THE LAW SOCIETY OF NEW SOUTH WALES THOUGHT LEADERSHIP SERIES 2022

HUMAN RIGHTS LEGISLATION FOR NEW SOUTH WALES

THE LAW SOCIETY
OF NEW SOUTH WALES

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I. INTRODUCTION

Public discussions around human rights in the context of the COVID-19 pandemic have suggested that how human rights operate in NSW and in Australia more broadly is not always well understood. The pandemic has raised legitimate questions in the minds of many citizens about what rights they, as individuals and as part of a community, enjoy, whether by virtue of the operation of rights founded in the Australian Constitution or otherwise.

The Law Society considers that it is in the public interest to have a discussion on the future of human rights in New South Wales and Australia. What do concepts such as human dignity, freedom and equality mean for our community? In what ways can we ensure due regard to human rights in administrative decision making? How might human rights legislation in NSW promote democracy and the rule of law? When are limitations on the exercise of rights fair and proportionate? What should happen if a person's human rights are breached?

As part of our Thought Leadership Series for 2022, the President of the Law Society, Joanne van der Plaat, sought to continue the discussion on human rights legislation for NSW. The first session in the Series, held on 4 April 2022, saw Ms van der Plaat in conversation with Professor George Williams AO and former NSW Premier, the Honourable Bob Carr, to discuss the impact of the pandemic on human rights in NSW, considering the longer-term implications for citizens, lawyers, and governments alike. The second session in the Series sought to unpack the features of the most recent state-based legislative model of human rights in Australia, namely Queensland's *Human Rights Act 2019*, to inform discussion about the potential future enactment of legislation in NSW. The expert panellists included Scott McDougall (Queensland Human Rights Commissioner), Sean Costello (Principal Lawyer, Queensland Human Rights Commission), Professor Rosalind Dixon (UNSW Law & Justice); and Joshua Aird (UNSW Law & Justice).

As a rule of law issue, the Law Society supports the enactment of standalone human rights legislation in Australia and NSW. Further, we believe human rights legislation will assist in fostering social cohesion and provide fairness and justice to the community. The purpose of this paper is to continue the conversation on the value that human rights legislation could bring to decision-making and the community in NSW and to record some of the ideas raised by our Thought Leaders in 2022 for further debate.

We consider that if human rights legislation is implemented carefully and in consultation with the community, there will be many benefits for this State, from better decision-making in the public sector to a greater engagement with questions of human rights across our diverse and vibrant community. Ultimately, we believe that human rights legislation for NSW will create a fairer, more compassionate society.

QUESTIONS ON HUMAN RIGHTS FROM THE NSW COMMUNITY

The Law Society's Human Rights Committee asked members of the NSW community what they wanted to know about human rights.

Where do my rights come from?

What are my constitutional rights?

Is freedom of religion a human right?

Can my employer require me to be vaccinated?

Does Australia have a Bill of Rights?

Can I be compensated for a breach of my human rights?

Do we have a right to stop trial by media?

What are my rights if I am evicted from my rental accommodation?

Are everyone's human rights the same?

Do human rights change?

Can I be discriminated against for breastfeeding my child in a public place?

Do Australians have a right to freedom of speech?

Does my child have a right to education?

What are my rights to protest?

What are my rights in relation to my data?

Do I have the right to choose how I die?

Do children have the right to be treated differently to adults in criminal proceedings?

What are my rights as a victim of crime?

What are my rights if the police stop me?

Who is responsible for the protection of human rights?

Do I have a right to legal representation?

Does Australia recognise the right to a healthy environment?

What happens if a new policy at work breaches my human rights?

Was it a breach of my human rights that I was required to wear a mask in lockdown?

II. WHY SHOULD WE CARE ABOUT PROTECTING HUMAN RIGHTS?

In *A Charter of Rights for Australia*, George Williams and Daniel Reynolds make the case for national human rights legislation for Australia.[1] The opening chapter of the work, 'An Absence of Human Rights', makes for sobering reading, as the authors detail media coverage of some of the egregious abuses of human rights that have occurred in Australia that, without appropriate human rights legislation, governments have been all too easily able to disregard.

