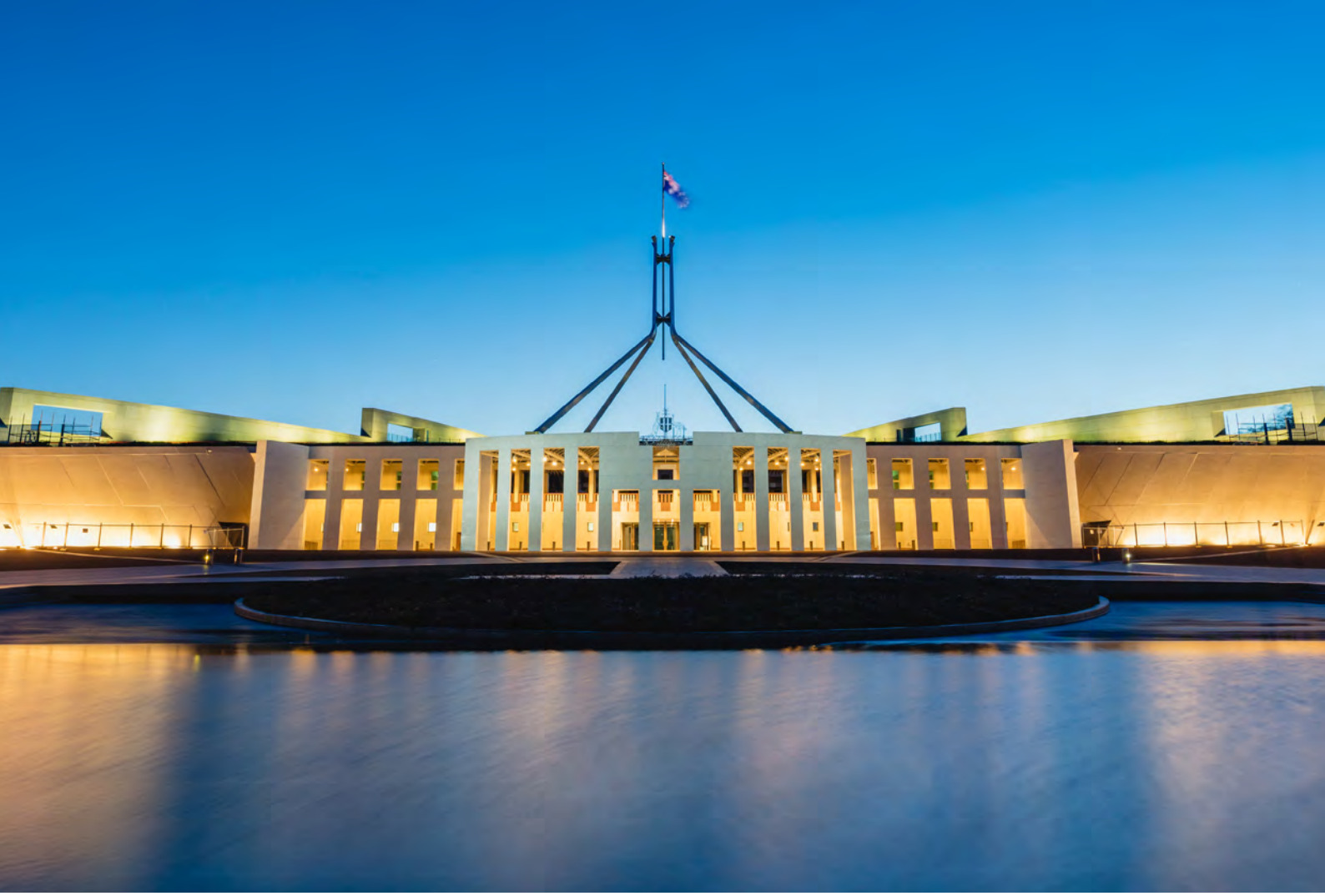

LEGISLATING HUMAN RIGHTS ACTS FROM WHITLAM TO NOW

By Cassandra Le Good & Professor Azadeh Dastyari

Human Rights Law Centre

HUMAN RIGHTS ACT

Whitlam Institute
WITHIN WESTERN SYDNEY UNIVERSITY

Acknowledgement of Country

The Whitlam Institute, the Human Rights Law Centre and the authors recognise the Traditional Custodians of the lands on which we work, the Darug people, Gadigal People, and Wurundjeri people. We pay our respects to Elders past and present. We acknowledge that the teaching, learning, research and advocacy undertaken across our institutions continue the teaching, learning, research and advocacy that has occurred on these lands for tens of thousands of years.

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EXECUTIVE SUMMARY

Australia remains the only democratic country in the world without a constitutionally enshrined or legislated national bill or charter of rights.

This is despite its commitment to various international human rights instruments and colloquial commitment to the notion of a 'fair go' as being at the core of Australian values. Human rights cannot exist simply as ideals, experience across the world has shown that their practical effect must be proactively safeguarded through education, oversight mechanisms and legislative reform. As it stands, human rights in Australia are not protected by any single robust mechanism, but instead protections come from a scattering of federal legislative provisions, the common law and select state-based legislation to create a patchwork approach that has been criticised both domestically and internationally for its inadequacy and failures. These failures have been repeatedly identified over the last decade by Royal Commissions, international treaty committees and Parliament's own Human Rights Scrutiny Committee.

Although Australia lacks any consolidated and cohesive federal statutory human rights instrument, it is not necessarily for a lack of trying. Since the 1970s when Gough Whitlam initially sought to reignite Australia's recognition of human rights, successive Labor governments including the Whitlam, Hawke and Rudd Governments have attempted but failed to pass a federal human rights act or similar legislation.

This report examines whether these failed attempts have any common themes or experiences between them. It does not seek to show that failure is inevitable, on the contrary, history indicates that particularly since the Rudd era there has been overwhelming public and expert support for an Australian human rights act. As a result of three comprehensive nation-wide inquiries including the 2008 National Human Rights Consultation, the 2023 Human Rights Commission Free & Equal project and the 2024 Inquiry into Australia's Human Rights Framework, there now exists before Parliament a breadth of unequivocal and robust evidence supporting the enactment of a human rights act. Over 80 percent of submissions received to both the 2008 and 2024 inquiries expressed support for an Act, indicating that not only does the community support the idea, but this support has also not weaned in the past 15 years. Each inquiry also made a formal recommendation supporting the enactment of a human rights act in Australia. The primary factor preventing reform, therefore appears to be not a lack of public support, but a lack of political will.

Debates about a human rights act have been on the political agenda since 1973 when Gough Whitlam introduced the first version of a human rights bill to Parliament. Further attempts occurred in 1983 and 1985 during the Hawke Government and whilst not formally introducing a Bill, the Rudd Government also took some notable steps towards reform via the National Human Rights Consultation.

The findings in this report indicate that at each juncture in the debate, a clear pattern of opposition against potential human rights legislation has arisen. The core commonalities in this opposition are twofold: political ideology or party affiliation and repeated use of the same themes and arguments to scrutinise, block or create fear about the legislation.

Since 1973, the main themes in the arguments raised by political opponents against an Act have remained virtually unchanged. These broadly include: that Australia does not need a human rights act; Australia's Common Law system and democratic foundations provide sufficient protection for individual rights and freedoms; an Act would diminish or substantially impact the existing structures of Government; an Act would transfer unacceptable amounts of power to the judiciary and an Act is likely to diminish rather than enhance human rights. At the community level, a key point of opposition that has likewise remained common is the opinion of some religious organisations and leaders. Claims about the impact of a human rights act on religious rights and freedoms was a core part of the legislation's failure in 1973 and this theme has carried through into debates as recently as the 2024 inquiry.

In addition to the repeated use of these key arguments, political opponents have also historically sought to create fear and division around the idea of a human rights act, by describing it in highly emotive terms like dangerous, evil and a threat to democracy.

This language has been used not only in Parliament but also during public commentary, in newspaper articles, in petitions and in submissions to formal inquiries. The evidence now available from the three major human rights inquiries examined in this report, indicates that this language and indeed, most of the key arguments used by opponents are outdated, unsupported and politically driven. Recently proposed models for a human rights act, such as the 'dialogue model' have been designed specifically to address opponent arguments and illustrate that there is no viable reason that Australia cannot implement an Act to safeguard human rights, whilst also preserving existing parliamentary processes.

Australia has failed, since at least 2013, to undertake any substantive reform of its mechanisms for the protection and promotion of human rights at the national level. This reform is therefore urgent and overdue. As this and many other reports have identified, the current system is disjointed, difficult to navigate and far from promoting human rights, fails to protect them through its complexity and opaqueness. Australia has indicated a desire to be identified as a supporter of human rights at the international level but has not adequately addressed its most fundamental responsibility - the rights of people within Australia. A human rights act represents a reasonable and necessary addition to Australian law to ensure Government can be held accountable for its decisions and individuals can be empowered to take action when their rights are breached.

Why pursue a Human Rights Act

The effort to legislate a human rights act comes from a belief that everyone's lives are made better by promoting respect for human rights and by giving people power to take action if their rights are breached. Successive Australian governments and politicians have sought an Act which prevents human rights violations by putting human rights at the heart of government decision making, making it mandatory to consider human rights when governments are developing laws and policies and delivering services. These proposals would also enable people to challenge injustice if their rights are violated.

Over the last 50 years, many Western democracies, including common law Westminster system democracies like the United Kingdom in 1998, New Zealand in 1990, and South Africa in 1994, have implemented a Human Rights Act or similar legislation. These instruments have improved people's lives in those countries in small and big ways. Whilst similar efforts have come to Australia, with Acts being passed in the Australian Capital Territory in 2004, Victoria in 2006, and Queensland in 2019, Australia as a whole is an outlier by not having an Act or similar legislation in its national laws to protect people's rights when dealing with governments, and promote transparency in the way the governments and parliaments deal with human rights issues.

A human rights act would require public authorities, including government departments, public servants, police and other agencies, to properly consider human rights when making laws, developing policies, delivering services and making decisions, and to act compatibly with human rights.

This requirement helps governments identify and address human rights issues affecting people at an early stage of policy development and provide transparency in how human rights have been considered.

An Act would also require that new laws be transparently assessed in Parliament against human rights standards. It would only allow Parliament to limit or restrict human rights when there is a good reason for doing so which is justified in a free and democratic society. In assessing whether a government has lawfully restricted a right, a court can look at things like the nature of the right, the reason for the restriction and any reasonably available less restrictive ways to achieve the purpose for the restriction. In broad terms, to lawfully restrict a right, a government must have a good reason for the restriction and must use the lowest level of restriction to get the job done.

An Act would promote better community understanding of human rights, and if a government doesn't act compatibly with human rights or properly consider human rights, an Act gives people the power to take action in the courts. Courts can't invalidate laws that breach human rights as parliaments have the final say on whether laws can breach human rights. A human rights act would require courts to interpret laws consistently with human rights.

This vision of embedding human rights into the heart of government is what motivated successive governments to try to make an Act a reality, but also drove opponents to try to thwart this effort by making various specious arguments disconnected to the reality of what an Act is or would provide.

