



**Protecting rights – enhancing communities
– submission to the Western Australian
inquiry into a Human Rights Act**

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy, Utilities and Sustainability for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates approximately income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on human rights and the current inquiry

PIAC welcomes the opportunity to contribute to the inquiry in Western Australian into human rights protection for Western Australia and applauds the Western Australian Government for implementing the inquiry.

This submission responds directly to the questions posed in the inquiry.

Throughout its 25 years of operation, PIAC has undertaken work on human rights issues, both through representing clients seeking to assert rights and in participating in public policy debate and development, and community legal education on rights.

Since 2003, PIAC has been working nationally to promote debate on effective human rights protection in Australia. In 2004, it published an education kit, *Protecting Human Rights in Australia*, which sets out background information on human rights then considers the levels of protection of key rights recognised in the International Bill of Rights¹, whether they are adequate and how this affects individuals. The kit has been distributed nationally and is available in three English and three other community languages.²

In 2005 and 2006, PIAC provided training in all states and territories on human rights. The training was provided to people working with communities. One aim of the training was to give those people knowledge of what is meant by the term 'human rights', how the international framework for human rights came into existence and how it operates, different models of human rights protection adopted in different countries, and how human rights are protected in Australia. The other aim was to give them the skills to conduct training and education sessions on human rights and to encourage discussion in their communities about whether Australia's current levels of protection of human rights are adequate.

During that time and since, PIAC has made submissions to both the Victorian Government inquiry into a human rights charter and the current Tasmanian Law Reform Institute inquiry. It also convenes and provides secretariat services to the NSW Charter Group.

1. Should WA have a Human Rights Act?

Yes. Protection of human rights is a fundamental obligation incumbent upon governments. A WA Human Rights Act is an important expression of this obligation and the commitment a government makes to all people within its jurisdiction that it will work to better people's lives and to be accountable to them where it acts or fails to act, in violation of an individual's human rights.

Through enacting a broad-based WA Human Rights Act that gives to people in Western Australia, the ability to vindicate their rights directly, the Government will succeed in achieving a human rights culture far more quickly than any mass education or awareness-raising campaign alone could hope to do.

In the absence of a WA Human Rights Act the task of creating a human rights culture becomes a costly exercise and challenging for individuals to understand and implement. A WA Human Rights Act gives Western Australians a direct and tangible link with human rights. Education,

¹ This is the collective title used to describe the *Universal Declaration of Human Rights*, (a non-binding statement made by the United Nations General Assembly on 10 December 1948), the *International Covenant on Economic Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* (both binding on those States party to the Covenants).

² The kit is available both in hard copy and as an electronic resource through the PIAC website at www.piac.asn.au.

awareness raising and capacity building activities would then become more powerful, direct and therefore cost-effective strategies.

2. What rights should be protected in a WA Human Rights Act?

In PIAC's view, a WA Human Rights Act should, at a minimum, protect the rights to which Australia has committed itself at international law, namely, the rights set out in the following international treaties:

- the *International Covenant on Civil and Political Rights* (ICCPR); and
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

These rights are interconnected, indivisible and pertain to each person by virtue of their humanity. The WA Human Rights Act should explicitly provide for:

- recognition of Indigenous peoples, their continuing cultures and connection to land, and their right to self-determination;
- the right to a safe and sustainable environment;
- the right of people with disabilities, and of all genders, sexualities and identities to enjoy substantive equality and to be free from discrimination;
- any further rights identified through the current community consultation process, or during subsequent consultations.

The Government should not balk at considering the protection of economic, social and cultural rights together with civil and political rights. An argument commonly made to oppose the inclusion of economic, social and cultural rights in any human rights legislation is that these rights are not justiciable in the same way as civil and political rights. While there is no equivalent provision to Article 2(3) of the ICCPR in ICESCR, Article 2(1) of the ICESCR requires that States Party to the Convention take steps, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the ICESCR, particularly through legislative measures. As such, these rights should be included with a similar provision that protects against the loss of progress towards full achievement.

It has also been argued that economic, social and cultural rights are seen as less important by the community. As far as PIAC is aware, there is no research that has been done to test this proposition fully. The rights covered by the ICESCR reflect many of the areas of life that are clearly of significant concern to everyone at a personal and political level: adequate housing, adequate standard of living, access to adequate health care, protection of rights at work, protection of family and community participation. Indeed, for many if not most people these issues are seen to have a much more continuing and direct impact on their day-to-day lives than the rights set out in the ICCPR.