The collective national conscience was seared by footage aired in 2016 on ABC's *Four Corners* of the degrading and abusive treatment of then 14-year-old Jake Roper and then 13-year-old Dylan Voller in Don Dale Youth Detention Centre.[2] As Williams and Reynolds emphasise, Don Dale was not an isolated incident. It is too often those most vulnerable or marginalised – whether they be children, the elderly, Aboriginal and Torres Strait Islander people or people with disability and mental illness– whose rights are infringed or cast aside.[3]

In Australia, we often rely on the media to bring human rights incidents to light. And when we are made aware of such incidents, we are often confronted with the deficiencies of a legal system that does not fully protect human rights at the federal or state and territory levels. Some recent examples of reporting that raise very real questions around human rights in this country include:

- In July 2022, reports came to light of 17 teenage detainees who were moved from Banksia Hill Detention Centre to a maximum-security adult jail in Western Australia; [4]
- In April 2022, the NSW Law Enforcement Conduct Commission described treatment of a 15 year-old Aboriginal boy who was sedated, strapped to an ambulance stretcher and inappropriately touched by an NSW police officer while four other police officers were present;[5]
- The apparent lack of healthcare services for asylum seekers brought to Australia under the Medevac regime;[6]
- The continuing high number of Aboriginal deaths in custody;[7]
- In September 2022, the United Nations Subcommittee on Prevention of Torture (**SPT**) suspended its visit to Australia, for reasons including that the NSW Government refused to allow the SPT to visit places of detention across the State;[8]

While the chance for individuals to defend their rights and access effective remedies is an important aspect of human rights legislation, the opportunity to create a human rights culture in NSW is just as significant. By requiring legislators, public entities and executive decision makers and judges to consider human rights in a systematic way when making and reviewing decisions, we consider there will be a greater consciousness about human rights overall and more transparent and accountable decision making in the first place.

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1 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017).

2 'Australia's Shame', *Four Corners* (Australian Broadcasting Corporation, 2016) <https://www.abc.net.au/news/2016-07-25/australias-shame-promo/7649462>.

3 Williams and Reynolds (n 1) 25.

4 Grace Burmas, 'Seventeen Banksia Hill juvenile inmates moved to Casuarina Prison', *ABC* (online, 20 July 2022) <https://www.abc.net.au/news/2022-07-20/seventeen-banksia-hill-inmates-moved-to-casuarina/101256138>.

5 Law Enforcement Conduct Commission, Operation Kimbla – Report to Parliament pursuant to section *132 Law Enforcement Conduct Commission Act 2016* (Report, April 2022); Nakari Thorpe, 'NSW Police officer found to have engaged in serious misconduct by touching Indigenous boy on stomach and nipple', *ABC* (online, 5 April 2022) <https://www.abc.net.au/news/2022-04-05/nsw-police-misconduct-inappropriate-touching-of-indigenous-boy/100968038>.

6 Eden Gillespie, 'Medevac asylum seekers forced to wait years for medical treatment, report finds', *SBS News* (online, 6 December 2021) <https://www.sbs.com.au/news/article/medevac-asylum-seekers-forced-to-wait-years-for-medical-treatment-report-finds/sg6tcf0uz>.

7 Michael McGowan, 'Aboriginal deaths in custody or during a police operation last year doubled NSW's previous record', *The Guardian* (online, 6 August 2022) <https://www.theguardian.com/australia-news/2022/aug/06/aboriginal-deaths-in-custody-or-during-a-police-operation-last-year-doubled-nsws-previous-record>.

8 Office of the High Commissioner of Human Rights, 'UN torture prevention body suspends visit to Australia citing lack of co-operation' (Media Release, 23 October 2022) <https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation>.

III. HOW WELL DO WE CURRENTLY PROTECT RIGHTS IN NSW?

Melissa Castan and Paula Gerber have described the landscape of human rights in Australia as a 'patchwork quilt', noting that there exists 'regional variations in anti-discrimination legislation and general human rights legislation'.[9] There is no federal Bill of Rights in Australia and NSW is not one of the three jurisdictions (the ACT, Victoria and Queensland) that have enacted specific human rights legislation. Therefore, the limited rights enjoyed by the people of NSW are derived from three main sources – the Constitution, statute (including Commonwealth and NSW anti-discrimination legislation) and the common law.

