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Human rights and civil liberties

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A foundational principle of liberal democracy is that all citizens are equal and their fundamental human rights must be protected, including protection against the possible political actions of a majority who might seek to strip rights away from an unpopular or inconvenient minority group of people. In many countries, a statement of citizens' rights forms part of the constitution and is enshrined in law and enforced by the courts. This approach was not adopted at Australia's foundation in 1901, reflecting the influence of UK constitutional thinking at the time. Instead, the political system has relied on more diffuse and eclectic ways of protecting fundamental human rights – through common law, the courts and Parliament. At the time of writing Australia remains the only Western democratic nation without a bill or charter of rights, and where its democratic necessity is still questioned (**Meagher, 2008**).

The most conspicuous peoples to have borne the historic costs of this approach are Aboriginal and Torres Strait Islander peoples, who only gained full citizenship and civil rights in 1967, following a referendum that changed Australia's Constitution. However, this change rectified only one aspect of a history of oppression in the country's colonial period. Efforts to institutionalise more effective means of combatting the multiple disadvantages suffered by First Nations peoples and their communities continued, leading in October 2023 to the Labor government's attempt to create a special advisory chamber – the Voice to Parliament. If this had succeeded, it would have represented First Nations Australians' interests and monitored and scrutinised proposed legislation. However, it was turned down decisively by voters in a national referendum; currently, the next steps in Australia's reconciliation with its First Nations peoples remain unclear (see Chapter 4).

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How must human rights and civil liberties be protected in a democracy?

- Liberal democratic states are now expected to respect a range of fundamental human rights set out in international human rights treaties such as the 1996 International Covenant on Civil and Political Rights ('the Covenant') (**United Nations, 2023a**). These extend from freedom from torture to the right to fair trial and freedom from discrimination.
- The functioning of any genuine democracy must be based on respect for these rights, without which individuals cannot participate freely or effectively in the political process.
- Human rights and civil liberties are intrinsic to every person. Respect for them cannot be overridden by electoral majorities, nor by the exigencies of government, without a state falling out of the ranks of liberal democracies.

Historically, human rights have not been given comprehensive and consistent legal protection in Australia, as shown by the recent developments highlighted in the following section. Thereafter, the strengths, weaknesses, opportunities and threats (SWOT) are summarised in an analysis of key issues in rights policies in Australia. Following the SWOT analysis, the chapter looks at three particular aspects of rights protection in more detail.

Recent developments

Many basic human and civil rights have remained unprotected in Australia for much of its recent history, and others have been only haphazardly covered by an assortment of laws. The nature of rights protection has remained precarious for many disadvantaged groups – including First Nations Australians, LGBTIQ+ people, the differently abled, and women exposed to domestic and sexual violence and sexism. Historically, non-white people also suffered major disadvantages – especially the hundreds of thousands of Chinese and Asian people in the north of the country who were forced to leave or denied property and voting rights and, later on, non-Anglophone and Asian people under the 'white Australia' policies from the 1900s to the 1960s.

In 2017, the Australian government was subject to a damning critique of its human rights record by the United Nations Human Rights Committee (UNHRC) with regard to the rights of children, the treatment of refugees, domestic violence, transgender rights, the sterilisation of intellectually disabled women and girls, and the impact of anti-terrorism laws on civil liberties (**Guardian, 2017a**). This assessment was given further validation by the Human Rights Measurement Initiative in 2021, which reported 'strikingly poor results' for Australia, 'particularly in terms of who is most at risk of rights abuses' – such as Aboriginal and Torres Strait Islander peoples, people that are differently abled, people with low socioeconomic status and refugees and asylum seekers (**SBS News, 2021b**).

Australia did consider the idea of introducing a Human Rights Act following an equally critical report from the UNHCR in 2009. In this it was reported that Australia had not:

- introduced legislation to give effect to the International Covenant on Civil and Political Rights (ICCPR)
- withdrawn its reservations to the ICCPR

- established appropriate procedures to implement the views of the Human Rights Committee
- amended counter-terrorism legislation to conform with ICCPR rights
- enacted a law to comprehensively protect the right to equality and non-discrimination
- enacted a law to protect against hate speech based on religion
- properly resourced the now defunct Indigenous representative body, the National Congress of Australia's First Peoples
- provided comprehensive reparations to members of the Stolen Generations – children forcibly removed from First Nations peoples' families and brought up in white households and communities (**AHRC, 1997**; **Wikipedia, 2023a**).

