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Human Rights and Public Service: Improving Processes, Delivering Better Outcomes

**Submission to the
Australian Public Service Commission:
Review of the APS Values and Code of Conduct**

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the enhanced legal protection of human rights at the local, national, regional and international levels; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction and Recommendations

1. The Australian Government has tasked the Australian Public Service Commission to revise the Australian Public Service Values (**APS Values**) to a 'smaller set of core values that are meaningful, memorable and effective in driving change'. Among other considerations, this revision should seek to 'affirm the importance of including consideration of human rights issues in policy making'.¹
2. This submission sets out the reasons for which the APS Values and Code of Conduct should be revised to require that the APS '**actively respects, protects, promotes and fulfils human rights**', and the other educational and cultural measures and strategies that would support the entrenchment and realization of this value.
3. In summary, the Human Rights Law Resource Centre recommends that:
 - (a) the APS Values and Code of Conduct should be revised to require that the APS 'actively respects, protects, promotes and fulfils human rights';
 - (b) for the purpose of the APS Values and Code of Conduct, 'human rights' should be defined to include *all* of the human rights and freedoms enshrined in *all* of the core international human rights treaties to which Australia is or may become a party;
 - (c) the scope, content and application of 'human rights' within the APS Values should be understood and informed by reference to 'international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals';
 - (d) the revision of any APS Values to incorporate consideration of human rights should be accompanied by a comprehensive, integrated, well-resourced, targeted and ongoing human rights education program for the APS and related entities;
 - (e) federal departments and agencies should develop human rights action plans and report on human rights compliance in their annual reports; and
 - (f) the APS should develop a range of other mechanisms and measures, such as those adopted by public authorities in Victoria and identified by the Victorian Equal Opportunity and Human Rights Commission as being useful and effective in the development and entrenchment of a human rights-based approach to public service.

¹ Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (March 2010) 46.

2. How to Include Human Rights as an APS Value

4. As discussed above, the HRLRC considers that the APS Values and Code of Conduct should be revised to require that the APS 'actively respects, protects, promotes and fulfils human rights'.
5. This formulation is similar to that adopted under the *Public Administration Act 2004* (Vic) which, pursuant to consequential amendments made by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), provides at section 7(1)(g) that 'public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—
 - (a) making decisions and providing advice consistent with human rights; and
 - (b) actively implementing, promoting and supporting human rights'.
6. The proposed formulation is also consistent with the typology of obligations identified by international human rights law and jurisprudence, being obligations to respect, protect and fulfil human rights.²

3. Why Include Human Rights as an APS Value?

3.1 The *Need* to Include Human Rights as an APS Value

7. The 2009 Report of the National Human Rights Consultation made a number of findings relevant to the revision of the APS Values and Code of Conduct and confirming the need to ensure that the APS actively respects, protects, promotes and fulfils human rights.
8. First, human rights matter deeply to Australians. They resonate with Australian democratic values, the rule of law and our sense of a fair go.³
9. Second, while Australia has strong democratic and legal institutions, they do not provide comprehensive or even adequate protection of human rights. The patchwork quilt of human rights protection is missing pieces and these 'inadequacies are felt most keenly by the marginalised and the vulnerable'.⁴

² See, eg, UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1999/5 (1995).

³ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 96.

⁴ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 127-8.

10. Third, human rights are not enjoyed fully or equally by all Australians, including people experiencing homelessness, people with mental illness, Aboriginal Australians, asylum seekers and people with disability. There is a strong view that 'we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out'.⁵
11. Fourth, 'many of the human rights difficulties that do arise occur when ordinary members of the public have contact with public sector decision makers and service providers'.⁶ As the National Human Rights Consultation Committee stated:⁷
- Be it the Centrelink office, a police station, an aged care facility, a hospital outpatients department or an immigration centre, the public sector has an important role to play in safeguarding human rights, and this is not always acknowledged.
12. Fifth, there is widespread support for:
- (a) the notion that the public service has a critical role to play in promoting and protecting human rights;⁸
 - (b) 'greater consideration of human rights...in the development of legislation and policy';⁹ and
 - (c) making human rights central to the design and delivery of public services.¹⁰
13. The Human Rights Consultation Committee Report confirmed that there is a need for a better understanding of and commitment to human rights within government.¹¹ The Committee found that 'instilling a human rights culture in the federal public sector is integral to better protection and promotion of human rights in Australia'.¹²