The Australian Constitution does contain several express rights, including compensation on just terms for the Commonwealth's compulsory acquisition of property (s 51 (xxxi)); trial by jury on indictment (s 80); freedom of religion (s 116); and freedom from discrimination on the basis of interstate residence (s 117). As Julie Debeljak reminds us, however, 'the judiciary has tended to interpret these rights narrowly, giving greater freedom to the representative arms of government in their creation and enforcement of Commonwealth law, without any significant rights-based constraints'.[10]

The High Court has also implied rights into the Constitution, for example the implied freedom of political communication or 'the right not to be detained otherwise than by judicial order'.[11] However, these 'implied' rights have not been uncontroversial and, as noted by Matthew Groves, Janina Boughey and Dan Meagher, 'properly understood (they) are not really 'rights' at all, but limits on the powers of legislatures and governments which are necessary to protect the structure of government established by the Constitution.'[12]

George Williams and Daniel Reynolds summarise the protections offered by the Constitution as follows:

> The protection the Constitution gives to human rights is often weak. Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian Constitution and any charter of rights in a like nation makes this clear. Where, for example, is our freedom from discrimination on the basis of race or sex or freedom from cruel and unusual punishment or torture?[13]

In addition to the limited express and implied constitutional rights, there are some statutory rights protections at the Commonwealth and State levels that partially implement Australia's international human rights obligations into domestic law: see, for example, anti-discrimination laws including the *Racial Discrimination Act 1975* (Cth); the *Sex Discrimination Act 1984* (Cth); the *Disability Discrimination Act 1992* (Cth), the *Age Discrimination Act 2004* (Cth) and relevant labour and workplace laws under the *Fair Work Act 2009* (Cth).

In NSW, the main piece of human rights legislation is the *Anti-Discrimination Act 1977* (NSW) (**NSW Anti-Discrimination Act**) which makes it unlawful to discriminate against a person on the basis of a number of attributes (e.g., race, sex, transgender status, marital or domestic status, disability, carer responsibilities, homosexuality and age). However, as set out in a recent position paper developed by the Public Interest Advocacy Centre (**PIAC**), while the NSW Anti-Discrimination Act was once considered as visionary legislation among the Australian states and territories, at the current time it requires comprehensive reform to provide 'adequate coverage for groups experiencing discrimination across relevant areas of public life'.[14]

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9 Melissa Castan and Paula Gerber, 'Taking the Temperature of Human Rights in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2021) vol 1, 1.

10 Julie Debeljak, 'The Fragile Foundations of the Human Rights Protections: Why Australia Needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2021) vol 1, 41.

11 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; 176 CLR 1, cited in Williams and Reynolds (n 1) 64-65.

12 Matthew Groves, Janina Boughey and Dan Meagher, 'Rights, Rhetoric and Reality: An Overview of Rights Protection in Australia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 2.

13 Williams and Reynolds (n 1) 65.

14 PIAC, *Leader to Laggard – The case for modernising the NSW Anti-Discrimination Act* (Report, 6 August 2021) 15.

In addition to the human rights protection provided by statute, the common law protects some rights, including protection against self-incrimination, access to the courts, legal professional privilege and procedural fairness. Further, the principle of legality supports a rights-based approach to statutory interpretation. As Brennan J noted in *Re Bolton; Ex parte Beane*: 'Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation'. [15]

A further layer of protection in NSW comes from the role played by the Legislation Review Committee that, pursuant to s 8A of the *Legislation Review Act 1987* (NSW), must report to Parliament on bills that:

- trespass on personal rights and liberties;
- do not properly define administrative powers that may affect personal rights;
- do not allow for the review of decisions that may affect personal rights;
- inappropriately delegate legislative power;
- do not sufficiently allow the Parliament to scrutinise legislative power.

The establishment of this kind of reviewing body was one of the recommendations of the 2001 Standing Committee on Law and Justice inquiry into a NSW Bill of Rights, which ultimately recommended against the introduction of a bill of rights in NSW.[16] It is the view of the Law Society, however, that the existing legislative scrutiny mechanisms do not provide sufficiently strong safeguards against legislative encroachment. Studies about the effectiveness of the NSW Legislation Review Committee have identified a culture of 'ignoring and deflecting the Committee's advice',[17] and it is not uncommon for legislation to pass quickly, with no possibility of thorough scrutiny.

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15 (1987) 162 CLR 514, 523. See also *Coco v The Queen* (2003) 211 CLR 476, 492.

