A HUMAN RIGHTS ACT FOR ALL AUSTRALIANS

National Human Rights Consultation

Submission on the protection and promotion of human rights in Australia

May 2009

Human Rights Law Resource Centre Ltd

Level 17, 461 Bourke Street

Melbourne VIC 3000

www.hrlrc.org.au

Emily Howie, Rachel Ball, Philip Lynch and Ben Schokman
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
F: + 61 3 8636 4455
E: phil.lynch@hrlrc.org.au
W: www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**), Australia's first specialist human rights legal service, is an independent community legal centre.

The HRLRC aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. The HRLRC also aims to support and 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 by undertaking and supporting the provision of legal services, litigation, education, training, research, policy analysis and advocacy regarding human rights.

The HRLRC works in four priority areas:

(a) the development, operation and entrenchment of human rights legislation at a national, state and territory level;

(b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;

(c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the rights to adequate housing and health care; and

(d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

Contents

Acronyms

Australian Human Rights Commission	AHRC
Committee on Economic, Social and Cultural Rights	CESCR
Community Legal Centre	CLC
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW
Convention on the Elimination of Discrimination in Education	CEDE
Convention on the Protection of the Rights of all Migrant Workers and Members of their Families	CMW
Convention on the Rights of the Child	CROC
Disability Discrimination Act	DDA
European Convention on Human Rights	ECHR
Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
Office of the High Commissioner for Human Rights	OHCHR
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
Joint Parliamentary Committee on Human Rights (UK)	JPCHR
National Association of Community Legal Centres	NACLC
Non-Government Organisation	NGO
Organisation for Economic Co-operation and Development	OECD
Public Interest Law Clearing House (Vic)	PILCH
Universal Declaration of Human Rights	UDHR
Victorian Equal Opportunity & Human Rights Commission	VEOHRC

1. Introduction

1.1 Scope of this Submission

1. This submission of the Human Rights Law Resource Centre (**HRLRC**) is one of two submissions to the National Human Rights Consultation.

2. This submission considers the current protection of human rights in Australia and legislative measures to strengthen the protection and promotion of human rights in Australia, including the enactment of a comprehensive Human Rights Act.

3. The submission is divided into sections corresponding to each to the 'key questions' raised in the Committee's Terms of Reference, namely:

   (a) which human rights (and corresponding responsibilities) should be protected and promoted?;

   (b) are these human rights currently sufficiently protected and promoted?; and

   (c) how could Australia better protect and promote human rights?

4. The HRLRC's core recommendation in response to these questions is that Australia should enact a Human Rights Act which protects and promotes all human rights. Recommendations around the scope and content of the Human Rights Act are contained in section three of this submission.

5. However, the HRLRC does not consider that the introduction of a Human Rights Act, of itself, would sufficiently ensure full and proper human rights protection in Australia. Any legislative change must be accompanied by non-legislative initiatives and measures that promote the realisation of peoples' rights, such as education, monitoring and reporting and the proper resourcing of NGOs. These non-legislative matters are of fundamental importance and are addressed separately in the HRLRC's submission of April 2009 entitled *Educate, Engage, Empower: Submission on Measures and Initiatives to Promote and Protect Human Rights*.

2. Executive Summary

2.1 Which human rights should be protected and promoted?

6. All of Australia's human rights obligations under international human rights law should be incorporated and protected under Australia's domestic law. Australian law should enshrine the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community.

7. Comprehensive protection of rights is vital because human rights are interdependent, indivisible and mutually reinforcing. Piecemeal recognition of human rights in inconsistent with basic human rights principles and threatens their effective implementation.

2.2 Are these human rights currently sufficiently protected and promoted?

8. Human rights are not given comprehensive and consistent legal protection in Australia. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws. There are numerous examples of violations that fall through the gaps in the current regime. The state of human rights for many disadvantaged groups in Australia remains precarious and vulnerable.

2.3 How Could Australia better protect human rights?

(a) The Commonwealth Government should introduce a Human Rights Act for Australia

9. A Human Rights Act would ensure that the human rights of all persons in Australia are protected. In addition to enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection, a Human Rights Act would provide important social, economic and cultural benefits, including:

   (a) improving law-making and government policy;

   (b) improving public service delivery and outcomes;

   (c) protecting marginalised Australians by addressing disadvantage;

   (d) contributing towards the establishment of a human rights culture;

   (e) creating and adding economic value;

   (f) more fully implementing Australia's international obligations;

   (g) promoting Australia's reputation as a good international citizen and regional and global human rights leader; and

   (h) 'bringing rights home' by enabling complaints to be heard and determined domestically rather than requiring that complaints be heard in New York or Geneva.

(b) Whose rights should be protected?

10. A Human Rights Act should protect all human persons in Australian territory and subject to its jurisdiction. It should not protect corporations.

(c) What would a Human Rights Act look like?

11. A Human Rights Act should be an Act of the Commonwealth parliament, aimed at establishing a dialogue between the three arms of government about human rights. This is referred to as a legislative/dialogical model.

12. A Human Rights Act should protect all the rights derived from the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**).[1]

13. Recognising that a balance is required between protecting individual rights on the one hand and collective community values on the other, a Human Rights Act should specify which rights are absolute and which can be limited.

14. Under a Human Rights Act, the parliament, public authorities and the courts would all have obligations to protect and respect human rights.

15. A Human Rights Act would retain parliamentary sovereignty. Parliament would be affected in the following ways:

    (a) a Statement of Compatibility would need to be tabled by any parliamentarian introducing a new Bill, describing whether and how the Bill is compatible with human rights;

    (b) a specialist Joint Committee on Human Rights should be established to, among other things, scrutinise all Bills for compatibility with protected rights; and

    (c) if the courts made a Declaration of Incompatibility (discussed below), the responsible Minister would prepare a written response for parliament.

16. Public authorities would be affected in the following ways:

    (a) all Commonwealth and state public authorities should be bound, including where they are acting outside of Australia. This should include government departments, statutory authorities, police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the Commonwealth, when they are performing those public functions; and

    (b) all public authorities would be required to:

        (i) act compatibly with human rights (a substantive obligation); and

[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

(ii) give proper consideration to human rights when making decisions and implementing legislation (a procedural obligation).

17. Courts would be required to:

(a) interpret all Commonwealth legislation in a manner compatible with human rights;

(b) have regard to international and comparative human rights jurisprudence when interpreting and applying laws that impact on human rights; and

(c) issue a Declaration of Incompatibility where it is not possible for a law to be interpreted consistently with human rights. Courts would not be able to invalidate laws passed by parliament that breach human rights.

18. For breaches of all human rights protected by a Human Rights Act, a free-standing cause of action should be provided. However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.

19. A full range of judicial and non-judicial remedies should be available for breaches of all civil, political, economic, social and cultural rights, including all such remedies as are just and appropriate.

Section 1: Which human rights and responsibilities should be protected?

1. Introduction

20. This section considers 'which human rights (including corresponding responsibilities) should be protected and promoted?' The question is answered with reference to:

    (a) the conceptual and legal foundations of human rights; and

    (b) Australia's existing obligations under international human rights law.

21. The HRLRC considers that all of Australia's human rights obligations under international law should be protected in Australian domestic law. International human rights law obligations are contained in the ICCPR and ICESCR and their content and scope is clarified and expanded upon in various other international human rights treaties, discussed below.

22. Comprehensive protection of rights is vital because human rights are interdependent. Piecemeal recognition of human rights in inconsistent with basic human rights principles and threatens their effective implementation. Effective protection of all rights is necessary to ensure the conditions necessary for all people to live with dignity and participate fully and equally in the community.

23. In addition, full and robust legislative human rights protection would allow Australia to lay claim to its long and distinguished legacy of leadership in the field of human rights and secure Australia's role as a regional and global leader in the protection and promotion of human rights.

24. The historical and legal foundations of human rights law are examined in parts two and three of this section, respectively. Part four examines the content of Australia's human rights obligations and addresses the question of whether a distinction should be made between economic, social and cultural rights and civil and political rights in the context of an Australian Human Rights Act.

2. What are human rights?

25. Human rights derive from the inherent dignity of people. According to the *Universal Declaration of Human Rights* ("**UDHR**" or "**Declaration**"), all people are free and equal and have fundamental human rights. These rights enshrine the civil, political, economic, social and cultural minimum standards that must be respected, protected and fulfilled to enable people to live with dignity. They apply irrespective of class, gender, race, age, religion, opinion or social status. Human rights are indivisible and interdependent, representing a comprehensive scheme of core minimum standards that conceptually should not – and practically cannot – exist in isolation.

2.1 The history of human rights

26. The notion of human rights stemmed from philosophers of the seventeenth and eighteenth centuries. Human rights were incorporated into some early domestic laws, such as the English Bill of Rights of 1689 and the United States Declaration of Independence and Bill of Rights of 1776. The idea of human rights persisted and developed, albeit mainly in domestic contexts rather than at an international level.

27. The atrocities of World War II escalated the concept of human rights to the international stage. Following World War II, States committed themselves to establishing the United Nations ("**UN**"), with the primary goal of bolstering international peace and preventing conflict. UN Member States further pledged to promote and respect human rights. UN Member States referenced human rights in the UN Charter, and went on to define those rights in the UDHR.

28. The UDHR was the first global expression of rights to which all humans are inherently entitled. UN Member States agreed that the protection of human rights is the "foundation of freedom, justice and peace in the world". UN Member States recognised that human rights violations were inconsistent with their aim to promote freedom, justice and peace. Accordingly, the purpose of the UDHR was to guarantee basic, universally acknowledged, human rights.

29. Following a process of drafting and consultation, the UN Member States unanimously endorsed the UDHR in 1948. Australia played a key role in the drafting and adoption of the UDHR, largely through Dr H V Evatt (Australia's Minister for External Affairs and leader of the Australian delegation to the UN). Dr Evatt went on to preside over the adoption and proclamation of the UDHR as President of the Third Session of the United Nations on 21 September 1948.

30. The UDHR is a Declaration and, as such, is non-binding. Many UN Member States went on to develop and sign the ICCPR and the ICESCR, both of which are binding. Taken together, these two treaties contain the human rights in the UDHR. Collectively, the UDHR, ICCPR and ICESCR are known as the "International Bill of Rights".

3. Sources of international human rights law

31. The sources of international law are enumerated in article 38(1) of the *Statute of the International Court of Justice* (**ICJ Statute**).[2] They include:

(a) treaties;

(b) customary international law;

(c) the general principles of law recognised by civilised nations; and

(d) judicial decisions and the teachings of the most qualified publicists.

32. The primary sources of international human rights law are treaties and customary law. These sources are discussed briefly below.

3.1 International human rights treaties

33. Treaties, or international conventions, are the most commonly referred to source of international law. A treaty is an instrument which imposes binding obligations on the states that become a party to it.[3] States may withdraw from a treaty if they no longer wish to be bound by the terms of the treaty.

34. Australia has ratified and accepted obligations under all of the primary international human rights treaties, including the two main human rights treaties, being the ICCPR and the ICESCR.

35. In addition to these core covenants, Australia is party to five of the six the international treaties created to ensure the specific recognition and protection of particular groups and particular human rights, namely the:

(a) *International Convention on the Elimination of all Forms of Racial Discrimination* (**CERD**);[4]

(b) *Convention on the Elimination of all Forms of Discrimination against Women* (**CEDAW**);[5]

(c) *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**);[6]

(d) *Convention on the Rights of the Child* (**CRC**);[7]

---

[2] Available at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

[3] See art 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (**VCLT**).

[4] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[5] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

[6] Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

(e) *Convention on the Rights of Persons with Disabilities* (**CRPD**).[8]

36. Australia is not yet party to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[9]

37. As stated above, international human rights instruments are interdependent, inter-related and mutually re-enforcing. No rights can be fully enjoyed in isolation, but depend on the enjoyment of all other rights. It is the stated intention of the UN that they be considered together when determining a state's human rights responsibilities.[10]

3.2 Customary international law

38. Australia also has human rights obligations arising under customary international law.[11] Customary international law is described as 'a general practice accepted as law' and is made up of norms which are supported by consistent state practice along with *opinio juris* (state belief that compliance is obligatory).[12]

39. Many of the human rights obligations contained in the international treaties listed above are also part of customary law. A conservative list of international customary law relevant to human rights is contained in the Restatement (Third) of Foreign Relations Law of the United States and includes:

(a) the murder or causing the disappearance of individuals;

(b) torture or other cruel, inhuman or degrading treatment or punishment;

(c) prolonged arbitrary detention;

(d) systemic racial discrimination; and

(e) consistent patterns of gross violations of international human rights.[13]

---

[7] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[8] Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

[9] Opened for signature 18 December 1990, 2220 U.N.T.S. 93 (entered into force 1 July 2003).

[10] OHCHR, *Fact Sheet No 30: The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, 20–1.

[11] 'The vast majority of States and authoritative writers would now recognize that the fundamental principles of human rights form part of customary or general international law, although they would not necessarily agree on the fundamental principles': Ian Brownlie, *Principles of Public International Law* (6th ed, 2003), 562.

[12] *Statute of the International Court of Justice,* art 38(1)(b); 'It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*)': Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 857 *International Review of the Red Cross* 175, 178; S Blay, R Piotrowicz and M Tsamenyi (eds.), *Public International Law: An Australian Perspective* (2005) 55.

[13] 'Restatement (Third) of Foreign Relations Law of the United States' (1986) (**the Restatement**) s 702.

40. This list is not exhaustive and according to some authors should be expanded to include all of the rights listed in the UDHR.[14]

41. As the full range of Australia's human rights obligations are reflected in the treaties to which it is a party, treaty law will be used as the point of reference in our consideration of which rights Australia is obliged to protect and promote.

[14] For a discussion of the different views on the customary status of human rights norms see Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, General Principles (1992) 12 *Australia Year Book of International Law* 82.

4. What are Australia's human rights obligations?

4.1 Introduction

42. As discussed above, Australia already has obligations under international law in relation to each of the human rights treaties to which it is a party. The content of particular rights is described in more detail in section 2, part 5 (on the gaps in human rights protections).

4.2 Human rights obligations in a federal system

43. Article 50 of the ICCPR and Article 28 of the ICESCR state that human rights protections extend to all parts of federal States without limitation or exception. This requires the Australian Government to guarantee that the states and territories of Australia comply with the Covenant.

44. Human rights violations can still be established and recognised where the actions or laws in questions are those of a state or territory.[15] In such cases, the violation in question is attributed under international law to the State party (being the party to the treaty).

45. Accordingly, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at federal, state and territory level, must respect, protect and fulfil the human rights afforded by the ICCPR and ICESCR.[16]

4.3 Nature of obligations

46. International human rights law is often described as imposing three levels or types of obligations: obligations to respect, protect and fulfill.[17] Asbjørn Eide, who acted as the UN's Special Rapporteur for Food during the early 1980s, described the obligations as follows:

(a) the obligation to 'respect' requires states to abstain from violating a right;

(b) the obligation to 'protect' requires states to prevent third parties from violating that right; and

(c) the obligation to 'fulfill' requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.[18]

---

[15] See, eg, the communication to the HRC in *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

[16] HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004). Article 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[17] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd ed, 1996) 52.

[18] Asbjørn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, UN Doc E/CN.4/Sub.2/1987/23 (1987) [67]–[69].

47. Today a number of UN human rights bodies have incorporated the tripartite typology into their language. For example, in relation to the right to adequate food, the Committee on Economic, Social and Cultural Rights (**CESCR**), has stated that: [19]

> The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect to protect and to fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, where an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by means at their disposal, States have an obligation to fulfill (provide) that right directly …

48. The Human Rights Committee, while not expressly using the language of the tripartite typology, has also remarked that states parties have more than a mere obligation to 'respect' the right to life guaranteed in the ICCPR:[20]

> The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life…
>
> The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

4.4 Which rights should be protected?

49. As a signatory to the main international human rights treaties, Australia has an obligation to implement the full range of internationally recognised rights.

(a) International Covenant on Civil an Political Rights

50. Australia signed the ICCPR in 1972 and ratified on 13 August 1980. The ICCPR enshrines almost all of the civil and political rights contained in the UDHR, such as the right to life, freedom from arbitrary detention and freedom of expression.

51. Under art 2(2) of the ICCPR, states parties undertake to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ICCPR.

---

[19] CESCR, *General Comment 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1999/5 (1995) (citations omitted) available at http://www2.ohchr.org/english/bodies/cescr/comments.htm.

[20] HRC, *General Comment 6: The right to Life*, 16th sess (1982) available at http://www2.ohchr.org/english/bodies/hrc/comments.htm.

52. A Human Rights Act should enshrine all the civil and political rights set out in the ICCPR. The ICCPR sets out the fundamental civil and political rights that derive from the inherent dignity of human beings and are the basis of freedom, justice and peace.

53. The rights enshrined by the ICCPR include:

(a) the right to legal recourse when rights have been violated, even if the violator was acting in an official capacity;

(b) the right to self-determination;

(c) the prohibition against retrospective punishment and penalty;

(d) the prohibition against double jeopardy;

(e) the right to equality of men and women in the enjoyment of civil and political rights;

(f) the right to a fair hearing;

(g) the right to presumption of innocence until proven guilty;

(h) the right to appeal a conviction;

(i) the right to life;

(j) freedom from inhuman or degrading treatment or punishment;

(k) the right to humane treatment in detention;

(l) freedom from slavery and servitude;

(m) the right to liberty and security of the person;

(n) freedom from arbitrary arrest or detention;

(o) freedom of movement;

(p) the right not to be imprisoned for an inability to fulfil a contractual obligation;

(q) the right to be recognised as a person before the law;

(r) the right to privacy and protection of that right by law;

(s) freedom of thought, conscience, and religion;

(t) freedom of opinion and expression;

(u) freedom of assembly and association; and

(v) the right to equality before the law and equal protection.