3.2 The Value of Including Human Rights as an APS Value

14. In addition to identifying a strong *need* to include the active promotion and protection of human rights as a core APS Value, the Report of the National Human Rights Consultation also

⁵ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 343-344.

⁶ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 143.

⁷ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 143.

⁸ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 143.

⁹ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 174.

¹⁰ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 143-4.

¹¹ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 149-151, 175, 355-356.

¹² NHRC, *Report of the National Human Rights Consultation Committee* (2009) 186.

identified significant *benefits and values* that would flow from doing so. The Report concluded that:¹³

It would offer a number of advantages, among them better identification and resolution of human rights considerations in the development and implementation of policy and legislation; incorporation of human rights considerations in administrative decision-making; and an approach to service delivery that better accommodates and responds to human rights concerns among the community.

15. These benefits are discussed further below.

(a) Enshrining universal Australian values

16. As identified above, the entrenchment of the promotion and protection of human rights as a core APS Value would be consistent with fundamental, democratic Australian values, such as freedom, dignity, equality, the rule of law and our sense of a fair go.¹⁴ This entrenchment could have positive educational and normative influences on the public service and the broader community.

(b) Improving law-making and government policy

17. The entrenchment of the promotion and protection of human rights as a core APS Value could improve the quality of law and policy by integrating relevant human rights considerations into all law-making and policy development processes.¹⁵ As former High Court Chief Justice Brennan has stated:¹⁶

The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.

18. Countering this, a human rights-based approach can promote transparency and accountability in government. There is strong evidence that human rights can provide a framework for the development of more effective, efficient and holistic public and social policy.

(c) Improving public service design

19. A human rights-based approach can improve public service design, promoting consultation, participation, and integration. As the Victorian Equal Opportunity and Human Rights

¹³ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 186.

¹⁴ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 269.

¹⁵ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 272-275.

¹⁶ Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre seminar, Melbourne, 12 March 2008), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/sir-gerard-brennan/>.

Commission concluded in its 2009 Report on the Victorian Charter of Human Rights and Responsibilities:¹⁷

A human rights-based approach requires equal consideration of *what* government is doing or is going to do, and *how* it intends to do it. The *what* (sometimes described as human rights programming) involves determining actions based on an understanding that when it acts, government is engaging with the rights of the community (or relevant segments of the community) and bears an obligation to protect, promote and fulfil those rights. With regard to the *how*, a human rights-based approach requires an appreciation of the importance of strategy, process and methodology – recognizing that these exert significant influence on the ultimate success, utility and acceptance (including the perceived legitimacy) of government initiatives.

20. A human rights-based approach can also promote public service innovation and continuous improvement. According to the Victorian Equal Opportunity and Human Rights Commission:¹⁸

A comprehensive human rights-based approach requires not only that new policies and services are designed and delivered with human rights issues at the forefront but that existing policies and services are constantly reviewed to ensure they reflect the continually changing understanding and application of human rights. As the Commission has observed repeatedly, this is not simply about meeting compliance obligations; it is about exploiting the opportunities afforded by a human rights-based approach to promote real improvements in the development of policy and delivery of services to the Victorian community.

(d) Improving public service delivery and outcomes

21. In addition to improving public service design, a human rights-based approach can also improve public service delivery and outcomes, changing the approach of both the users and providers of services,¹⁹ encouraging a more client-focused, responsive and individualised approach to public services, and facilitating a shift away from inflexible or blanket policies and practices.²⁰

¹⁷ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 55.

¹⁸ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 44.