16 Standing Committee on Law and Justice, Parliament of NSW, *A NSW Bill of Rights* (Report No 17, October 2001).

17 Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21. Emma Phillips and Aimee McVeigh, 'The grassroots campaign for a Human Rights Act in Queensland:

A PATCHWORK QUILT OF MECHANISMS TO PROTECT HUMAN RIGHTS IN AUSTRALIA AND NSW

IV. HUMAN RIGHTS LEGISLATION IN QUEENSLAND, VICTORIA AND THE ACT

It is useful from a comparative perspective to look briefly at the three jurisdictions in Australia that have implemented human rights legislation, starting with the most recent legislation in Queensland and then considering Victoria and the ACT.

A) QUEENSLAND'S HUMAN RIGHTS ACT

Following a grass-roots campaign, which attracted the support of over 40 human rights organisations and thousands of Queenslanders, the Queensland Labor Party committed to the introduction of human rights legislation in its election campaign of November 2017.[18] The Human Rights Bill 2018 was introduced on 31 October 2018 and passed on 27 February 2019. The Human Rights Act 2019 (Qld) (**Queensland Act**) commenced on 1 January 2020, making Queensland the third Australian jurisdiction to enact stand-alone human rights legislation.

The main objects set out in s 3 of the Queensland Act are:

i. to protect and promote human rights; and
ii. to help build a culture in the Queensland public sector that respects and promotes human rights; and
iii. to help promote a dialogue about the nature, meaning and scope of human rights.

The rights that are protected are mostly rights drawn from the International Covenant on Civil and Political Rights (**ICCPR**) (see, for example, ss 15-35), but there are also two economic, social and cultural rights that are protected, namely the right to education services (s 36) and the right to health services (s 37).

The Queensland Act, like the human rights legislation in Victoria and the ACT, is what is sometimes described as a 'dialogue' or 'parliamentary' model. This means that the Queensland Act is a regular piece of legislation (i.e. not constitutionally entrenched) but where the three arms of government are in dialogue with each other. As described in the Explanatory Memorandum to the Queensland Act, 'each of the three arms of government will have an important role to play: the judiciary through interpretation of laws and adjudicating rights; the legislature through scrutinising legislation and making laws; and the executive through developing policy and administrative decision-making'.[19]

Under this model, the role and obligations of the Parliament include the following:

- a statement of compatibility must be prepared for all bills introduced to Parliament and tabled when a bill is introduced (s 38);
- a statement of compatibility should state whether, in the opinion of the member who introduces a bill, the bill is compatible with human rights and the nature and extent of any incompatibility (s 38);
- the Minister responsible for subordinate legislation must prepare a human rights certificate to accompany the legislation (s 41);
- the portfolio committee responsible for examining a bill must report to Parliament about any incompatibility with human rights (s 39);
- in exceptional circumstances, Parliament is able to expressly declare via an 'override declaration' that an Act or a provision of an Act has effect despite being incompatible with one or more human rights or despite anything else in the Queensland Act (s 43-44).

The role and obligations of the courts are:

- to interpret all statutory provisions, to the extent possible consistent with their purpose, in a way that is compatible with human rights (s 48(1)) and, if a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible consistent with its purpose, be interpreted in a way that is most compatible with human rights (s 48(2))
- if the provision cannot be interpreted consistently with human rights, the Supreme Court may make a declaration of incompatibility to the effect that the Court is of the opinion that a statutory provision cannot be interpreted compatibly with human rights (s 53)

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[18] A case study of modern Australian law reform' (2020) 45(1) *Alternative Law Journal* 12.
[19] Explanatory Memorandum, *Human Rights Act 2019* (Qld) 6.

Public entities (i.e. the executive) are required to act and make decisions in a way that is compatible with human rights. The Bill provides that it is unlawful for a public entity:

- to act or make a decision in a way that is not compatible with human rights (s 58(1)(a)); or
- in making a decision, to fail to give proper consideration to a human right relevant to the decision (s 58(1)(b))

It should be noted that the Queensland Act does not provide the right to a stand-alone cause of action for a contravention of any of the named rights (s 59). Instead, a human rights argument must be attached or 'piggybacked' to a separate independent cause of action (for example, judicial review proceedings or discrimination complaints) which is separate from a claim under s 58 of the Act. This is similar to the requirements of s 39 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**).