In order to effectively protect human rights, both the ICCPR and ICESCR rights should be protected.

3. What form should a WA Human Rights Act take?

Human rights protection should be achieved by introducing a legislatively entrenched WA Human Rights Act, and establishing a set of institutions and processes to support the full implementation of the principles recognised in the Act. Legislation should ensure that to amend it would require the agreement of two thirds of the parliament in a joint sitting.

The legislation should include a ratchet clause, such that once rights are recognised they cannot easily be taken away. PIAC's position is that the full range of human rights protections should be included in the WA Human Rights Act from the outset. While PIAC advocates strongly for the enforceability of the full range of human rights once the legislation comes into effect, the minimum position it argues for is one of phased implementation and enforceability, rather than phased recognition. This means that all of the rights recognised in the ICCPR and ICESCR should be recognised in the legislation at its inception, but that the legislation include within it a phased implementation of mechanisms for the enforcement of those rights. PIAC strongly urges the Government to prioritise and adequately fund community engagement, awareness, and capacity-building initiatives.

In order to achieve that objective, PIAC supports a WA Human Rights Act that:

- binds public officials, authorities, agents and those performing public functions;
- gives individuals a direct right of action and enforceable remedies in State courts, with respect to certain rights, including but not limited to the rights recognised and protected in the ICCPR; and
- requires that all new legislation, including delegated legislation, respects, protects and promotes the rights recognised in the WA Human Rights Act
- vests courts with the authority (and obliges them) to interpret existing legislation and delegated legislation consistent with the rights recognised in the WA Human Rights Act,
- vests the Supreme Court with authority to read down or strike down inconsistent laws as invalid; and
- recognises the interconnectedness and indivisibility of classes of human rights by recognising the full spectrum of human rights rather than a limited sub-set of rights, such as political and civil rights alone; and
- includes a 'reasonable limits' clause; and
- does not include 'notwithstanding' clause.

PIAC supports a WA Human Rights Act in this form because:

- it is emblematic of the Government's commitment to protect, respect and promote human rights;

- it provides a clear normative framework against which public functions and actions can be assessed and within which individual rights, freedoms and responsibilities can be balanced;
- it engages the three branches of Government—the Parliament, Executive and Judiciary—in dialogue about how to protect, respect and promote human rights;
- it generates a shared community understanding of what the content of the human rights recognised in the WA Human Rights Act;
- it sparks engagement with the broader community;
- it signals real commitment from Government by aligning rights with remedies;
- it is a cost-effective means of protecting, promoting and fulfilling human rights.

4. How should a WA Human Rights Act require human rights to be protected?

The Supreme Court of Western Australia should be empowered to strike down as invalid legislation and delegated legislation that is inconsistent with rights recognised in the WA Human Rights Act, and which cannot be interpreted in a way that is compatible with those rights. Lower courts, faced with an application to strike down legislation as invalid, should be empowered to refer this to the Supreme Court.

The Auditor-General and Ombudsman, with a new human rights capacity, together with a newly established Joint Parliamentary Committee, and an Office of Human Rights (OHR), provides an effective mixture of administrative and Parliamentary mechanisms: to monitor the performance of public authorities; to collaborate to identify poor performance and its causes; and to develop strategies to improve human rights compliance with poorly performing public authorities.

Public authorities should be required to do the following:

- Develop a Statement of Commitments as a compact between the public authority and its stakeholders, including members of the community. A Statement of Commitments should reflect how the public authority plans to respect, protect, promote and fulfill relevant human rights standards.
- Report annually to parliament, via the Joint Parliamentary Committee, on steps taken to respect, protect, promote and fulfill the rights recognised in the WA Human Rights Act, including on its performance against its Statement of Commitments. Such reports would be part of social outcomes reporting, which the Auditor-General will be mandated to review.

The OHR would be charged with ensuring a co-ordinated, whole-of-government approach to rights protection and to foster human rights capacity within the Government. The Ombudsman would retain an investigative and reporting function in relation to the conduct of public authorities, which will be explicitly expanded to include human rights standards. Together, the OHR, the Auditor-General, the Ombudsman and the Joint Parliamentary Committee, if they

develop systems to work together effectively, will be uniquely placed to promote human rights compliance in Government.