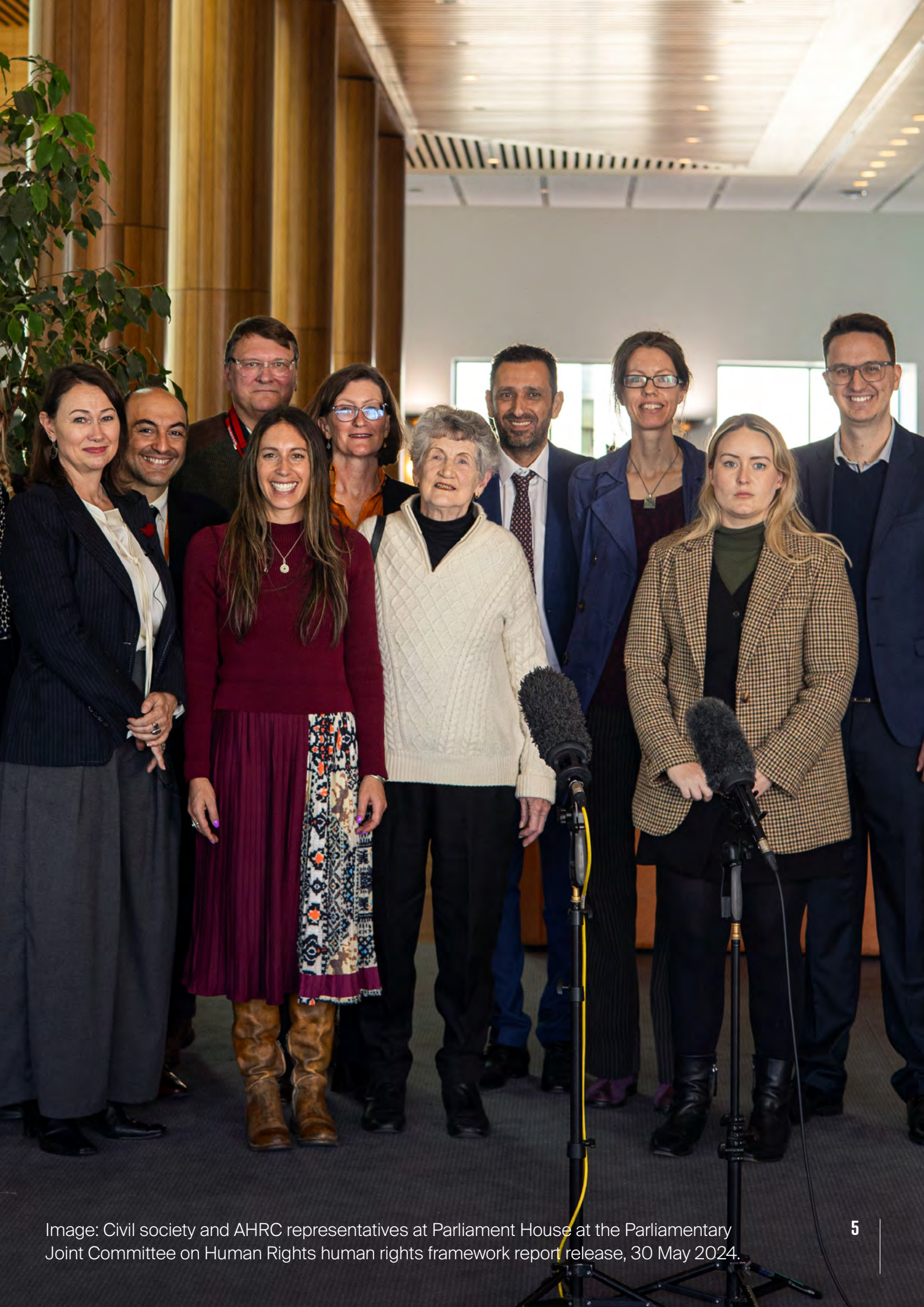
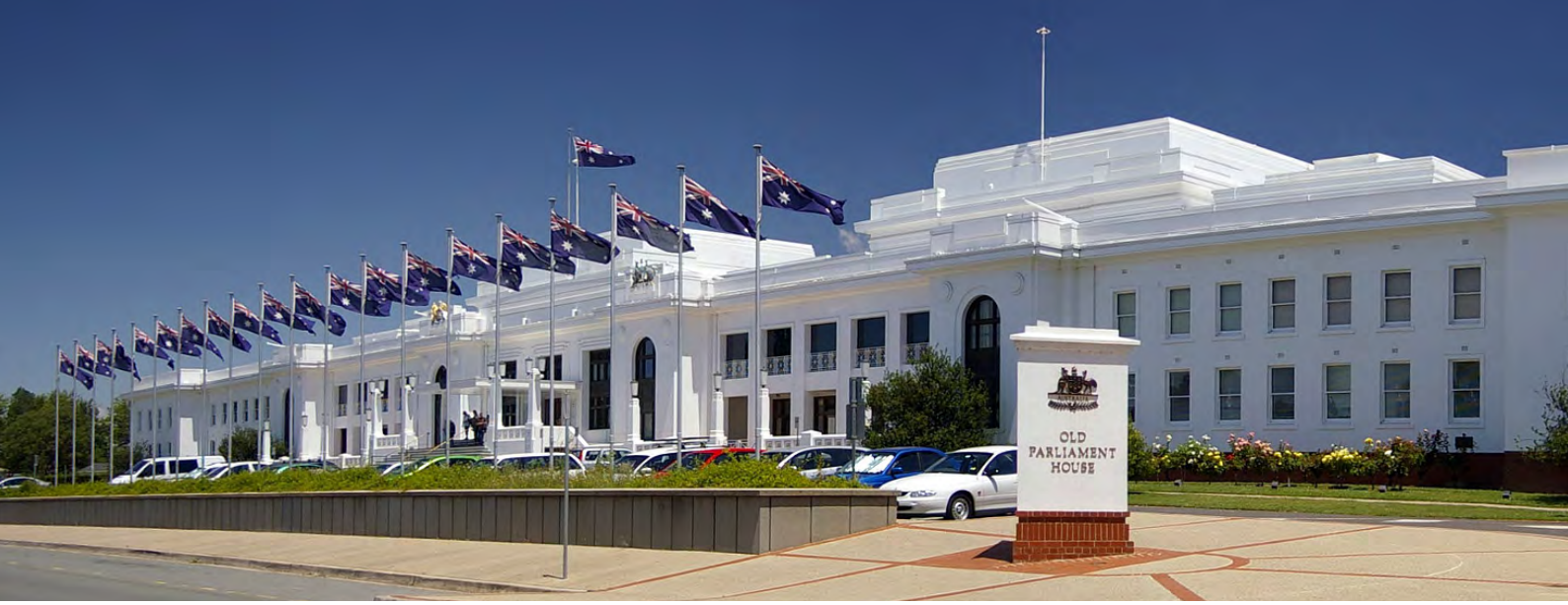


Image: Civil society and AHRC representatives at Parliament House at the Parliamentary Joint Committee on Human Rights human rights framework report release, 30 May 2024.



WHITLAM AND THE HUMAN RIGHTS BILL 1973

1.1 Human Rights In Australia: A Brief History

The debate over how fundamental human rights should be recognised in Australia can be traced back as far as Federation and the drafting of the Australian Constitution. Much of the early discussion about what rights provisions should be included in the Constitution occurred at the 1898 Melbourne Convention, where a Bill proposing the contents of the Australian Constitution was finalised.[1] The Constitution's drafters were sceptical about including a comprehensive list of express human rights guarantees, particularly if they would bind the States, so no bill of rights was developed or widely debated at Federation and instead focus was given to other key concerns such as foreign affairs, defence, trade, commerce and immigration.[2]

The general sentiment was that the protection of rights should be left to the legislature and the processes of responsible government, rather than being enshrined in a constitutionally binding Bill or Charter of Rights.[3] As Sir Owen Dixon, a former Chief Justice of the High Court of Australia has suggested, the Constitution's framers believed in 'the wisdom and safety of entrusting to the chosen representatives of the people... all legislative power, substantially without fetter or restriction'.[4]

Rights protections in Australia's Constitution are therefore highly limited, with only a narrow spectrum of rights explicitly recognised. These include:

- The right to trial by jury (s 80);
- Freedom of religion (s 116);
- Protections against acquisition of property on unjust terms (s 51 xxxi); and
- Protections against discrimination on the basis of interstate residence (s 117)

While not expressly stated, the High Court has also interpreted the Australian Constitution as containing implied rights, including freedom of political communication,[5] and a limited right to vote in federal elections.[6]

Some have suggested that these few rights are, however, so limited in both scope and the circumstances in which they operate that they are restrictive, problematic and almost totally ineffective.[7]

With few rights protections included in the Constitution and no Constitutional bill of rights or other consolidated Federal human rights legislation, the protection of human rights in Australia has historically relied on a mix of ad hoc protections in individual pieces of federal legislation, the Common Law and, in more recent decades, State enacted legislation in Victoria, the Australian Capital Territory (ACT) and Queensland.[8] In an overarching but non-binding capacity, the principles set out in international human rights instruments have also served as important interpretive aides and benchmarks. Australia's ad hoc approach has so far failed to provide clear and cohesive avenues for rights protection or redress for all Australians. The Common Law, for example, is a work in progress of more than 800 years but is limited by the rights or interests that it has so far recognised. Even where the Common Law does recognise certain rights, these have always been subject to change by Parliament.[9]

The outcome is that since Federation, human rights in Australia have never been clearly recognised or robustly protected by any one mechanism, with the framework instead amounting to a fragmented approach that is subject to both inconsistent interpretation and limitation by courts or parliamentary processes.

1.2 Whitlam and the International Human Rights Covenants

Before 1945, debates about the recognition of human rights in Australia commonly referred to either American or British practices, particularly America's constitutionally entrenched Bill of Rights, the likes of which (as described in section 1.1) had not been considered a preferable addition to Australia's legal framework at Federation. An attempt in 1944 by the Curtin Government to partially entrench rights via referendum was defeated.

However, Australia's position on human rights was broadened with the formation of the United Nations ('UN') in October 1945 and the emergence of an international framework for human rights in 1948.[10] In 1966, the UN adopted two major human rights treaties — *the International Covenant on Civil and Political Rights* ('ICCPR'),[11] and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').[12]

Australia did not immediately seek to become party to either the ICCPR or ICESCR.[13] Indeed, it wasn't until the successful election of the Whitlam Government in 1972 (the first Labor government to be in power in Australia for 23 years), that the political appetite for greater recognition of human rights in Australia gained more momentum. During its 1972 campaign, the Labor Party, led by Gough Whitlam committed to shifting Labor's position on human rights, promising that if elected, Australia would become a state party to both the ICCPR and the ICESCR.[14] Whitlam subsequently signed both treaties on 18 December 1972 and immediately sought to engage in a process of ratifying them.[15]

During his time as Prime Minister, Gough Whitlam was a strong and vocal advocate for human rights and particularly the work of the UN. In a speech given for the United Nations Association Human Rights Day in December 1973, Whitlam marked the 25th anniversary of the adoption of the Universal Declaration of Human Rights by expressing that he believed Australia's record on the issue of human rights was one of 'negligence and inaction' and that such inaction should not continue to be tolerated.[16] Unlike his predecessors, Whitlam saw the protection of human rights as a crucial area of foreign policy and regarded Australia in its position as a prominent middle power as having a significant obligation to promote human rights both at home and abroad.[17] To this effect he stated:

> *Governments have a continuing obligation to do all in their power to promote respect for human rights... the record of our predecessors [in Australia] was marked by a lack of any sense of initiative in the promotion and protection of human rights in our own community and in the world at large.*[18]

In recognising the inadequacies of Australia's existing human rights framework, Whitlam made clear that improving the protection of human rights in Australia would be a key policy objective during his time as Prime Minister. In the same speech he said:

> *It is a fundamental objective of the Labor Government to ensure that Australia's policies are soundly based on respect for, and on the protection and enhancement of, civil liberties and basic human rights...*
>
> *Existing laws in Australia have not adequately protected the rights and freedoms of the individual as set out in the Declaration. The government is acting to correct this situation.*[19]

Whitlam's answer to Australia's lack of a legislative framework protecting and promoting human rights, was the introduction of the *Human Rights Bill 1973* alongside an additional Racial Discrimination Bill. The package of Bills, which sought to bring Australian laws in line with international standards and fulfil the obligations of the UN covenants,[20] represented the first of several attempts that would follow since the 1970's to enact federal human rights legislation in Australia.

Image: Lionel Murphy, 1972, National Archives of Australia.

1.3 The Human Rights Bill 1973

On 15 November 1973, the Whitlam Government's Attorney-General, Senator Lionel Murphy sought leave to introduce a Bill to Parliament for an Act to implement the ICCPR.[21] The *Human Rights Bill 1973* (Cth) was formally introduced in the Senate on 21 November 1973. In introducing the Bill, Murphy described its purpose as a Bill to 'give recognition in legislation of the Australian Parliament to basic human rights and freedoms and to provide remedies for their enforcement'.[22]

Murphy suggested that Commonwealth legislation that set out, in full scope, the basic individual rights and freedoms owed to all Australians was a necessary step in ensuring Australia's obligations under the ICCPR could be fulfilled and any inequity in Australia's existing rights framework could be overcome.[23] Murphy was strongly of the opinion that without a robust legislative framework for human rights, many disadvantaged members of Australian society were falling through the cracks and being denied their basic human rights.[24]

The comprehensive rights and freedoms set out in the 1973 Bill were defined in almost identical terms to the ICCPR. The Bill provided protection for a range of rights including:[25]

- freedom of thought, conscience and religion
- freedom of expression
- freedom of association
- the right to hold opinions
- the right to vote
- liberty of movement
- the right to privacy
- equal protection under the law

The Bill also stated that the legislation would be binding on both the Commonwealth and each State and Territory, and that any Commonwealth or State laws inconsistent with the rights defined in the Bill would be inoperative by way of section 109 of the Constitution, unless they contained an express term that they were to operate notwithstanding the Human Rights Bill.[26] In addition, to assist with enforcing the legislation, an Australian Human Rights Commissioner and Australian Human Rights Council would be established and each would be given a range of investigative, legal and advisory powers.[27]

The Human Rights Bill 1973 provoked significant controversy but was not afforded much opportunity for formal debate in Parliament. The Bill ultimately lapsed with the prorogation of Parliament in early 1974.[28] Due to strong opposition from politicians and community groups, the Bill was not reintroduced after Whitlam's successful re-election in May 1974.[29] However, throughout the remainder of 1974, several petitions against the Bill were still recorded in Hansard, providing insight into the themes and arguments underpinning opposition to a Bill of this kind.

1.4 Opposition to the 1973 Bill

Arguments against the 1973 Bill came from some politicians, community groups and members of the public. The key arguments put forward by opponents can be summarised as follows:

i. **The Bill would interfere with the separation of powers between the Commonwealth and the States**

Liberal and Country Party Coalition MPs suggested that the proposed statutory human rights framework would allow or lead to 'a Commonwealth domination over the States'.[30] Whilst the Racial Discrimination Act passed in 1975 also applied to the States and is now considered uncontroversial and common sense (discussed in more detail below), this argument affected the 1973 Bill but also permeated the debates of latter attempts to enact federal human rights legislation.[31]

After its second reading, Liberal Senator and then Deputy Opposition Leader Ivor Greenwood, stated that the suggestion the new legislation would be binding on Australian, State and local government officials and State parliaments was 'quite new in law in Australia apart from the provisions of the Constitution itself'.[32] In response, Attorney-General Murphy made clear that the concept of binding State parliaments through Commonwealth legislation was not novel, given section 109 of the Constitution already existed to cut across State laws that were inconsistent with Federal laws.[33]

He correctly stated:

> *What is being said [in this Bill] is not in any way novel. However one expresses it, it may sound a little novel, but there is no doubt that any law properly made by this Parliament binds all the people, all the courts and judges and in that sense all the parliaments of the States. I think there is nothing novel at all in that approach to the matter.*[34]

In newspaper articles published around March 1974, former Australian Prime Minister Sir Robert Menzies also made a series of public statements suggesting that the Australian Parliament should not use its constitutional power to give effect to international agreements, if this would involve legislating in areas previously thought to be the province of the States.[35]

In a reply article, Murphy clarified that this was not the purpose of the Human Rights Bill, and it did not expand the powers of the Federal Government over the States but instead, 'what it does is to set limits on the power of both State and Federal Governments to interfere with fundamental rights and liberties. This is a limitation which is long overdue'.[36]

ii. The Common Law system was sufficient to protect individual rights and freedoms

Opponents also argued that there was no need for the legislation because the existing Common Law system was sufficient to protect human rights. However, this argument effectively turned a blind eye to the experience of minority groups and portions of the population suffering rights abuses.[37]

To this effect, Murphy wrote publicly about the realistically weak protections provided by the Common Law in a March 1974 Sydney Morning Herald article, stating:

> *The common law is Judge made law. The rules and principles of the common law apply only where they have not been set aside by some statutory enactment... even where our fundamental rights and freedoms apparently depend on the common law, the common law because it is subservient to statutory enactment, is often powerless to protect those rights and freedoms... the common law and our system of responsible government do not stop any Australian Government that feels so inclined discriminating against whomever it pleases.*[38]

To give one example of the common law failing to uphold rights at the time, the 1971 *Milirrpum v Nabalco Pty Ltd* case in the Northern Territory Supreme Court rejected the Yolngu challenge to a Federal Government mining lease of their land on, amongst other grounds, that the common law didn't recognise native title. It took the 1992 *Mabo v Queensland (No 2)* High Court decision for the courts to recognise native title by rejecting the Terra Nullius legal fiction.[39]

iii. The Bill would change the traditional roles of Government and the Courts and threaten Australia's existing systems of governance

More generally, opponents were against an entrenched bill of rights because they claimed it entailed radical changes to traditional parliamentary government and the role of the courts.[40] They warned that the imprecise language of a bill of rights 'must provoke unimaginable complexity and uncertainty, with a resultant flood of litigation such as this country has never known, and lead to administrative chaos'.[41]

The President of the Liberal Party of Australia (Canberra branch) at the time, wrote in a Canberra Times opinion piece that what primarily concerned her and her Liberal colleagues was that an attempt to define and give guarantees for the rights listed in the Human Rights Bill could in fact lead to the traditional rights enshrined in the common law being eroded, rather than expanded.[42] Miss McKellar went on to say:

> *Many nations which have enacted legislation guaranteeing rights and freedoms enjoy these much less than Australians... our branch believes that by codifying and isolating these rights, they could cease to become part of our everyday community life and tradition and we would lose the protection they are meant to provide.*[43]

iv. The Bill would encroach on religious rights and freedoms

Throughout 1974, several petitions were recorded in Hansard urging that the Human Rights Bill be either amended or abandoned, and almost all petitions were underpinned by religious reasoning. Petitions are generally presented by members of parliament on behalf of constituents who have contacted them with concerns about proposed legislation.