One unique feature in Queensland is the availability of an accessible complaints mechanism. Section 64(1) provides for an individual who has been the subject of an alleged contravention to make a complaint to the Queensland Human Rights Commission. If the matter does not resolve at conciliation, however, there is no standing to proceed to a court. Nevertheless, in the case of an unresolved complaint, the Commission does have the ability to publish information about the steps it believes the public entity should take in the future to ensure that its actions are compatible with human rights (s 90).

[20] Williams and Reynolds (n 1) 147-149.
[21] Victorian Charter, s 1(2).

B) VICTORIA'S CHARTER OF RIGHTS AND RESPONSIBILITIES

The enactment of human rights legislation in Victoria was led by state Attorney-General, Rob Hulls, who appointed a small Human Rights Consultation Committee that consulted with a broad range of Victorians, including those that may have been alienated from the legal and justice system, as well as young people.[20]

The Victorian Charter came into force on 1 January 2007 and was fully operational by 1 January 2008. Its purpose is to protect and promote human rights by:

- setting out the human rights that Parliament specifically seeks to protect and promote; and
- ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
- requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
- conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.[21]

As noted by Julie Debeljak, like the Queensland Act, the Victorian Charter is an ordinary Act of Parliament (rather than a constitutionally entrenched model) and the judiciary's power is limited to the interpretation of legislation in a way that is compatible with human rights and the making of declarations of inconsistency (as opposed to declarations of invalidity), two features which are said to ensure 'Parliamentary sovereignty'.[22]

The twenty rights guaranteed in the Victorian Charter are set out in sections 8-27 and are based on civil and political rights identified in the ICCPR. The rights in the Charter are not absolute as they can be subject to reasonable limitations that are 'justified in a free and democratic society based on human dignity, equality and freedom'. Section 7(2) of the Charter sets out a list of factors for determining whether a limitation on a right is justified, namely:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose

The Victorian Charter requires people and public institutions, including the courts, to interpret and apply all laws in a way that is compatible with human rights. As Julie Debeljak explains, this 'imposes a presumption in favour of rights-compatible interpretation of legislation; rebutted only when Parliament includes clear legislative words, or necessary intention, that legislation be interpreted to the contrary'.[23] Where the Supreme Court is unable to find a rights-compatible interpretation to a provision, it can issue a declaration of inconsistent interpretation, which does not invalidate the provision but rather initiates a review of the legislation, with the responsible Minister given six months to prepare a written response to the declaration and to table it in Parliament (s 37).

As in Queensland, there is no stand-alone remedy under the Charter. It could be argued that the need to 'attach' or 'piggyback' a claim under the Charter to another claim reduces the capacity for an individual to obtain effective relief.

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory agency. It has functions in the area of reporting, human rights education and intervening in proceedings where a question of law arises about the Charter's application or the human rights compatible interpretation of a law (s 40). Unlike in Queensland, however, there is no accessible complaints mechanism in Victoria.

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22 Debeljak (n 11) 66.
23 Ibid.

C) THE ACT'S HUMAN RIGHTS ACT

The ACT was the first jurisdiction in Australia to enact human rights legislation following a report prepared by the ACT Bill of Rights Consultative Committee in 2003, which noted the fragmented nature of human rights protections in the ACT. The *Human Rights Act 2004* (**ACT Act**) was intended to improve the protection of human rights in the ACT and provide people within the ACT with a 'clear and accessible statement of their fundamental human rights' [24]

The ACT Act provides protection for civil and political rights (ss 8 to 27) and two economic, cultural and social rights that have been subsequently added following reviews of the ACT Act, namely the right to education (s 27A) and the right to work (s 27B).

As with the Queensland Act and the Victorian Charter, the ACT Act is based on a dialogue model whereby obligations are set out for each arm of government. As regards the obligations on Parliament, the Attorney-General must prepare a statement of compatibility about a bill for presentation to the Legislative Assembly (s 37); and the relevant Assembly committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly (s 38).

Like in Victoria and Queensland, the judiciary is required to interpret legislation in a way that is compatible with human rights (s 30). The Supreme Court has the power to issue a declaration of incompatibility, but as with the other state jurisdictions, that declaration does not affect the validity of the legislation (s 32).

The ACT Act makes it unlawful for public authorities, including Tribunals, 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 (s 40B).