However, after a wide-ranging national consultation on the protection and promotion of human rights, the Australian government decided not to introduce a Human Rights Act. Ministers defended the decision by claiming that 'the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us' (**Ball, 2013**). During the consultation, the adoption of a Human Rights Act was supported by over 87 per cent of 35,000 public submissions and was a key recommendation of the National Human Rights Consultation Committee. In the states of Victoria and Queensland and in the Australian Capital Territory, Australia's international human rights obligations have been enshrined in domestic human rights legislation expressly protecting freedom of expression and assembly. But at the Commonwealth level, the Australian government instead adopted the Australian Human Rights Framework in April 2010. Subsequently, most of the key elements of the Framework at the federal level were terminated or suspended under Liberal-National Coalition governments. For example, in the period leading up to 2022 the federal government cut funding to the Human Rights Education Grants Scheme, backed away from its commitment to simplify and strengthen Commonwealth anti-discrimination laws and stalled implementation of Australia's National Action Plan on Human Rights.

One key Framework component was implemented: the strengthening of parliamentary scrutiny of human rights, through *The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*, which came into operation in 2012. This legislation has:

- required that each new bill introduced into federal Parliament be accompanied by a Statement of Compatibility of the proposed law's compliance with Australia's international human rights obligations in seven different core international treaties
- established a new Parliamentary Joint Committee on Human Rights (PJCHR) to provide greater scrutiny of legislation for compliance with the human rights treaties to which Australia has become party.

Australia also has an independent Human Rights Commission, the AHRC, established by an act of federal Parliament in 1986 to 'protect and promote human rights in Australia and internationally' (**AHRC, 2023a**). The AHRC can conduct an inquiry into an act or practice which may be contrary to human rights and can attempt to resolve the issue through conciliation. The AHRC has been lauded internationally for its ability to investigate and uncover human rights abuses, but it has also been subject to federal government backlash on many of its reports. Legal critics argue:

> *If the AHRC is to act as a crusader for the victims of human rights abuses and enforce the law, the Commission's independence and special status should be recognised and protected. To perform its role most effectively, the AHRC cannot operate in fear of government reprisal. (Allen, 2010)*

Instead, the AHRC has faced the constant risk that the government of the day could punish it with funding cuts or by scaling back its powers for criticising executive actions or supporting litigation against the government. Ministers can also use their powers of appointment to pack the AHRC with political appointments due to the absence of a 'fair, open and merit-based selection process for commissioner positions' (**Napier-Raman, 2021**).

Australia did take several other steps towards the realisation of the ICCPR rights and the promotion of human rights more generally, including:

- acceding to the Optional Protocol to the Convention on the Rights of Persons with Disabilities in August 2009
- ensuring federal protection against discrimination on the new grounds of 'sexual orientation', 'gender identity', 'intersex status' and 'marital and relationship status' through the *Sex Discrimination (Sexual Orientation, Gender Identity, and Intersex Status) Amendment Act 2013 (Cth)*; this brought to an end most of the legal biases under which lesbian, gay, bisexual and transgender people suffered throughout the 20th century
- gradually working towards reform of the Constitution in consultation with First Nations peoples
- committing to ratify the Optional Protocol to the Convention against Torture in 2017.

In addition, a national advisory referendum to allow marriage equality for homosexual people was conducted by post (on a voluntary basis, without compulsory voting) between September and November 2016. After nearly 62 per cent of people voted in support of the proposal, in December 2017 the *Marriage Act 1961* was updated to define marriage as 'the union of two people to the exclusion of all others, voluntarily entered into for life' (see also Chapter 3). This step finally ended a key dimension of legal discrimination against homosexual people.

However, in some other areas, Australia clearly went backwards in the 21st century:

- The Rudd government established the National Congress of Australia's First Peoples as a First Nations representative body in 2010 (**Wikipedia, 2023c**). However, in 2013, the Abbott government withdrew its funding. In 2019, Ken Wyatt, the Minister for Indigenous Australians in the Morrison government, chose not to renew the organisation and instead developed a proposal for an alternative Indigenous Voice (**Australian Government, 2021**). This was supposed to involve 25–35 local and regional Voice bodies working with states and territories and local governments to form consultative groups that would input representatives on a national body. The proposal was criticised for failing to enact recommendations of the Uluru Statement from the Heart (**2017**), which was seen as a more representative view of First Nations Australians **(Synot, 2019)**. Irrespective of one's views on the performance of the National Congress, critics argued that the rights of First Nations Australians should not have become a game of political football between governments.
- Australia continued to maintain a system of mandatory indefinite detention of asylum seekers in Nauru. Its facility on Manus Island, Papua New Guinea (PNG), was shut down after it was found to be unconstitutional by the PNG Supreme Court in 2016.
- The federal government instituted a policy of turning back boats at sea seeking to land visa-less migrants on Australian shores. This arguably violated its non-refoulement obligations under international law, whereby people who seek asylum may not be returned to a country in which there are reasonable grounds to believe they will be subjected to persecution (**United Nations, 2023b**).