54. The ICCPR also provides for the right to marry and to found a family. It guarantees the rights of children, including their rights to registration, nationality and name, and also prohibits discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It restricts the death sentence to the most serious crimes and forbids it for people under 18 years of age and pregnant women. It also

guarantees condemned people the right to seek pardon or appeal for commutation to a lesser penalty.

55. It is common for some civil and political rights to be modified when they are included in a domestic human rights instrument, so that they match contemporary aspirations of the domestic community and only contain those rights that have broad community acceptance. For example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) does not contain a right to self-determination.[21]

(b) International Covenant on Economic, Social and Cultural Rights

56. The ICESCR sets out the basic economic, social, and cultural rights necessary to live with human dignity. The rights enshrined by the ICESCR include:

(a) the right to an adequate standard of living, including adequate housing;

(b) the right to work, including the right to gain one's living at work that is freely chosen and accepted;

(c) just conditions of work and wages sufficient to support a minimum standard of living;

(d) the right to equal pay for equal work and equal opportunity for advancement;

(e) the right to form trade unions and the right to strike;

(f) the right to adequate food, water and sanitation;

(g) the right to the enjoyment of the highest attainable standard of physical and mental health;

(h) the right to social security; and

(i) free primary education, and accessible education at all levels.

57. In addition, the ICESCR forbids economic and social exploitation of children and requires all nations to cooperate to end world hunger.

58. A Human Rights Act should protect all the rights set out in the ICESCR.

4.5 Indivisibility of civil and political rights and economic, social and cultural rights

59. A distinction is commonly made between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The following sections discuss the extent to which these rights should be contained in a Human Rights Act.

60. Although historically some nations have been reluctant to place economic, social and cultural rights on an equal footing with civil and political rights, there is an increasing push for meaningful recognition and protection of both kinds of rights. When the ICCPR and ICESCR were being developed internationally, Australia was one of the countries that pushed for a

[21] See, eg, George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 895–7.

single binding instrument that would include economic, social and cultural rights together with civil and political rights.[22]

61. The HRLRC submits that economic, social and cultural rights should be included in a Human Rights Act for a number of reasons.

62. First, it is common sense to say that to persons living in poverty, economic, social and cultural rights may even play a more important role than civil and political rights. Economic, social and cultural rights should, at least, be given equal priority. In 2003, Kofi Annan (then Secretary-General of the UN) stated that:

> While some wish to focus on civil and political rights, others would like to see equal attention paid to economic, social and cultural rights, complaining bitterly that the right to vote is worth little if their children are hungry and do not have access to safe water … Human rights – whether they be civil, political, economic, social or cultural – are universal and by forging unity and determination in their defence, you can set an example of common progress for the broader international community.[23]

63. Second, human rights do not exist in isolation. Rather, the enjoyment of many rights is dependent or contingent on, and contributes to, the enjoyment of other human rights.[24] The enjoyment of economic, social and cultural rights is crucial to the enjoyment of civil and political rights. Social inclusion is essential to political participation, and therefore to the maintenance of a truly democratic system.[25] For example:

(a) meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education;

(b) the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing; and

(c) access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

64. Third, recognition of the interdependence of human rights in a Human Rights Act would improve decision-making and policy design processes. By seeking to identify all of the various civil, political, social, economic and cultural factors that contribute to policy 'problems', a

---

[22] Louis Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982-1983) 32 *The American University Law Review* 1, 38; Paul Kennedy, *The Parliament of Man* (2006), 183-4.

[23] United Nations Headquarters, *Human Rights -- Whether Civil, Political, Economic, Social or Cultural -- Are Universal, Must Be Upheld in Every Country, Secretary-General Says,* UN SG/SM/8675 HR/CN/1043 (2003), available at www.unis.unvienna.org/unis/pressrels/2003/sgsm8675.html.

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

[25] See Keith D Ewing, 'Judicial Review, Socio-Economic Rights and the Human Rights Act', *International Journal of Constitutional Law*, 16 December 2008, 14.

Human Rights Act could promote a more sophisticated analysis of social issues, capturing their multidimensional and interrelated elements. By focusing on the conditions and capabilities that people need to meaningfully participate in society, it would encourage an integrated and holistic response to the problems identified. In short, recognition of the interdependence of civil and political rights and economic, social and cultural rights would encourage 'joined up solutions to joined up problems'.[26]

65. Fourth, economic social and cultural rights should be incorporated into a Human Rights Act because social and economic policy should be developed, interpreted and applied compatibly with social and economic rights. It is more appropriate and preferable, for example, that the courts interpret and apply residential tenancies legislation, so far as possible, consistently with the right to adequate housing than in a manner that has no regard to or is inconsistent with this fundamental human right.

66. Finally, the arbitrary division of rights makes no sense to the rights holder and does not respond to the aspirations or needs of people, particularly people experiencing marginalisation or disadvantage. As one homeless man, Bill, wrote in his submission to the Victorian Charter Consultative Committee, '[h]aving freedom of movement and expression without the right to health and housing is like having icing without a cake'.[27]

(a) Treatment of economic, social and cultural rights in other jurisdictions

67. The experience in comparative domestic jurisdictions is that economic, social and cultural rights are capable of being protected by law and enforced in courts. Put simply, the experience in comparative domestic jurisdictions is that economic, social and cultural rights are either:

(a) expressly protected in the constitution, giving the courts the role to assess the 'reasonableness' of government conduct or lack of action, allowing a large margin of appreciation for governments to act in accordance with human rights (eg, in South Africa);[28]

(b) not explicitly included as rights in a constitution or legislative rights instrument, but protected to a limited extent through interpretation of civil and political rights that are protected by law, such as:

[26] OHCHR, above n 24, 4–5; Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper* (2001); Mark Moore, *Creating Public Value: Strategic Management in Governance* (1995) 10; Andrew Jones and Paul Smyth, 'Social Exclusion: A New Framework for Social Policy Analysis?' (1999) 17 *Just Policy* 11, 16.

[27] PILCH Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria; Submission to the Human Rights Consultation Committee* (August 2005), 41

[28] The position in South Africa is discussed in more detail in section (c) below.

(i) the right to equality (Canada);[29] or

(ii) the right to life (India);[30]

(c) partly protected by legislation (such as the right to education and property in the UK);[31] or

(d) partly protected by operation of existing common law actions and statutory interpretation rules (UK).[32]

68. In order to provide comprehensive protection of all economic, social and cultural rights, and to avoid having to argue for their protection using positive aspects of civil and political rights which are not always an appropriate mechanism, a Human Rights Act should protect all economic, social and cultural rights.

(b) Economic, social and cultural rights and resource issues

69. A common argument for excluding economic, social and cultural rights from human rights instruments is that it is not appropriate to have issues concerning the allocation of public resources dealt with by courts; such issues should instead be addressed by Parliament, consistent with the principles of parliamentary sovereignty and the separation of powers.

70. There are three responses to this criticism:

(a) First, the assumption that enshrining economic, social and cultural rights will require courts to make resource allocation decisions that are properly the domain of Parliament is misconceived. If economic, social and cultural rights were included in a Human Rights Act, the extent to which courts would have a say about resource allocation would depend on the model adopted. The models for a Human Rights Act proposed by the HRLRC would not allow courts to strike down legislation or order damages as a remedy, but instead preserves Parliamentary sovereignty over such decisions.

(b) Second, the assumption that courts do not already engage in some resource allocation decisions is a falsehood. For example, when the High Court removed a blanket ban on prisoners voting and determined that prisoners serving sentences of less than three years were entitled to vote, it necessarily involved the deployment of

[29] See discussion in Bruce Porter, 'Twenty Years of Equality Rights, Reclaiming Expectation' (2006) 33 *Supreme Court Law Review* (2d).

[30] The right to life has been held to include the right to live with human dignity, which in turn includes the bare necessities of life such as nutrition, clothing, shelter and facilities for reading, writing and expressing oneself: see for example *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

[31] See arts 1 and 2 of the *First Protocol* to the *European Convention for the Protection of Human Rights*, incorporated into the UK *Human Rights Act* by s 1(1)(b).

[32] Certain economic, social and cultural rights (such as social security) may be made available under statute in the UK, and the decisions to provide assistance under those statutes could be subject to judicial review.

resources to prisons, such as mobile voting booths and personnel.[33] As Justice Kirby of the High Court stated in a different judgment:

> Arguments of inconvenience and potential political embarrassment for the Court should fall on deaf judicial ears ... This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.[34]

(c) Third, given the indivisibility of human rights, even where economic, social and cultural rights are not expressly protected, they can become the subject of judicial consideration and determination through the operation of existing laws or the enforcement of positive obligations under civil and political rights.[35] This proves the justiciability of economic, social and cultural rights.

71. The jurisprudence of the South African Constitutional Court provides helpful guidance as to the role that Australian courts could properly play with respect to economic, social and cultural rights if enacted in a Human Rights Act. Appropriately, the South African Constitutional Court has, in its own words, been 'slow to interfere with rational decisions taken in good faith by the political organs … whose responsibility it is to deal with such matters'.[36]

72. Australian courts could consider the reasonableness of government action in relation to economic social and cultural rights, rather than whether a particular policy is more desirable or rights-compliant than another. The South African Court has considered the issue of 'reasonableness' in determining the extent to which governments have acted or should act in respect of economic, social and cultural rights. According to the Court in the *Grootboom Case,* which concerned the right to adequate housing:

> A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent … It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.[37]

73. In a further decision, the *Treatment Action Campaign Case*, which concerned access to anti-retroviral drugs in accordance with the right to health, the Constitutional Court held that:

[33] *Roach v Electoral Commissioner* [2007] HCA 43.

[34] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 414.

[35] See for example the UK experience of enforcing economic, social and cultural rights as positive aspects of civil and political rights in *Airey v Ireland* 32 Eur Ct HR Ser A (1979).

[36] *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

[37] *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].

> Determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging the budgets. … All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights.[38]

74. The Canadian Supreme Court has taken a very similar approach when adjudicating economic, social and cultural aspects of civil and political rights, reviewing policies, programs and practices for consistency with the *Canadian Charter of Rights and Freedoms* (**Canadian Charter**) but deferring to government to then fashion an appropriate remedy.

(c) Middle ground: Differential treatment of economic, social and cultural rights in a Human Rights Act

75. Although the HRLRC strongly supports the inclusion of economic, social and cultural rights in the Human Rights Act, it acknowledges that a middle ground exists in which economic, social and cultural rights could be included but not made enforceable in courts. Although the HRLRC strongly supports the full implementation of economic, social and cultural rights, a middle ground solution with the following features may be another option:

(a) Protection of both civil and political rights and economic, social and cultural rights with a two-tiered remedial regime.

(b) Breaches of rights could be treated differently depending on whether the right is a civil or political right or an economic, social or cultural right.[39] For example, there should be a free standing cause of action allowing individuals to commence proceedings for breaches of civil or political rights, with the full range of remedies available.

(c) Breaches of economic, social or cultural rights may only be the subject of complaints and administrative, rather than judicial, remedies. Such a complaints process would provide a mechanism to ensure that public authorities were made aware of policies or procedures that were not compatible with economic, social or cultural rights.

76. The two-tiered approach to remedies is discussed in further detail in Section 3 of this submission.

---

[38] *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

[39] The Declaration of Incompatibility provision (such as Victorian Charter s 33; *Human Rights Act 2004* (ACT) (**ACT Human Rights Act**) s 32 and *Human Rights Act 1998* (UK) (**UK Human Rights Act**) s 4) and the Interpretative Principles (such as Victorian Charter s 32(1) and UK Human Rights Act s 3(1)) should apply equally to economic, social and cultural rights and to civil and political rights.

Question 2: Are these rights currently sufficiently protected?

5. Introduction

77. Human rights are not given comprehensive and consistent legal protection in Australia. There is no comprehensive statement of rights in Australia that operates as a minimum standard for the protection of human rights. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws. Further, most of the current protections can be easily removed (eg, statutory and common law protections) or are not enforceable (eg, international human rights law that has not been incorporated into domestic law).

78. Concerns about Australia's lack of entrenched institutional protection have recently been expressed by the HRC,[40] the CESCR,[41] the Committee against Torture[42] and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[43]

79. The HRLRC submits that a Federal Human Rights Act is an essential component of effective human rights protection. This section considers how human rights are currently protected in Australia and identifies a number of gaps in protection.

80. Part two of this section examines the relationship between international and domestic law and the extent to which international human rights law impacts upon domestic legal proceedings.

81. Part three considers the nature and sufficiency of Australia's existing human rights protections, including:

    (a) constitutional protections;

    (b) democratic institutions;

    (c) statutory protections;

    (d) common law;

    (e) State and territory legislation;

[40] HRC, *Concluding Observations: Australia*, [23], UN Doc CCPR/C/AUS/CO/5, 2 April 2009.

[41] CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [14], [36], UN Doc E/C.12/1/Add.50 (2000).

[42] Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [9]–[10], UN Doc CAT/C/AUS/CO/1 (2008).

[43] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [10], UN Doc A/HRC/4/26/Add.3 (2006).

(f) domestic human rights bodies; and

(g) international mechanisms.

82. Part four sets out the key rights contained in the ICCPR and ICESCR with a brief explanation of the content of the right, the gaps in legal protection and examples of violations that continue to occur (and in many cases, go un-remedied), notwithstanding existing protections.

6. Relationship between international law and domestic law

6.1 Application of international law in domestic proceedings[44]

83. International human rights law is not directly applicable in Australia unless it is given domestic legislative effect. However, it can still be persuasive in domestic proceedings, as illustrated by its use in the following ways:

(a) as a tool for statutory interpretation;

(b) to influence the development of the common law;

(c) as a basis of judicial review in administrative law;

(d) in the exercise of judicial discretion; and

(e) as an indicia of contemporary standards and values and therefore relevant to the context in which the federal Constitution should be interpreted and applied.

84. These five modes of potential influence are examined below. On the whole, the capacity of courts to incorporate human rights obligations into Australian law is limited: courts only become involved when legal proceedings are brought, interpretative presumptions can be avoided by clear and unambiguous legislation, and common law principles develop haphazardly and can easily be overridden by statute.

6.2 Statutory interpretation

85. While human rights law may, in some circumstances, play a role in statutory interpretation, legislation that conflicts with international law will prevail if it is written in clear and unmistakable language. For example, in *Minister for Immigration and Multicultural and Indigenous Affairs v B,*[45] Kirby J held (at 414) that the *Migration Act 1958* (Cth) requires unlawful non-citizens, including children, to be compulsorily detained and that it was therefore not open for the Court to reverse this position to comply with Australia's international obligations to protect the human rights of children.

86. Australia's international human rights obligations may provide guidance as persuasive extraneous material when resolving ambiguities in domestic legislation. According to Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*, '[t]hat is because Parliament, prima facie, intends to give effect to Australia's obligations under international law'.[46]

---

[44] This section is taken from an article by Rachel Ball and Melanie Schleiger, 'Think Global, Act Local' *Law Institute Journal* 83 (Jan/Feb 2009) 46.

[45] (2004) 219 CLR 365.

[46] (1995) 183 CLR 273, 287 (***Teoh***). In *Teoh*, Mason CJ and Deane J rejected a "narrow conception of ambiguity", thereby giving the interpretive principle broad application. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38.

6.3 Development of the common law

87. International human rights law may be invoked to influence the development of the common law. In the historic High Court decision of *Mabo v Queensland [No 2],*[47] Brennan J stated that 'the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[48] In *Mabo,* the High Court drew upon international human rights principles and jurisprudence to determine indigenous peoples' right to native title.

88. However, the High Court has also expressed concern about developing the common law by reference to international instruments that Parliament has not chosen to enshrine in domestic legislation. Implementing an international instrument in this way has been referred to as 'backdoor implementation'.[49]

6.4 International law and judicial review in administrative law

89. In *Teoh* the High Court held that entry into a treaty may give rise to a legitimate expectation that administrative decision-makers will follow the provisions of the treaty when making administrative decisions, or at least provide the affected party with an opportunity to be heard in relation to relevant human rights issues.[50]

90. The 'legitimate expectation' doctrine in *Teoh* has been strongly resisted by the executive under both major parties.[51] Members of the High Court have also expressed, in obiter, their reservations.[52] Though *Teoh* remains good law, it is certainly one of the more controversial applications of international human rights and it is unclear whether it would survive judicial re-consideration.

6.5 International law and judicial discretion

91. Human rights law may guide and lend legitimacy to the exercise of judicial discretion.[53] Kirby J has stated:

> A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments… than if they are simply derived from the experience and predilections of a particular judge.[54]

---

[47] (1992) 175 CLR 1 (***Mabo***).

[48] *Mabo* (1992) 175 CLR 1, 42.

[49] *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

[50] (1995) 183 CLR 273.

[51] Both Labor (in 1995) and Coalition Governments (in 1997 and 1999) have made unsuccessful attempts to legislate to overturn the *Teoh* decision.