Unlike the Queensland Act and the Victorian Charter, the ACT Act provides for a stand-alone cause of action for breaches of human rights (s 40C), a feature that was added after the 2009 Review of the Act.[25] The Supreme Court can provide 'relief it considers appropriate' if an action against a Public Authority succeeds, but there is no entitlement to damages.

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[24] See Caxton Legal Centre, 'Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland' (18 April 2016), 36.

[25] See also Legislative Assembly for the Australian Capital Territory Standing Committee on Justice and Community Safety, 'Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)' (Report 7, 10th Assembly, June 2022) 3.See Caxton Legal

V. THOUGHT LEADERSHIP SESSION 1: IMPACT OF THE PANDEMIC ON HUMAN RIGHTS IN NSW - *WITH PROFESSOR GEORGE WILLIAMS AO AND FORMER NSW PREMIER, THE HON BOB CARR*

The first session of the Thought Leadership series arose from a recognition that the COVID-19 pandemic, in particular the lockdowns that occurred across Australian states and territories, fundamentally changed the way in which our citizens exercised freedoms that they previously took for granted. In this context, it was considered an opportune time to reflect on the community's understanding of human rights as well as the protections and safeguards available in times of emergency. As Professor Williams noted at the start of the discussion:

> It goes without saying that we live in remarkable times and if we only turn our minds back… it was unthinkable that we would have gone through a period where state borders were closed, curfews had been put in place, tens of thousands of Australian citizens would have been denied their right to return home to reconnect with their families, or that we could have even been arrested for leaving home except for a very small number of reasons.

The COVID-19 measures above were described by Williams as both an infringement of human rights as well as an attempt to protect human rights, including the right to life. This reminds us that any discussion on human rights is nuanced in that it must take account of competing rights and, importantly, unpack the frameworks available to community and political leaders, who in times of emergency must make decisions quickly and under considerable pressure. Rather than giving our leaders a 'blank cheque', however, Williams suggested that 'the more extreme, the more extraordinary the powers granted to our leaders (during an emergency such as COVID-19), the greater the need for vigilance, the greater the need for checks and balances and scrutiny'.

Williams pointed to what he described colloquially as 'whatever-it-takes powers' found in certain pieces of Commonwealth and State legislation that vested the respective Health Ministers with almost unfettered power to deal with health emergencies and their consequences. Under the *Biosecurity Act 2015* (Cth), for example, the Health Minister may personally exercise powers during a human biosecurity emergency period, declared by the Governor General (s 474), by determining any requirement and making any direction necessary to prevent or control the disease (ss 477 and 478), despite any provision of any other Australian law. Such determinations and directions cannot be disallowed by Parliament, as is normally the case. A like provision at the State level can be found in s 7 of the *Public Health Act 2010* (NSW).

Williams noted that this kind of legislation, intended for emergency situations, has been drafted to exclude the usual administrative law processes, and there appears to be very little thought directed towards how to craft policy in an emergency in a way that retains accountability. The only check on the exercise of public power in these examples is the Constitution, but, in the absence of a bill of rights instrument, its effectiveness is limited.

In the context of the pandemic, Williams argued that the lack of human rights legislation at both the Commonwealth and State levels meant that decisions e.g., curfews or bans on citizens returning home could not be properly tested. A human rights charter or act would allow for a 'thorough, rational analysis by an independent person' of whether the public health measures were justifiable and proportionate. In terms of social cohesion, Williams suggested the lack of opportunity to test laws for their human rights compatibility can undermine public confidence, as well as fuel discontent and anger. It was also suggested that when governments are faced with a public policy challenge of the scale of the pandemic, there needs to be accountability after the event, including through some type of independent public inquiry, which would assure the community that processes will be subject to scrutiny and oversight.

The pandemic demonstrated that there was some confusion amongst members of our community about what exact rights they hold as citizens. In the view of Professor Williams, the educative force of human rights legislation is a powerful reason for its implementation. Such legislation, which would be taught in schools and other educational institutions, would help promote a 'strong, cohesive community around shared values'. We have seen, particularly in certain contexts such as national security legislation, a shift to the increasing use of executive power. This trend has continued during the pandemic, and has arguably become more apparent, given the impact of pandemic laws on a broader cross-section of the public. As noted by Williams, 'Wherever public power is exercised, you need checks and balances in the form of a good human rights instrument', including through human rights legislation at both the Commonwealth and State levels. In particular, Williams emphasised the importance of parliamentary scrutiny, noting:

> The most important institution during a pandemic to provide that scrutiny is Parliament… it's vital that Parliament is seen to sit, is seen to listen and is seen to respond to community concerns…That did not happen during the worst of the pandemic. Instead we had rule by decree, through a series of ruling health orders made without parliamentary oversight. Ministers were delegated law making powers without scrutiny and were able to control their messaging to an unprecedented degree.