- A Royal Commission established in 2016 investigated the protection and detention of children in the Northern Territory following reports of brutality against (mainly First Nations) children held in youth detention (**Royal Commission, 2017**). It found that the requirements of section 150 of the *Youth Justice Act 2005 (NT)* were not complied with. These sections embodied the principles contained in Rule 24 of the UN's 'Rules for the Protection of Juveniles Deprived of Their Liberty'.
- Australian police were given greater powers to lock up Aboriginal and Torres Strait Islander peoples without charge, despite previous scandals **(SBS News, 2021a)**. Prisons in Australia are increasingly overcrowded, with the rate of imprisonment in 2021 double that of 1990. First Nations men are disproportionately affected (**Guardian, 2017b**). In these contexts, a report by Freedom House noted that:

  > *First Nations Australians continue to lag behind other groups in key social and economic indicators; suffer higher rates of incarceration; and report routine mistreatment by police and prison officials. Aboriginal and Torres Strait Islander children are placed in detention at a rate 22 times higher than that of non-Aboriginal children. Additionally, people with disabilities make up almost one-third of the prison population, and face harassment and violence in prisons. (**2022**, section F4)*

- Australia created more criminal offences under counter-terrorism legislation, which significantly restricted rights (**AHRC, 2023b**). And federal ministers also introduced the most extreme metadata retention laws among its allies, requiring all internet metadata to be kept by telecommunications service providers for two years. This can be accessed by law enforcement without a warrant or any independent authorisation (**Gal, 2017**).

Perhaps for these reasons, there was emphatic public support in 2019 to 2021 for creating a document that would set out the rights and responsibilities of Australia's citizens (83 per cent of respondents in one key survey, an increase from 66 per cent in 2019) (**Deem, Brown and Bird, 2021**). In 2021, three-quarters of respondents agreed that a Charter of Human Rights would 'help people and communities to make sure the government does the right thing', compared to 56 per cent two years earlier (**Deem, Brown and Bird, 2021**). The biggest increases in support were from young Australians, suggesting a generational attitudinal shift that promises reform in the long term. There was also increasing public support for a constitutional voice for First Nations Australians (61 per cent) (**Deem, Brown and Bird, 2021**).

The Voice to Parliament: origins

A year after its election in May 2022, the Albanese Labor government brought forward a proposal, developed over a long period in discussions between the centre-left parties and First Nations interest groups, to create a statutory advisory chamber for Parliament called the Indigenous Voice to Parliament. The initiative was a compromise proposal, falling well short of more radical demands, but as a constitutional amendment it would still have had to go through a rigorous progress, requiring approval in a nationwide referendum and passage through both houses of the federal Parliament and the parliaments of all six states. In fact, as Chapter 4 explains in detail, the referendum was lost decisively. In July 2023 the proposal still looked as if it might pass (**Guardian, 2023**). But the leader of the federal opposition (Peter Dutton) came out arguing for a 'No' vote in the Voice referendum – albeit with some controversy within his own party – and by October the proposal also came to grief on criticisms that the powers of

the proposed Voice body were only vaguely formulated, creating a lack of clarity around what a 'Yes' vote would entail (so that 'Don't know' implied a 'No' vote).

This final-stage failure also partly reflected the force of the Australian political tradition in suppressing the case for a 'better' rather than a 'fair' go. As Stan Grant puts it:

> *Australia simply does not accept that Aboriginal people are exceptional. Unlike every other nation with Indigenous peoples, we have no political standing as First Nations. Australia is an assimilationist project, a country without history and Australians want it that way. Migrants leave their histories behind. We don't mind ceremonial difference but not political difference. Put simply: the question of what constitutes Australia is settled. (in* **Grant and Jacobs, 2023***)*

Many activists had already turned their minds to the day after the referendum, when the next campaign would begin in earnest. At this stage, then, perhaps the most useful insight into the hopes that Aboriginal activists have vested in the Voice on behalf of their people and communities can be gleaned by a long quotation from a recent blog by Stan Grant and Jack Jacobs. The blog situates the Voice within the long historical perspective of decolonisation and the unique conditions of Grant's own people, the Wiradjuri nation:

> *With liberal democracy struggling under the weight of its racist and violent history, now is a time for our voices to add more weight to the scales: to demand liberal democracy is responsible, accountable, and fit for the 21st century. Australian liberalism has passed from extermination to exclusion to assimilation but has stopped short of recognition. After two centuries of broken hearts and shattered dreams, it is little wonder hope can appear delusional.*
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> *In Australia, Yorta Yorta man William Cooper sent a petition to King George VI to remind him of his moral duty to a people whose lands were 'expropriated' by the Crown and to whom the Crown denied legal status. He called for black seats in parliament to 'prevent the extinction of the Aboriginal race'.*[1] *And Pearl Gambayani Gibbs helped lead a day of mourning in 1938, proclaiming: 'I am more proud of my Aboriginal blood than of my white blood'. These figures implore us to remember that liberal democracy is but one way of living and being.*
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> *Wiradjuri people have our own philosophy, 'yindyamarra'. It defies simple translation but it grounds respect in all we do. How do we bring respect – yindyamarra – to Australian democracy? Is our liberalism even capable of respecting the sovereignty never ceded of First Nations peoples? Yindyamarra is a Wiradjuri voice; a voice for justice. It calls us to build a world of respect grounded in our knowledge and being in a world worth living in. Yindyamarra is an antidote to Western nihilism and the worst of Western liberalism. Yindyamarra dares this nation to build a democracy worthy of that hope.*
>
> *A constitutionally enshrined First Nations Voice offers its own version of what Noel Pearson has spoken of as radical hope. Proponents of the Voice say it is a pathway to justice – to truth and treaty. Political philosopher Duncan Ivison says it 'prefigures a possible refounding of Australia'. But its modesty – a voice not a veto – risks losing faith with First Nations people. Prime Minister Anthony Albanese has already said it is a voice 'nothing more, nothing less'. He says the parliament will set the composition of the Voice. That begs the question: can*

the parliament meet the urgency of the demands of Aboriginal and Torres Strait Islander peoples? The challenge of the Constitutional Voice is to honour the unending struggle of those Aboriginal and Torres Strait Islander champions who have sought to prise open the locked door of Australian democracy. (**Grant and Jacobs, 2022***;* Note: the original text has been slightly re-ordered here to aid clarity.)

Strengths, weaknesses, opportunities and threats (SWOT) analysis

Current strengths	Current weaknesses
Australia signed the UN's Universal Declaration of Human Rights (UDHR) in 1972 and ratified it in 1980. In theory, therefore, the country has been bound by the UDHR's provisions and subject to cyclical evaluation of its human rights performance.	In practice, Australian governments have repeatedly been able to introduce legislation diluting international rights protection, especially in areas like national security and immigration. As a result, international human rights law has had a very limited impact on Australian public law or policy (**Human Rights Law Centre, 2023**).
A Parliamentary Joint Committee on Human Rights (PJCHR) was set up to scrutinise federal legislation for its compatibility with the seven core international human rights treaties. And the Australian Human Rights Commission (AHRC) was created to advocate for and investigate potential infringements of human rights.	Australia has never adopted the ICCPR into domestic law. Current legislation provides limited legal protection for core civil and political rights due to the absence of bills or charters of rights, or a human rights act. Human rights agencies rely on the executive and Parliament to implement their recommendations and are not genuinely independent from the executive, either financially nor politically.
Human rights agencies at the federal level have had strong investigative powers. Ministers have also had to respond to their reports (**Napier-Raman, 2021**).	In 2024 the PJCHR 'reported on its Inquiry into Australia's Human Rights Framework. By majority, it recommended the federal government introduce an Australian Human Rights Act' (**Chen, Debeljak and Tate, 2024**). Australia has been subject to ongoing international critique by the UNHCR for its human rights record **(Guardian, 2017a**) with regard to the rights of prisoners, First Nations children, the treatment of refugees, domestic violence, transgender rights, the sterilisation of intellectually differently abled women and girls, and the impact of anti-terrorism laws on civil liberties.