[52] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1.

[53] See Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere', (2004) 5 *Melbourne Journal of International Law* 108.

92. For example, human rights instruments have been considered relevant in the exercise of judicial discretion in relation to:

(a) sentencing;[55]

(b) the granting of bail;[56]

(c) the exclusion of confessional evidence;[57]

(d) restraint of trade;[58] and

(e) the rights of self-represented litigants.[59]

93. In *Tomasevic v Travaglini & Anor*, Bell J considered the duty of a judge to ensure a fair trial by giving due assistance to a self-represented litigant and stated that:

> Without impairing, indeed by asserting, the independence of our own law, judges can, and in my view should, act consistently with the international obligations specified in the ICCPR by accepting that, when appropriate, the exercise of relevant judicial powers and discretions … can take into account the human rights specified in the ICCPR… [60]

6.6 International law and constitutional interpretation

94. Although judges have historically referred to international law in interpreting the Commonwealth Constitution,[61] the prevailing position is that the Constitution is not to be read subject to principles of international law.[62] Nevertheless, international law may be relevant to identifying the contemporary circumstances and values that provide the context for interpretation of the Constitution.[63]

---

[54] Justice Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 526 and discussed in Lacey, ibid, 114.

[55] *R v Togias* (2001) 127 A Crim R 23, [85], [179]; *R v Hollingshed* (1993) 112 FLR 109, 114; *Smith v R* (1998) 98 A Crim R 442, 448.

[56] *Schoenmakers v DPP* (1991) 30 FCR 70, 74–5; *Re Rigoli* [2005] VSCA 325, [5].

[57] *Evidence Act 1995* (Cth) s 138(3)(f); *McKellar v Smith* 1982] 2 NSWLR 950.

[58] *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR ¶41-664.

[59] *Tomasevic v Travaglini & Anor* [2007] VSC 337.

[60] Ibid, [74].

[61] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

[62] *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***). See also *Polites v Commonwealth* (1945) 70 CLR 60.

[63] See *Singh v Commonwealth* (2004) 209 ALR 355; *Grainpool of Western Australia v Commonwealth* (2000) 202 CLR 479; *Sue v Hill* (1999) 199 CLR 462; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Cheatle v R* (1993) 177 CLR 541.

7. Existing human rights protections

95. Although there is no comprehensive protection of human rights at the federal level in Australia, there is some ad hoc protection of human rights under the various mechanisms outlined below.

7.1 Constitutional protections

(a) Express constitutional rights

96. There are three express civil and political rights contained in the Constitution:

(a) the right to trial by jury for indictable federal offences (section 80);

(b) a prohibition on the Commonwealth Government making a law to 'establish' a religion or to prevent the free exercise of religion (section 116); and

(c) the right to be free from discrimination because of interstate residence (section 117).

97. In addition, the Constitution protects two economic rights, by providing for:

(a) freedom of interstate trade (section 92); and

(b) the right to be compensated on just terms for the compulsory acquisition of property by the Commonwealth Government (section 51(xxxi)).

98. The High Court has tended to interpret these rights narrowly, limiting their scope.[64] This is especially the case in relation to sections 80 and 116. The two economic rights (sections 51(xxxi) and 92) have been interpreted more broadly.[65]

(b) Implied constitutional rights

99. The Constitution has been interpreted by the High Court to contain a few implied freedoms and limits on legislative and executive power. These are:

(a) The separation of judicial power from executive and legislative power. This is implied from the structure of the Constitution, which deals with each arm of government in a separate chapter. This separation prevents too much power being concentrated in the Parliament or the executive. It also means that the judiciary is politically independent, giving the public confidence in the administration of justice.[66]

(b) The freedom of political communication. This is implied from the notions of representative and responsible government evident in the text and structure of the

[64] Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, 198–9; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 32; Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom*, (Doctoral Thesis, Monash University, 2004) 12–14.

[65] Stone, ibid, 32; Charlesworth, ibid, 199.

[66] Debeljak, above n 64, 14–15.

Constitution.[67] This implied freedom is limited to communications about political and governmental issues relevant to Australia that are necessary for the effective operation of a representative and responsible government.[68]

(c) An implied right to vote or at least an implied principle of universal adult suffrage.[69]

100. A potential implied freedom of political movement and association has been raised. However, there is no clear judicial authority to support this implied freedom.[70]

101. The extent to which implied rights can be effective in protecting human rights is limited. First, there are very few rights implied from the text and structure of the Constitution. Second, this approach to the recognition of human rights is piecemeal, uncertain and is not comprehensive. Finally, arguably, it would be more democratic for elected parliamentarians to enact a legislative human rights instrument, or for the Constitution to be amended by referendum to include express rights, rather than relying on judges to imply rights.[71]

7.2 Democratic institutions

102. Australia is a democratic nation that elects its governments by popular vote. Legislation requires that every Australian citizen (18 years or older) enrol and vote, subject to certain qualifications.[72] The right of all Australians to vote in elections, without any discrimination, enables recognition and equality before the law. Political participation is the cornerstone of a representative democracy and a fundamental human right.[73] Australian citizens are able to participate in the parliamentary process through their elected officials.

103. Article 25 of the ICCPR, to which Australia is a party, supports the ideals of representative democracy. Article 25 specifies that each citizen has the right to political participation. Through Article 25, Australians have the right to take part in the conduct of public affairs (directly or through their chosen representative), the right to vote or be elected, and have access to public service.

104. Essential to the idea of representative democracy is transparency and accessibility. The Australian public has access to Parliamentary proceedings, and may apply for information from the government through freedom of information legislation. In addition to an open and

---

[67] See *Australian Constitution* ss 7, 24, 64 and 128; Debeljak, above n 64, 16–17.

[68] *Lange v ABC* (1997) 189 CLR 520; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Levy v Victoria* (1997) 187 CLR 579; Sarah Joseph and Melissa Castan, *Federal Constitutional Law – A Contemporary View* (2nd ed, 2000), ch 13; Debeljak, above n 64, 16–17.

[69] *Roach v Electoral Commissioner* [2007] HCA 43.

[70] Stone, above n 64, 33.

[71] Debeljak, above n 64, 14–5, 17.

[72] See *Commonwealth Electoral Act 1918* (Cth)

[73] AHRC, *The right to vote is not enjoyed equally by all Australians* (October 2007) available at <http://www.hreoc.gov.au/HUMAN_RIGHTS/vote/index.html> accessed 6 May 2009.

accessible Parliamentary system, members of Parliament are held accountable to the electorate for their performance in office and for the integrity of their conduct.[74]

7.3 Statutory protections

105. There is some statutory protection of human rights at both the Commonwealth and State levels. Often, rights have been protected by statute as part of Australia's obligations under international treaties. However, Australia has only partially implemented its international human rights obligations through domestic law. The following are examples of Commonwealth legislation that protects human rights:

(a) the *Racial Discrimination Act 1975* (Cth) (***Racial Discrimination Act***), which partially implements the International Convention on the Elimination of All Forms of Racial Discrimination (1966);

(b) the *Sex Discrimination Act 1984* (Cth), which partially implements the Convention on the Elimination of All Forms of Discrimination Against Women (1979);

(c) the *Disability Discrimination Act 1992* (Cth), which partially implements the ICCPR and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (1958); and

(d) the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which is relevant to most international human rights covenants and establishes a national human rights body for the purposes of law reform, education, intervention in court proceedings, investigations, and conciliation of disputes under the above Acts.

106. There are also a number of state and territory laws that protect various human rights, including particularly the right to non-discrimination.[75]

107. In addition, there are many laws that were not necessarily enacted for the express purpose of protecting human rights but which have that effect. For example, there are statutory (and common law) restrictions on police powers, and laws which protect economic, social and cultural rights such as Medicare laws, education laws and industrial relations laws (ie, the latter enforces the right to work and the right to a fair/minimum wage).

108. Statutory protection of human rights tends to be much more comprehensive than current protections under the Constitution.[76] However, there are problems associated with having

[74] Beetham, David 'Parliament and Democracy in the Twenty-First Century' (Inter-Parliamentary Union, 2006) 2., 10.

[75] See, eg, *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1998* (Tas); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1977* (NSW); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA); *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic); *Whistleblowers Protection Act 1993* (SA).

[76] Debeljak, above n 64, 19; George Williams, *Human Rights under the Australian Constitution* (1999), 10–11.

human rights protected by a raft of different laws. In particular, this approach is likely to result in the piecemeal and erratic development of human rights law.

109. Other arguments against protecting human rights through ordinary laws are that:

(a) there is a lack of uniformity of human rights standards and protections across Australia because the Commonwealth and the States have concurrent power to legislate – this is problematic because human rights are universal and should be consistent;

(b) there are exemptions from statutory regimes that allow certain people or bodies to act without human rights obligations; and

(c) the scope of rights protected by statute is much narrower than under international human rights law - central concepts are often more narrowly defined in domestic legislation than in international treaties, and courts and tribunals tend to interpret human rights law restrictively.

7.4 Common law protections

110. Some human rights are enshrined in common law principles, which are established and applied by courts. For example, the right to a fair trial (requiring biased judges to excuse themselves from proceedings), and prohibitions on trespass that indirectly and partially protect the right to privacy.

111. Courts have also developed rules of statutory construction that limit legislative interference with rights and freedoms.[77] For example, the common law encourages a rights-based interpretation of legislation, presuming that Parliament does not intend to override basic rights unless such an intention is clearly expressed.[78] Some judges have also relied on the 'peace, order and good government' formula in state and federal constitutions, the structure of the Constitution, and the free and democratic nature of Australian society to limit the legislature's ability to impinge on fundamental rights and freedoms.[79] However, there are problems with relying on common law protection of human rights, some of which are listed below.

(a) Some argue that it is inappropriate for unelected judges to introduce and develop laws (including laws protecting rights), as this is the role of elected representatives.

(b) Common law principles can easily be overridden by law-makers. This may even be done inadvertently. One benefit of a Federal Human Rights Act would be that Parliament's attention would at least be drawn to the issue before it departed from fundamental principles. That way, that such a departure would only be made deliberately.

---

[77] Justice David Malcolm, 'Does Australia Need a Bill of Rights?' (1998) 5(3), *E-Law - Murdoch University Electronic Journal of Law*, [5] available at www.murdoch.edu.au/elaw/issues/v5n3/malcolm53.html.

[78] Kirby, above n 54, 11.

[79] Malcolm, above n 77, [5].

(c) Common law rights are limited in scope. This is because such rights are 'residual' in nature – they are 'what is left after the limitations and restrictions imposed by law'.[80]

(d) Where legislation is unambiguous, courts are unable to interpret it as being subject to fundamental rights and freedoms. This can lead to unacceptable outcomes from a human rights perspective. Some relatively recent cases have shown that as long as the Federal Parliament passes laws that are clearly linked to a head of power in the Constitution, those laws will be binding regardless of the impact on rights.[81] For example, in the *Al-Kateb* case, which related to the mandatory, indefinite detention of asylum seekers, McHugh J said that

> the justice or wisdom of the course taken by Parliament is not examinable in [the High Court] or in any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.[82]

(e) A court can only develop common law when a case is brought before it, and even then it is confined to declaring only the rights of the parties before it, not making a general statement of rights.[83]

(f) Development of the common law is confined by the doctrine of precedent (a court's decision has to be consistent with previous relevant decisions).[84]

7.5 State and territory human rights legislation

112. Victoria and the Australian Capital Territory (**ACT**) are currently the only Australian jurisdictions that have statutory human rights Acts. In 2004, the ACT enacted the *Human Rights Act 2004* (**ACT HRA**) and in 2006 Victoria followed, enacting the Victorian Charter. The ACT HRA and the Victorian Charter do not allow Victorian and ACT courts to strike down laws on the basis that they are inconsistent with the human rights enshrined in them. However, the Acts protect human rights in the following ways:

(a) they require law-makers and parliament to consider how their legislation will impact on human rights;

---

[80] 'For example, freedom of speech is a residual right, being what is left subject to the application of the law of defamation, contempt, sedition, official secrets, confidentiality, etc.' Malcolm, above n 77, [12]; see also Williams, above n 76, 16.

[81] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (*Hindmarsh Island Bridge Case*); *Al-Kateb* (2004) 219 CLR 562; Dr Sev Ozdowski, 'An Absence of Human Rights: Children in Detention' (Speech delivered at the Human Rights Law and Policy Conference, Melbourne (Mariott Hotel), 17 June 2008), 18–20.

[82] *Al-Kateb* (2004) 219 CLR 562, 595. See also Ozdowski, above n 81, 18–20.

[83] Malcolm, above n 77, [13].

[84] Ibid.

(b) they require courts (where possible) to interpret legislation in accordance with human rights;

(c) they require administrative bodies (government and public authorities) to comply with human rights.[85]

113. Only natural persons have rights under the ACT HRA and Victorian Charter – corporations and other legal entities do not have coverage under the Acts.[86] Both the ACT HRA and the Victorian Charter protect civil and political rights and make brief reference to cultural rights. They do not refer to economic and social rights, environmental rights or rights to self-determination.[87]

114. In Tasmania and Western Australia, recent independent community consultations have demonstrated widespread public support for improved legal protection of human rights and recommended the enactment of comprehensive human rights legislation. To date, however, neither the Tasmanian nor Western Australian governments have enacted those recommendations.[88]

7.6 Australian Human Rights Commission

115. The AHRC (formerly the HREOC) was established in 1986 as a national, independent, statutory body. It administers the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). The AHRC aims to improve understanding, respect and protection of human rights in Australia, focusing particularly on issues relating to gender, race, disability, Indigenous Australians, and (recently) age discrimination.[89]

116. The AHRC reports to the Federal Parliament through the Attorney-General and has the following functions:[90]

(a) it conducts inquiries into issues of national importance (eg, the forced removal of Aboriginal children from their families, and the rights of children in immigration detention centres);

(b) it assists courts in cases involving human rights principles by providing independent legal advice (ie, acting as *amicus curiae*);

---

[85] Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 1.

[86] See s 6(1) of the Victorian Charter and s 6 of the ACT Human Rights Act

[87] Evans and Evans, above n 85, 33.

[88] Ibid.

[89] Ozdowski, above n 81, 21–2.

[90] AHRC, www.hreoc.gov.au.

(c) it advises parliaments and governments about the development of laws, programs and policies to protect human rights;

(d) it increases public awareness of human rights through education and public discussion; and

(e) it investigates and conciliates complaints under the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth), as well as alleged rights violations under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

117. The AHRC produces reports that indicate when Australia is not meeting its international human rights standards under the treaties that it has ratified. However, those reports only result in recommendations to the Commonwealth. The AHRC is not able to provide affected individuals with effective or enforceable remedies where international human rights standards are not being met.[91] In some respects the AHRC is only as effective as the government of the day allows it to be.[92]

7.7 International mechanisms

118. There is a range of international strategies available to advocates and organisations seeking to promote the realisation of human rights in Australia. These include international human rights monitoring and reporting, as well as complaints and inquiry mechanisms.

(a) Monitoring and reporting mechanisms

119. Upon ratifying a treaty, states undertake to submit regular reports to the relevant treaty body regarding implementation. Each of the seven core human rights treaties,[93] establishes a separate international committee of experts (known as a treaty body) to monitor the implementation of relevant treaty provisions. Each treaty body is required to receive and consider the reports submitted by states parties and then prepare a critical evaluation in the form of 'Concluding Comments' or 'Concluding Observations'. These comments and observations often provide recommendations for further action by the state party in order to better respect, protect and fulfil the human rights contained in the relevant treaty.

120. The purpose of the reporting mechanisms is to record, monitor and evaluate states parties' progress towards the implementation of treaty obligations, and ultimately to redress human

[91] Elizabeth Evatt, 'Meeting Universal Human Rights Standards: the Australian Experience', (Speech delivered at Department of the Senate Occasional Lecture Series, Canberra (Parliament House), 22 May 1998), 7.

[92] Debeljak, above n 64, 19.

[93] The ICCPR monitored by the HRC; ICESCR monitored by CESCR; CERD monitored by the Committee on the Elimination of Racial Discrimination (**CERD Committee**); CEDAW monitored by the Committee on the Elimination of Discrimination against Women; CAT monitored by the Committee against Torture; CRC monitored by the Committee on the Rights of the Child (**CRC Committee**); and the *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (**CMW**) monitored by the Committee on the Protection of the Rights of all Migrant Workers and their Families.

rights violations. The reporting process also enables constructive dialogue between states parties and the UN, which helps to implement the goals of the treaties.

(b) Individual complaint mechanisms

121. Complaint procedures (also known as communication procedures) are a mechanism established under certain human rights treaties whereby individuals who allege that they have been victims of human rights violations can seek individual redress for those violations.

122. Unlike the inquiry mechanism (see discussion below), the individual complaints procedure does not seek to provide remedies for general human rights abuses within a state. Rather, the purpose of the complaint mechanism is to empower victims to seek individual redress for human rights violations they have suffered.

