Australian Government to introduce a Human Rights Act modelled on the human rights legislation already protecting people in other Australian jurisdictions.²⁰ ■

Endnotes

1. Australian Human Rights Commission, Free and Equal Position Paper: A Human Rights Act for Australia (2022) ('AHRC Position Paper').
2. Parliamentary Joint Committee on Human Rights, Inquiry into Australia's Human Rights Framework (2024) ('PJCHR Report').
3. AHRC Paper, p 243.
4. AHRC Paper, p 243.
5. See, for example, Human Rights Law Centre Submission to the Parliamentary Joint Committee on Human Rights, Inquiry into Australia's Human Rights Framework, p 16.
6. HRLC submission, 17.
7. AHRC Position Paper, 243.
8. Ibid.
9. See, National Human Rights Consultation, *Report*, September 2009, p. 306, citing Stephen Gageler AC and Henry Burmester AO KC, *In the matter of constitutional issues concerning a Charter of Rights: supplementary opinion*, SG No. 68 of 2009 (September 2009).
10. PJCHR Report [711].
11. AHRC Position Paper, 243; PJCHR Report [9.10].
12. Human Rights Law Centre, 101 Cases Report (2022).
13. See e.g. *Commissioner of Police of the Metropolis v. DSD* [2018] UKSC 11.
14. Human Rights Law Centre, 101 Cases Report (2022) 36.
15. Human Rights Law Centre, 101 Cases Report (2022) 16.
16. Human Rights Law Centre, 101 Cases Report (2022) 19.
17. Human Rights Law Centre, 101 Cases Report (2022) 38.
18. Human Rights Law Centre, 101 Cases Report (2022) 24.
19. Report of Consultation Committee for a Proposed WA Human Rights Act (November 2007).
20. If you would like to become a member organisation or sign up as an individual supporter of WA4HRA visit the website at wa4hra.com.au or email us at wa4hra@gmail.com. You can also follow us on Facebook, Instagram, X and LinkedIn.



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