Human rights protection has been afforded at the state and territory level by the Australian Capital Territory's (ACT) *Human Rights Act 1998*, Victoria's *Civil Rights Act 2006* and Queensland's *Human Rights Act 2019*.	There has been little political consensus as to the actual substance of human rights guarantees across Commonwealth and state and territory government. The existing framework has been enmeshed in politics (especially between the top two parties) and has remained vulnerable to political manipulation.
Australia's laws require all telecommunications metadata to be kept by internet service providers (ISPs) for two years. This has provided some assurance to citizens or enterprises concerned about harmful social media content.	At the same time, Australia has introduced extreme arrangements for law enforcement agencies to gain access to all metadata kept by telecommunications service providers without a warrant or any independent authorisation.
Future opportunities	**Future threats**
As a signatory to the ICCPR, Australia has been an energetic advocate for extending and improving human rights protection internationally.	Management of the COVID-19 pandemic posed a considerable threat to civil liberties in Australia, one that needed to be carefully monitored and debated in an open and transparent way.
Human rights and civil liberties have enjoyed relatively strong domestic political support, particularly from younger age groups, and better legal protection in certain states (Victoria and Queensland) and territories (ACT). Similar laws might be passed by other states. There has been a strong commitment to rights values and activism in urban Australia.	Human rights have remained contested concepts in Australian political culture, and vulnerable to political attack especially when the rights are those of unpopular minorities such as terrorist suspects, migrants and other disfavoured social groupings. At the time of writing, the place of legal rights protection within Australia's constitutional culture remained uncertain.
With the Russian invasion of Ukraine in 2022, and apparent threats by China against Taiwan, international advocacy for rights protection has increased in salience. An upsurge in international concern at the erosion of civil liberties during the COVID-19 pandemic also created a space for the reassertion of the rights agenda. US President Joe Biden's Summit for Democracy in 2021, for example, identified three challenges for democracy – defending against authoritarianism, addressing and fighting corruption and advancing respect for human rights. If Australian ministers also seek to advance these aims, remedying domestic rights problems may also become more salient.	The mainstreaming of populist anti-immigration policies in electoral politics has created a political climate where rights have been placed at risk in order to placate a still-influential nativist sentiment among some voters.

The remainder of the chapter examines three other rights issues: the treatment of refugees, the rights issues raised by the COVID-19 pandemic experience, and some issues around social rights.

Detention of refugees

Australia has operated policies to process visa-less immigrants outside the country itself, in other Pacific island nations' lands, since 2001. Boats trying to reach Australia are intercepted by the Navy and escorted to offshore processing centres. This policy effectively prevents refugees from claiming asylum, which they would be able to do under international law if they had reached Australian territory. These policies and practices have been consistently criticised by the United Nations, by Australian human rights groups and by refugees themselves. In 2015, the United Nations adjudicated that Australia's system violated the convention against torture, a claim angrily rejected by PM Abbott (**Guardian, 2015**). The International Criminal Court's prosecutor said in 2020 that indefinite detention offshore was 'cruel, inhuman or degrading treatment' and unlawful under international law (**Guardian, 2020**). At least 12 people have died in the island camps (**Guardian, 2018b**), including one who was murdered by guards in a 2014 riot (**Guardian, 2023**). Others have died through medical neglect (**Guardian, 2018c**) and by suicide (**Guardian, 2018a**). Psychiatrists sent to work in the camps described the conditions as 'inherently toxic' (**Guardian, 2014**) and akin to 'torture'. The 'Nauru Files', published by *The Guardian* (**2016**), exposed the Nauru detention centre's own internal reports of systemic violence, rape, sexual abuse, self-harm and child abuse in offshore detention. However, the then long-serving Home Affairs Minister, Peter Dutton, on the right wing of the Liberal Party, strongly defended policies of punitive action towards refugees.

Following the closure of one of the offshore centres by the island government, in May 2021 the Morrison coalition government rushed through legislation that allowed it to lock up refugees in detention centres, potentiality for the rest of their lives. The legislation – one of the first laws passed by former Home Affairs Minister Karen Andrews – continued the legacy of Andrews' predecessor, Peter Dutton (**Human Rights Law Centre, 2021**). The *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021* targeted refugees in immigration detention who cannot return to their home countries because of a risk of persecution or serious harm. While the new laws notionally provided protections against sending people to harm, the legislation actually gave the minister a new power to overturn refugee status (in breach of international law) and it contained no mechanism to prevent the indefinite detention of refugees who cannot be returned. The legislation was an attempt to shield the Morrison government from legal challenges in the courts against the lifetime detention of refugees. In April 2021, the JPCHR raised concerns that the legislation would result in fewer checks on indefinite detention and sought clarification from the minister. No response was published before the legislation was rushed through Parliament.

In January 2012, less than 3 per cent of people in Australian immigration detention had been detained for more than two years. Nine years later that number had grown to almost 30 per cent. The average period that a person was detained after being taken into immigration detention in Australia increased steadily, from less than 100 days in mid-2013 to more than 600 days at the end of 2020. This level has been vastly more than that of comparable liberal democratic jurisdictions, such as the UK and Canada, where people are more often detained for a period of days or weeks. In contrast, it has become common for people to be held in detention in Australia for five years or more. By mid-2023, Australia still had no legal framework for reviewing whether keeping someone in immigration detention is appropriate or necessary, and no limit has applied on how long they can be held. However, only the Greens have argued for a fundamental policy rethink, and the top two parties retain punitive policies on refugees as a disincentive against refugees seeking to reach the country, which they see as an electorally popular stance that cannot be touched.