123. Australia is party to four UN human rights treaties that provide for individual complaint procedures: the Optional Protocol to the ICCPR, CERD, CAT and the Optional Protocol to CEDAW.[94] In order for the relevant treaty bodies to be able to receive individual complaints under these treaties, the state party in relation to which the complaint is directed must have both ratified the treaty *and* also recognised the competence of the treaty body to receive complaints.[95]

(c) Special Rapporteurs

124. International action in respect of human rights violations can also be taken by UN Special Rapporteurs. A Special Rapporteur[96] is an independent expert appointed by resolution of the UN Human Rights Council[97] to examine, monitor, research, report and advise on human rights issues. A Special Rapporteur is entrusted with a mandate that is country specific or thematic

125. Special Rapporteurs can act on requests for action by individuals or organisations such as NGOs, and may undertake country visits in order to investigate, report on or lobby governments in respect of alleged human rights violations. In this way, the UN Special

---

[94] Discussions are underway to develop a complaints procedure under *ICESCR*.

[95] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 1 (entered into force 23 March 1976) (***OP to the ICCPR***); *CERD*, art 14(1); *CAT*, art 22(1); *Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 54/4, GAOR, 54th sess, 28th plen mtg, UN Doc A/RES/54/4 (1999) art 1 (**OP to CEDAW**).

[96] For information about all of the Special Rapporteurs, see http://www2.ohchr.org/english/bodies/chr/special/index.htm. Note that Special Rapporteurs are also sometimes referred to as independent experts, representatives of the Secretary-General or representatives of the Commission. These different titles are the result of political negotiation and do not reflect different positions: OHCHR, *Fact Sheet 27: Seventeen Frequently Asked Questions about the United Nations Special Rapporteurs* (2001) 6 available at http://www2.ohchr.org/english/about/publications/docs/factsheet27.pdf.

[97] Special Rapporteurs were originally a special procedure of the UN Commission on Human Rights (**UNCHR**). The UNCHR has recently been succeeded by the HRC: see HRC, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006). The Special Rapporteurs have been retained by the HRC and, as such, reference in this section is made to the HRC rather than the UNCHR.

Rapporteurs aim to help bring intergovernmental debate on human rights closer to the reality on the ground.

(d) Inquiry mechanisms

126. CAT, the Optional Protocol to CRPD and the Optional Protocol to CEDAW authorise the CAT Committee, the CRPD Committee and the CEDAW Committee respectively to inquire into alleged violations of rights. Unlike the individual complaint mechanism, which provides individual redress to victims of human rights violations, the inquiry mechanism empowers a treaty body to investigate human rights abuses extending beyond individual cases, and is therefore particularly suited to investigating systemic violations.

127. Under the inquiry mechanism, the treaty body can then issue recommendations aimed at addressing the underlying causes of those violations. While Australia has not yet recognised the powers of the CRPD Committee in this respect, it has recognised the competence of the CAT and CEDAW Committees to undertake inquiries.

8. What are the gaps in human rights protection in Australia?

8.1 Introduction

128. This section sets out each of the rights contained in the ICCPR and ICESCR and discusses the extent to which the right is currently protected in Australia. Case studies illustrating the gaps in protection are also provided.

8.2 Right to equality and non-discrimination (Article 2 ICESCR; Articles 2 and 26 ICCPR)

129. Australia has enacted a number of laws to prevent discrimination on the basis of race, age, sex and disability (see discussion in section 2, 3.3). However, these legal protections operate in a piecemeal way in Australia, and equal opportunity and anti-discrimination laws do not cover all of the grounds of discrimination. Australian laws also fail to adequately address the issues of substantive equality, systemic and compounded discrimination, and provide for numerous exceptions and exemptions that are inconsistent with international human rights law and entrench stereotypes and perpetuate structural barriers to equality.[98]

130. Accordingly, there are a number of groups within Australian society that remain vulnerable to both direct and systemic discrimination and do not enjoy their human rights on an equal basis. These groups include: Indigenous Australians; women; people with disability and mental illness; people from non-English speaking backgrounds; homeless people; gay, lesbian, bisexual, transgender and intersex people; children and young people; and diverse religious or ethnic communities.

Case Study: Discrimination on the Basis of Sexual Orientation

'One of our lesbian friends lay ill and dying in her hospital bed. When it came time for her to die the hospital staff prevented her partner from entering her hospital room and sitting with her at the end of her life because she was not the 'spouse'. Our friend died, alone. Her partner sat outside in the corridor prevented from being with her. She continues to suffer great distress that her life-time partner died without her comfort and without knowing she was there with her.

At present, Federal anti-discrimination law does not cover discrimination on the basis of sexual orientation.

Source: This example is taken from AHRC, 'Stories of discrimination by gay, lesbian, bisexual, transgender and intersex community'. This publication is available at: http://www.hreoc.gov.au/human_rights/gay_lesbian/stories.html#endnote2.

[98] For example, the *Sex Discrimination Act 1992* (Cth) contains exemptions for sporting activities (s 42), religious bodies and religious educational institutions (ss 37 and 38), charities and voluntary bodies (ss 36 and 39), partnerships (s 17), accommodation (ss 30(f) and 34) and combat duties, among other things.

8.3 Right to life (Article 6 ICCPR)

131. The right to life is the supreme human right. It is essential for the realisation of all other basic human rights. The right to life means that:

(a) no person can have their life unlawfully taken away from them;

(b) positive measures must be taken to protect the lives of people, such as through the development of criminal laws and their enforcement by the police; and

(c) if the government knows of the existence of a real and immediate risk to someone's life, then it should take appropriate action to protect the life of that person.

132. As with all human rights, the right to life has a particular importance for vulnerable individuals, including people in detention, individuals who may require particular protection (such as situations involving domestic violence or people in a hostage situation) and other disadvantaged people who may not have adequate access to basic minimum standards, such as water, food and basic health care.

133. Generally speaking, the right to life is reasonably well protected in Australia. However, there are still many situations where the right to life for particular individuals is under threat. For example, the significant inequality in standards of health between Indigenous Australians and non-Indigenous Australians raises serious concerns in relation to the right to life. The significant difference between life expectancy, infant mortality rates and rates of chronic disease are all serious issues in relation to the right to life of Indigenous peoples. Other areas of concern include the significant rates of domestic violence against women, the level of homelessness in Australia and the overrepresentation of Indigenous Australians in deaths in custody.

Case Study: Ian Ward

On 27 January 2008, a respected Warburton Aboriginal elder, Ian Ward, was placed in the back of a prison transport van for up to four and a half hours while temperatures outside exceeded 40 degrees. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of drink driving. Mr Ward was found unconscious in the back of the van, having collapsed and vomited. He subsequently died in hospital. It is suspected that the van's air-conditioning system was faulty.[99] Police and the Western Australian Government are refusing to release details of Mr Ward's post-mortem.[100]

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/.

[99] Paige Taylor, 'Drink Driver Dies in Custody', *The Australian* (Sydney), 28 January 2008.

8.4 Freedom from forced work (Article 7 ICESCR; Article 8 ICCPR)

134. Everyone has an absolute right not to be held in slavery or servitude or to be required to perform forced or compulsory labour.

135. The state has a positive obligation to take effective measures to prevent these acts from occurring and to prosecute any perpetrators.

136. Australian laws prohibit slavery and servitude, however, it still occurs in Australian society in some instances (for example, trafficking of women for sexual servitude).

Case Study: Protection from Trafficking

X travelled to Australia after agreeing to work in the sex industry to repay a set fee for a broker to arrange a tourist visa, travel and accommodation. Upon her arrival in Australia she was taken to her workplace where her passport was taken from her for 'security', the agreed fee was tripled and the work conditions changed substantially (increased work hours and limited, if any, days off).

Working illegally with a tourist visa that had expired, X was picked up by Department of Immigration and Citizenship compliance officers six months after her arrival. During this time she had managed to pay off three-quarters of her debt but had not been able to save any money, as the majority of her earnings had gone directly to her employer. As she worked in a brothel and did not have easy access to her passport, she was put onto a bridging visa[101] and passed on by DIAC officers to the Australian Federal Police and the victim support agency as a potential victim of trafficking.

Unable to share any information about the broker who assisted her to Australia and/or to provide any useful information about those operating the business she was working in, X's case was dropped and she was no longer eligible to remain in Australia on the bridging visa. As she was ineligible for any other visa, X was returned to her country of origin with no money and without any financial support to assist her upon her return.[102]

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/

[100] Tiffany Laurie, 'Silence on Cause of Elder's Death in Custody Van', *The West Australian* (Perth), 1 February 2008; Ronan O'Connell, 'Guards Unaware of Van Trauma', *The West Australian* (Perth), 4 February 2008.

[101] In Australia, there are five classes of 'bridging visas', which are used to make 'non-citizens' lawful who otherwise would be unlawful in the following situations: (a) during the processing of an application, made in Australia, for a substantive visa; (b) while arrangements are made to leave Australia; and (c) at other times when the 'non-citizen' does not have a visa (for example, when seeking judicial review) and it is not necessary for the person to be kept in immigration detention.

[102] Case study based on experiences of victims of trafficking involved in the research of Dr Marie Segrave, University of Western Sydney.

8.5 Freedom from torture and other ill-treatment (Article 7 ICCPR)

137. The prohibition on torture, and cruel, inhuman or degrading treatment (collectively ill-treatment) is a broad right that covers a range of situations:

(a) Torture is severe pain and suffering that is intentionally inflicted by the state for the purpose of, for example, extracting information. The threshold of the severity of conduct amounting to torture is very high.

(b) Cruel and inhuman treatment involves less severe physical or mental suffering than torture and does not need to be intentional.

(c) Degrading treatment means treatment that humiliates or debases a person.

138. The right to freedom from torture and other ill-treatment is especially relevant for people in detention. This includes people in prison, police cells, immigration detention, hospitals and nursing homes. In many of these situations, individuals may be particularly vulnerable because their treatment is entirely dependent on the people who are detaining them — they therefore have limited or no ability to protect themselves or to assert any of their rights.

139. The prohibition against torture and ill-treatment is not comprehensively enshrined in Australian law or practice. On 16 May 2008, the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment issued its Concluding Observations on Australia.[103] The Concluding Observations included 27 recommendations concerning Australia's compliance with its obligations under the CAT Areas of significant concern raised by the Committee included:

(a) the inadequate protection of human rights, including the prohibition against torture and other ill-treatment, under Australian domestic law;

(b) aspects of Australia's immigration and asylum-seeker law, policy and practice, including particularly the policy of mandatory immigration detention and the use of excised offshore processing facilities;

(c) aspects of Australia's counter-terrorism law and practice, including in relation to incommunicado detention, and the use of preventative detention and control orders;

(d) Australia's law and policy in relation to refoulement, extradition and expulsion;

(e) the impact of the criminal justice system on Indigenous Australians;

(f) Australia's treatment of prisoners and conditions of detention, including in particular the lack of access to adequate health care;

(g) the use of evidence obtained under torture or pursuant to other cruel, inhuman or degrading treatment or punishment; and

[103] *Concluding Observations of the Committee against Torture*: Australia, UN Doc CAT/C/AUS/CO/3 (2008).

(h) Australia's failure to investigate and remedy allegations of torture.

8.6 Freedom from arbitrary detention (Articles 9 and 11 ICCPR)

140. Article 9(1) of the ICCPR enshrines the right to liberty and security of person. It also prohibits the subjection of any person to arbitrary arrest or detention, and limits the deprivation of a person's liberty to such grounds and in accordance with such procedures as are established by law.

141. There is no general right to freedom from arbitrary detention in Australian law. Many of Australia's laws and government policies have a negative impact on people's right to be free from arbitrary detention (for example, mandatory immigration detention, counter-terrorism measures, mandatory sentencing laws and involuntary detention for people with mental illness).

142. In its recent Concluding Observations, the HRC commented that:[104]

> the Committee remains concerned at its mandatory use in all cases of illegal entry, the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken in Christmas Island. The Committee is also concerned at the lack of effective review process available with respect to detention decisions.

Case Study: *A v Australia*

This decision by the Human Rights Committee was issued on 3 April 1997.[105] The applicant, Mr A, was a Cambodian citizen who had been detained at the Port Hedland Detention Centre in Australia for over four years, awaiting the determination of his application for asylum.[106] Mr A claimed that his detention was arbitrary and therefore violated Article 9(1) of the ICCPR (which protects against unlawful or arbitrary detention) and that he had been denied the right to judicial review of the lawfulness of his detention in violation of Article 9(4) of the ICCPR (which provides the right to have the lawfulness of one's detention decided by a court).[107]

The Human Rights Committee concluded that Mr A's detention for a period of over four years was arbitrary and therefore violated Article 9(1) of the ICCPR. It said that the decision to keep a person in detention should be open to periodic review and it should be considered whether ongoing detention can be appropriately justified. Australia's only ground to justify Mr A's ongoing detention was his illegal entry (there was no suggestion of a fear he would abscond or not co-operate) and therefore his ongoing detention was arbitrary.[108] The Committee also found that there had been a violation of Mr A's right to have the lawfulness of his detention reviewed by a court under Article 9(4) because the

[104] HRC, *Concluding Observations on Australia*, above n 40, [23].

[105] Charlesworth, above n 64.

[106] Ibid; Evatt, above n 91, 9–10.

[107] Evatt AC, above n 91,10.

[108] Ibid.

court had only reviewed the lawfulness of detention according to domestic law, not according to the principles of the ICCPR. It was found that the right of a person to have a court review the lawfulness of their detention should not be limited to consideration of domestic law only. Although the court review had found that Mr A was a 'designated person' within the meaning of the *Migration Amendment Act*, the court did not consider whether the detention was arbitrary within the meaning of the ICCPR. The Australian Government formally rejected these findings of the Committee.[109]

Despite recent policy shifts, the *Migration Act* still provides for the indefinite detention of asylum seekers without judicial review (see section 189).

Source: *A v Australia* (560/1993) UN Human Rights Committee

8.7 Right to humane treatment in detention (Article 10 ICCPR)

143. All persons deprived of liberty must be treated with humanity and dignity. This right is related to the right to freedom from torture and other cruel treatment.

144. According to the right, persons detained by the state must be held in conditions that conform with certain standards, and do not impair the dignity of the detained person. For example:

(a) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

(b) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

(c) Detainees must not be subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself. Any restraints on liberty must be the minimum necessary for the lawful purpose.

145. The right applies to all forms of detention by the state, not just in the context of criminal law enforcement. As such, it also includes immigration detention and involuntary detention for mental health treatment.

146. Many of Australia's laws and practices raise significant concerns under the right to humane treatment while deprived of liberty. These include:

(a) poor conditions and detainee treatment in immigration detention centres;

(b) the practice of imprisoning children under the age of 18 in adult correctional facilities;

(c) counter-terrorism laws which allow for incommunicado detention and prolonged solitary confinement; and

(d) barriers to access to healthcare, including mental healthcare, by prisoners.

[109] Ibid; Charlesworth, above n 64.

147. The widespread use of solitary confinement (or 'segregation' as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness. Research suggests that solitary confinement can cause and significantly exacerbate symptoms of mental illness, such as paranoia.[110] It is well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.[111]

148. According to Forensicare[112], the high incidence of mental illness in prison, in combination with the lack of adequate mental health care, means that it is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a 'management and observation cell' (also known as a 'Muirhead cell'). This placement is often not a mental health decision, but one made by correctional administrators where there is no other accommodation available to guarantee the safety of a prisoner displaying disturbing psychiatric symptoms. Forensicare noted that solitary confinement and strict observation and control in these cells may prevent suicide, but may also cause 'enormous destruction to the psychological and human aspects' of the individual concerned.[113]

[110] *Inquest into the Death of Scott Ashley Simpson* (Unreported, New South Wales Coroner's Court, Pinch SM, 17 July 2006), available at http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc.

[111] See, eg, HRC, *General Comment 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992) [6]; *Bequio v Uruguay*, [10.3], UN Doc CCPR/C/OP/2 (1990).

[112] Forensicare is a government body responsible for the provision of adult forensic mental health services in Victoria.

[113] Evidence to the Senate Select Committee on Mental Health, Parliament of Australia, Melbourne, 6 July 2005, 48–9 (Professor Paul Mullen, Clinical Director, Victorian Institute of Forensic Mental Health). See also *Submission to Senate Select Committee on Mental Health*, Parliament of Australia, May 2005, 4-5, 19-20 (Forensicare) available at http://www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf, 21; the comments of the Victorian Court of Appeal in respect of the use of solitary confinement, normally viewed as a form of punishment, to protect a mentally disturbed prisoner in *R v SH* [2006] VSCA 83 (Unreported, Victorian Court of Appeal, Warren CJ, Charles and Chernov JJA, 20 April 2006) [22]; Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health: From Crisis to Community (First Report)* (2006) [13.110]–[13.111].

Case Study: Segregation in Prisons

In June 2006, the Deputy State Coroner of New South Wales investigated the suicide death in custody of an inmate, Scott Simpson. At the time of his death, Mr Simpson was awaiting admission into a prison hospital facility for treatment for his mental illness, but this admission had been repeatedly delayed. He had no traces of anti-psychotic medication in his system, despite the fact that a number of psychiatrists had diagnosed him as suffering from a serious case of paranoid schizophrenia, and despite the fact that he was urgently awaiting admission into hospital for treatment.

Simpson had been found not guilty of a criminal offence on the grounds of mental illness, but was still being kept in a segregation unit in the main high security prison. He had been placed in a cell with hanging points. For the final 26 months of his life (except for two short periods), he was kept in solitary confinement.

The Deputy State Coroner was critical of the circumstances of his incarceration. She recommended, in line with international human rights law, that inmates suffering from mental illness should be held in solitary confinement only as a last resort and only for a limited period.[114] This recommendation, however, has only been poorly and patchily implemented across Australia.