For example, a petition recorded on 13 March 1974 by Liberal MP William Wentworth urged the House of Representatives not to proceed with the Human Rights Bill, on the grounds that it could affect religious liberty and freedom in Australia as well as the rights of parents. The petition read:

> *... the Human Rights Bill will deprive free Australian citizens of religious liberty and freedom of worship, and parents and guardians of the right to choose the moral and religious education of their children.*[44]

The petition made by Mr Wentworth was recorded a further five times between March and April 1974. The same petition was also recorded by five other Liberal MPs and one Labor MP.[45] On 2 April 1974, Labor MP John Coates recorded a similar petition, but it suggested the petitioners believed amendments to the Bill should be made that would ensure the affairs of the church and state were kept separate.[46]

This petition was recorded a further seven times between April and November 1974 by Mr Coates and separately by other Labor, Liberal and Australian Country Party MPs who had obviously received notice of similar concerns from the community. It is clear the issue of religious rights and freedoms was highly sensitive and relevant across various sections of society at the time.

By far the most widely supported petition opposing the Human Rights Bill on religious grounds was initially recorded by Liberal MP Mr John Hodges. Petitioners urged the House not to proceed with the Bill because it would be in contravention of s 116 of the Constitution insofar as it attempted to legislate regarding the exercise of religion and would:

> *... tend to deprive free Australian citizens of religious liberty, freedom of worship and parents and guardians of the right to choose the moral and religious education of their children...*[47]

Mr Hodges recorded this petition a further 12 times between July and November 1974. A joint petition of the same wording was also recorded by Hodges and Mr Charles Kelly on 24 July 1974.[48]

Church representatives were quick to publicly condemn the Bill which likely contributed to the community scepticism, fear and misunderstanding identified in the Hansard petitions.

For example, on 28 December 1973, the Canberra Times published an article titled 'Human-rights bill a threat to worship'. The article reported that senior representatives of several Australian churches supported complaints that the Bill posed a 'threat to freedom of worship'.[49]

Sydney Anglican rector Rev Bernard Judd was quoted as saying in a public sermon that the Human Rights Bill would permit the Government to introduce regulations as to the 'time, place and manner in which people may manifest their religion and beliefs'.[50]

These comments referred to a clause of the Bill that suggested 'the freedom to manifest ones religion or beliefs may be subject only to such limitations as are prescribed by law and that are reasonably necessary to protect public safety or public health'. In response, Attorney-General Murphy made clear that much of the criticism of the church representatives arose from a misunderstanding of the language of the Bill and that the Bill did not intend to curtail people's right to practice their religion.

Despite a suggestion that the Bill's text could be amended to make the government's intentions clearer,[51] faith-based objections to the 1973 Bill contributed significantly to its inability to progress through Parliament. This is despite the lack of any credible evidence that the proposed Bill would, in practice, curtail religious freedoms. This is confirmed by the subsequent experience of human rights acts following their enactment in the ACT, Victoria, and Queensland.

1.5 Whitlam's impact

Both the Human Rights Bill and Racial Discrimination Bill reflected Whitlam's bold, reformist agenda and his commitment to advancing the stagnant discussion on establishing a framework to protect individual rights and freedoms in Australia. Whilst the Human Rights Bill 1973 was not successful in its passage through Parliament, Whitlam did have success in passing the Racial Discrimination Bill which despite also facing lengthy debate and opposition, was passed in June 1975 with some amendment.[52]

Similar to the Human Rights Bill, the racial discrimination legislation was also based on a UN treaty (the International Convention on the Elimination of All Forms of Racial Discrimination[53]) and also bound the States via the Constitution in the same way that the Human Rights Bill had proposed.[54]

The *Racial Discrimination Act (1975)* was also initially opposed on very similar grounds to Human Rights Bill with the Coalition rejecting the need for the legislation and suggesting it would be a 'serious threat to an individual's privacy and freedom', rather than an enhancement of human rights.[55]

The fallacy of those fears has been clearly exposed. Since its enactment, the *Racial Discrimination Act 1975* (Cth) has had major impact, particularly in recognising and protecting the rights of Indigenous peoples, and for migrant and multicultural communities. It also provides highly relevant precedent for the argument that consensus, even if hard fought, can be found in the passage of legislation relating to human rights issues.

Image: Gough Whitlam, 1974, Australian Government.

HUMAN RIGHTS BILLS SINCE WHITLAM

2.1 The 1983 Evans Bill

After the election of the Hawke Labor Government in 1983, two further attempts were made to legislate human rights standards. The first brief attempt under Prime Minister Bob Hawke began in late 1983, when then Attorney-General Senator Gareth Evans announced his plans to draft a new Human Rights Bill that would be more suited to Australia's political culture and would overcome some of the criticism of the 1973 Bill, namely that it had been too vague and far-reaching.[56]

Attorney-General Evans was quoted as describing the 1983 Bill as 'a shield rather than a sword' that intended to be 'an inspirational and educative charter providing general guarantees of basic rights and freedoms'.[57] Evans initially circulated his draft Bill in private to select people and it was approved in principle by Cabinet in October 1983. However, a copy was obtained and made public by members of the Opposition in the lead up to the December 1984 election in order to generate objections and criticism.[58]

Arguments against the 1983 Bill were largely similar to those levelled at Whitlam's Bill, particularly in relation to the idea that the Bill would be binding on the States and somehow unfairly or covertly impede on State powers and independence. Those most vocally opposed were again Liberal/Coalition party members who sought to undermine the notion of a bill of rights, by accusing it of having an ulterior or even dangerous political motive.

For example, then Queensland Premier, Sir Joh Bjelke-Petersen, was quoted as calling Evans' Bill an 'audacious attempt to restructure Australian political and social life to meet the demands of a power-hungry Commonwealth Government bent on the destruction of the States and the establishment of a socialist republic'.[59] He even went so far as suggesting that the Bill would 'virtually abolish Queensland and destroy the Federation'.[60] Other State leaders including then Premier of Western Australia, Brian Burke also objected to the Bill on similar grounds with Burke suggesting it should be wholly rejected on the basis it would diminish State legislative power.[61]

The sudden and negative publicity surrounding the 1983 Bill ultimately led the Government to again cease pursuit of enacting the legislation.[62] However, despite Evans' Bill being abandoned, a second and further refined attempt under Hawke was made in 1985.

Image: Gareth Evans, 2000, Library of the London School of Economics and Political Science.

2.2 Australian Bill of Rights Bill 1985

Despite the unsuccessful 1973 and 1983 attempts, the Hawke Government continued to actively pursue the introduction of federal human rights legislation. Senator Lionel Bowen replaced Gareth Evans as Attorney-General after the re-election of the Hawke government in December 1984 and took on the task of preparing the new *Australian Bill of Rights Bill 1985* (Cth).

Likely because of the criticism levelled at the Murphy and Evans Bills, Bowen's draft Bill was narrower than the 1983 Bill, seeking to apply only to Commonwealth and Territory laws (except the Northern Territory) and broadly excluding State laws from its scope.[63] The rights guaranteed in the 1985 Bill would not be unlimited, but similar to the Canadian model would be 'subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society'.[64]

A contentious aspect of Bowen's plan was the additional proposal to replace the existing Human Rights Commission with a new and improved Human Rights and Equal Opportunities Commission, which would be tasked with investigating and conciliating complaints against State laws.[65]

The 1985 Bill proposed to operate in the following way:[66]

- As to Commonwealth laws generally, the Bill of Rights would act as a guide to construction and interpretation.
- As to Commonwealth laws made after the Bill, the Bill of Rights would as far as possible (subject only to an explicit intention to the contrary) render inconsistent laws inoperative.
- As to Commonwealth laws made before the Bill, only after five years from commencement would it be able to override inconsistent laws.
- Commonwealth and State laws and practices could be referred to the Commission for inquiry, and conciliation where appropriate, and for study and report to Parliament.

Whilst introducing the Bill to Parliament on 9 October 1985, Bowen described the Bill of Rights as a Bill that would 'provide real and significant protection for rights and freedoms essential to real democracy and to the respect for human dignity in Australia'.[67] However, he also stressed that the legislation was drafted to provide only the 'minimum rights which are fundamental'.[68] Like its predecessors Bills, the 1985 Bill's overarching purpose was still tied to codification of the ICCPR, but this iteration was not designed to override any other pre-existing rights and freedoms contained in either the Common Law or other federal legislation.[69]

Notwithstanding this more moderate approach, the 1985 Bill was met with very similar objections as its predecessors Bills, and in some respects was even more fiercely opposed. Despite eventually passing through the House of Representatives after extensive debate, further opposition in the Senate and from the States meant that the Bill ultimately failed. A summary of the arguments against the 1985 Bill is provided in the following section.

Image: Lionel Bowen, Department of Foreign Affairs and Trade.

2.3 Opposition to the 1985 Bill

Unlike the 1973 and 1983 Bills, the 1985 Australian Bill of Rights Bill was subject to more extensive parliamentary debate in both the House of Representatives and the Senate. The main debate on the Bill in the House of Representatives took place on 14 November 1985. Hansard records indicate that the lengthy debate continued into the early hours of 15 November.

Opposition in the House of Representatives

There was a clear political divide in the House between those for and against the Bill. The Bill was overwhelmingly supported by Labor Members and overwhelmingly opposed by members of the Liberal-National Coalition.

> *... members on this side of the chamber have perhaps never been as intense in expressing concern about legislation as they have been about the contents of this piece of legislation* **(Mr Cameron, Liberal Party).**[70]

The key arguments against the 1985 Bill in the House of Representatives broadly included that:

- A bill of rights is unnecessary in Australia because rights and freedoms are already embedded in Australian society through the existing common law system.
- The rights contained in the Bill are too broad and ambiguous.
- The Bill will negatively impact the relationship between Federal and State powers by trying to remove power from the States.
- The Bill will affect the powers of Federal Parliament and damage the existing structure of government by undermining democratic rights and practices.
- The Bill has socialist objectives.
- The Bill will give excessive powers to the Human Rights Commission.
- The Bill will cause division and be used to change the Australian way of life.
- The Bill will suppress not protect human rights, and interfere with religions freedoms and the rights of parents.

These objections were raised despite the text of the Bill showing the objections to be baseless. For example, Division 3 of the Bill contained provisions on the right to participation in public life, freedom of expression, and freedom of association that supported democratic rights and practices. It further included provisions for freedom of thought and conscience and freedom to have or adopt a religion or belief that supported religious freedoms.[71]

The controversy and fear created around the 1985 Bill was again similar to that of the 1973 and 1983 Bills. The speeches given by opponents in Parliament and the commentary shared and publicised in the community, generally involved highly emotive language and antagonistic statements.

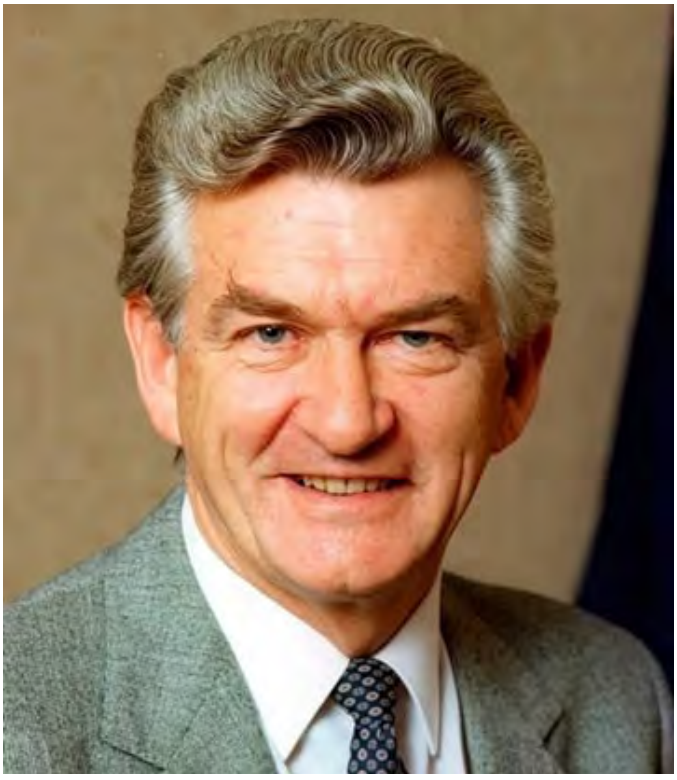


Image: Bob Hawke, 2011, Commonwealth of Australia.