¹⁹ A UK Ministry of Justice research project even identifies the business case for a human rights approach to government: See Constitution and Strategy Directorates, *Human Rights Insight Project*, UK Ministry of Justice Research Series 1/08 (January 2008), 12-13.

²⁰ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 273-274. See also UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

22. Further, evidence demonstrates that human rights norms can provide strong frameworks for ethical and effective public service policies and practices.²¹ As the Victorian Equal Opportunity and Human Rights Commission observed in its 2009 Report:²²

there is a growing body of international evidence demonstrating that policies and services which champion and reflect a commitment to human rights are not only indicative of a just, inclusive society; they are also more effective in attaining their objectives and producing beneficial outcomes. This is reinforced by observations from statutory authorities. For example, Victoria's Health Services Commissioner noted in her report to the Commission (based on the many complaints handled by her office) that 'respecting a patient's human rights is a way of making health care more patient-focused or patient-centred as well as improving safety and quality'.

(e) Protecting marginalised Australians by addressing disadvantage

23. Finally, there is strong evidence that a human rights culture, underpinned by strong human rights standards, laws and institutions, can promote human dignity and address disadvantage by:²³
- (a) empowering marginalised and vulnerable individuals, communities and groups;
 - (b) challenging 'poor treatment' and thereby 'improving the quality of life' of marginalised and disadvantaged individuals and groups; and
 - (c) assisting in the development of more effective social inclusion and poverty reduction strategies.

4. Making Human Rights an *Effective* APS Value

4.1 Defining and Understanding 'Human Rights'

24. Comprehensive recognition and protection of rights is vital because human rights are interdependent and indivisible. The enjoyment of many rights is contingent on, and contributes to, the enjoyment and reinforcement of other human rights.²⁴

²¹ Victorian Equal Opportunity and Human Rights Commission *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 16.

²² Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 42.

²³ See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007) 5; UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006); Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3.

25. For this reason, it is appropriate and imperative that, for the purpose of the APS Values and Code of Conduct, 'human rights' be defined to include *all* of the human rights and freedoms enshrined in *all* of the core international human rights treaties to which Australia is or may become a party.²⁵
26. The definition of human rights in this way would be consistent with the definition of 'human rights' adopted in section 3(1) of the Human Rights (Parliamentary Scrutiny) Bill 2010. This Bill enacts key elements of Australia's new 'Human Rights Framework' and, when passed, will:
- (a) introduce a requirement that each new Bill introduced to parliament be accompanied by a Statement of Compatibility which includes an 'assessment of whether the Bill is compatible with human rights'.²⁶ This requirement also extends to certain legislative instruments; and²⁷
 - (b) establish a Joint Parliamentary Committee on Human Rights with a mandate to:
 - (i) 'examine' Bills, legislative instruments and existing Acts 'for compatibility with human rights and to report to both Houses of Parliament on that issue',²⁸ and
 - (ii) 'inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of Parliament on that matter'.²⁹
27. The HRLRC also considers that the scope, content and application of 'human rights' within the APS Values should be understood and informed by reference to 'international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals'.³⁰ This would encourage and enable both policy-makers and service providers to

²⁴ United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993). See also Office of the High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3.

²⁵ Namely, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of all Forms of Discrimination against Women*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*.

²⁶ Human Rights (Parliamentary Scrutiny) Bill 2010, s 8.

²⁷ Human Rights (Parliamentary Scrutiny) Bill 2010, s 9.

²⁸ Human Rights (Parliamentary Scrutiny) Bill 2010, ss 7(a) and (b).

²⁹ Human Rights (Parliamentary Scrutiny) Bill 2010, ss 7(c).