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/.

8.8 Right to a fair hearing (Article 14 ICCPR)

149. The right to a fair hearing is an essential aspect of the judicial process and is vital for the protection of other human rights. The purpose of the right to a fair hearing is to ensure the proper administration of justice. The basic elements of the right to a fair hearing are:

(a) equal access to, and equality before, the courts;

(b) the right to legal advice and representation;

(c) the right to procedural fairness;

(d) the right to a hearing without undue delay;

(e) the right to a competent, independent and impartial tribunal established by law;

(f) the right to a public hearing; and

[114] Inquest into the Death of Scott Ashley Simpson (Unreported, New South Wales Coroner's Court, Pinch SM, 17 July 2006), available at http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc.

(g) the right to have the free assistance of an interpreter where necessary.

150. The right to a fair hearing applies in both civil and criminal proceedings and in courts and tribunals. The right may also apply when dealing with various government bodies.

151. Many of the aspects of the right to a fair hearing are already embedded in Australia's common law and specific legislation. However, further protection is required, particularly in the areas of access to legal aid, assistance for self-represented litigants and limitation of litigation costs and fees.

152. In 2004, the Senate Legal and Constitutional Affairs Committee's inquiry into legal aid and access to justice found that many community legal centres and legal aid systems are facing a 'funding crisis'.[115] Inadequate funding of legal aid commissions has led to a significant heightening of eligibility criteria, meaning that legal aid is, practically, only available in some jurisdictions to the very poor and predominantly in relation to criminal matters. Minimal assistance is available with respect to civil and administrative law matters, even where they pertain to fundamental human rights.

153. The right to a fair hearing is particularly at risk for a range of marginalised and disadvantaged groups. For example, a report recently released by the Aboriginal Resource and Development Services has found that many Indigenous Australians who come into contact with the criminal justice system have little comprehension of what is happening and how the legal system operates.[116] Similarly, many prisoners' rights to a fair trial and access to justice are severely curtailed. Australian courts are very reluctant to engage in review of prison conditions, classifications or management. In recent times, this judicial reluctance has been exacerbated by the operation of the legislation. The prison population also face multiple and compounding forms of disadvantage and have complex legal needs. Despite this, there is a significant lack of access to legal services as well as legal resources for prisoners, which is a specific barrier to prisoners wishing to access justice.[117]

[115] Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) [11.26].

[116] Aboriginal Resource and Development Services, *An Absence of Mutual Respect* (2008), available at http://www.ards.com.au/print/LawBookletWeb.pdf.

[117] Anne Grunseit, Suzie Forell and Emily McCarron, *Taking justice into custody: the legal needs of prisoners* (2008).

Case Study: Mental Health Review Board In 2006/07, only 5.6 per cent of individuals who appeared before the Mental Health Review Board in Victoria had legal representation. Many patients are unable to present their cases as well as they might wish because of their mental illness, or they may be reluctant to speak openly at a Board hearing.

The presence of an advocate provides support and ensures that the patient's rights are appropriately protected. Individuals who appear before the Board and have legal representation are two to three times more likely to successfully challenge their treatment order.

The very low level of representation in matters before the Board is particularly concerning given the extreme consequences of Board decisions on the liberty and security of persons who may be subjected to mental health treatment orders.

Source: Information taken from the Mental Health Legal Centre (Victoria) Annual Report 2006-07. This report is available from: http://www.mhrb.vic.gov.au/publications/documents/MHRB_AR_2007web.pdf

8.9 Right to privacy (Article 17 ICCPR)

154. The right to privacy places limits on the extent to which the government can invade a person's privacy. Government can only intrude into the lives of the community when it is reasonable to do so.

155. The right to privacy includes the right not to have your family, home or correspondence unlawfully or arbitrarily interfered with.

(a) 'Privacy' is a broad term which covers all aspects of a person's physical, psychological and social identity and relationships.

(b) 'Family' includes family as understood in society and is not confined by marriage.

(c) 'Home' includes where a person resides and works.

156. While it is difficult to define privacy with precision, it is often categorised in the following terms: bodily privacy, territorial privacy, communications privacy and information privacy.

157. The right to privacy is particularly relevant to people who use health or other social services, who are having housing difficulties or are charged with criminal offences, as well as in relation to families and children. The right to privacy is also relevant to the police force and government agencies that may require access to personal information or property.

158. Privacy legislation that currently exists at a state and federal level predominantly relates to personal information only. The right to privacy remains largely unprotected in Australia's domestic laws. There is no general recognition of the right to privacy in Australian law, either at common law or in legislation.

159. A recent Australian Law Reform Commission report on privacy recommends 295 changes to privacy laws and practice and identifies 10 key areas of concern, including: children and young people; credit reporting; health; data breach notification (fraud and identity theft); emerging technologies; and creating a statutory action for serious invasion of privacy.

160. Other major areas of concern with respect to the right to privacy include:

(a) The use of closed circuit television cameras (CCTV) by both public authorities and private organisations is increasing. The use of CCTV in public places raises significant privacy issues and impacts disproportionately on homeless people, young people and other groups reliant on public space. There are significant gaps in the legislative framework regarding video surveillance in public places.

(b) Police 'stop and search' powers are overly broad and inadequately regulated, resulting in disproportionate interferences with the right to privacy and alleged victimisation of groups such as Indigenous Australians, Muslims and African migrants.

(c) Prisoners are subject to significant interferences with their right to privacy beyond those that are necessary by consequence of incarceration, including with respect to their bodily integrity, correspondence, and access to family and friends.

Case Study: Identity Documentation for the Gender Diverse Community

'I have been treated appallingly numerous times by people who have realised I am different to them because of various legal documents… While I realise that, in most cases, this kind of treatment is simply the result of ignorance and/or red-tape, rather than blatant prejudice on the part of individuals dealing with me in these places, the grief caused by constantly being outed and judged is unspeakable.'

Source: HREOC, 'Sex Files: the legal recognition of sex in documents and government records,' March 2009. Available at http://www.hreoc.gov.au/genderdiversity/sex_files2009.html#Heading180.

8.10 Freedom of movement (Article 12 ICCPR)

161. The right to freedom of movement means that people who are lawfully in Australia have the right to: enter and leave Australia; move around freely within Australia; and chose where to live within Australia.

162. People cannot be prevented from moving through, remaining in, entering or departing from areas of public space. The right is also engaged where the government limits or places conditions on where people can live in Australia.

163. The right imposes positive obligations on the government to take steps to ensure that a person's freedom of movement is not unduly restricted by other people or government bodies. The right also imposes negative obligations on the government, meaning that the government must refrain from interfering with a person's freedom of movement.

164. There is no general right to freedom of movement in Australia's law. Many laws curtail the right, such as counter-terrorism measures (primarily control orders), and police powers such as "move on" powers. Some laws promote the right to freedom of movement in certain groups, such as laws targeted at improved disabled access to buildings and public transport.

8.11 Protection of families and children (Articles 23 and 24 ICCPR; Article 10 ICESCR; CRC)

(a) Families

165. According to the right to protection of family, everyone has the right to found a family and to marry if they wish to do so. All families must be afforded protection, regardless of marital status, gender, socio-economic status or ability. This includes the right to have family relationships recognised by the law, and the right of a family to live together and to enjoy each other's company.

166. Australian law offers only limited protections for families and such protections do not extend to include all definitions of "family" (such as same-sex couples and their families) and is not always reflected in government policies and guidelines.

167. Whilst there are many laws which impact on the family, Australia's immigration laws raise key issues as they often serve to undermine the rights of the family. The Geneva Expert Roundtable, organised by the United Nations High Commissioner for Refugees, has stated that '[r]espect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated'.[118] However, under Australia's immigration laws and policies, it is particularly common for refugee families to be separated. Family unity issues arise most frequently where:

(a) there are moves to deport a non-citizen family member;

(b) a family member is denied the ability to bring family members to Australia; or

(c) entry is denied to an individual seeking to join family members already residing in Australia.

168. An additional concern is the requirement for all family members migrating to Australia to pass strict health criteria.[119] Most permanent visas require all members of the family unit to undergo health examinations and satisfy the health requirement. This applies regardless of whether that family unit member is a visa applicant and/or intends to join the visa applicant in Australia. Thus, 'where one member of the family fails any of the public interest criteria, the entire family unit fails'.[120]

Case Study: Protection of Refugee Families

Shahraz was recognised as a refugee in 1996. He attempted to sponsor his family members to Australia several times over a period of four and a half years. The Department of Immigration and

[118] Geneva Expert Roundtable, UN High Commissioner for Refugees, *Summary Conclusions on Family Unity,* [5], UN Doc UNHCR/IOM/08/2002 Annex 8 (2001).

[119] Health criteria are found in *Migration Regulations 1994* (Cth) sch 4, cl 40.

[120] Commonwealth Ombudsman, *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application* (2001) 2.

Citizenship refused to exercise its discretion to waive the health requirement in respect of his disabled child who, together with his wife and two daughters, was seeking to join him.

Shahraz lost all hope of ever being reunited with his wife and children and died as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. As a result of an investigation, the Commonwealth Ombudsman stated that 'the history of this case is one of administrative ineptitude and of broken promises' and recommended that the health requirements for immediate family members be no different than those for their proposers.[121] To date, this recommendation has not been implemented.

Source: This example is taken directly from the 'Freedom Respect Equality Dignity: Action: NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia'. This document is available from: http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/.

(b) Children

169. The right to protection of children, recognises that children (persons aged under 18 years) are entitled to special protection in their best interest, on account of their vulnerability. It is usually only reasonable to treat children differently than adults in order to protect the child and in accordance with other human rights.

170. Of the many issues affecting children, issues surrounding domestic violence illustrate the special assistance that is required to be given to children. Up to one-quarter of young people in Australia have experienced or witnessed an incident of physical or domestic violence against their mother or stepmother.[122]

171. The rights of children are also inadequately protected in the criminal justice system. Mandatory sentencing laws have a particular impact on young people and disproportionately affect young Indigenous Australians, leading to a racially discriminatory impact on their rate of incarceration.[123] Other areas of the juvenile criminal justice system that do not adequately protect the rights of children include:

(a) the availability and conditions of bail;

(b) the detention of juveniles in adult facilities;

(c) the public identification of children in criminal proceedings; and

[121] Ibid 1.

[122] These findings come from a survey of 5,000 Australians aged between 12 and 20 from all States and Territories in Australia: David Indermur, 'Young Australians and Domestic Violence' (2001) 19 *Trends and Issues in Crime and Criminal Justice*.

[123] The CRC Committee recently expressed its concern about the over-representation of Indigenous children in the juvenile justice system: see CRC Committee, *Concluding Observations of the Committee on the Rights of the Child: Australia*, [73]-[74], UN Doc CRC/C/15/Add.268 (2005).

(d) the use of curfews and 'move on' laws.

172. A range of groups confront significant barriers to education and do not have equal access to educational opportunities, including children with disability, Indigenous children, children from low income families, and children from rural and remote areas. The level of support provided for children with disabilities to attend mainstream schools is manifestly inadequate, resulting in much lower levels of secondary school completion.

Case Study: Protection from Domestic Violence

James tried to get a violence restraining order from a court due to the ongoing abuse of his stepfather. James had left the home because his mother refused to do anything about the abuse against him. The Magistrate refused to grant a restraining order on the basis that no complaints had been made to police prior to James' application, the police had never been called to the house and the only evidence that the court had was the testimony of James.

Source: Case study provided by SCALES Community Legal Centre, Western Australia.

8.12 Freedom of thought, conscience and religion (Article 18 ICCPR)

173. People have the freedom to hold or choose a religion or belief, and publicly or privately demonstrate their religion or belief. This right protects people's rights in relation to a broad range of views, beliefs, thoughts and positions of conscience, as well as their faith in a particular religion.

174. It may be permissible to restrict freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

175. The right to freedom of thought, conscience and religion is especially relevant to religious institutions or religion-based organisations, and people whose religious or other beliefs require special accommodation in their dealings with the government, such as dress codes, being unable to attend work, school or an examination on a religious holiday, or special dietary needs.

176. There is no right to freedom of thought, conscience and religion in Australian law, as well as no federal legislation that prohibits discrimination or vilification on the ground of religion. Furthermore, some aspects of law, particularly counter-terrorism measures, are administered in a discriminatory fashion or in a way that imposes a discriminatory burden on those who hold certain opinions or beliefs. Following the events of 11 September 2001, anti-Muslim and anti-Arab prejudice has increased and Australia's Muslim and Arab community has reported 'a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority'.[124]

[124] Human Rights and Equal Opportunity Commission, *Isman — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 3.

177. In its recent concluding observations, the Human Rights Committee stated:

> While acknowledging the measures taken by the State party to combat islamophobia, the Committee remains concerned at reports of an increased number of cases of discrimination of persons of Muslim background. The Committee regrets the lack of hate speech prohibitions of the form envisaged by article 20 of the Covenant.[125]

8.13 Freedom of expression (Articles 19 and 20 ICCPR)

178. Everyone has the right to seek, receive and impart information and ideas of all kinds. The right to freedom of expression protects expression in any form such as speaking aloud, publishing articles, books or leaflets, television or radio broadcasts, producing works of art, communication through the internet, commercial advertising, dress and images.

179. The right to freedom of expression is not an absolute right. It is subject to other laws such as defamation, or laws for the protection of national security. These limitations are aimed at respecting the rights and reputation of other persons and for the protection of national security, public order, public health or public morality.

180. There is no general right to freedom of expression in Australian law. Freedom of expression is restricted by some laws which are proportionate to their aims (for example, defamation) and some which appear to be disproportionate to their aims (for example, some counter-terrorism legislation). A recent independent audit of the state of free speech in Australia disclosed that, in the absence of comprehensive constitutional or legislative protection of freedom of expression, free speech has been significantly eroded in Australia over the last 10 years.[126]

Case Study: Anti-Terror Laws and Freedom of Expression

X is of Tamil origin and hosts a Tamil radio program on a community radio station. Under Australian law, the Liberation Tigers of Tamil Eelam (**LTTE**) would fall within the legal definition of a 'terrorist organisation'. X has observed that, in the prosecution of two Tamil-Australians in relation to their links with the LTTE, part of the prosecution case was that the defendants held political materials relating to the plight of Tamils in Sri Lanka. X is therefore reluctant to speak about matters relating to the situation in the north-eastern region of Sri Lanka in his radio program for fear of being linked with the LTTE and for fear that political commentary might be used to incriminate him. He therefore avoids speaking about Sri Lankan politics on his radio program altogether.

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

[125] HRC, *Concluding Observations on Australia*, above n 40, [26].

[126] Irene Moss, *The Independent Audit of the State of Free Speech in Australia* (2007), available at http://abc.net.au/unleashed/documents/Audit-Report-Final-31-Oct.pdf.

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/

8.14 Freedom of assembly and association (Articles 21 and 22 ICCPR; Article 8 ICESCR)

181. The right to peaceful assembly protects the right of individuals and groups to meet in order to exchange ideas and information, to express their views publicly and to hold a peaceful protest.

182. The right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful – but does not protect violent demonstrations. However, civil disobedience manifested without force may be protected.

183. The right may impose a positive obligation on the government to facilitate peaceful assemblies and to take action to protect peaceful demonstrators from counter-demonstrators.

184. The right to freedom of association protects the right of all persons to voluntarily group together for a common goal and to form and join an association. The right to freedom of association also includes the right not to associate with others.

185. The right applies to all forms of public association, including trade unions. The right also means that people cannot be compelled to join an association or trade union. The right to strike is also an integral part of the principle of freedom of association.

186. There is no general right to freedom of association and assembly in Australian law. Further, many laws such as counter-terrorism laws, 'move-on' powers and workplace relation laws threaten the right to freedom of association and assembly.

187. Specific laws have been passed to apply to a number of major public events, and this is one issue that raises concerns with Articles 21 and 22 of the ICCPR. For example, legislation was passed specifically to limit the ability of particular groups to participate in public assembly in relation to the meeting of the Asia-Pacific Economic Cooperation Economic Leaders in Sydney in September 2007 and World Youth Day in Sydney in July 2008.[127] Concerns have also been expressed over the manner in which many of these powers were exercised. During the APEC Meeting, there were reports of unlawful arrests and excessive use of force by the police.[128]

188. Similarly, a report released in 2007 also found that police used disproportionate and unjustifiable force against protesters and bystanders during the Group of 20 Summit in Melbourne in November 2006 (**G20 Summit**).[129]

[127] *APEC Meeting (Police Powers) Act 2007* (NSW); *World Youth Day Act 2006* (NSW).

[128] Liz Snell, Combined Community Legal Centres' Group (NSW) and Kingsford Legal Centre, *Protest, Protection Policing: The Expansion of Police Powers and the Impact on Human Rights in NSW* (2008) 21.

[129] Federation of Community Legal Centres (Vic) Inc. *Human Rights Observer Team Final Report: G20 Protests*, (2007), available at http://www.communitylaw.org.au/fedclc/resources/HROFinalReportforwebrelease.pdf.

Case Study: G20 Summit

While walking with friends in Melbourne, Tim Davis-Frank, who took part in the G20 Summit protests, was snatched by about eight unidentifiable men and forced into an unmarked white van. Without identifying themselves, the men in the van tied his hands behind his back, forced him to lie face down on the floor and proceeded to interrogate him, punching him repeatedly in the face if he didn't answer their questions quickly enough and once for accidentally calling one of them 'mate'.