For example, during the 14 November 1985 debate in the House, Liberal and National Party MPs made the following comments about the Bill:

> *"The Australian Bill of Rights Bill is a sham"* **(Mr Spender, Liberal Party).**[72]
>
> *"It is clearly an effort to change society and remove the old values, and protect the right of individuals to do what they like, even if they can harm society and the family. A country could never be regarded as a Christian country under this proposed Act"* **(Mr Webster, Liberal Party).**[73]
>
> *"An emphasis on human rights is destructive to any cohesive, forward looking nation"* **(Mr Miles, Liberal Party).**[74]
>
> *"Does Australia need a Bill of Rights? In my view the answer is no. We have our most fundamental institutions - parliament, common law and the Constitution which develop and maintain our basic rights and freedoms"* **(Mr McGauran, National Party).**[75]
>
> *"The Bill of Rights must be opposed before the Human Rights Commission is given draconian powers which will have not only the power to destroy federalism but also the potential for massive abuse of the rights of the individual, abuses which may be greater than the rights the Bill is alleged to protect"* **(Mr Connolly, Liberal Party).**[76]
>
> *"To believe that through this Bill of Rights we can improve protection of the rights of the people is crass stupidity... Those who vote against the Bill are the real protectors of the rights and civil liberties of all Australians"* **(Mr Conquest, National Party).**[77]
>
> *"There is no fundamental attack on basic liberties in this country... The Bill is not necessary. It will lead to a restriction of human rights and not an expansion of them"* **(Mr Brown, Liberal Party).**[78]
>
> *"It is an evil Bill... likely to offer nothing but harm to the ordinary law abiding, decent and hard working citizens"* **(Mr Goodluck, Liberal Party).**[79]
>
> *"The legislation will be detrimental to the standard of education in this country"* **(Mr Robinson, National Party).**[80]
>
> *"This is a discriminatory Bill which will not merely redress the victims of discrimination; it will become an instrument of mischief and vindictiveness... it will become a monster, something that we neither need nor want in this country"* **(Mr Adermann, National Party).**[81]
>
> *"The Bill of Rights is in fact and in application, the greatest threat to human rights since Federation"* **(Mr Everingham, Liberal Party).**[82]

Despite these arguments, with the support of a Labor majority in the House, the Bill successfully progressed to the Senate.[83] However, in the Senate, the Bill faced further opposition that ultimately stalled it and then led to its failure. The Hawke Labor Government did not have a majority in the Senate, and the Coalition (Liberal–National Party) formed the main opposition. The Australian Democrats held the Senate balance of power at the time and therefore formed an important part of the Senate discussions.

Image: Senate Chamber, Old Parliament House, Canberra.www

Opposition in the Senate

Consideration of the 1985 Bill in the Senate began in February 1986. At the time, the Senate was composed of 34 Labor and 32 Liberal members, meaning the seven Australian Democrat and two Independent members held significant power in the successful passage of legislation.[84] Once again, strong opposition came primarily from Liberal and National Party Senators, who repeatedly urged the Senate to completely reject the Bill during lengthy debates recorded in Hansard. Arguments against the Bill in the Senate were made on virtually identical grounds to those in the House and encompassed issues such as:

- The Bill is not needed, and the Common Law is sufficient.
- The Bill will endanger the Federal system of government.
- The Bill is harmful and divisive.
- The Bill will endanger the independence of churches and religious institutions.
- The Bill is anti-democratic.

Independent Senator Brian Harradine also opposed the Bill, arguing it was 'anti-union' and failed to adequately protect the right to life. He too took issue with the idea that the Bill would potentially cause a shift of power away from Parliament stating:

> *To ensure that the courts are required to deal with questions emanating from this Bill is to give them enormous powers and to disturb the balance between the Executive, the judiciary and the legislature.*[85]

Unlike Harradine, Independent Senator Josephine Vallentine supported entrenched human rights protections, but suggested a bill of rights would be better adopted as a constitutional amendment rather than an ordinary Act of parliament, which was vulnerable to being amended or repealed.[86]

Australian Democrats' members took a similar stance. They supported the notion of a bill of rights but suggested that to be effective, the legislation must bind the States. Party Leader, Donald Chipp said the Australian Democrats had a 'very strong policy commitment to the enactment of a strong Bill of Rights which gives legislative recognition to basic human rights and freedoms and provides remedies for their enforcement'. However, he described the proposed 1985 Bill as 'weak' because it did not extend to the States or local government which he viewed as two areas where 'massive infringements of civil and human rights occur'.[87]

All Democrats members who gave speeches in the Senate echoed this sentiment and suggested they would be proposing amendments at the Committee Stage to strengthen the Bill's reach.[88] The Democrats support was therefore somewhat of a double-edged sword, because if their proposed amendments were not accepted, they intimated they may not ultimately support the passage of the 1985 Bill.[89]

Significantly, the Democrats also believed an unparalleled and unjustified campaign of fear and misinformation about the 1985 Bill of Rights Bill had spread in the community and directly attributed this to the Liberal/National parties and their allies.

Deputy Leader Senator Janine Haines said:

> *I would hazard a guess that in all the five years that I have been a member in this place, I have never before run into so much misinformation being spread around the community about any piece of legislation as that which has been disseminated about the Australian Bill of Rights Bill... The letters that I have had from people who have been subject to this disinformation or misinformation campaign indicate the extent to which some people in the community will go to stop a piece of legislation going through.*[90]

Echoing this, Senator Chipp stated he had received some 10,000 - 20,000 letters from concerned citizens:

> *These people [the Liberal/National party] have been responsible for whipping up a campaign of frenzy, misrepresentation and lies which has been directed at decent, innocent Australian citizens... I have received a frightening number of letters... During the whole of the Vietnam war or any other national catastrophe, I did not get anywhere near the number of letters or representations that I am getting on this matter.*[91]

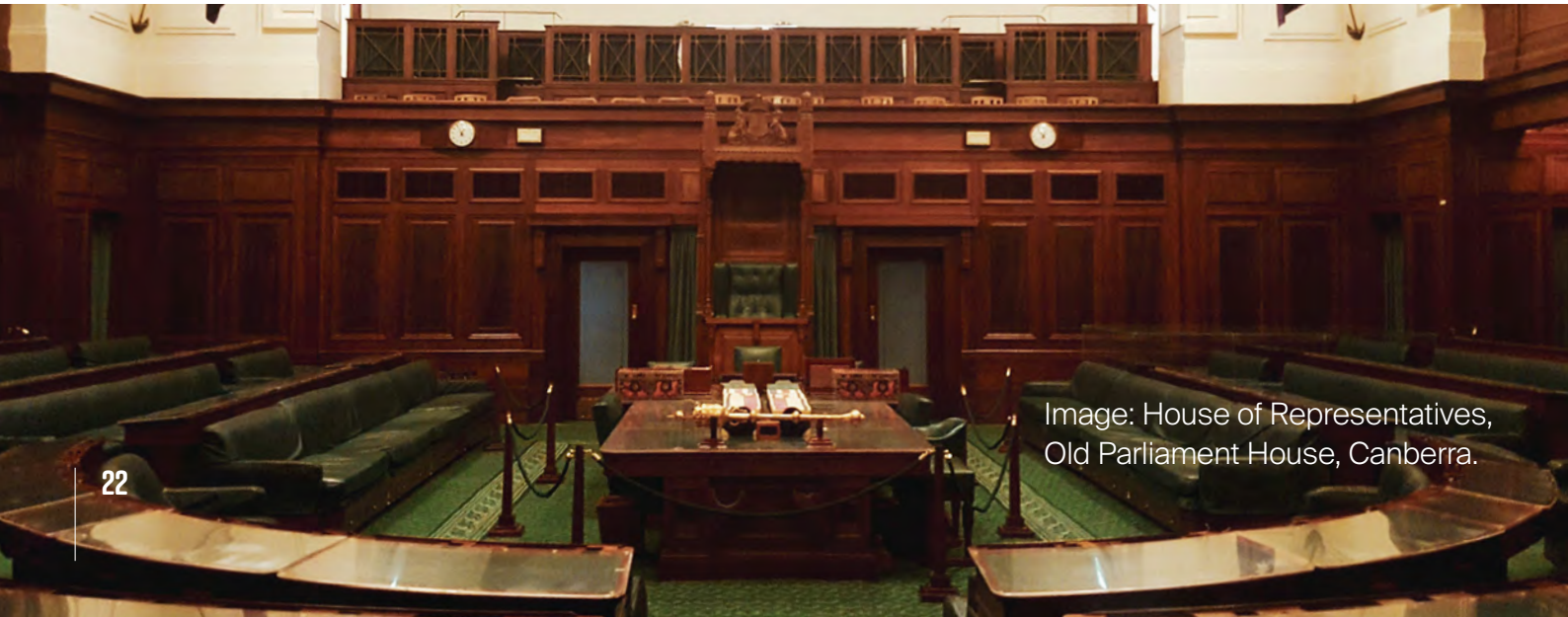


Image: House of Representatives, Old Parliament House, Canberra.

Indeed, the level of community concern was evident in a mass of petitions against the Bill recorded in Hansard between February and November 1986. The following examples exemplify the type of fear and concern in the community noted by the Democrats:

> *"That we deplore the proposed Bill of Rights because it adversely affects the liberty and freedom of Australians... It will remove the power of the people through Parliament, by giving power to a new more powerful Human Rights Commission which is not elected, but can act as a Star Chamber. We do most earnestly wish to keep our system of Common Law"*
> **(by Senator Sheil, from 241 citizens).**[92]
>
> *"... the Australian Bill of Rights Bill is a harmful, dangerous and divisive proposal, the provisions of which are authoritarian and anti-democratic"*
> **(by Senator Jessop, from 17 citizens).**[93]

With the support of the Democrats and Vallentine, a vote at the conclusion of the main Senate debate saw the 1985 Bill pass through to the Committee Stage where each clause was further scrutinised and amendments considered. Again, stymied by Liberal/National Party opposition and an inability between all parties to agree on the composition and powers of the Bill, negotiations stalled, and consideration of the Bill did not proceed past Article 4 of Clause 8 which contained the 'bill of rights' itself.[94]

By June 1986 the Opposition questioned the Government's intention to persist with the Bill. In reply, Senator Gareth Evans made the following pertinent statement about the effect of the unreasonable opposition to the Bill:

> *If the Opposition had not engaged in what has been clearly the most extravagant, self-indulgent and destructive filibuster in the history of this Parliament, in a debate that has so far occupied some 36 hours of parliamentary time-the longest debate in our history since Federation, or at least since records have been kept-it would have been possible for the Bill to have passed this House by now. It is the Attorney's intention to take up the matter again-hopefully with a slightly greater sense of realism on the part of others in this chamber as to the appropriate time for debate-in the hope that we can get it through early in the next session.*[95]

Petitions against the Bill continued to flow in and under this pressure further debate ultimately did not resume. On 25 November 1986, Senator Evans on behalf of the Government agreed to withdraw the Australian Bill of Rights Bill providing that the *Human Rights and Equal Opportunity Commission Bill 1985* (Cth) and the *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Bill 1985* (Cth) were passed.[96] *The Australian Bill of Rights Bill 1985* was subsequently withdrawn and discharged from the Senate Notice Paper on 28 November 1986.[97]

A NEW ERA FOR HUMAN RIGHTS IN AUSTRALIA?

3.1 Rudd and the 2008 National Human Rights Consultation

After the Whitlam and Hawke Bills, there was not another significant attempt to pursue a federal human rights act until the mid 2000's. Some success initially emerged at the State level, with the ACT and Victoria both enacting state-based human rights legislation in 2004 and 2006 respectively.[98] When the Labor party, led by Kevin Rudd, successfully campaigned to return to federal Government in 2007 they made an election commitment to:

> *... initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians and to establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy.*[99]

On 10 December 2008 and coinciding with the 60th anniversary of the Universal Declaration of Human Rights, then Attorney-General Robert McClelland announced that the Government would fulfil this commitment by launching the Australian National Human Rights Consultation ('NHRC') to be led by human rights advocate Father Frank Brennan AO.[100]

The NHRC Committee was tasked with conducting a nationwide consultation that aimed to establish:[101]

- Which human rights should be protected and promoted in Australia;
- Whether they were being sufficiently protected, and if not;
- How Australia could better protect and promote human rights in the future.

Over the 10-month consultation period, the NHRC Committee received more than 35,000 written submissions and heard from approximately 6,000 roundtable participants. The consultation was the largest of its kind in Australian history and at its conclusion, the Committee noted they were 'left in no doubt that the protection and promotion of human rights is a matter of national importance'.[102] The final report and findings were delivered to the Government on 30 September 2009, before being released publicly on 8 October 2009.

The NHRC's findings and recommendations were of great significance. The Committee found that, generally, participants in the consultation were in no doubt that Australia could do better in guaranteeing fairness and protecting the dignity of all people, especially those in vulnerable sectors of the community.[103]

Rights that people regarded as requiring unconditional and essential protection in Australia included the right to essential health care, access to justice, religious expression, education, freedom from discrimination and free speech.[104] However, the Committee also noted that there was some diversity in community understanding of human rights and current rights protections mechanisms. For example, where some social research found that most participants thought human rights were adequately protected in Australia, an assessment of 8,671 written submissions to the NHRC that expressed a view on the adequacy of rights protections, found overwhelmingly that 70% of those submissions thought human rights were not adequately protected.