Rights and the COVID-19 pandemic

The most difficult human rights issues arise where the rights of some groups in the nation can only be effectively maintained and defended by taking actions that restrict some rights of another group in society. Rights clashes of this kind especially occur around free speech, which cannot be an absolute – for example, most liberal democracies ban hate speech online and in public settings. Nonetheless, the ability of Australian citizens to come together and speak out on the issues they care about has been and remains fundamental to the health of democracy. Tireless, sustained protests were needed before Aboriginal and Torres Strait Islander peoples could change discriminatory laws so that they could gain the right to vote. Similarly, LGBTIQ+ people had to campaign ceaselessly to achieve marriage equality, and it took trade unions years to secure the eight-hour workday. People power also continues to play an invaluable role in protecting forests, important wetlands and natural areas of significance.

The right to public protests has long been crucial to people and communities building the public awareness and media visibility needed to secure policy changes, and it will likely always remain so. Peaceful protest has been protected under international human rights law in Australia (**United Nations, 2023a**). The High Court has also ruled that Australia's Constitution protects 'freedom of political communication', because the Constitution is premised on a democratic system of government. This means that laws and government decisions which unduly restrict political communication through limiting protest rights are constitutionally invalid.

The COVID-19 pandemic from 2020 to 2022 posed a serious threat to public health, and so some temporary and proportionate restrictions on gatherings and people's movement were necessary on public health grounds (and will remain so for similar future crises). However, democracy did not stop during the pandemic, and it was vital that crisis was not used as a gateway to impose lasting restrictions on protest rights. Proportionality and reasonableness had to underpin the application of any public health restrictions, which also had to be enforced in a fair way and without the use of excessive force or violence. In several recent cases, Australian courts confirmed that protest remained central to democracy even in a pandemic and that restrictions on protest action may be unlawful if they go beyond what is strictly necessary to protect public health.

For example, in the case of *Commissioner of Police v Gray (2020)*, the organisers of a Black Lives Matter (BLM) protest in Newcastle in July 2020 asked the Supreme Court of New South Wales to authorise the protest after police refused to do so. In deciding to authorise the protest, Justice Adamson said that social media was not an adequate replacement for traditional in-person protest, commenting that 'if this were the case, Ms Gray … would not have gone to the trouble of organising the event'. Given that the protest was to take place at a time when many other activities involving the gathering of people had been allowed, and the first BLM protest was conducted in a peaceful manner with respect paid to social distancing, the judge went on to hold that 'to deprive such groups of the opportunity to demonstrate in an authorised public assembly would inevitably lead to resentment and alienation if the public risk concerns did not warrant it'.

In assessing the lawfulness of planned protest action, courts have also considered steps taken by protesters to comply with the latest public health guidelines. For example, in *Commissioner of Police (NSW) v Gibson* [7] (*Gibson*) in 2020, the NSW Supreme Court acknowledged that a previous BLM protest on 6 June 2020 (which was authorised on appeal in *Bassi v*

Commissioner of Police (NSW) had not led to any transmissions of COVID-19, despite there being at least 10,000 people in attendance. The Court also took into account the variety of safety measures that the organisers had proposed to reduce the risk to public health, even though the judges felt that the organisers lacked mechanisms to enforce them. Ultimately, in this case, the Court of Appeal refused authorisation on public health grounds, but the arguments made highlighted the legal relevance of steps taken by organisers to ensure protests were conducted responsibly in accordance with reasonable public health guidelines. In addition, Chapters 17–24 cover the experience of state and territory government policies responding to protests, including some colourful and at times turbulent demonstrations by anti-lockdown and anti-vaccination protestors. As Commonwealth, state and territory governments across Australia emerged from strict lockdowns and lifted restrictions, they also still had a responsibility to facilitate safe and peaceful protest as an essential component of a healthy democracy.

Issues for future legislation

Australia's COVID-19 pandemic experience of using emergency powers at state and federal levels strongly suggest that a new pandemic law needs to be developed to replace the existing emergency powers scheme to ensure adequate protection of human rights in times of crisis, guided by key human rights principles of necessity, proportionality and least restriction. In time of crisis, democratic transparency, oversight and accountability also need to step up, not shut down, to build and maintain public trust. Human rights obligations suggest that any new pandemic legislation should therefore incorporate nine key safeguards:

- Parliamentary scrutiny of the government's pandemic response: Dedicated cross-party parliamentary oversight committees, across Australia and internationally, have provided much-needed scrutiny and accountability of governments' pandemic responses and their use of emergency powers. Committee processes have given business, civil society and individuals a meaningful opportunity to provide information and feedback to help inform government decision-making. A dedicated parliamentary oversight committee should be established whenever pandemic powers are enlivened.
- Independent review of all public health directions: Extraordinary powers require commensurate oversight and accountability. An independent body or panel, with human rights and public health expertise, should be empowered to independently review and publicly report on the necessity and proportionality of all public health orders made during a pandemic.
- Transparency of human rights compatibility assessments: Timely transparency around the public health and human rights justification for pandemic measures will benefit public policy and public confidence.
- Detention review rights: Any person deprived of their liberty – in a pandemic or otherwise – should be able to seek review of their detention.
- Safe protests need to be allowed: A serious health crisis may also coincide with other profoundly important national and international events, where protests are vital for representing important viewpoints. COVID-19 restrictions in Australia were in force at the height of a global wave of BLM protests on systemic racism and state violence. It should not be an offence to leave home for the purpose of a protest that is otherwise compatible with public health directions. There should be a fair and accessible process for working with authorities to facilitate pandemic-safe protest actions.

- Stronger safeguards around police powers: The granting of discretionary powers to police under emergency response laws carries acute risks for over-policed groups, such as Aboriginal and Torres Strait Islander peoples and communities of colour. There must be transparency and accountability in the exercise of police powers, including the collection, reporting and independent analysis of enforcement data and independent investigation of police complaints. Any additional powers given to police must be removed once the pandemic is over.
- Punitive enforcement measures should be a last resort: Achieving compliance with pandemic rules should focus on community engagement and collaboration, addressing information barriers and providing support to vulnerable groups. The objects of the law should reflect this.
- Reducing the risks of super-spreading events among people held behind bars: Given the health vulnerabilities of children and adults detained behind bars and the super-spreading potential of those closed environments, pandemic legislation should include a trigger that requires steps to be taken to reduce the numbers of people in prisons. For example, making bail more available and granting leave, early release or parole to people whose health is most at risk and who are of low safety risk to the community.
- Protection of individuals' data: While the collection of check-in data through QR codes and other sources have assisted public health officials to improve the efficiency and effectiveness of contact tracing to manage COVID-19 outbreaks, it has long been recognised as important that check-in and contact tracing data is used for that purpose only and is accessible by public health officials only.

In all these respects, rights critics argued that the 2020–2022 period revealed many weaknesses and vulnerabilities. The eclectic arrangements presented potential threats where micro-institutions in spheres far removed from electoral politics might nonetheless stunt democratic processes (**Dunleavy, 2019**). By contrast, defenders of Australia's status quo argue that – with some exceptions – existing laws worked reasonably well, and citizens' trust in government improved despite lockdowns and compulsory vaccination mandates (see Chapter 28).

Social rights

Since 2021 when it began work, most observers have commended the PJCHR for its generally robust reviews of the human rights compatibility of proposed legislation. However, it has also generally been perceived to have had limited effectiveness and influence, because its recommendations are routinely ignored. For example, the PJCHR found that a proposed 'Foreign Fighters' law, which created an effective travel ban by introducing a new offence of entering or remaining in a declared foreign area, would effectively reverse the onus of proof and threaten the right to a fair trial and the presumption of innocence. The bill was passed anyway. Many ministerial responses to the PJCHR's recommendations essentially disagreed with its views, and some repudiated the PJCHR's warnings outright, even when the bills gave the minister extraordinary powers to revoke citizenship and authorise the use of force against detained asylum seekers. Even when bills were amended after a PJCHR report, there was usually no significant executive policy change by ministers and agencies. Government policy

has typically been almost 'set in stone' by the time legislation has been tabled in Parliament, because of the number of approval processes required to reach that stage. And the PJCHR's low media profile, and its relatively weak influence with parliamentarians as a whole, has meant that ministers often feel confident in simply rebutting its arguments and ignoring recommendations wherever they can do so legally.

When the bill for the creation of the PJCHR went before Parliament in 2012, the Shadow Attorney-General at the time, George Brandis QC, called it 'the most important piece of human rights legislation in a quarter of a century' (**Brennan, 2016**). Its purpose was to

> *deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues.*[2]

However, a recent review of its impact observed: 'These goals have not yet been realised. Indeed, the major achievements of the regime are difficult to identify' (**Williams and Reynolds, 2015**, p.506).

Although ministers in the Liberal-National governments from 2013 to 2022 started justifying their policies through a human rights lens, there has been no evidence that this 'culture of justification', as George Williams has termed it, has led to better laws (**Williams, 2016**). On the contrary, Williams argued that there was evidence of delay in the PJCHR reaching its conclusions, resulting in bills being passed prior to the PJCHR's final report being issued, and hence an extraordinarily high number of rights-infringing bills making it into law. Nor has the new rights regime's impact in the public sphere been strong, with the PJCHR receiving an average of just three mentions in the media per month.