The Hon Bob Carr also agreed on the importance of checks on executive power including by way of parliamentary scrutiny, in times of crisis with unprecedented challenges, noting 'when you're taking rights from people, even with the strongest justification, you need to have heightened scrutiny'. During his time as NSW Premier, he was a prominent opponent of a Charter of Rights but now considers himself more 'open minded' towards the issue. His view has shifted at least partly in response to the extent of powers that have been vested in Commonwealth security agencies, which has represented a sharp acceleration in executive law making, as well as documented invasions of privacy around the world.

The first Thought Leadership Session asked the audience to consider the value that human rights legislation might bring to help navigate extraordinary periods in history, such as the COVID-19 pandemic. Not only would such legislation provide a framework for good decision-making under pressure, but it would also function as a force of social cohesion and strengthen a human rights culture in this state and beyond, in both emergency and non-emergency times.

VI. THOUGHT LEADERSHIP SESSION 2: - *WITH SCOTT MCDOUGALL, SEAN COSTELLO, PROFESSOR ROSALIND DIXON AND JOSHUA AIRD*

The second Thought Leadership Session began with an overview provided by the Queensland Human Rights Commissioner, Scott McDougall, on the development and operation of the Queensland Act (see details in Section III above). The discussion then proceeded to consider some of the issues raised in the context of the Queensland Act and how these might apply to NSW.

As regards the development of human rights legislation in NSW, the panellists noted the importance of a 'first principles' approach. Professor Dixon commented:

> There is one danger… to the iterative approach that says the only thing that is possible in NSW is a tweak on Queensland. Of course, it is possible for NSW to be informed by these experiences but go much bolder.

One possibility, Dixon suggested, is a discussion about whether to put a charter of human rights into the State Constitution to give courts the power to invalidate legislation for inconsistency with the charter subject to a Canadian-style express override clause. She noted that, in her view, involvement of the judiciary, subject to an appropriate democratic override, could be a positive contributor to the human rights culture in NSW. While there may be arguments against empowering unelected judges within any framework of human rights legislation with 'judicial teeth', Professor Dixon's suggested this can be countered by appointing the right kinds of judges, noting a 'broader reckoning with judicial appointment reform' may be important.

The panellists noted that it was important to contemplate how to assess the performance of any human rights legislation, with Joshua Aird commenting: 'Before we ask if (human rights legislation) is doing a good job, we need to define what (a) good job is…Are we looking for strict compliance with a human rights act … Or are we looking at something that is a little more (focused on) dialogue or contestation?'. Any discussion of performance would also encompass the way in which legislation provides for an analysis of what are reasonable and proportionate limits on rights.

Scott McDougall noted that the Queensland Act does some of its 'heavy lifting' through s 13, as when deciding whether a limit on a human right is reasonable and justifiable, there are a number of factors to consider including 'whether there are any less restrictive and reasonably available ways to achieve the purpose': s 13(2)(d). Section 58 is another central provision of the Act in terms of building a human rights culture in the public sector. The provision imposes a twin obligation on public entities to give proper consideration to human rights when making a decision and to act and make a decision in a way that is compatible with human rights. McDougall suggested that such provisions were important in assessing the performance of the Queensland Act, noting that it required 'public servants, at the time at which they are making critical public policy decisions, actually being forced to …look at genuine alternatives and consider whether they are financially feasible…(and) reasonably available'.

A unique feature of the Queensland Act is that it allows complaints to be made to the Commission, where the parties are subsequently brought together for conciliation. As noted by McDougall, the complaints mechanism means that those public servants are 'brought to (the) table to account for their decisions'.