The Committee acknowledged that ultimately Australia had a 'patchwork quilt of protection for human rights' and despite its strong democratic institutions, these had not always ensured that human rights and particularly minority rights received sufficient consideration or protection.[105] Nor was the community well educated on what their rights were or where to find them.[106]
The NHRC concluded that the 'patchwork quilt' approach to human rights protections was inadequate in several ways, including:[107]

- That Australia's administrative laws which aim to encourage accountability and allow individuals to challenge government decisions, provide only limited remedies and there is no onus on government to take human rights into account during its decision making.
- The common law, which is judge made, protects some human rights but it ultimately does not stop Parliament passing legislation that diminishes or abrogates human rights.
- Oversight mechanisms such as the Australian Human Rights Commission have limited powers, and their recommendations are generally not enforceable.

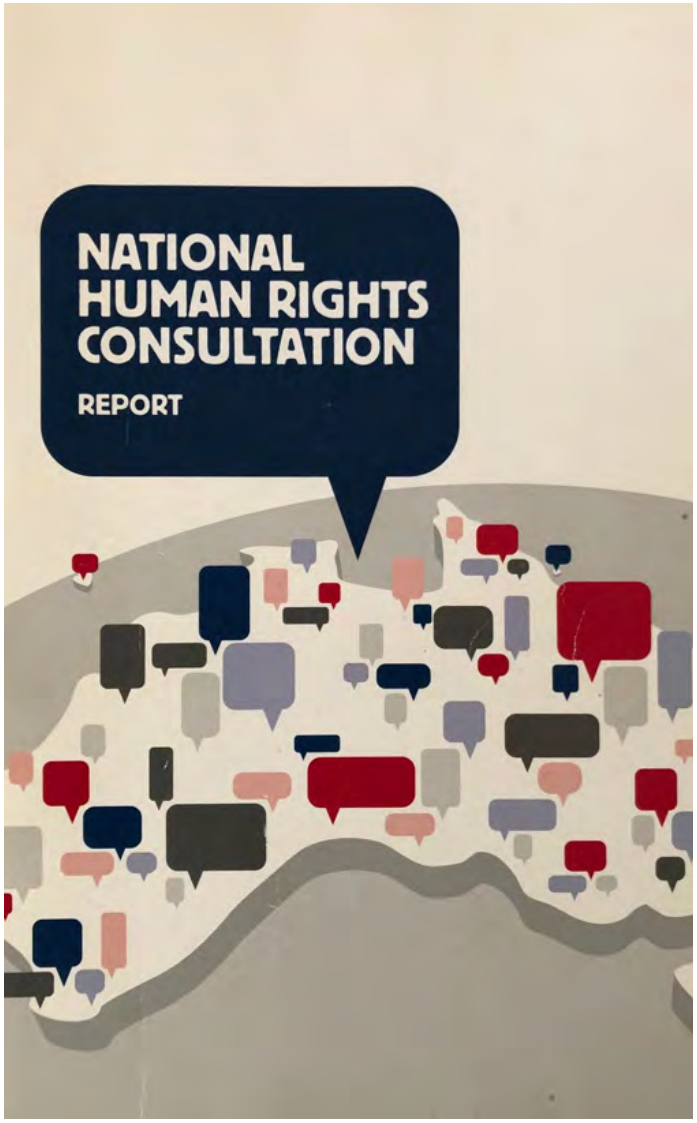


Image: National Human Rights Consultation report cover.

Consideration of a Human Rights Act

During the consultation, there was clear and compelling support for a federal human rights act. Some 87.4 percent of written submissions made to the NHRC expressed support for an Australian human rights act and only 12.6 per cent were opposed.[108]

In a national telephone survey of 1,200 people, also conducted during the consultation period, 57 per cent expressed support for a human rights act, 30 per cent were neutral, and only 14 per cent were opposed.[109]

Submissions in support of an Act came from a broad range of interested parties including academics, private organisations, international organisations, industry professionals and concerned members of the public.

The primary view of those in support was that a federal human rights act would help to address the inadequacy of existing human rights protections in Australia, streamline rights education and improve government policy and accountability. Most importantly, it would also bring Australia in line with other modern democracies and reinforce Australia's commitment to human rights both internationally and domestically.[110]

> *"The legislative protection of human rights in Australia is ad hoc, limited and selective, protecting some human rights but not others. It is also hard to navigate, being scattered through the common law and many instruments"* **(Gilbert + Tobin Centre of Public Law)**.[111]

> *"... That under the current Australian system human rights protection depends on the goodwill of governments who may be in power from time to time demonstrates the problem with the system"* **(International Commission of Jurists)**.[112]

The minority opposition to the prospect of an Act was driven primarily by religious bodies including the Australian Christian Lobby, and influential leaders of the Catholic and Anglican Churches in Sydney including then Cardinal George Pell and Senior Minister Phillip Jensen.[113] Select organisations and members of the Federal Coalition opposition also made submissions to the NHRC expressing concerns about a potential human rights act recommendation.

For example, Senator George Brandis SC, on behalf of the Federal Opposition, submitted:

> *Central to the Opposition's concern about bills of rights is that they inevitably import ideological and cultural agenda. [They] define a particular hierarchy of political values, which both purports to resolve contestable philosophical issues by favouring certain values over others (eg liberty over egalitarianism; communitarianism over private ownership) and universalises the values of one particular time.*[114]

The Police Federation of Australia also opposing a human rights act submitted:

> *Striking the delicate balance between competing rights and responsibilities is something that should be the responsibility of democratically elected members of our Parliaments, not judges.*[115]

Overall, the key arguments submitted to the NHRC against a human rights act again followed similar themes to the arguments raised during the Whitlam and Hawke era Bill's and can be summarised as follows:[116]

A federal human rights act in Australia

- is unnecessary because human rights are adequately protected in Australia through democratic institutions, legislation and the common law;
- would result in an unacceptable shift in power from Parliament to unelected judges and undermine the tradition of parliamentary sovereignty;
- would fundamentally change the way judges are required to interpret the law;
- would not result in better human rights protections or government policy;
- might limit rather than promote human rights; and
- would generate excessive and costly litigation. Additionally, the economic costs would outweigh any benefits the Act might offer.

The NHRC Committee evaluated that the arguments put forward by those opposing a human rights act, could be countered by the majority of submissions made to the consultation supporting an Act in the following ways:[117]

i. **In relation to the claim that a human rights act would undermine parliamentary sovereignty by transferring additional power to the judiciary.**

- It was argued this claim is particularly weak when considering a legislative, rather than constitutional charter or bill of rights because Parliament would retain the power to amend the Act itself.
- A human rights act is consistent with the aims of democracy and should in fact strengthen democracy 'through the different and complementary roles played by the different arms of Government'.[118]
- There is no evidence to suggest that the introduction of human rights Acts in the United Kingdom, the ACT or Victoria has resulted in politicisation of the judiciary.

ii. **In relation to the argument that a Human Rights Act is ineffective against Government tyranny.**

- Violations of human rights are more likely to result from a breakdown in democratic institutions and the rule of law, rather than from a failure of the rights instruments themselves. The strength of Australia's democratic institutions can be clearly distinguished from other states where human rights have not been observed despite the implementation of protective instruments.

iii. **In relation to the argument that a Human Rights Act would prioritise some rights over others and would not be susceptible to change over time.**

- A human rights act would constitute an ordinary piece of legislation and therefore have the flexibility to be amended over time by Parliament as or when the needs of the community changed.

iv. In relation to the argument a Human Rights Act would lead to excessive litigation.

- The experience of the United Kingdom, Victoria and the ACT indicate that the impact in this regard is likely to be minimal. In fact, over time, a legislated human rights act should lead to less litigation because it will ensure that laws and policies better comply with human rights to begin with.

The NHRC also commissioned The Allen Consulting Group to conduct a cost-benefit analysis of a selection of options proposed to improve Australia's human rights framework. The options evaluated included a human rights act, three variations of which scored better in relation to benefits, implementation timeliness/cost and overall risk than all other options evaluated (which included education campaigns, a parliamentary scrutiny committee and increasing the role of the Australian Human Rights Commission).

The Committee noted that in presenting their findings, the Allen Consulting Group had concluded:

> While maintaining current arrangements will not incur additional costs, there are ongoing detrimental costs associated with maintaining current human rights arrangements. In summary these include a lack of redress for individuals with human rights complaints (of particular concern for disadvantaged sectors of the community), a lack of clarity concerning human rights obligations in Australia, a lack of community awareness of human rights, and unmet international obligations.[119]

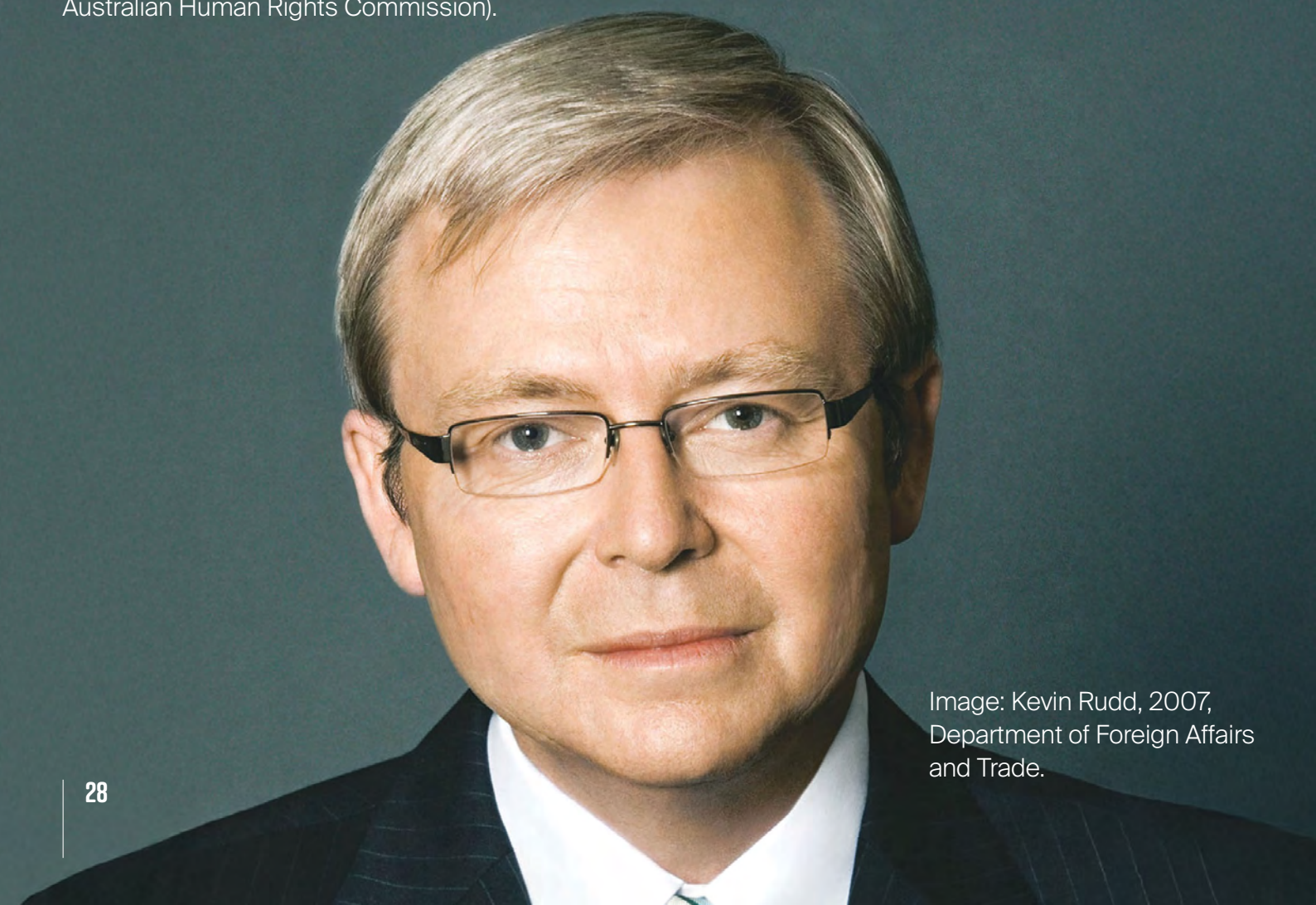


Image: Kevin Rudd, 2007, Department of Foreign Affairs and Trade.

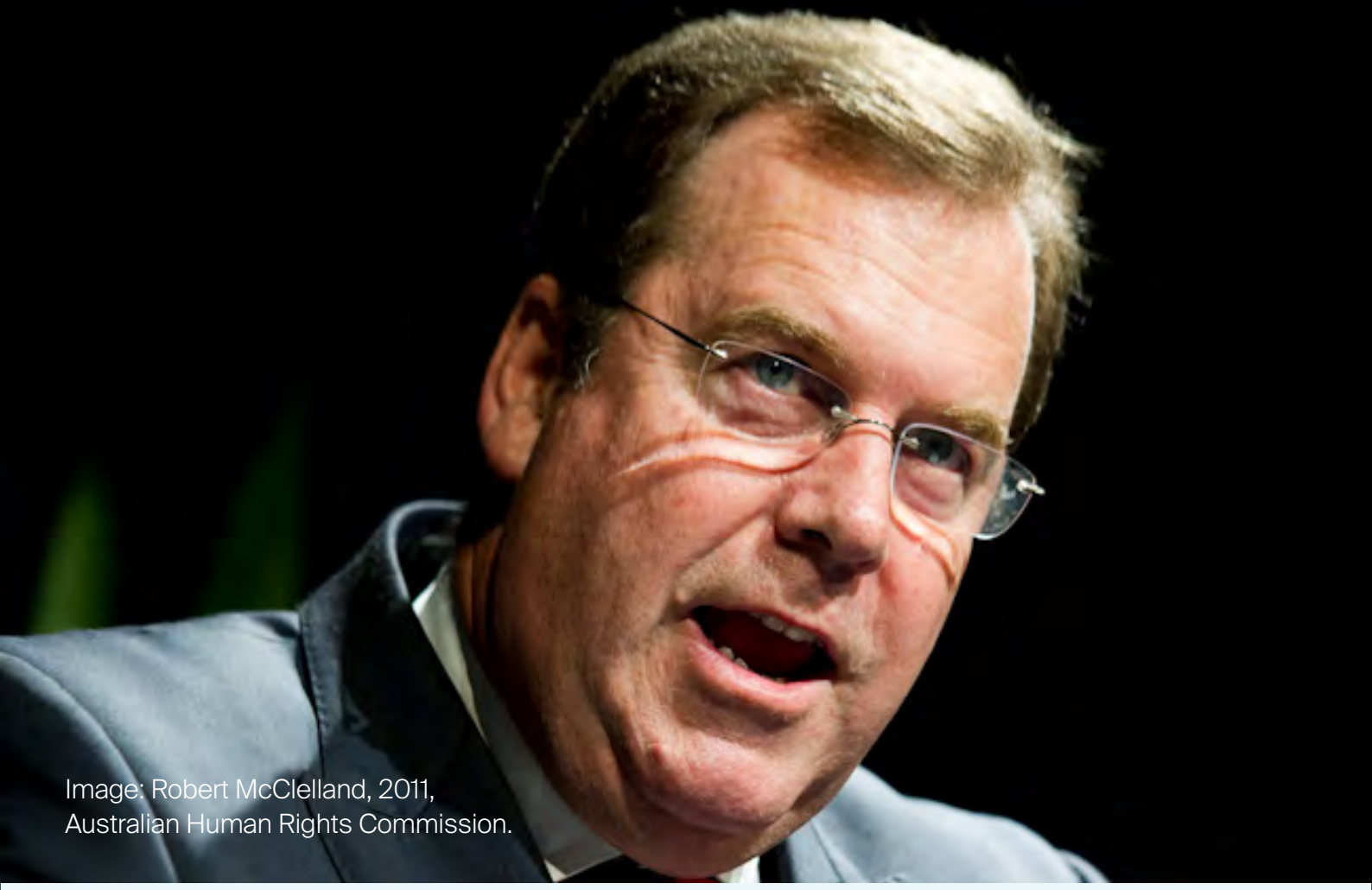


Image: Robert McClelland, 2011,
Australian Human Rights Commission.