The Religious Discrimination Bill 2021

A further human rights row flared up with the Morrison government's introduction of the *Religious Discrimination Bill 2021* (**Wikipedia, 2023b**). The bill sought to afford religious Australians greater freedom of speech than that allowed for non-religious expressions of conscience. In a submission to the human rights committee inquiry into the religious discrimination package, the leading academic expert George Williams argued that prioritising religious speech was 'deeply problematic in a secular nation' and had 'no basis' in the international law the bill purports to implement, which 'does not separate out religious speech for protection' (**Williams, 2023**). The Australian Lawyers Alliance also warned that the bill could be unconstitutional because it could curtail other rights, such as the rights of gay and lesbian staff and students to work and study in religious schools, and risked overriding state laws with more limited religious exemptions to discrimination law, such as Victoria's legislation (**Beck, 2024**). A grouping of moderate MPs within the Liberal Party secured an amendment to the bill that removed a previous protection for religious schools in a 1984 law, which had allowed these establishments to discriminate against LGTB+ people when hiring staff. Following that change, Christian groups influential on the right wing of the Liberal Party withdrew support for the bill and it was quickly dropped by ministers. Yet controversy over religious exemptions to legislation continued into the mid-2020s (**Beck, 2024**).

Labour rights

Trade union membership has been in general decline in Australia since 1986. This has been an important development for Australian democracy, since historically trade unions have formed the largest civil society movement. The proportion of employees who were trade union members fell from 43 per cent to 13 per cent for men and from 35 per cent to 16 per cent for women in 2020 (**ABS, 2023**; see Chapter 7 for a full discussion). There are many reasons for this declining membership, reviewed in Chapter 7, but one important factor has been the enactment of legislation by Liberal-National governments seeking both to 're-balance' industrial relations towards employers and to curtail union influence in Australian politics, which has predominantly been aligned with Labor.

Under the federal *Workplace Relations Act 1996*, passed by the Howard Liberal-National government, union preference and compulsory unionism were made illegal both for employees covered by the federal government system and for those outside but within reach of other Commonwealth powers. Similar legislative changes prohibiting compulsory unionisation at workplaces were enacted by Liberal-National Coalition state governments. The decline in trade union membership generally weakened the bargaining power of trade unions, certainly in the eyes of most Australians. However, the Australian Council of Trade Unions suggested in late 2021 that Australian workers had more bargaining power post lockdowns due to the limited availability of international labour during the pandemic (**Guardian, 2021**). And a careful 2019 analysis suggested that low wages growth was not caused by the declining bargaining power of trade unions (**Bishop and Chan, 2019**; also see Chapter 7).

Conclusion: the rights deficit

The protection of human rights has perhaps been the weakest component of Australia's representative democracy. The history of the Australian nation state since federation, along with its legacy of colonialism, has been a political tradition that emphasises the centrality of a strong executive (see Chapter 1). Australia has been governed through Parliament and not by Parliament, so that as long as the federal PM can secure a majority in the legislature and maintain party discipline, executive government can potentially remain a law unto itself. Historically, attempts to challenge or dilute the authority of the executive through human rights acts or bills and charters of rights have been given short shrift.

Does this record matter? Comparative evidence suggests that once parliamentary bills or charters of rights are established on the statute books, they have tended to become more and more embedded over time in the thinking and operations of the countries involved (Hiebert and Kelly, 2015). The longer they can endure, become known and begin to achieve effects, the more difficult it becomes for their critics or opponents to abolish or replace them. The experience in Britain provides evidence in support of this observation. Successive UK Conservative governments between 2010 and 2024 promised to replace the Labour government's *Human Rights Act* with a 'British Bill of Rights'. However, the complexity of this task, plus the bedrock of support for human rights among younger age groups, intellectual opinion-formers and swathes of civil society organisations meant that multiple replacement efforts foundered. A similar (if still contested and perilous) level of *de facto* 'weak entrenchment' might be feasible in Australia also.

It is also important to note that even in countries with bills of rights, the rights of minority groups remain vulnerable in times of crisis. Moreover, effective human rights protection also requires the equitable provision of legal aid to ensure that all citizens, irrespective of their social income, are able to practise those rights. These factors have undermined key premises underpinning the causal theory of human rights reform, namely that convention rights should be protected and enforced free from governmental constraints.

Judicial decisions

Commissioner of Police v Gray [2020] NSWSC 867, [39]-[40], [66].

Notes

1 For more on Cooper, see **National Museum of Australia (2022)**.

2 Commonwealth, Parliamentary Debates, House of Representatives, 30 September 2010, 272 (Robert McClelland).

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