The Act should include a requirement that all legislative proposals be accompanied by a detailed Human Rights Impact Statement. The responsible Minister or MP should, upon introducing the Bill or delegated legislation, make a statement about the human rights implications of the proposed legislation. This should include, as a minimum, whether or not the proposed legislation will promote compliance with the rights recognised in the WA Human Rights Act. If the Minister believes the legislation will breach, fail to promote compliance with particular rights, or impair a right recognised in the WA Human Rights Act, the Minister should be required to provide a justification for the legislation. Such a justification should be based on the wording of the 'reasonable limits' clause of the WA Human Rights Act.

PIAC recognises that the parliament will need the ability to balance competing rights by passing legislation to limit qualifiable rights where such laws are:

- necessary in a democratic society;
- pursue an important objective;
- are rationally connected to that objective;
- impair a right no more than necessary to achieve the objective; and
- do not have a disproportionately severe impact or impermissibly discriminatory effect on the people to whom the law will apply.

PIAC does not support the inclusion of a 'notwithstanding' clause.

When discussing the balancing of rights, terrorism and threats to national security will usually be raised as examples of when rights should be restricted. The main point PIAC wishes to emphasise is that measures to counter terrorism and protect national security should be, and can be, consistent with human rights and the Rule of Law. Absolute protection is not possible and human rights should not become a casualty in the efforts to protect human rights. In PIAC's view, it is fundamental that any measures to combat terrorism should themselves uphold, rather than circumvent, international human rights standards. In discussing measures to combat terrorism, it is not a question of 'striking an appropriate balance' between human rights and the national security interest. Australia's human rights obligations are not negotiable. They are part of the democratic relationship between the Government and people within Australia and any compromise is to the detriment of Australian democracy. The International Bill of Rights recognises in the preambular provisions that the effective protection of human rights is central to effective democracy and the maintenance of peace and security.

The international human rights framework recognises that some human rights can be temporarily impaired to respond to threats to national security and public order. However, this framework requires that State Party seeking to implement any action to impair rights must notify publicly its intention to do so. Further, the impairment of rights cannot continue indefinitely.

5. Who should be required to comply with the human rights recognised in a WA Human Rights Act?

The WA Human Rights Act should apply to the acts and omissions of a 'public authority'. By 'public authority', PIAC means to include government officers and entities such as Ministers, the Parliament, government departments and agencies, courts and tribunals, the police, and public servants. PIAC is also concerned to ensure coverage of actions and omissions of contractors and other persons or entities when performing functions for government, or that government would ordinarily perform. The term 'public authority' captures all these classes of people or entities when performing a public function, and also permits some interpretive leeway. The WA Human Rights Act should impose an explicit obligation on public authorities, officials and agencies to protect, promote, respect and fulfill the rights it recognises.

All three branches of Government should be subject to the WA Human Rights Act.

PIAC understands human rights to accrue to natural persons from the time of birth. The drafting of the WA Human Rights Act should reflect this and not extend beyond it. PIAC understands the right to life, protected in the ICCPR, to be a right that begins at the time of birth, and to operate to restrain the Government from taking the life of any person in its jurisdiction. PIAC does not understand that right to prevent a woman from exercising her right to exercise control over her own body, or to prevent an informed and voluntary decision to take one's own life. The debate about a WA Human Rights Act should not become a debate about women's access to abortion or about assisted suicide.

The rights that PIAC advocates should be protected in a WA Human Rights Act accrue to individuals, not to governments, corporate entities of any sort or to government. They exist to protect individuals and to give individuals a means of asserting a right against the more powerful State. They reflect a clear vision of the basic and inherent rights that belong to each of us, before any other tag is attached to us, as human beings.

6. What should happen if a person's human rights are breached?

Individual cause of action and remedies

Legislation without a mechanism to provide individuals whose rights have been violated with an accessible and effective remedy is of limited utility and inconsistent with the obligations within the international human rights framework. A WA Human Rights Act without directly enforceable protections undermines the strength of the encouragement it gives for respect by public authorities of the rights it recognises, and limits general public confidence that the Government will honour its stated intent to respect, fulfill and promote human rights.

To provide a right without a remedy would mean that the Government was claiming to be a champion of human rights protection without being subject to an important measure to keep it true to its human rights commitments, namely, an individual right of action for an effective remedy. The provision of an accessible and effective remedy is itself a basic principle of human rights law.

The common law has long recognised the necessary correlation between a right and a remedy in the maxim *ubi jus ibi remedium* (for the violation of every right, there must be a remedy). The UN Human Rights Committee has provided definitive guidance on the meaning of Article 2(3) of the ICCPR.