The NHRC's recommendations

The NHRC Committee made 31 recommendations in total, including a recommendation that Australia should adopt a federal human rights act, and fourteen other recommendations related to a human rights act.[120]

It was recommended that the Act should follow a 'dialogue model', contain similar provisions and limitations as the ACT and Victorian Acts and should be binding on federal officials and entities only.[121] The proposed model did not intend to allow judges to overrule any law made by Parliament. Instead, should they determine a law improperly infringed on a person's rights, a declaration of incompatibility could be issued which would not invalidate the law, but require the executive to review and reconsider its compatibility with the human rights act.

In relation to the proposed Acts compatibility with the principles of parliamentary sovereignty, the Committee was of the view that:

> *... this model is completely consistent with the sovereignty of parliament because parliament retains the last word on the content of the legislation. The procedure described gives parliament the opportunity to re-examine legislation that might provoke an unforeseen interference with human rights that comes to light only when a wronged person brings proceedings against government in the courts.*[122]

3.2 Outcome of the 2008 Human Rights Consultation

In the lead up to the release of the NHRC's final report and recommendations, familiar backlash against the potential of a human rights act emerged. This was driven primarily by key political opponents and members of the religious right who drew on historical opposition and utilised newspaper campaigns to portray the proposal of a human rights act by the NHRC as elitist, bureaucratic, patronising, utopian and undemocratic.[123]

In early September 2009, several petitions against the adoption of a charter or bill or rights were raised in Parliament by members of the Coalition opposition. These included a petition by Liberal MP Don Randall on behalf of Western Australians calling for the Government to 'reject the adoption and notion of a charter or bill of rights in Australia' because 'Australia's democratic nature means that the protection of human rights is already well founded', and judges should not be allowed to determine if laws are incompatible with human rights.[124]

In the Senate, National's Senator Ron Boswell made a speech suggesting that the prospect of the introduction of a bill of rights had been 'comprehensively settled' some 20 years prior when it was debated and rejected during the Hawke era. He did not believe sentiment on the issue had changed, suggesting:

> *Australia is the Australia we know and love because our founding fathers got the location of power pretty well right. A charter of rights would threaten that finely balanced location of power.*[125]

Boswell also noted that whilst it rejected the implementation of a bill of rights, the Coalition supported the establishment of a parliamentary scrutiny committee and suggested this would still have the effect of bringing the existing mechanisms of human rights in Australia to a higher point, but without the 'potentially undemocratic consequences of placing unprecedented power to resolve essentially political questions in the hands of the judiciary'.[126]

In November 2009, Senator Brandis tabled a petition, co-organised by the Australian Christian Lobby with some 20,000 signatures, that likewise sought to put pressure on the Rudd Government to 'reject a Charter of Rights'.[127]

There was initially a positive outlook within the Rudd government about the prospect of a statutory bill of rights or human rights act for Australia, with Labor MP's such as Mark Dreyfus suggesting in September 2008 (prior to the NHRC's commencement) that such legislation would not cause a loss of parliamentary sovereignty, nor was there anything 'constitutionally impossible' about the prospect of it.[128]

However, by November 2009 Attorney-General McClelland suggested that the Government was not committing to the introduction of a statutory bill of rights and was reviewing all options put forward by the NHRC. He indicated that the Government believed any response to the NHRC should 'preserve parliamentary sovereignty' and 'appropriately balance the rights of all groups in society'.[129]

The Government's response to the NHRC

Attorney-General McClelland provided the Rudd Government's formal response to the NHRC recommendations in April 2010, whilst releasing its plan titled 'Australia's Human Rights Framework'.[130]

The new Framework sought to 'reaffirm, educate, engage, protect and respect' but not through the implementation of a human rights act as many had hoped. Despite acknowledging that the Government remained firmly committed to a 'fairer and more inclusive Australia', and that people's rights could be better protected and promoted in Australia, McClelland also stated at the outset of the proposal that the Framework would not include a human rights act.

> *The Framework does not include a human rights act or charter. While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community.*[131]

McClelland instead suggested that the result of the NHRC was the clear need for a primary focus on education and making information about human rights more readily available for all members of the community.[132] Therefore, the new Framework would provide additional funding to the Australian Human Rights Commission, make provision for the reaffirming of Australia's commitment to certain international treaties and develop a new National Action Plan.

During the Framework's launch in Canberra, McClelland also announced that the Government would introduce a new scrutiny regime to enhance human rights compliance in future Commonwealth legislation.[133] This commitment came to fruition with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

At the conclusion of his address, McClelland acknowledged that although there were many who had argued that the judiciary should have enhanced powers through a human rights act it was ultimately the Government's view that:

> *... the well-established principles of statutory interpretation, together with the proposed Statements of Compatibility and any Committee report – will provide the Courts with the appropriate tools to undertake their role in the context of the Parliament's enhanced focus on human rights considerations.*[134]

The Government's decision to reject the NHRCs key recommendation of a human rights act was disappointing to many, especially given the strong evidence of support for an Act during the consultation process and lack of persuasive counter evidence to justify the arguments put forward by those opposed.

Some suggested the failure was related to two key factors: the weakness of any catalysing political trigger and the continued influence of a fragmented governmental structure which raised the barrier against reform.[135] Others concluded that the outcome had a very familiar sense of déjà vu:

> *Australia's failure, yet again, to adopt a bill of rights therefore has a familiar ring.... a strong feeling of déjà vu, a sense that we have been here before and that we have already heard all of the arguments in one form or another.*[136]

Parliamentary Scrutiny Act 2011 (Cth)

The *Human Rights (Parliamentary Scrutiny) Act 2011 ('PSA')* intended to enhance parliamentary deliberation of human rights issues at the early stages of lawmaking. Firstly, through a requirement for new Bills to have accompanying statements of compatibility, and secondly through a Joint Committee on Human Rights who would be empowered to assess draft Bills for their human rights compatibility and make (non-binding) recommendations to Parliament for improvements before a Bill is passed.[137]

Whilst introducing the legislation in late 2010, Attorney-General McClelland suggested that this process would establish an important 'dialogue between the executive and the parliament' and 'inform parliamentary debate on human rights issues considered by the executive'.[138]

However, the parliamentary scrutiny regime's approach has been criticised for its restrictiveness. It creates an arrangement whereby Parliament is the only body capable of engaging in the human rights protection process (there is no provision in the PSA for any judicial intervention).[139] Key issues of the PSA framework in practice have been identified as a lack of consistency in compatibility statement quality, and significant fluctuation in the number of new Bills receiving close review or 'scrutiny' of the Committee, due to the common pressure for Bills to pass through Parliament quickly.[140]

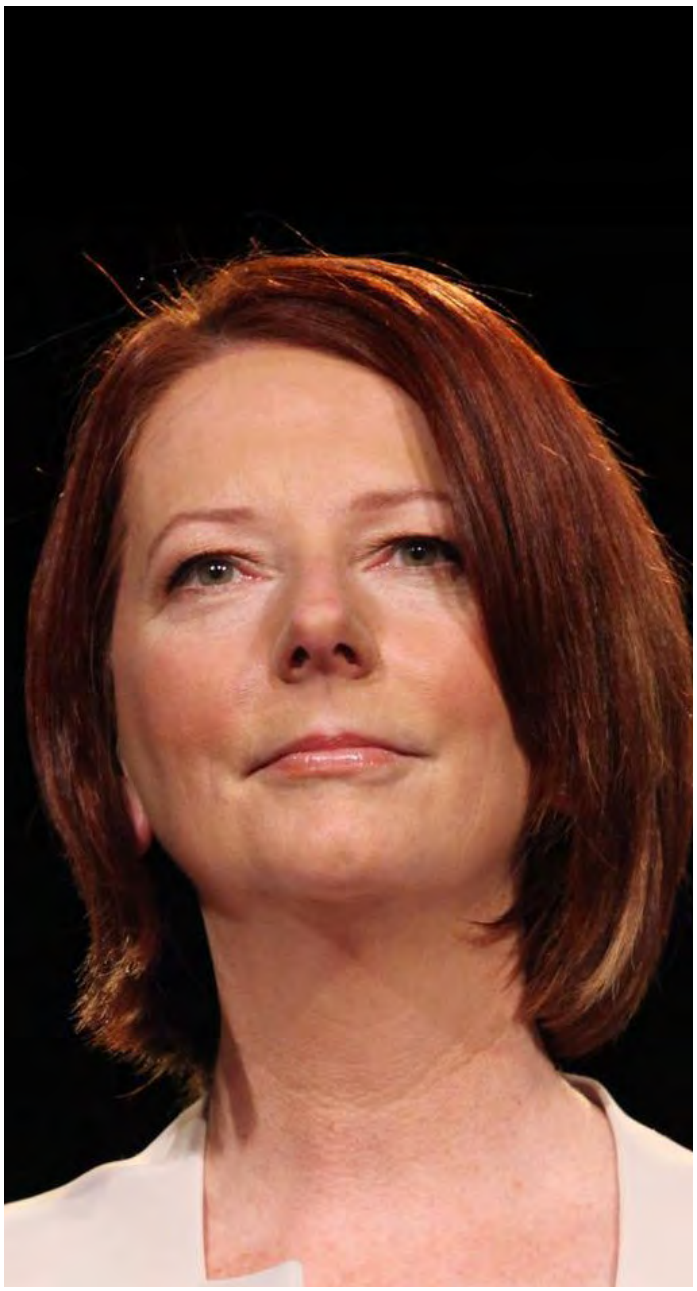


Image: Julia Gillard, Troy Constable Photography.

3.3 Parliamentary Joint Committee Inquiry into Australia's Human Rights Framework

As noted in section 3.2, the federal Parliamentary Joint Committee on Human Rights ('PJCHR') was established in early 2012 as part of the PSA and broader response to the 2008 NHRC recommendations. The Committee comprises federal MPs from across the political spectrum.

In December 2018, the Australian Human Rights Commission ('AHRC') commenced a project called 'Free & Equal' aimed at setting out the AHRC's proposed reform agenda for the better protection of human rights in Australia.[141] The project had a particular focus on the Commission's view that Australia needed to implement a federal human rights act to address ongoing inadequacies in the national approach to human rights.

On 7 March 2023, the AHRC published a position paper titled 'Free and Equal: A Human Rights Act for Australia'. The position paper set out why Australia needed a human rights act, noting that a human rights act for Australia should be viewed as 'an evolution not a revolution'.[142]

It also focussed importantly on the growing discrepancy between rights protections available in different parts of the nation.

> *Human Rights Acts have been passed in Victoria, the Australian Capital Territory and, most recently, Queensland. The lack of an overarching federal instrument means that a person's access to rights protections is wholly contingent on where they live.*[143]

Following the publication of the Position Paper, on 15 March 2023 then Commonwealth Attorney-General of the Albanese Government, Mark Dreyfus, requested that the PJCHR conduct an inquiry into Australia's Human Rights Framework which had been implemented in 2010 but had not been reviewed since. The Framework itself broadly lapsed following a change of Government in 2013, except for some legislated aspects including the work of the PJCHR and the requirement for statements of compatibility which had continued.[144]

The PJCHR delivered its findings and recommendations to the Albanese Government in a report released on 30 May 2024.