Improvements to the human rights legislation in Queensland will be considered in the upcoming mandatory four-year review. Sean Costello suggested some questions that may arise include whether more rights should be covered, for example a right to housing, or whether there should be a new tribunal for complaints that fail to resolve by conciliation. If states and territories in Australia are engaged in a healthy 'race to the top' to establish leading human rights legislation, Dixon suggested that the most important element is around social, economic and cultural rights for the most vulnerable members of society, an area for which Australians express high support. In terms of how the right to education and access to healthcare are working in Queensland, McDougall noted that the Commission has been granted leave to intervene in the inquest into the death of three Doomadgee

women from the Gulf due to rheumatic heart disease, where the question of access to healthcare is in issue. All panellists acknowledged the importance of culture in supporting effective human rights implementation and enforcement. Sean Costello noted that, within the dialogue model, the way that legislation comes to pass is influenced by an existing culture of accountability and how seriously arms of government take their responsibilities under human rights legislation. Professor Dixon commented that in Australia we still enjoy a political culture 'where people talk to each other (and) are willing to hear arguments and facts.' She suggested that such a climate would allow for debate about any potential human rights legislation where the community could examine issues such as how we might strengthen the protection and enforcement of rights while respecting the central tenets of self-government that underpin our democratic society. Such a discussion moves away from simplistic notions of absolute rights to a more nuanced discussion of the balancing of rights.

Joshua Aird also agreed that culture is fundamental to the way in which any charter of rights operates. In particular, he noted that early engagement with questions of human rights before a bill is introduced to parliament can lead to more considered and proportionate legislation being introduced. As well as the importance of culture for law-making itself, McDougall pointed to the importance of the accessibility of enforcement measures, noting that a prohibitively costly system would only pay lip-service to the principles of any charter.

It is clear from the Thought Leaders that any inquiry into human rights legislation in NSW should therefore take a first-principles approach, and while the models of other jurisdictions both nationally and internationally should be considered, it is also possible to think both critically and creatively about what is possible for NSW.

EXAMPLES OF RIGHTS THAT COULD BE PROTECTED UNDER NSW HUMAN RIGHTS LEGISLATION

VII. REASONS TO CONTINUE THE DISCUSSION FOR HUMAN RIGHTS LEGISLATION IN NSW

It was over twenty years ago, in 2001, that the Legislative Council Standing Committee on Law and Justice published a report on its inquiry into an NSW Bill of Rights, recommending against the introduction of such legislation. The Thought Leadership series in 2022 made clear that a new discussion on human rights legislation in NSW, particularly in light of the pandemic, is necessary and important.

It may be for some members of the community that it is reason enough to enact a charter of rights on the basis that it will provide statutory recognition for universal human rights that are not afforded protection under Australian law. Others may be persuaded by the educative force of human rights legislation, where a consciousness in the community of the meaning and balancing of human rights, contributes to a culture of tolerance and understanding that acknowledges and respects rights.

It is possible to look at rights at an individual level and be persuaded by the need for access to remedies for those whose rights are breached. This may include minorities, for example, or marginalised groups, particularly those that interact regularly with government services. Perhaps an equally powerful argument is to understand the collective benefits of human rights legislation, including potential improvements to housing, healthcare or education, if it encompasses the social, economic and cultural rights highly valued by the Australian community.

One of the strongest arguments in favour of state-based human rights legislation is that it has the potential to improve the quality of Parliamentary, Executive and bureaucratic decision-making. It is important that human rights are not simply an afterthought when legislation is made, but a central consideration from the outset of the legislative process.

Any discussion around the enactment of human rights legislation in NSW will necessarily lead to a consideration of the current state of anti-discrimination legislation in this State. As mentioned above, PIAC have recently mounted a strong case for reform of the NSW Anti-Discrimination Act, including recommending the modernisation of the test for discrimination; a positive obligation to make reasonable adjustments for persons with disabilities; a harmonisation of civil and criminal vilification protections and a modernisation of sexual harassment provisions.[26] The Law Society supports a review of the NSW Anti-Discrimination Act. While not necessarily a prerequisite to the introduction of human rights legislation, such a review would certainly act as a catalyst for important discussions on protections against discrimination in the twenty-first century, particularly for more vulnerable groups in the community.

The Law Society has a long-standing position in support of human rights legislation for NSW. In the absence of a concrete commitment to a stand-alone human rights Act, we urge leaders across the political spectrum to commit to a broad and inclusive consultation on human rights with the community of NSW. We remain positive that NSW can become a leading jurisdiction nationally and internationally for the protection of human rights.

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[26] *Leader to Laggard* (n14).

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