PIAC advocates an individually enforceable right for both ICCPR and ICESCR rights. In relation to ICESCR rights, the inquiry might think about a range of remedies that are tailored to the nature of the rights in question. More often than not, claims involving a breach of economic, social and cultural rights will be brought by on behalf of a group of similarly affected people seeking a common outcome. It may be that the inquiry considers appropriate enforcement mechanisms for economic, social and cultural rights to be systemic remedies, available through Courts or through other complaints mechanisms.

It is PIAC's strong view that a new body that is clearly dedicated to the broader question of human rights should be established. Anti-discrimination protections should afford everyone the same access to existing entitlements and services. If, for example, the parliament were to limit the right to vote across the board, anti-discrimination legislation would not assist someone who wished to exercise an enhanced right to vote. There should be a mutually supporting range of individual, systemic and compliance outcomes.

PIAC recommends a range of enforcement mechanisms and remedies for breaches of rights of individuals. Where a complaint identifies a systemic barrier to the protection and promotion of recognised rights, there should be mechanisms to address the systemic aspects of the individual's complaint as well as compensating or providing other remedies to the individual. There should also be processes to enable systemic human rights issues to be identified by community organisations and government institutions.

Where a person's rights are breached, they should be entitled to an accessible and effective remedy for that breach. This is consistent with international approaches to human rights protection. Individuals should be empowered to make a claim against public authorities that fail to respect, protect or promote the individual's rights recognised in the legislation. Where claims in administrative tribunals raise human rights issues, those tribunals should be empowered to consider the matter, providing they arise from a cause of action within the tribunal's jurisdiction.

Care should be taken to ensure that mechanisms for seeking remedies through the courts are user friendly, inexpensive, and are supported through appropriate registry services and access to legal aid and affordable legal services.

Available remedies should include declaratory relief, compensation, injunctive relief, orders designed to remedy the effects of the violation upon the individual, and orders designed to address the systemic roots of the violating conduct by the public authority (systemic orders). The Supreme Court should be empowered to make an order that a legislative provision is invalid or that a legislative provision that is inconsistent with recognised rights be read down. Lower courts should be empowered to refer to the Supreme Court any application to strike or read down a legislative provision as inconsistent with recognised rights.

Systemic outcomes

Systemic orders might include, for example, an order that managers of the public authority and key staff undergo approved human rights capacity-building and awareness training, that the public authority implement a human rights strategy, or that the public authority report at appointed times on measures it has taken to address the systemic problem identified as a result of the individual's complaint. In this way, individuals are provided with an effective and sustainable remedy that ensures respect for their rights, and further, creates an opportunity for a co-operative and capacity building approach to ameliorating any systemic cause of the complaint.

PIAC proposes that community-based organisations that are representative bodies, such as the Western Australian Council of Social Service, be recognised as competent bodies to make a complaint alleging systemic breaches of the Legislation. Such a complaint would compel a response from the respondent and an investigation. The investigating body would have the ability to make recommendations that should be:

- tabled in Parliament;
- monitored for compliance and implementation by the authority; and
- enforceable upon application to the Supreme Court.

Compliance mechanisms

PIAC submits that the Auditor-General and Ombudsman, with a new human rights capacity, together with a newly established Joint Parliamentary Committee, and the OHR, provides an effective mixture of administrative and Parliamentary mechanisms to monitor the performance of public authorities, to collaborate to identify poor performance and its causes, and to develop strategies to improve human rights compliance with poorly performing public authorities.

As outlined above, public authorities should be required to do the following:

- Develop a Statement of Commitments as a compact between the public authority and its stakeholders, including members of the community. A Statement of Commitments should reflect how the public authority plans to respect, protect, promote and fulfill relevant human rights standards.
- Report annually to parliament, via the Joint Parliamentary Committee, on steps taken to respect, protect, promote and fulfill the rights recognised in the WA Human Rights Act, including on its performance against its Statement of Commitments. Such reports would

be part of social outcomes reporting, which the Auditor-General will be mandated to review.

An Office of Human Rights would be charged with ensuring a co-ordinated, whole-of-government approach to rights protection and to foster human rights capacity within the Government. The Ombudsman will retain an investigative and reporting function in relation to the conduct of public authorities, which will be explicitly expanded to include human rights standards. Together, the OHR, the Auditor-General, the Ombudsman and the Joint Parliamentary Committee, if they develop systems to work together effectively, will be uniquely placed to promote human rights compliance in Government.