Four months later, a further incident took place at his parents' house in Sydney. The house was one of a number which were raided by teams of up to ten police in a 'dawn sweep through Sydney' to arrest G20 demonstrators four months after the event.[130]

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/

8.15 Right to take part in public life (Article 25 ICCPR)

189. The right of political participation means that everyone has the right to take part in public affairs without discrimination. This right applies to all people in Australia, and includes the right to vote as well as participate in public debate regarding government policy at all levels (local, state and federal).

190. The right requires the government to take positive action to enable meaningful participation of individuals and groups who are marginalised or have special needs.

191. Every eligible person has the right to vote, be elected and have equal access to the Australian public service and public office. However, eligibility is determined by other laws. For example, certain groups of people (such as non-citizens and those who are sentenced to lengthy periods of imprisonment) are ineligible to vote. Furthermore, enrolment and election processes present barriers to various community groups, including young people, homeless people, and people with a disability.

192. The right to vote requires the government to take positive steps to ensure all persons can participate. For example, a non-English speaker may face an impediment to his or her right to vote if there is no electoral information translated in his or her native language or a language he or she could understand.

[130] See Tim Davis-Frank, G20 Protestor: *'We are not the Dangerous Ones'* (23 March 2007), Green Left Weekly, available at http://www.greenleft.org.au/2007/704/36552; see also David Marr, 'His Master's Voice: Corruption of Public Debate Under Howard' (2007) 26 *Quarterly Essay* 33.

Case Study: Accessible Electoral Information

In the 2007 Federal Election campaign, the major and minor political parties released policies on disability. All are available on-line only in portable document format (PDF), which is not compatible with screen-reading software used by people who are blind or vision impaired.

Source: Case study provided by the Australian Federation of Disability Organisations

8.16 Right to social security (Article 9 ICESCR)

193. Social security is a system in which the government provides for people who are faced with circumstances that prevent them from being able to ordinarily provide for themselves. It assists people through providing benefits in the form or cash or otherwise. These benefits should be of an amount and last for a time that sufficiently supports the person according to their particular needs. Social security enables many disadvantaged people to enjoy an adequate standard of living and without it, many people would live in poverty. It also promotes social inclusion.

194. People should be able to access such benefits without unreasonable or arbitrary restrictions. Governments are expected to provide social security to the maximum level that can be reasonably expected, taking into consideration other demands on government funding.

195. The social security system is set out in various pieces of legislation. This legislation and social security policy is administered by Centrelink, which is a statutory authority. The entitlement of a person to social security in Australia is circumscribed by qualification and payability criteria, which is set out in the legislation. Payments made are funded by general tax revenue, as distinct from other types of social security systems that are funded by contribution or insurance.

196. Australian courts have interpreted social security as 'no more than a gratuity, to payment of which a person can have no rights enforceable at law',[131] meaning that social security benefits are not prioritised as a human right at Australian law. As a result, not all people in Australia who require social security are able to access it. Such people include newly arrived migrants, people unable to provide adequate proof of identity and people unable to satisfy 'mutual obligation' requirements, all of which have a particularly adverse impact on marginalised and disadvantaged people.

197. The inadequacy of social security payments is another area of significant concern. Social security payments are indexed around or below the Henderson Poverty line, which in many cases is insufficient to guarantee an adequate standard of living. In September 2007, 'Newstart', the base unemployment benefit, was paying $212.15 per week to single unemployed adults, 43 per cent below below the Henderson Poverty Line; and the maximum

[131] See, eg, *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; contra, *Green v Daniels* (1977) 13 ALR 1.

welfare payment for a couple with three children was 11 percent below the Henderson Poverty Line.[132]

198. The inadequacy of social security payments detrimentally impacts vulnerable groups of the community. The aged pension is currently inadequate to support the needs of older Australians, a recent Senate Committee describing the full pension payment as 'insufficient to maintain a basic, decent standard of living'.[133] The single parent allowance in Australia is also inadequate, with the risk of poverty for single parents being around 70 per cent.[134] Young people are also at a high risk of poverty as current student 'Youth Allowance' payments are also inadequate.

Case Study: Access to Social Security

Michael suffers from a mental illness. He was deemed to have refused a suitable job offer and an eight week no payment period was imposed. During the eight weeks with no income he was unable to meet rent payments, was evicted and became homeless. He was unable to eat well and his mental health deteriorated to a point that he was involuntarily hospitalised.

Source: Case study provided by Welfare Rights Centre, Sydney.

8.17 Right to work (Article 6 ICESCR)

199. All people have the right to work. Each and every person should have the opportunity to participate in employment that he or she freely chooses or accepts. This includes a person working for themselves or working for another person or organisation.

200. Participation in work is essential for a person to be able to seek an adequate standard of living for themselves and their family. It is also important for the dignity of all people and promotes participation in the community.

201. At work, a person should enjoy safe working conditions. For example, employers should provide adequate occupational, health and safety training and equipment when and where necessary. Workers are entitled to receive a decent remuneration for their work so that they may support themselves and their family.

202. The right to work is not expressly protected in Australian law. The WorkChoices legislation introduced by the former Australian Government in 2005[135] seriously undermined the right to work, for example, by encouraging individual contracts, discouraging collective bargaining,

[132] See generally, Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia* (September Quarter, 2007).

[133] Senate Standing Committee on Community Affairs, *A decent quality of life: Inquiry into the cost of living pressures on older Australians*' (March 2008), xi, available at http://www.aph.gov.au/Senate/Committee/clac_ctte/older_austs_living_costs/report/report.pdf.

[134] OECD, 'Country Note: Australia', Growing Unequal?: Income Distribution and Poverty in OECD Countries (2008), 2, available at http://www.oecd.org/dataoecd/44/47/41525263.pdf.

[135] Contained in the *Workplace Relations Act 2006* (Cth).

and winding back protection from unfair dismissal. While the new regime established by the *Fair Work Act 2009* (Cth) phases our individual statutory contracts are strengthens unfair dismissal rights and minimum standards of employment,[136] the proposed new system does not ensure full realisation of the right to strike, freedom of association and the right to work.

203. In addition to Work Choices, the former Australian Government also introduced the *Building and Construction Industry Improvement Act 2005* (Cth) which severely limits the freedom of association of building and construction industry workers and exposes their unions to steep penalties, including imprisonment, for conducting union business. Under the Act, the Australian Building and Construction Commission has broad and unfettered discretionary power to investigate potential contraventions and compel the giving of evidence. These powers are not subject to judicial approval or review and, in that sense, are broader than the investigatory powers of the Australian Secret Intelligence Organisation.[137]

204. A range of groups confront significant barriers to workforce participation, including Indigenous people, asylum seekers, migrants and persons with disabilities. For example, in 2003 the unemployment rate of people with a disability was almost twice that of people without a disability, and the labour force participation rate was 60% for people with a disability compared to 90% for people without a disability.[138] Women with disabilities are particularly disadvantaged in this regard, with lower pay and employment rates than males with similar disabilities.[139]

205. Finally, Indigenous Australians have not been adequately compensated for 'Stolen Wages', being the wages of many Indigenous workers whose paid labour was controlled by governments for much of the 19th and 20th centuries. No coordinated response to Indigenous stolen wages has been initiated by the Australian Government.

8.18 Right to an adequate standard of living (Article 11 ICESCR)

206. Everyone has the right to an adequate standard of living. This includes the right to food, water, clothing and housing. This right is one of the most fundamental human rights.

207. For a person to have an adequate standard of living they must have, among other things;

(a) easy access to nutritious, quality and affordable food;

(b) easy access to sufficient, safe and affordable water for personal and domestic use;

---

[136] See Australian Labor Party, *Forward with Fairness: Labor's plan for fairer and more productive Australian Workplaces* (April 2007).

[137] Senate Standing Committee on Education, Employment and Workplace Relations, *Building and Construction Industry (Restoring Workplace Rights) Bill 2008,* 28 November 2008, available at: http://www.aph.gov.au/Senate/committee/eet_ctte/building_and_construction/report/report.pdf, 17.

[138] Australian Bureau of Statistics, *1301.0 - Year Book Australia*, (2006), graph 9.13.

[139] Women with Disabilities Australia, *Submissions to the National Competition Policy Review of the Disability Discrimination Act 1992,* (2003).

(c) adequate housing for themselves and their family; and

(d) a healthy environment.

208. This right also means that governments must take steps to ensure that food and water supply is sustainable for present and future generations.

209. The right to an adequate standard of living is not expressly protected in Australian law. Some laws, such as those that enable the provision of Centrelink payments, improve people's ability to access an adequate standard of living. However, many people still do not have adequate, and affordable, housing, or access to adequate food and water (especially in rural areas).

210. Areas of significant concern in relation to the right to an adequate standard of living include the following:

(a) In 2008, 12 per cent of Australians were found to be living in poverty, which is a higher proportion than the OECD average.[140] The risk of poverty for Australian sole parents is extremely high, at 70 per cent.[141] Older Australians are also particularly affected by poverty. For single people aged over 65, the income poverty rate is 50 per cent – the highest of all the countries in the OECD.[142]

(b) At least 105,000 people across Australia are homeless every night.[143]

(c) In addition to those experiencing homelessness and marginal housing, it is estimated that up to 35 per cent of low income people experience 'housing stress', meaning that their housing costs are so great relative to their income so as to jeopardise their ability to meet other basic needs. This equates to 750,000 lower income households being in housing stress. Further, almost 10 per cent of people with a low income experience 'extreme housing stress', meaning that they are required to spend more than 50 per cent of their income on rent to avoid homelessness.[144]

(d) Over the past ten years, funding for public housing was cut by 25 per cent.[145] As a result, public housing stock is severely depleted and available to only the most severely disadvantaged households.

---

[140] OECD, above n 134, 1. This means that 12 per cent of the population lives on less than half of the median average income.

[141] Ibid.

[142] Ibid.

[143] Australian Bureau of Statistics, *Counting the Homeless, 2006* (2008)

[144] Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004) 123–4. See also Julian Disney, *Election 2007: Affordable Rental Housing* (2007) available at http://www.australianreview.net/digest/2007/election/disney.html.

[145] Shelter WA, *Newsletter* (October 2007) available at http://www.shelterwa.org.au/publications/regularpubs/newsletters/2007/Shelter_WA_October_Newsletter_2007.pdf.

(e) Indigenous Australians have generally less access to nutritious foods than the wider population. Remoteness and poverty are more common for Indigenous than non-Indigenous Australians, and are major factors which often severely limit access to food. The much higher prevalence of illnesses related to food and nutrition in the Indigenous community is a clear indicator of the extent of the food access problems faced by Indigenous Australians.[146]

(f) Despite some positive improvements in the Government's policies toward asylum seekers, there are still asylum seekers on bridging visas who cannot access work, welfare benefits or healthcare.[147] As the Australian Human Rights Commission has stated, these restrictions result in many asylum seekers and refugees facing poverty and homelessness. The Commission states that 'without the ability to support themselves through work or social security, asylum seekers are entirely dependent on community services for their basic subsistence.'[148]

Case Study: Centrelink payments

Over the past 5 years, a 37 year old single woman renting a small flat on her own has found it difficult to find private rental accommodation that is both affordable and close to her workplace. She recently moved into a new flat when she was forced to resign from her job due to pre-existing work-related injuries. She was earning $600 per week and paying $130 per week on rent (22 per cent of her income).

Since becoming unemployed she receives $210 per week from her Newstart allowance. Her rent now consumes 62 per cent of her income. This leaves her with little over $10 per day for living expenses. While she has the option of moving to a cheaper area to reduce her rent, this will take her further from specialist medical services she requires as well as reducing her employment prospects. She may then risk breaching the conditions of her Newstart allowance because Centrelink can impose penalties on recipients who move to an area with high unemployment.

Source: This case study is taken from Brotherhood of St Laurence, 'What People Told Us' (2003) 12 *Changing Pressures* 4 available at http://www.bsl.org.au/pdfs/Changing_Pressures_Feb03.pdf.

Case Study: Welfare Quarantining

The Northern Territory Intervention introduced welfare quarantining, which included segregating parts of the welfare payments, so that part may be used only for food. Although the aim was to increase

[146] See National Aboriginal and Torres Strait Islander Nutrition Working Party, *National Aboriginal and Torres Strait Islander Nutrition Strategy and Action Plan 2000–2010* (2001).

[147] Department of Immigration and Citizenship, *Fact Sheet 62 – Assistance for Asylum Seekers in Australia* (2008) available at http://www.immi.gov.au/media/fact-sheets/62assistance.htm.

[148] Australian Human Rights Commissions, *Factsheet: The impact of bridging visa restrictions on human rights* (June 2008) available at http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visas_factsheet.html.

access to food for people in Indigenous communities, the operation of the system has in some cases hindered access to food. There have been a number of negative effects on Indigenous people's access to food including:

- The purchase of food can only be made from Government-approved and specially licensed stores, which must keep detailed records of all supplies made. This means that small community stores may be closed down, or that people must travel long distances to access food.
- The high amount of administration required to implement the scheme means that errors have occurred, including insufficient store vouchers being available at the Centrelink offices. This has meant that some people have received vouchers for food that were valued at a lower amount than they are actually entitled to.[149]
- The restrictions on shops approved to receive quarantined money and the slow process for approval of other spending reduce Indigenous people's ability to provide their own sustenance. For example, money for repairs to four-wheel drive vehicles that are required for hunting, as well as other hunting supplies, is difficult or impossible to get approved. This effectively removes Indigenous people's rights to use their land for food or to access their traditional sources of food.

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/.

8.19 Right to health (Article 12 ICESCR)

211. Enjoying good physical and mental health is a fundamental human right and is a pre-condition for the enjoyment of many other rights. This right includes both rights and freedoms.

212. All people should be free to control their body, including their sexual and reproductive activities. No one should be the subject of non-consensual medical treatment or torture.

213. All people are entitled to have access to health care that enables them to attain the highest level of health possible. This right is not a guarantee of good health. Rather, it is the aspiration that a person should have the best health possible, taking into consideration the individual's biological and socio-economic preconditions. Although a country's available resources need to be taken into consideration when determining the funding and attention that is given to health care, the health of people is of prime importance and therefore the area should be provided with as much funding as possible.

[149] For example, Rachel Willika of Eva Valley in the Northern Territory received a $50.00 store voucher for food when she was entitled to $147.00: see Rachel Willika, 'Christmas Spirit in the Northern Territory', *ABC News* (15 June 2008) available at http://www.abc.net.au/news/stories/2008/01/15/2138459.htm.

214. There is no general right to health in Australian law. Furthermore, provision of public health care in Australia is suffering from chronic under funding, rising medical costs, inadequate coverage, and inaccessibility — particularly for disadvantaged and marginalised people.

215. The poor health outcomes of Indigenous Australians remain a critical challenge to the health system in order to lower the discrepancy in mortality and morbidity between Indigenous and non-Indigenous Australians. The state of Indigenous health in Australia continues to result from and present serious human rights breaches. Indigenous Australians, and in particular Indigenous women, continue to experience much higher levels of ill-health, disease and death than non-Indigenous Australians. The average life expectancy for Indigenous male Australians is 56.3 years and 62.8 years for females, compared to 77 years for males and 82.4 years for females in the general Australian population.[150]

216. Mental health inpatient and crisis services are significantly under-resourced in Australia and there are widespread problems with access to care, quality of care and adequate accommodation for people requiring mental health services. People with mental illness are significantly over-represented in key measures of disadvantage such as homelessness, unemployment, poverty, substance abuse, and incarceration rates. Furthermore, within mental health services, there is still too great a use of aversive treatments with harmful side effects and reliance on involuntary treatment regimes. These factors jeopardise the adequacy of mental health treatment for consumers.

217. Prisoners face major health issues, including high rates of injecting drug use and high rates of sexually transmitted diseases. Despite this, most Australian prisons have not developed adequate harm minimisation strategies, including the provision of free condoms, and needle and syringe exchange programs. There is also substantial evidence that mental health care in Australian prisons is manifestly inadequate and constitutes a severe level of neglect. The number of forensic patients and mentally ill inmates housed in Australian prisons has steadily increased, but without a proportionate increase in mental health resources. Recent research indicates that of a total Australian prison population of around 25,000 people, approximately 5,000 inmates suffer from serious mental illness.[151]

Case Study: Affordable Dental Care

'I couldn't afford a dentist. I was homeless and ended up in emergency accommodation, where I found free dental care because of my circumstances. But all the dentist did was pull teeth out that could have been retained and repaired and I'm still waiting for replacements.' One man reported that

[150] Australian Institution of Health and Welfare, *The Health and Welfare of Australia's Indigenous and Torres Strait Islander Peoples 2003* (2003).

[151] J P R Ogloff et al., Australian Institute of Criminology, *The Identification of Mental Disorders in the Criminal Justice System* (2007).

he was turned away from many hospitals when he presented with a broken sternum on the ground that the injury was not sufficiently severe or 'life threatening'.

Source: Case study based on PILCH Homeless Persons' Legal Clinic consultations, 2005.

8.20 Right to education (Article 13 ICESCR)

218. All people have the right to education, including:

(a) free primary education. This includes assistance to those who have not received or completed primary education as a child;

(b) free secondary education; and

(c) access to higher education that should be free or low cost, and may be on the basis of capacity.