Inquiry into Australia's Human Rights Framework 2024

In carrying out the inquiry, the PJCHR was asked to:[145]

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

In relation to scope, the PJCHR invited submissions that specifically addressed the question of whether the Australian Parliament should enact a federal human rights act.[146]

Having examined what developments had occurred in Australian human rights law since 2010, the PJCHR noted that although there had been some notable legislative developments such as the introduction of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the *Modern Slavery Act 2018* (Cth) and amendments to strengthen some individual Acts such as the *Racial Discrimination Act 1975* (Cth), there had also been numerous examples of federal legislation that raised human rights concerns. Particularly in the areas of counter terrorism, national security, refugees and asylum seekers, privacy, social welfare and citizenship.[147]

Despite there being more than 14 years between the 2008-09 NHRC and the PJCHR's inquiry, the PJCHR ultimately found that Australia's approach to human rights remained 'piecemeal and scattered', echoing the 2009 NHRC reports description of a 'patchwork quilt'. Concerningly, the Committee also suggested that the vast amount of different legislation relevant to human rights issues across the Commonwealth, States and Territories, and additional caselaw meant that it was simply 'not possible for this committee to assess all developments in this area over the last 14 years'.[148]

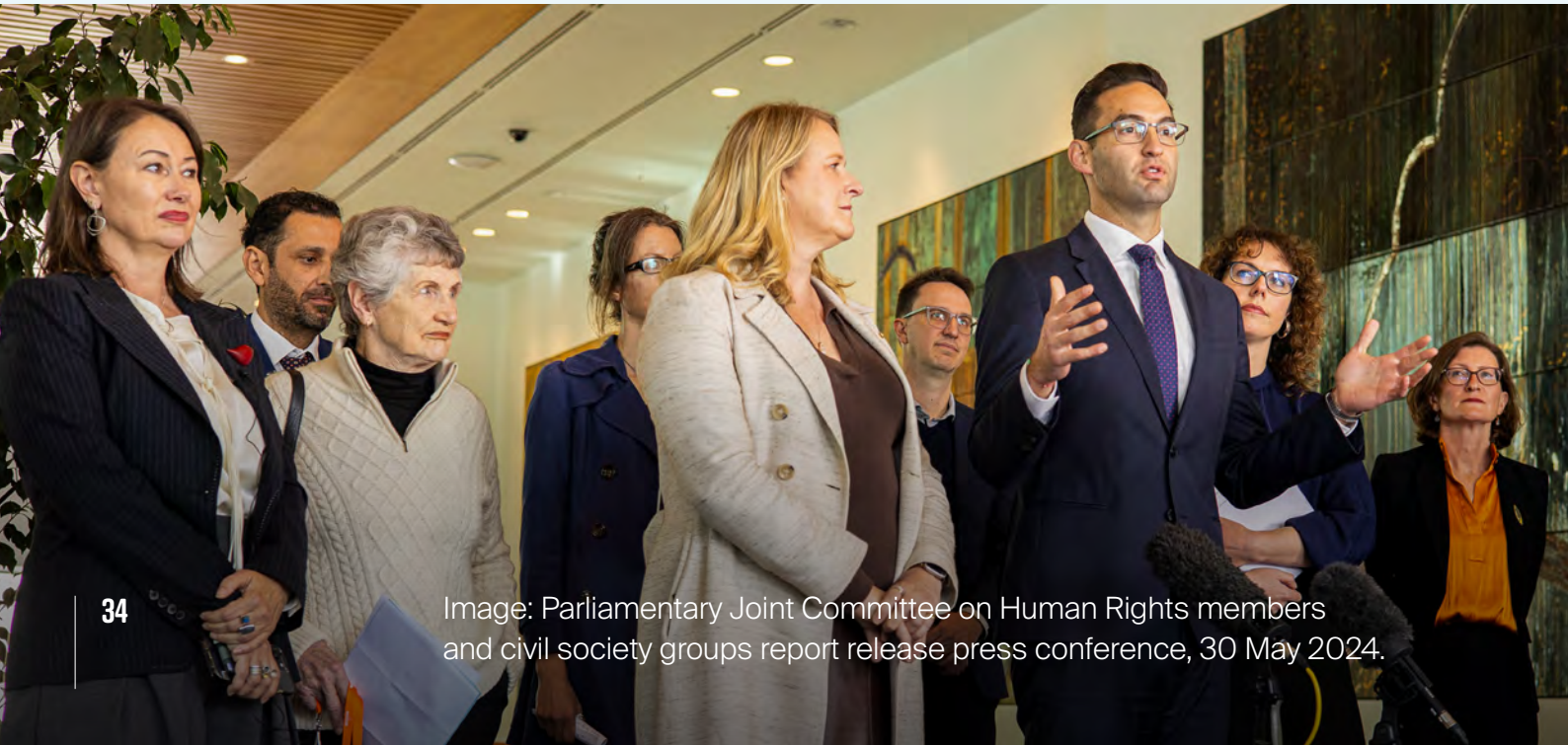


Image: Parliamentary Joint Committee on Human Rights members and civil society groups report release press conference, 30 May 2024.

Recommendation for a Human Rights Act

Submissions received by the PJCHR inquiry were 'overwhelmingly in favour' of a federal human rights act. Of the 335 submissions received, 87.2 percent indicated support for the adoption of revised rights protections via a human rights act. In addition, the inquiry received 4,107 form letters all of which supported an Act. The PJCHR noted that many of the arguments put forward in support were broadly similar to those considered by the 2008-09 Brennan Consultation.[149]

Against this backdrop, and after considering a vast array of human rights concerns affecting the Australian community,[150] the PJCHR made 17 recommendations, including that the government should re-establish and significantly improve Australia's Human Rights Framework and introduce legislation to establish a statutory human rights act.[151]

The PJCHR report also provides an example Human Rights Bill,[152] modelled on the proposals of the AHRC and which similarly to the 2009 NHRC recommendations, follows the 'dialogue model'. The Committee recommended that the Act be inspired by similar Acts already in operation in the United Kingdom and New Zealand and those enacted in the ACT, Victoria and Queensland. Once again, the proposed Act would not override other federal legislation but provide for the consolidation of rights in one place and streamlined mechanisms for redress and review.[153]

Coalition members' minority dissenting report

Despite the overwhelming evidence collated by the inquiry in support of a human rights act, and a Committee majority supporting the recommendation of an Act as the primary outcome of the inquiry, there was also a minority dissenting report prepared by Coalition committee members Henry Pike, Matt O'Sullivan and Gerard Rennick. They put forward a view that they did not support the enactment of a federal human rights act and encouraged the Government to reject any such proposal.

The Coalition members suggested that Australia had an 'enviable human rights record' and that the AHRC's human rights act proposal (on which the PJCHR recommendation was based) created the potential for a 'dangerous departure from the international human rights agreements' that Australia is bound to.[154] They, like many predecessor opponents, expressed particular concern about the levels of protection proposed for issues such as freedom of thought, conscience and religion.

> *Australia's enviable human rights tradition is secured within the very fabric of Australian society, rather than through legislation or constitutional provisions.*[155]

Also like the Coalition's arguments against the 1973, 1983, 1985 and 2009 proposals, at the core of this dissenting opinion was once again the notion that Australia does not *need* a standalone instrument to protect and promote human rights:

> *Proponents of this proposal have failed to demonstrate that our current systems are not providing adequate protection of human rights or that their reform model would achieve preferrable outcomes where current protection is lacking.*[156]

> *A Human Rights Act would be unnecessary, divisive and dangerous and should not be adopted by the Government.*[157]

They further outlined that their opposition to the proposed human rights act was essentially twofold:

> *... to avoid Parliament disrupting the balance of competing rights with an Act which composes rights in a politicised way; and to avoid Parliament surrendering its responsibility to defend human rights, by throwing open the interpretation of an Act which contains excessive uncertainty to final determination by an unelected and unaccountable judiciary.*[158]

The Coalition members cited in their arguments the few submissions received by the inquiry that opposed a human rights act. These were primarily from the Rule of Law Institute, the Australian Christian Lobby, Christian Schools Australia, the Human Rights Law Alliance (a group also focussed on religious and faith-based rights issues) and a select few individuals. Without acknowledging any of the arguments or submissions received by the inquiry in support of a human rights act, the Coalition members concluded that the Act proposed by the PJCHR was dangerous, unjustifiable and likely to result in an 'American-style conflict between branches of government' (despite the model proposing a legislative instrument, not a constitutionally entrenched bill of rights).[159]

Ultimately, these arguments did not stand up to either the majority view of the PJCHR or the many respected organisations (including the AHRC), professionals and individuals that provided evidence to the inquiry in support of the urgent need for a human rights act and other reform.

The dissenting report largely relied on the same themes and arguments put forward by Coalition opponents since the 1970's and neglected to address in any detail the negative impacts and impracticability of Australia's current and undeniably 'patchwork quilt like' system of human rights protections.

The establishment of the PJCHR inquiry and its impactful findings not only reinforce the findings of the 2008 NHRC, but also provide, again, an important opportunity for significant and overdue human rights reforms to return to the Commonwealth agenda.

3.4 Support for a Human Rights Act Now

At the conclusion of its five-year Free and Equal project, the AHRC presented the Albanese Government with its final report titled Free & Equal Revitalising Australia's Commitment to Human Rights ('Free and Equal Report') on 8 November 2023. The report represented a culmination of extensive consultation and research undertaken over the five-year inquiry period, as well as the findings published in its 2021 and 2023 Position Papers.

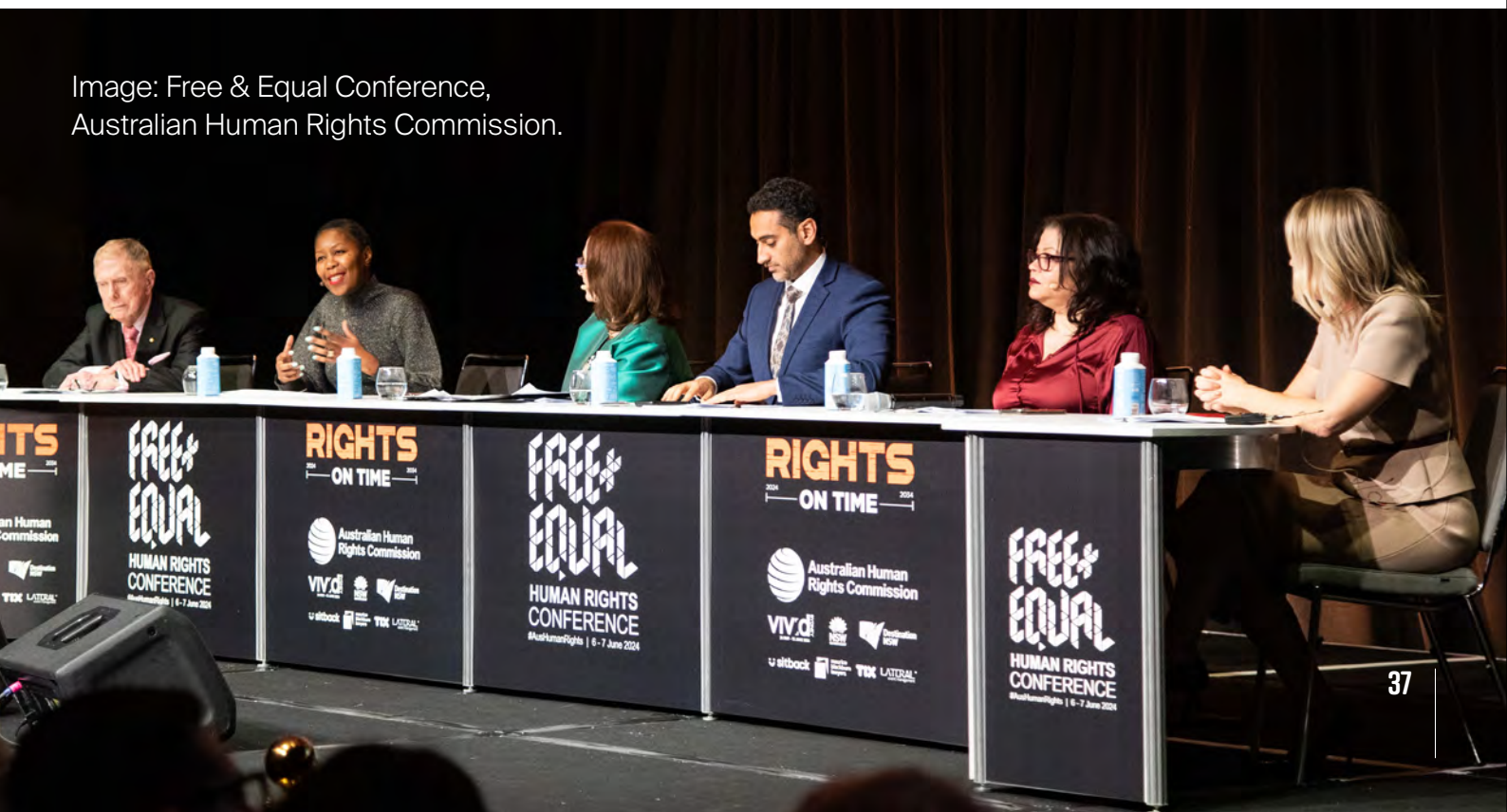
In line with the findings and recommendations of the 2008-09 NHRC and the PJHRC inquiry of 2023-2024, the AHRC also put forward significant evidence to support the need for urgent reform to Australia's national human rights framework, including a recommendation for the implementation of a human rights act.[160]

Why does Australia still need a national Human Rights Act?

The Free and Equal Report made several compelling observations about the persistent inadequacy of human rights protections in Australia at the national level, all of which speak to the ongoing need for a human rights act, including pressingly that:

- Law, policy and practice relating to human rights at the federal level has been inconsistent over the past decade and lacked a foundational reference point from which to fully consider the human rights implications of Government decisions.
- Australia's national legal and policy framework for human rights remains limited and primarily reactive in focus. It relies heavily on anti-discrimination laws, most of which only come into operation after harm occurs and there is not have enough focus on proactive measures that advance human rights at the outset of decision making.[161]

Image: Free & Equal Conference, Australian Human Rights Commission.



Notably, since the lapse of the 2010 National Framework implemented by the Rudd Labor government, the AHRC found there has been:[162]

- No adequate processes for national priority setting on human rights issues such as through a new national action plan or alternative measures.
- No regular consideration of reforms required to better protect human rights, such as through the consolidation of discrimination laws or an audit of existing laws related to human rights.
- No appropriate targeted investment to build human rights awareness and improve community education.
- No rigorous, transparent accountability mechanisms for tracking progress on human rights – noting that the 2014 review promised when the 2010 National Framework was launched never occurred.

Experiences during the COVID-19 pandemic and decision making related to the Robodebt scheme have specifically illustrated how policy and decision making can lose focus of human rights impacts, particularly when they are being made without clearly identifiable human rights guidance.[163] Several recent Royal Commissions including the Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Royal Commission into Aged Care Quality and Safety (2021), Royal Commission into the Robodebt Scheme (2023) and Royal Commission into the Violence, Abuse, Neglect and Exploitation of People with Disability (2023) have all exposed and confirmed the existence of systemic human rights failures occurring across a broad spectrum of issues, policy areas and time periods.