³⁰ Section 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is expressed in similar terms.

draw on extensive and illuminating international and comparative human rights jurisprudence, policy and practice.³¹

4.2 Educating the APS About ‘Human Rights’

28. As recognised by the National Human Rights Consultation Committee, the development of a human rights culture in the public sector and broader community must be underpinned by a comprehensive programme of human rights education. Reflecting this, the Committee recommended that ‘education be the highest priority for improving and promoting human rights in Australia’.³²
29. In order to be effective, the revision of any APS Values to incorporate consideration of human rights should be accompanied by a comprehensive, integrated, well-resourced, targeted and ongoing human rights education program for the APS and related entities. As the Victorian Human Rights and Equal Opportunity Commission stated in relation to the effective implementation, operationalisation and entrenchment of the Victorian Charter:³³

As with any initiative intended to foster cultural change, the success of the Charter and the capacity of public authorities to meet their new human rights obligations is heavily reliant upon the availability of clear, accessible and consistent messages, information and resources for the full range of key audiences.

30. Human rights education needs to be both consistent and ‘whole of government’ on the one hand, and localised, targeted and grounded on the other. The Commission identified the need for three inter-connected strategies in this regard.³⁴
- (a) first, ‘human rights education and training programs’ for all staff, with a particular focus on the human rights dimensions of ‘day-to-day operations’ and the integration of human rights in all aspects of decision-making and conduct;

³¹ For a discussion of the benefits of drawing on such jurisprudence, see *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [201] (per Bell J). This direction would also be consistent with and complement the principle that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels: see *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 421E; see also *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 433 [25] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

³² NHRC, *Report of the National Human Rights Consultation Committee* (2009) 151.

³³ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 19.

³⁴ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 19.

- (b) second, 'communication and general awareness raising' about human rights to ensure a 'broad, baseline awareness' of human rights among public service providers and users; and
- (c) third, support to non-government 'entities that perform public functions on behalf of government' to ensure that human rights inform all aspects of public service delivery, regardless of the service delivery model or agency.

4.3 Embedding 'Human Rights' in the APS

31. Ultimately, the purpose of the revision of the APS Values to include consideration of human rights is the embedding of a human rights-based approach and culture in all aspects of APS decision-making, program development and service delivery; it is the integration of 'human rights awareness and principles into the day-to-day operations of public authorities and the various entities that work alongside them'.³⁵
32. Consistently with this, the National Human Rights Consultation Committee recommended that 'the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports'.³⁶ The Committee expressed support for 'measures that involve greater human rights planning and compliance reporting by the federal public sector' and considered that 'periodic human rights audits of specific agencies and their practices would provide a useful measure for ensuring greater transparency and public accountability'.³⁷
33. Similarly, the Victorian Equal Opportunity and Human Rights Commission has stated that:³⁸
- activities in two key areas can indicate progress in the public sector's uptake of [human rights] tenets: the inclusion of human rights principles and obligations in agencies' short- and long-term planning processes, and the adequacy of monitoring and audit mechanisms to ensure that policies and programs translate into practice.
34. The HRLRC supports this view. If public authorities do not have adequate planning, auditing and reporting procedures, the implementation and incorporation of human rights values and requirements into policy development and service delivery stalls.

³⁵ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 19.

³⁶ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 187.

³⁷ NHRC, *Report of the National Human Rights Consultation Committee* (2009) 184.

³⁸ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 56.

35. The HRLRC also commends to the APSC a range of other mechanisms and measures adopted by public authorities in Victoria and identified by the Victorian Commission as being useful and effective in the development and entrenchment of a human rights-based approach to public service, including:³⁹
- (a) incorporation of human rights considerations, values, aims and objectives in business and strategic plans;
 - (b) the development of specific human rights complaint and grievance mechanisms;
 - (c) the appointment of 'human rights ambassadors' or 'portfolio holders' to 'disseminate information and promote human rights' across the agency;
 - (d) human rights driven and focused reviews of public service policies and practice;
 - (e) the development and use of human rights assessment tools for planning, monitoring and auditing purposes;
 - (f) the consideration of human rights compliance and promotion as an aspect of performance management and assessment; and
 - (g) taking account of human rights in procurement, tenders and contracting processes.

³⁹ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010) 55-68.