219. Educational facilities should be available to all people, especially disadvantaged groups. Schools should be in enough locations so that they can be reasonably accessed. Any costs related to schooling should be minimal so that all people can attend school, regardless of their financial means. Schools should be given enough funding, resources and facilities so that education can be of a quality standard regardless of whether the school is public or private.

220. Parents and guardians have the right to choose the school that their child or children attends. This includes religious and other specialised private schools, provided they meet the educational standards required by the government. Private individuals and bodies have the right to establish such private schools as long as they meet the requirements imposed by the government.

221. The right to education is important because it empowers people and enables greater social and economic participation. It is particularly relevant for young people who are at disadvantage including illness or disability, language barriers, homelessness, or domestic violence.

222. School attendance is compulsory in Australia until the age of 15 or 16 years. However, some children face barriers to equal access to schools (for example, children with disability, children from low income backgrounds and Indigenous children). Further, a decline in government funding and increasing privatisation of tertiary facilities has hindered access to higher education for people from people from disadvantaged backgrounds. Indigenous children and young people have lower levels of access to education, from pre-school through to tertiary levels. Indigenous students are still only half as likely as non-Indigenous students to complete

secondary school.[152] In addition, participation and completion rates are much worse for female Indigenous students.

223. Children with disability also confront many issues in the Australia's educational system, including a lack of accessibility, inadequate curricula and insufficient levels of support and resources available to students with disability. As a result, secondary school completion rates are much lower, which leads to further concerns such as significant lower employment rates, increased incidences with the criminal justice system and increased situations of discrimination.

Case study: Visually Impaired Students

Students with a visual impairment are increasingly reliant on texts in electronic form. However, in Australia, it is difficult for blind people to access a wide range of electronic texts and no scheme exists to enable such access.[153] At the same time, sighted people are using electronic text and other digital media at an ever-increasing rate. As a consequence, visually impaired students in Australia face significant disadvantage when compared with the level of access to electronic versions of all published material for sighted people, which has implications for their educational opportunities.

Source: This example is taken directly from 'Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights'. This publication is available at:

http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/

8.21 Right of self determination (Article 1 ICCPR; Article 1 ICESCR)

224. The right of self-determination means that all people have the right to freely determine their political status and pursue their economic, social and cultural development. This includes the freedom to acquire and dispose of property and wealth generally as the person choses. It is an unalienable right, meaning that governments cannot take the right away.

225. The concept of self-determination requires all governments to recognise the dignity and equality of all groups of people. As such, the right applies to individuals as well as groups. For example, Indigenous Australians are entitled to self-determination both as individuals and as a collective community.

226. The right of self-determination is important because it is an essential condition for the effective guarantee of individual human rights and also further helps promote and strengthen those rights.

---

[152] Australian Bureau of Statistics, *Australian Social Trends* (2006), available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/9FA90AEC587590EDCA2571B00014B9B3?opendocument.

[153] See Suzor, Harpur and Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) *Media and Arts Law Review*.

227. Some of Australia's laws and government policies have a significant negative impact on Indigenous Australians' right to self determination. For example, the Northern Territory Intervention measures include compulsory acquisition of Indigenous land and quarantining of social security payments.

228. Indigenous Australians continue to be denied the right of self-determination and are inadequately politically represented. Without national or regional Indigenous-controlled representative organisations, the ability of Indigenous people to contribute to the formulation of Indigenous policy is extremely limited. The Australian Government's historical policy of merely 'consulting' with Indigenous Australians regarding policies which are particularly likely to affect them does not meet the standards of meaningful engagement, participation and empowerment required by the right of self-determination.

8.22 Cultural rights (Article 27 ICCPR; Article 15 ICESCR)

229. People of all cultural, religious, racial or linguistic backgrounds have the right to enjoy their culture, declare and practise their religion and use their languages. This includes the right of Indigenous people to enjoy their identity and culture.

230. The protection of cultural rights applies to people with a particular cultural, religious, racial or linguistic background. These people may or may not be a member of a minority group.

231. The right requires the government to take steps to foster positive relationships with communities to develop a good understanding and knowledge of the group's practices, cultural traditions and observances or cultural, religious, racial and languages. It is essential that government understand and respect people's cultural rights, and take appropriate steps when usual government policies and procedures would require someone to do something that interferes with their cultural practices.

232. The right is especially relevant to Indigenous people. For Indigenous people, the right to maintain and use their language, maintain kinship ties and maintain a connection with traditional lands, waters and other resources is protected. For example, the right may protect traditional activities of Indigenous people such as fishing and hunting.

233. There are no express cultural rights in Australian laws. Further, Australian laws often infringe on cultural rights, especially those of Indigenous people.

Case Study: The Northern Territory Intervention and Protection of Culture (I)

Pursuant to powers granted in the Northern Territory Intervention, the Australian Government took over culturally sensitive areas of the Warlpiri nation, including a men's ceremonial area and a cemetery.

Source: Lindsay Murdoch, 'Stop Interfering: Angry Elders Take a Stand against Changes', Sydney Morning Herald (25 October 2007) available at http://www.smh.com.au/news/national/stop-interfering-angry-elders-take-a-stand-against-changes/2007/10/24/1192941153373.html.

Case Study: The Northern Territory Intervention and Protection of Culture (II)

In November 2007, a government contractor involved in the Northern Territory Intervention built a pit toilet on a culturally important site at Numbulwar, 600 kilometres south-east of Darwin.

Source: ABC, 'Claims Pit Toilet Built on NT Cultural Site', ABC News, 12 November 2007 available at http://abc.net.au/news/stories/2007/11/12/2088464.htm.

Section 3: How could Australia better protect human rights?

9. Should Australia have a Human Rights Act?

9.1 The need for a Human Rights Act and other protections

234. Given that the protection of human rights under Australian law is currently ad hoc and piecemeal (as set out in section 2 above), the Australian Government should enact a Human Rights Act to ensure that all human rights of all persons in Australia are protected. This was confirmed by the UN Human Rights Committee in its recent Concluding Observations on Australia.[154]

235. An Australian Human Rights Act should protect all the rights contained in the ICCPR and ICESCR (see section 1 above). Further details of a proposed Human Rights Act are set out in some detail in section 3 of this paper, including:

(a) the persons or entities that should have obligations under a Human Rights Act to protect and respect human rights;

(b) the appropriate legal form of a Human Rights Act; and

(c) the remedies that a Human Rights Act should provide for breaches of human rights set out in the Act.

9.2 The 'value add': Benefits of a Human Rights Act

236. The HRLRC submits that as well as enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection (as set out in section 2 above), a Human Rights Act would provide important social, economic and cultural benefits. There are a number of key benefits set out below.

(a) Improving law-making and government policy

237. According to former High Court Chief Justice Brennan:

---

[154] HRC, *Concluding Observations on Australia*, above n 40, [8]. The Committee noted that:

> 'the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000.'

The Committee recommended that:

> 'The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.'

> 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.[155]

238. A Human Rights Act could improve the quality of all laws by making the consideration of human rights part of all law-making and policy development processes, in particular by:

(a) requiring Parliament to scrutinise new laws and consider whether the law infringes peoples' human rights;

(b) requiring the executive arm of government (ie, ministers and their departments) to respect human rights when developing policy, implementing laws and otherwise making decisions; and

(c) requiring courts to interpret all legislation, as far as is possible, in accordance with the Human Rights Act.

239. Although a Human Rights Act may not go so far as *preventing* Government and courts from acting contrary to human rights in all circumstances, it would require human rights to be *considered*. In this way a Human Rights Act makes it 'more difficult for Parliament to compromise those rights unreasonably',[156] whether deliberately or inadvertently.

(b) Improving public service delivery

240. Case studies and evidence from the UK suggest that a Human Rights Act improves public service delivery by changing the approach of both the users and providers of services.[157] Human rights principles are not merely the domain of lawyers, and are used to guide government and community services. In particular:

(a) the language and ideas of human rights have a dynamic life beyond the courtroom and empower a wide range of individuals and organisations to improve people's experience of public services and their quality of life generally;[158]

(b) human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond just anti-discrimination;

---

[155] 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/.

[156] Julian Burnside, 'Justice will prevail', *The Sunday Age* (Melbourne), 18 May 2008, Opinion 21.

[157] 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.

[158] Note that in the ACT there has been 'a small, but growing impact beyond government': ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review - Report* (2006) 16, available at http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf.

(c) human rights principles can help decision-makers and others see seemingly intractable problems in a new light;

(d) human rights frameworks guide ethical and workable policies and practices, particularly for aspects of government responsibility that have multi-dimensional human rights concerns, such as Corrections and Police,;[159] and

(e) awareness-raising about human rights empowers people to take action.[160]

241. According to a formal review of the implementation of the UK Human Rights Act, 'the Human Rights Act has led to a shift away from inflexible or blanket policies towards those which recognise the circumstances and characteristics of individuals'.[161]

How human rights can improve service delivery

Case Study: Older couple split up by local authority after 65 years of marriage

A husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to come with him but was told by the local authority that she did not fit the criteria. Speaking to the media, she said 'We have never been separated in all our years and for it to happen now, when we need each other so much, is so upsetting. I am lost without him – we were a partnership'. A public campaign launched by the family, supported by the media and various human rights experts and older people's organisations, argued that the local authority had breached the couple's right to respect for family life (Article 8 of the UK Human Rights Act). The authority agreed to reverse its decision and offered the wife a subsidised place so that she could join her husband in the care home.

Source: This example is taken directly from the British Institute of Human Rights' publication, *The Human Rights Act – Changing Lives*. This publication is available at: http://www.bihr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL.pdf.

(c) Protecting marginalised Australians by addressing disadvantage

242. Australia's most socially and economically marginalised and disadvantaged people are the most likely to come into contact with government services.[162] Given their high level of interaction with public services, such vulnerable people are also more likely to suffer violations

[159] VEOHRC, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (27 February 2009) 16, available at http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf.

[160] British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007) 5, available at http://www.bihr.co.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf.

[161] UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

[162] Fred Chaney, Former National Native Title Tribunal Deputy President, 'Conflict Over Aim of Human Rights Legislation', *The West Australian* (Perth), 4 May 2007, 6.

of their human rights than people in majority groups, or people with the means to protect their own interests.

How human rights can address marginalisation and disadvantage

Case study: Young people with acquired brain injuries forced into aged-care facilities

A Victorian rehabilitation centre operating as part of a public hospital was seeking to discharge several young people with acquired brain injuries because their two year contractual period had ended. However, the only alternative care facilities available were aged care facilities, which would not provide the social environment, or support services (such as speech therapy) needed for the young people to continue their recovery. Transferring these young people to an aged care facility would therefore arguably present a violation of their right to equality and non-discrimination (in this case on the basis of their disability and health) and their right to privacy under the Victorian Charter. A disability advocate raised these rights arguments with the rehabilitation centre, which agreed not to move the young people until it had considered its obligations under the Victorian Charter.

Case study: Eviction of pregnant single mother without reasons

A pregnant single mother with two children was living in community housing. She was given an eviction notice, without providing any reasons for the eviction, or an opportunity to address the landlord's concerns. The rights to family life and to privacy in the Victorian Charter were used to negotiate with her landlord to prevent an eviction into homelessness, and to reach an alternative agreement. This case has led to further education and systemic change improving the response of public and community housing providers to vulnerable tenants.

Source: These are real-life examples from Victoria that demonstrate how a Human Rights Act could address disadvantage and promote human dignity. See HRLRC, *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage*, available at: www.hrlrc.org.au.

243. There is strong evidence that a human rights approach can: [163]

(a) empower marginalised and vulnerable individuals, communities and groups;

(b) provide a framework for the development of more effective, efficient and holistic public and social policy;

(c) promote more flexible, responsive, individualised and 'consumer friendly' public and social services;

(d) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and

[163] See, eg, British Institute of Human Rights, above n 160; UK Department for Constitutional Affairs, above n 161; Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); OHCHR, above n 24.

(e) assist in the development of more effective social inclusion and poverty reduction strategies.

(d) Cultural change – towards a human rights culture

244. A Human Rights Act would be a clear statement of Australia's human rights and related responsibilities, contributing to a culture with a greater awareness of, and respect for, human rights, within government and throughout the community. A Human Rights Act would serve an important educative function, articulating those standards, rights and responsibilities that are necessary in a free, democratic and inclusive society.

245. A Human Rights Act could also promote a culture of human rights at a very local level. Although the full operation of the Victorian Charter is only relatively recent, there is growing evidence of cultural change in Victoria under the Act. The VEOHRC 2008 report on the operation of the Victorian Charter records some of that change within government: [164]

> Reports from agencies and other sources suggest that the understanding of human rights in the Victorian public sector has been amplified and brought into sharper focus by the Charter. The Charter has encouraged employees to see human rights as relevant to their work, acted as a trigger for reform in some areas, enhanced existing ethical frameworks and provided a new framework for independent statutory authorities to strengthen and reinforce the obligations of service providers.

246. The VEOHRC 2008 report also sets out many initiatives from across the Victorian Government, including case studies of how a human rights framework is being incorporated into departmental systems. For example, the Department of Treasury and Finance has adapted its procurement process to include an eight point public interest test that encapsulates key principles from the Victorian Charter, including equality and public access.[165]

247. There is also a growing body of case studies from Victoria of how human rights are being used outside of courtrooms to change not only the culture of government action and decision making, but also the approach of service users and their advocates.[166]

248. However, creating a culture of respect for human rights is not simply a matter of enacting a law (or amending the Constitution). Much would depend on how public bodies, under a Human Rights Act, responded to their obligations, whether people were educated about their rights, and whether sufficiently-funded public bodies existed to promote the aims of the Charter and respect for human rights generally.

---

[164] VEOHRC, above n 159, 5.

[165] Ibid, 42.

[166] See HRLRC, *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage* (2009), available at http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/.

How human rights can promote cultural change

Case study: Building community participation in development of public buildings

A medium-sized primary school in Victoria used human rights principles to inform its policies and processes around the re-design and development of the school building. Taking into account the right to education, the rights of children and rights of persons with a disability, input was sought from all relevant stakeholders, including students, parents and teachers. Three different response forms were distributed to match the literacy levels of all students. In addition, the needs of people with disabilities were given special consideration and a local Indigenous co-operative was consulted.

The principal of the school has reported that: '[a] simple walk through of the new building gives the message that this is your school, your community and you own the space equally with all others who use it, it generates excitement, ownership and buy-in from all.'[167] She also noted that the process had a positive effect on the students and broader school community through the development of strong relationships and positive, supportive community cultures.

Source: This is a real-life example from Victoria that demonstrates how a Human Rights Act could address disadvantage and promote human dignity. See HRLRC, *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage*, available at: www.hrlrc.org.au.

(e) Economic value add

249. There is clearly an economic cost associated with policies that do not effectively protect the lives and safety of citizens. Access Economics conducted a study of the costs of domestic violence to the Australian economy. It estimated that in 2002-2003, the total cost of domestic violence was $8.1 billion.[168]

250. However, there is an increasing body of economic research which demonstrates that there is a strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.[169]

251. For example, when the Productivity Commission conducted a review of the *Disability Discrimination Act 1992* (Cth) (**DDA**), it found that the benefits of the Act in the community fell into two broad categories, one of which was the productive capacity of the economy. It stated: [170]

---

[167] See ibid, example 1.7.

[168] Access Economics, *The Cost of Domestic Violence to the Australian Economy* (October 2004), available at http://www.accesseconomics.com.au/publicationsreports/showreport.php?id=23&searchfor=2004&searchby=, Parts 1, 3.

[169] See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

[170] Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report Vol 1, Report No 30, (30 April 2004) 134.

> First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community.
>
> Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.

252. Indeed, although difficult to quantify, the Productivity Commission found that the impact of the DDA had been to produce a net benefit to the community. It stated: [171]

> …taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction.

253. The economic benefits of closing the gap in life expectancy between Indigenous and non-Indigenous Australians have also been confirmed by a study. An Access Economics report states that there is clear economic justification for reducing Indigenous disadvantage, including improving government budgets by $8.3 billion per year and boosting national income by $10 billion.[172]

254. The effective implementation of a Human Rights Act may yield substantial economic benefit.

(f) Implementing Australia's international obligations

255. Australia is already a party to many human rights treaties, including the ICCPR, ICESCR, CROC, CERD, CEDAW and CRPD (see discussion in section 1). A Human Rights Act would have significant symbolic value in affirming that Australia is committed to providing its own citizens with human rights standards, in accordance with obligations it has already committed to in the international community. The HRC recently called upon Australia to enact comprehensive legislation to give effect to human rights across all states and territories, to ensure that Australia's domestic system is compatible with international standards.[173]

---

[171] Ibid, 152.

[172] Access Economics and Reconciliation Australia, *An overview of the economic impact of Indigenous disadvantage* (30 September 2008). 'The report estimates government revenue would be $4.6 billion higher than otherwise in 2029, including a $1.7 billion increase in the income tax take and $530 million extra from the GST, which goes to the states. Government spending would be $3.7 billion lower, saving $1.3 billion in health, $1.2 billion in welfare and $850 million on the justice system.': Mike Sketekee, 'Closing prosperity gap a $10bn gain', *The Australian*, 30 September 2008, available at http://www.theaustralian.news.com.au/story/0,,24423119-25072,00.html.