There also remains serious implementation gaps in Australia between international human rights standards that Australian governments have committed to uphold over many years, and the actual protections provided for in Australian laws, policies and processes.[164]

Since 2017 several human rights treaty committees who are responsible for reviewing state party compliance with international human rights treaties, have repeatedly observed that Australia has failed to fully recognise and implement its treaty responsibilities at the domestic level. The Free and Equal Report notes for example, that treaty committees including the UN Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on Economic Social and Cultural Rights and the Human Rights Committee have all recommended that Australia should adopt comprehensive federal legislation in the form of a charter or human rights act to ensure rights provided under the Conventions are fully recognised and protected in Australia.[165]

The missing element to all of the above is clearly the existence of a comprehensive, targeted national approach to the protection and promotion of human rights, including a human rights act. A human rights act would also create the foundation for human rights education in Australia, both now and for generations to come. As the experience of Victoria, Queensland and the ACT has shown, the existence of consolidated human rights legislation means that there is always a clear point of reference for organisations and individuals to assess both the protection of rights and potential breaches.

The AHRC importantly identified ten specific ways a national human rights act would make a difference to people in Australia:[166]

1. There would be a better understanding of human rights.
2. 'Rights-mindedness' leads to better decision making.
3. There would be increased transparency and accountability about the impact of decision making on human rights.
4. The focus of decision makers would be on ensuring law and policy causes the least harm to people's human rights.
5. Engagement with the community on proposed laws and policies would be improved.
6. The views of persons with disability, Aboriginal and Torres Strait Islander peoples and children would matter under a human rights act.
7. The proposed participation duty would improve individualised decision making.
8. There would be pathways for addressing breaches of people's rights.
9. The remedial framework under a human rights act would be accessible to the most vulnerable in the community.
10. The requirement of reasonable adjustment would be built into the administration of justice.

By ensuring human rights are at the centre of Australian laws, people can be empowered to understand their individual rights, promote the rights of others and hold organisations and institutions to account when rights are breached or neglected. The need for a federal human rights legislation remains relevant, pressing and overwhelmingly supported.

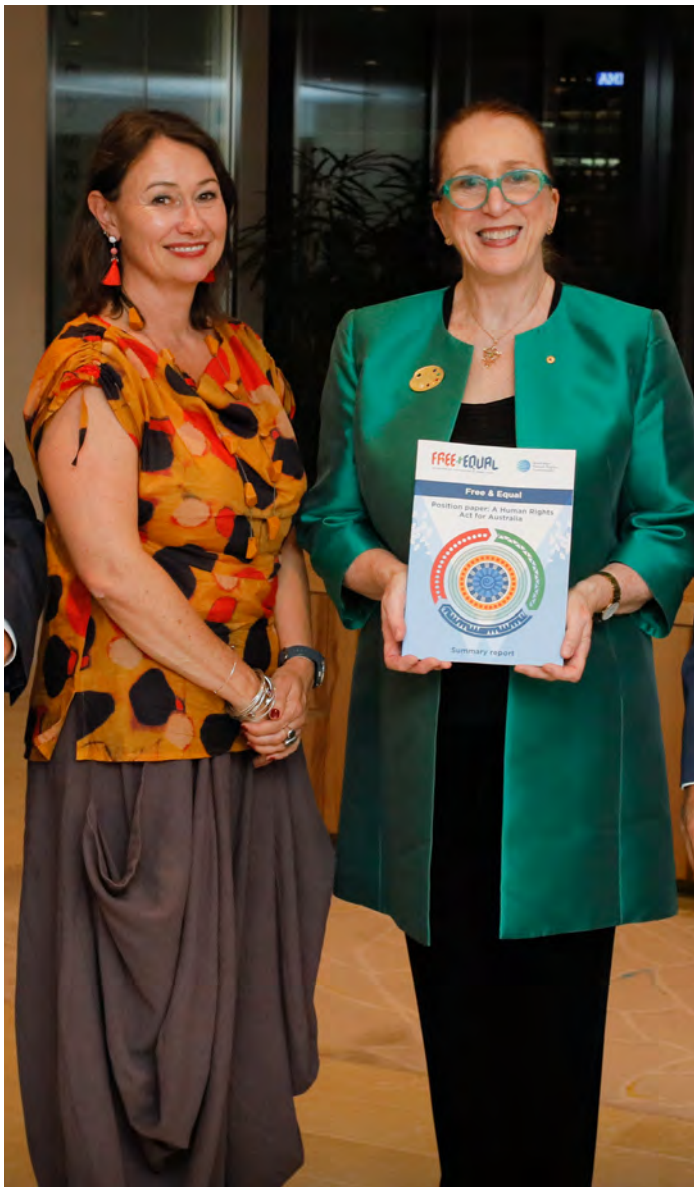


Image: Free & Equal Position Paper Launch, 2023, Australian Human Rights Commission.

Conclusion

Gough Whitlam's government made a bold and enduring statement in 1973: human rights should be protected by law, not left to convention or political discretion. By introducing Australia's first Human Rights Bill, Whitlam laid the foundation for every serious reform effort that followed.

This report traces the long and unfinished journey from Whitlam's first Human Rights Bill to the present day. Throughout this history, a clear pattern emerges. Whether through the formal introduction of legislation or the recommendations of national inquiries, each push for a federal human rights act has been met with fierce, mostly one-sided political opposition and public fear campaigns that rely on unsupported claims a human rights act will diminish rather than enhance the rights of Australian people.

As the debate has developed over time, evidence about the need, most appropriate format and likely success of a federal human rights act has increased significantly, but the common arguments against an Act have continued virtually unchanged since the 1970's. Parliamentary debates after the introduction of the 1973, 1983 and 1985 Human Rights Bill's all show common themes of opposition. These same themes also carried through into discussions and debates post 2000.

Firstly, the report identifies there has been a clear division in political support and opposition to any proposed Australian bill of rights, charter of rights or human rights act. Support has primarily come from the Australian Labor Party, Australian Democrats, Greens and some Independents and opposition from the Liberal, National or equivalently conservative parties at different points in time.

Secondly, in continuing to oppose a human rights act, opponents have primarily relied on the same core arguments including that:

- Australia does not need a human rights act.
- Australia's Common Law system and democratic foundations provide sufficient protection for individual rights and freedoms.
- An Act would diminish or substantially impact Australia's existing structures of Government and democratic institutions.
- An Act would transfer unacceptable amounts of power to the judiciary and unelected judges.
- An Act would potentially diminish rather than enhance human rights.

There were some marked differences in themes of opposition across the various time periods, which accounted for prominent societal concerns at the time. For example, in relation to the 1973 Bill most opponents raised concern about protection of the separation of powers between the Commonwealth and States. There was a fear that Whitlam's proposed Bill (which did propose to bind the States) would negatively impact on the independence of the States and provisions of the Constitution. Additionally, most petitions against the 1973 Bill, as well as other negative community feedback related to concerns about the rights of the family, religious freedoms, and freedom of thought and conscience which were prominent social issues at the time.

In 1985, when Hawke presented a significantly amended proposal that intended to bind federal laws and agencies only, opponents retained the core arguments mentioned above but also focussed on discrediting the Bill with highly emotive language that described it in terms like sham, draconian, evil and destructive to society. The Bill was tainted as aiming to make Australia more like a totalitarian country, with star chamber

like institutions and projected to the public as dangerous and a threat to human rights rather than a tool for protection. There was no expert or academic evidence put forward at the time to support these propositions which it can be concluded intended to be inflammatory, rather than accurately reflective of the impact a human rights act would actually have on Australia's legal and parliamentary frameworks.

The findings of the 2008-09 National Human Rights Consultation, offered substantial evidence over its more than 400-page report that the sentiment of the Whitlam and Hawke eras was not, in fact, reflective of the opinion of most Australian people, nor was it supported by the majority of expert submissions made during the substantive consultation period. The 2009 report was clear that it had received overwhelming support for the idea of a national human rights act and that an Act could be successfully implemented in such a way that is completely consistent with the sovereignty of parliament. Nonetheless, arguments against this recommendation again focussed on the same themes raised during the 1970's-80's, but on this occasion were driven not only by political conservatives but also by prominent religious organisations like the Australian Christian Lobby and influential leaders of the Catholic and Anglican churches.

The 2008-09 Consultation and the Government's response declining to adopt its recommendation of a human rights act represented a notable fork in the road. On the one hand, there was now before Parliament undeniable evidence that the majority of Australian's randomly polled or invited before the Consultation favoured a human rights act, but on the other, ongoing scrutiny continued to stall its implementation. As a result, Australia's disjointed approach to the protection and promotion of human rights has persisted.

Governments in recent decades have favoured the enactment of anti-discrimination laws as one solution. However, these laws only prohibit discrimination and do not set out in any comprehensive detail the fundamental rights owed to all Australians. Nor do they adequately protect against government decision making that violates human rights.

Recent policy failures related to COVID 19, the Robodebt scheme and the findings from various Royal Commissions examining systemic failures relating to the protection of children, people with disabilities and people in aged care have also highlighted the urgent need for better human rights protections and a more cohesive approach to human rights in Australia. With the enactment of some state-based legislation, including in Victoria, the ACT and Queensland, access to rights protections has now become selective based on where a person lives. This should not be considered acceptable. As found by the 2008-09 Consultation, the Parliamentary Committee Inquiry and the Australian Human Rights Commission, all Australians deserve the opportunity to know what fundamental rights they have, how these rights are protected and what avenues for redress are available should their rights be breached. As it stands there remains a lack of equality in rights protections in Australia.

Support for a human rights act has not waivered, with the high level of support noted by the 2008-09 Consultation was similarly seen in the 2023-2024 Inquiry into Australia's Human Rights Framework. However, with the continued absence of proactive steps towards reform, it appears the arguments raised against a human rights act haven't been conclusively rejected.
This cannot properly be attributed to a lack of evidence-based counter arguments or to well researched reform options and models.

Indeed, all inquiries since 2008 have recommended a 'dialogue model' of human rights act that seeks to ensure the balance of parliamentary and judicial powers is protected and that the last word on the operation of federal legislation remains with Parliament.

It could therefore reasonably be concluded that the failure to see through any attempt thus far to enact federal human rights legislation in Australia, is attributable to the makeup of Parliament at a given time and a lack of political will in recent decades to give human rights, as a matter of policy, the priority it requires.

From Whitlam to now, substantial reform to Australia's human rights framework remains essential to the realisation, protection and promotion of fundamental rights and freedoms at the national level. A human rights act will not divide the community, nor should it divide Parliament. It is a practical step in repairing Australia's broken system of rights protections and will ensure human rights remain at the forefront of government decision making in the years to come. Governments should consider human rights in all aspects of law-making and public service delivery. They must be able to be held to account, and people must be empowered to protect themselves and others against rights abuses. A human rights act for Australia is therefore a necessary and overdue step towards realising this responsibility.

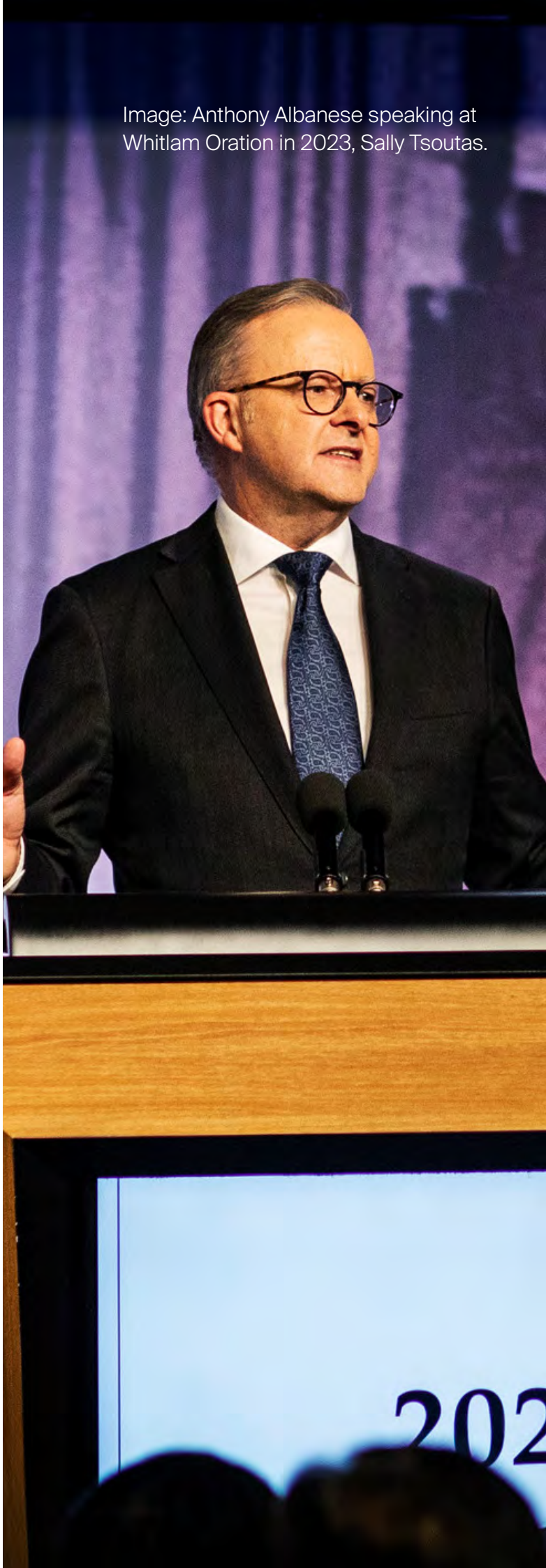


Image: Anthony Albanese speaking at Whitlam Oration in 2023, Sally Tsoutas.

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160 Australian Human Rights Commission, 'Free & Equal Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023' (Report, November 2023) 11.

161 Ibid 16.

162 Ibid 43.

163 Ibid 16, 47.

164 Ibid 18.

165 Ibid 18.

166 Ibid 69.

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