7. If WA introduced a Human Rights Act what wider changes would be needed?

PIAC makes a range of suggestions in relation to the institutions of government that involve the expansion of existing offices, and in limited instances, the creation of new mechanisms:

- ***Establishment of a Human Rights Commission:*** this would act as a human rights watchdog and a source of expertise and capacity. PIAC proposes that the Commission be empowered to initiate law reform and research on human rights in, to educate and build capacity in human rights principles, to investigate and report on human rights issues, to act as *an amicus curiae* in human rights matters, to bring representative proceedings in relation to systemic violations of recognised rights, and to provide technical assistance to litigants in relation to human rights principles.
- ***Establishment of an Office of Human Rights, in the Office of Premier and Cabinet (OHR):*** this would provide a focal point for whole-of-government implementation, capacity building and policy development.
- ***Establishment of a Joint Parliamentary Committee on Respecting, Protecting and Promoting Rights (Joint Parliamentary Committee):*** this would oversee parliamentary activity and to signify parliamentary commitment to the protection of human rights. PIAC proposes that the Joint Parliamentary Committee's Terms of Reference would be to inquire into the practices of public authorities on its own information, or on a reference that discloses a significant and systemic human rights issue from the Attorney General, the Ombudsman, or the Auditor-General.
- ***Changes to the role of the Ombudsman:*** the role would be expanded to develop an explicit human rights capacity to deal with complaints of serious human rights violations consistent with existing powers.
- ***Changes to the role of the Auditor-General:*** this role would be expanded to develop explicit human rights compliance audit capacity. PIAC proposes that public authorities

begin to report more explicitly against social outcomes. PIAC proposes that consistent with a broadened reporting base, the Auditor-General should develop a new capacity to monitor social outcomes reporting, including outcomes consistent with human rights standards.

The Government needs to make a policy and fiscal commitment to institutional capacity building within Government and in the community about the substance of human rights principles, and more specifically what the WA Human Rights Act means in practice.

All public authorities should be required, as part of the implementation strategy of any WA Human Rights Act, to develop a Statement of Commitments to their stakeholders, clients and the community more broadly. Such Statements engender human rights awareness amongst public servants, and those in the community whom they affect in their work.

PIAC proposes stronger reporting and accountability measures by public authorities. PIAC proposes that public authorities be required to report to parliament on an annual basis on indicators that include their implementation of the WA Human Rights Act and their Statement of Commitments. Such reporting should explicitly include social outcomes. Further, PIAC proposes that administrative remedies and inquiries should follow serious breaches of Statements of Commitments by public authorities.

PIAC recognises that the parliament will need the ability to balance competing Administrative measures for human rights compliance include:

- The creation of the OHR.
- The creation of guidance documents in relation to human rights protection, not merely equality rights. PIAC is concerned to ensure that any such manuals are comprehensive human rights documents, and do not remain in a particular subset of human rights protection, such as equality rights.
- The development of practical human rights implementation training and workshops that become part of the fabric of public service professional development.
- The requirement that public authorities articulate their commitment to human rights in the form of a policy framework and undertakings to stakeholders, including the community in the form of a Statement of Commitments.
- The introduction of a requirement that public authorities report annually to parliament on their work to respect, protect and promote recognised human rights standards in the WA Human Rights Act.
- The referral of poor performance against policy commitments/compacts/ community agreements to the OHR to build better awareness and capacity to meet the expectations of the community.

8. What else can the Government and the community do to encourage a culture of respect for human rights in WA?

To achieve a fully functioning human rights culture, everyone in Western Australian society should know about human rights, know how to protect their own human rights, and be encouraged to respect the human rights of others.

The community has an important role to play in making the WA Human Rights Act a living document, as individuals and as a collective body. If members of the community are not aware of the WA Human Rights Act, and not empowered to use it and the mechanisms that are created to support it, the potential benefit of the WA Human Rights Act and associated mechanisms will be diminished. In addition to the remedies available to individual members of the community, the Government should dedicate financial and material resources to increasing community capacity to understand human rights principles. Key measures that the Government could undertake to secure this outcome include:

- the provision of human rights education as part of core curriculum throughout the education syllabus;
- funding of community groups and initiatives with the aim of protecting and promoting human rights, particularly those that include an awareness raising aspect.