[173] HRC, *Concluding Observations on Australia*, above n 40.

(g) Promoting Australia's reputation as a good international citizen and regional and global human rights leader

256. As Australia seeks to establish itself as an effective international citizen and regional leader, as demonstrated by seeking a seat at the UN Security Council, our authority and legitimacy on human rights issues requires, at a minimum, that our domestic laws recognise and protect those rights which Australia has pledged to uphold by ratifying the core human rights conventions. Australia's status as the only Western democracy without a human rights law undermines its authority and legitimacy of its voice on human rights issues. A number of UN bodies have expressed concern that Australia does not provide any constitutional or other appropriate protection of human rights.[174] Similar concerns about Australia's lack of entrenched institutional protection for human rights have recently been expressed by the CESCR,[175] the Committee against Torture[176] and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[177]

(h) 'Bringing rights home' rather than requiring that complaints be heard in New York or Geneva

257. Australians may currently raise human rights complaints with the HRC in New York or Geneva.[178] They can also bring complaints under the Optional Protocol to the ICCPR, CERD, CAT and the Optional Protocol to CEDAW.[179] In the absence of a Human Rights Act which confers domestically enforceable rights, the inability of Australians to, at least initially, bring these complaints in Australia raises a number of problems. As Lord Bingham, the former Senior Law Lord of the United Kingdom, has observed:

(a) Complaints reach UN treaty bodies without the benefit of a domestic judgment addressing the human rights issues.

(b) A domestic legal system should 'command the confidence of the public as one which is inclusive, belongs to them and affords a remedy for obvious wrongs. It is

[174] The HRC has repeatedly requested that Australia properly incorporate the terms of the ICCPR into domestic law across Australian jurisdictions. See HRC, *Concluding Observations on Australia*, above n 40. In the HRC's earlier observations, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55th sess, 1967th mtg, [514], UN Doc A/55/40 (2000) it stated: "there remain lacunae in the protection of Covenant rights in the Australian legal system''. See discussion in Section 2 of this submission.

[175] CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [14], [36], UN Doc E/C.12/1/Add.50 (2000).

[176] Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [9]–[10], UN Doc CAT/C/AUS/CO/1 (2008).

[177] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [10], UN Doc A/HRC/4/26/Add.3 (2006).

[178] ICCPR arts 1, 5(2)(b).

[179] The text for an Optional Protocol to the ICESCR has been adopted by the UN General Assembly and will open for signature around September 2009.

destructive of such confidence if there is a justified belief that for a significant category of serious wrongs the domestic court can offer no remedy and the disappointed litigant is obliged to go away and seek this superior justice abroad'.

(c) It is very undesirable that members of the public be put to the expense and the considerable delay of seeking redress in New York or Geneva for a human rights complaint which could, had such human rights been part of domestic law, have been granted more inexpensively and much more quickly at home.

(d) If the rights and freedoms embodied in the international human rights treaties are, as described, 'fundamental', it is a grave defect that they are not fully protected in domestic law.[180]

258. A Human Rights Act might increase the opportunities for Australians to raise human rights issues in domestic courts. Australian courts could also have increased opportunities to participate in the development of the international body of human rights law.

Recommendation 1:

The Commonwealth Government should introduce a Human Rights Act for Australia.

[180] Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008), available at http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/lord-bingham/.

10. Whose rights should be protected by a Human Rights Act?

10.1 Who has human rights?

259. Human rights belong to people. These rights arise from the fact that all persons are human beings, and as such are born free and equal in dignity and rights.[181]

(a) All persons have rights

260. A Human Rights Act should protect the rights of human beings and not corporations. The exclusion of corporations is a reflection of the fact that human rights instruments are concerned with the dignity and value of the lives of human beings. This approach is in accordance with the major international human rights treaties. The ICCPR and the ICESCR, along with the Victorian Charter, are all limited in their application to the rights of human beings.

261. A Human Rights Act would protect the human rights of either individuals or groups. Most human rights are held by individuals, although some rights, such as the right to self-determination of peoples, must, by definition, be held by a group of people.

(b) Citizens and non-citizens have rights

262. A Human Rights Act should not distinguish between the rights of citizens and non-citizens, other than with respect to the right to vote and to freely exit and enter the country. A person's human rights inhere in that person by virtue of their being human, and a person does not relinquish his or her rights by entering a country of which they are not a citizen.

263. The obligation of the State to respect, protect and fulfil human rights applies to all persons subject to its jurisdiction or within its territory or control. The HRC has stated that rights in the ICCPR 'apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.[182] Although non-citizens may be excluded from enjoyment of certain rights if there is a legitimate state purpose for the exclusion (for example, non-citizens may not be accorded the right to electoral participation) they retain all the other rights set out in the ICCPR.

[181] UDHR, GA Res. 217A(III), 10 December 1948, Article 1. The ICCPR also states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'

[182] *General Comment 15: The position of Aliens under the Covenant* (11 April 1986). See also, in relation to discrimination under the CERD: CERD Committee, *General Recommendation No 30: Discrimination Against Non Citizens* (1 October 2004).

264. The importance of protecting non-citizens' rights is particularly pertinent when one considers the serious breaches of non-citizens' rights that occur, even in high-profile matters, and by States that are not generally considered the poorest human rights performers. [183]

(a) For example, the US Government has held suspects who are not US citizens at Guantanamo Bay without charge and without trial for up to seven years. Recently the Pentagon official responsible for convening the military commissions admitted that torture of detainees had occurred.[184] Not only are the conditions of detention, the delay in holding a trial, and torture of detainees in clear breach of the detainees' human rights, but the torture has impacted on the evidence to the point of making it inadmissible, and thereby compromised the ability to prosecute at all.

(b) Closer to home, the former Australian Government's practice forcible removal of asylum seekers to Manus Island and Nauru and detaining them indefinitely, demonstrates the disjuncture between the treatment of citizens and non-citizens.

265. A Human Rights Act is an opportunity for Australia to ensure that the respect and protection of human rights is extended to all people within its territory or subject to its jurisdiction.

Recommendation 2:

A Human Rights Act should protect all human persons in Australian territory and subject to its jurisdiction.

[183] See the remarks of UN Special Rapporteur, David Weissbrodt, *Final Report on the Rights of Non-Citizens,* UN Doc E/CN.4Sub.2/2003/23 (2003), on the disjuncture between the guarantees of human rights at an international level and the treatment of non-citizens.

[184] On around 15 January 2009 Pentagon official Susan Crawford made this admission to the media, which was widely reported. See, eg, Demetri Sevastopulo, 'Pentagon official says 9/11 suspect was tortured at Guantánamo Bay', *Financial Times* (Washington), 15 January 2009, available at http://www.ft.com/cms/s/0/ed37e214-e2a4-11dd-b1dd-0000779fd2ac.html.

11. What rights would a Human Rights Act protect?

266. A Human Rights Act should implement all the human rights to which Australia has already made international commitments. The question of which rights Australia should protect and promote is considered in section one of this submission.

Recommendation 3: ***Protection of civil and political rights***

The Human Rights Act should include the following civil and political rights derived from the ICCPR:

- the right to legal recourse when rights have been violated, even if the violator was acting in an official capacity;
- the right to self-determination;
- the prohibition against retrospective punishment and penalty;
- the prohibition against double jeopardy;
- the right to equality of men and women in the enjoyment of civil and political rights;
- the right to a fair hearing;
- the right to presumption of innocence until proven guilty;
- the right to appeal a conviction;
- the right to life;
- freedom from inhuman or degrading treatment or punishment;
- the right to humane treatment in detention;
- freedom from slavery and servitude;
- the right to liberty and security of the person;
- freedom from arbitrary arrest or detention;
- freedom of movement;
- the right not to be imprisoned for an inability to fulfil a contractual obligation;
- the right to be recognised as a person before the law;
- the right to privacy and protection of that right by law;
- freedom of thought, conscience, and religion;
- freedom of opinion and expression;
- freedom of assembly and association; and
- the right to equality before the law and equal protection.

Recommendation 4: ***Protection of economic, social and cultural rights***

The Human Rights Act should include the following economic, social and cultural rights derived from the ICESCR:

- the right to an adequate standard of living, including adequate housing;
- the right to work, including the right to gain one's living at work that is freely chosen

and accepted;

- just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to adequate food, water and sanitation;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security;
- free primary education, and accessible education at all levels; and
- children's freedom from social exploitation.

11.1 The restriction of rights

(a) Absolute, non-absolute and non-derogable rights

267. Although expressed in broad, general terms, human rights are generally not enjoyed at the expense of all other considerations. The enjoyment of many human rights can be restricted in certain prescribed circumstances.

268. Most rights can be 'limited', meaning that the enjoyment of a right will be reduced to allow for other concerns to take precedence, such as the enjoyment of other protected rights or competing communal concerns such as public health and safety. The limitation on human rights recognises that a balance is required between protecting individual rights and liberties on the one hand and other collective community values on the other.

269. However, certain rights, such as freedom from torture or slavery, are considered to be 'absolute', which means that no limitation of that right is allowable. Further, it is appropriate that in certain exceptional circumstances (such as a state of emergency), states might derogate from particular rights, meaning that the enjoyment of that right is temporarily suspended.

270. A Human Rights Act should:

(a) set out the rights that are absolute and the rights that are not absolute;

(b) state that no limitation of absolute rights is allowed;

(c) provide a framework for determining whether and how limitations of non-absolute rights will be allowed; and

(d) if a derogation provision is deemed necessary, provide for the exceptional circumstances where derogation of the operation of certain rights is allowed.

271. The following sections will:

(a) explain the HRLRC's proposed model for allowing limitations of human rights in particular circumstances;

(b) discuss absolute rights and their treatment in a Human Rights Act; and

(c) set out the appropriate model for allowing derogations of rights in exceptional circumstances.

(b) An appropriate model for a limitations analysis

272. The HRLRC submits that rights in a Human Rights Act (save for the absolute rights set out below) should be subject to a general limitations provision that allows for the rights to be limited, but only where the limitation is reasonable and proportionate. Although there are a number of ways of implementing such limitations,[185] the HRLRC submits that the general limitations provision in the Victorian Charter is an appropriate model. The limitations provision in the Victorian Charter provides:

> (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
>
> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
>
> (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

273. A limitations analysis provides the means by which a range of relevant interests can be taken into account when considering whether a restriction of rights is reasonable and justified.

274. According to the Explanatory Memorandum, section 7 'reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests'.[186] The right to freedom of expression should not be used to destroy other peoples' rights to privacy or to liberty and security of the person. Rather, a balancing exercise is envisaged. For example, the right to freedom of expression

[185] See discussion of limitations provisions in HRLRC, *The National Human Rights Consultation: Engaging in the Debate* (2009), 4.2-4.3.

[186] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 8. The Human Rights Consultative Committee, which investigated and recommended the adoption of the Victorian Charter, recognised that rights need to be balanced against one another as well as against competing public interests. This view is consistent with the case law of comparative jurisdictions, such as the UK and New Zealand, and international jurisprudence.

would not extend to the right of a person to engage in hate speech or speech which incites racial and religious vilification. The right to freedom of speech would need to be weighed against other peoples' rights to demonstrate their religion, to non-discrimination and to liberty and security of the person, as well as the broader issues of public security and public order. On balance, freedom of expression is unlikely to be found to be a reasonable justification for limiting those rights and public interest concerns. Similarly, the criminalisation of ownership of child pornography can be seen as a reasonable and justified limitation on peoples' rights to expression, given the competing rights of children and serious public safety concerns.

275. A limitations analysis allows for broader public interests to be taken into account and weighed against rights. For example, laws which are necessary in order to protect security, public order, public safety or public health which limit human rights can often be demonstrably justified in a free and democratic society.[187] Similarly, reasonable limitations provisions would also apply in situations where 'full, free and informed consent to medical treatment might not be possible because of an emergency or because the person is incapable of giving consent'.[188]

276. Importantly, the limitations analysis is not intended to be performed and implemented exclusively by the judiciary. A limitations analysis is a common sense exercise that can assist organisations with human rights-friendly policy development and can contribute to effective front end advocacy. It is also a very useful tool to guide the common sense and consistent exercise of discretion. Where a limitations analysis is used in these contexts, disputes can be avoided and the practical effect may even be a decrease in litigation.

277. The following examples are intended to show how a limitations analysis enables a consideration of competing rights and public interest concerns.

11.2 Limitations of rights in practice

Case study 1: Powers to detain persons with quarantinable diseases

Under the *Quarantine Act 1908* (Cth), returning travellers to Australia are subject to quarantine measures upon arrival including, in extreme cases, to measures that would keep them sectioned from the rest of the community.

Relevant rights: Where a person is held in quarantine, their detention is likely to engage the right to freedom of movement in so far as the person is prevented from moving outside of the quarantine area.

Limitations Analysis: The purpose of human quarantine activities is to protect the public through the identification, monitoring and management of people who have been potentially exposed to, or have symptoms of, a quarantinable disease. Given the importance of maintaining public health and safety,

[187] See The Hon Rob Hulls, Attorney-General, 'Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006', *Hansard*, Legislative Assembly, 4 May 2006.

[188] Ibid.

any restriction on a person's freedom of movement by quarantine, assuming there is evidence that they have been exposed to or potentially exposed to a quarantinable disease, would almost certainly be a permissible limitation on the person's freedom of movement.

Case study 2: Detention of asylum seekers

Under Australian law, an asylum seeker who does not have a valid visa upon entry to Australia must be detained until such time as they are removed from Australia, deported or granted a visa. In some cases this has meant that people have been subject to arbitrary mandatory detention within detention centres indefinitely (and for years at a time), without proper access to individualised assessment of their cases.

Relevant rights: Detention of asylum seekers in these circumstances engages the right to freedom from torture and other cruel, inhuman and degrading treatment, freedom from arbitrary deprivation of liberty and the right to access legal representation (among others).

Limitations: Holding asylum seekers in immigration detention is not, of itself, an impermissible breach of asylum seekers' rights. However, the circumstances of detention may be such that detention fails to be demonstrably justified. In order for the detention to remain a permissible limitation, detention should not be mandatory, it should be subject to review by the judiciary or another authority and it should only ever be used as a measure of last resort and for the shortest time possible. Where there is indefinite detention, without access to individualised assessment of cases, the measures do not fall within the permissible range.

Case study 3: Doctors' right not to conduct an abortion

The Victorian *Abortion Law Reform Act* was passed by the Victorian Parliament in October 2008. Section 8 of that Act provides that a medical practitioner who holds a conscientious objection to abortion and is asked to advise on, perform, direct or supervise an abortion must inform the patient of their conscientious objection and refer her to another practitioner who is known not to hold a conscientious objection. Medical practitioners who hold a conscientious objection must also perform or assist in an abortion in cases of emergency.

Relevant rights: Section 8 of the Act engages the right of some doctors to manifest their religious beliefs, in so far as it may require a particular doctor to act in a manner that is contrary to the teaching of that doctor's religion by requiring the doctor to perform emergency abortions or by referring a woman to a doctor that does not hold a conscientious objection.

Limitations analysis: There is no absolute right to manifest religious beliefs in any manner a person sees fit. In the case of abortions, it is important that the right of a doctor to manifest his or her religious beliefs is balanced against a woman's right to lawfully access health services. Failure to provide legal and safe access to abortion on request can lead to breaches of women's right to life, liberty, privacy, health, freedom from torture and cruel, inhuman or degrading treatment and non-discrimination. On balance, given the fundamental nature of the rights engaged for women seeking abortions, it is probably not reasonable or justifiable for a doctor's right to manifest their religious beliefs to limit the enjoyment by women of such fundamental rights.

Case study 4: Call to ban wearing of hijab in shops

In January 2009, a Queensland retailers group called for a ban on the wearing of burqa and hijab in shops.

Relevant rights: A law that bans the wearing of burqa or hijab in shops would engage the rights of Muslim women to equality and non-discrimination, freedom of religion, and freedom of persons with particular religious backgrounds to enjoy their religion.

Limitations analysis: The retailers group argued that banning the burqa and hijab in shops was necessary for security reasons, presumably to ensure that women's faces could be discerned by the shopkeeper and security cameras. The security purpose of the limitation is clearly an extremely important matter to be taken into account. However, in the absence of evidence that Muslim women are conducting crime under the cover of their burqa or hijab, it would be difficult to establish a rational connection between removal of the burqa or hijab and an improvement in security. In those circumstances, there would not be a proper relationship between the limitation (removal of burqa) and its purpose (addressing a security threat) and the limitation of the right is arguably not a reasonable or justified limitation.

Case study 5: Appropriate police response to unrest

In Northern Ireland, police were required to respond to an outbreak of violent disorder between two religious groups along Ardoyne Road. Ardoyne Road was a route by which many children walked to school with their parents. The police response was to erect barriers between the groups and dispatch large numbers of police in riot gear to patrol the road. Despite the police measures, the parents walking their children to school continued to be subject to abuse from the public, including verbal abuse, death threats, explosive devices and other missiles, shouting of sexual obscenities and the use of piercing whistles and sirens.

Relevant rights: A parent who regularly walked her child to school along Ardoyne Road alleged a breach of the right to inhuman and degrading treatment. Pursuant to that right, the police have a positive obligation to take measures to prevent the infliction of inhuman and degrading treatment upon the appellant. She claimed that the police had failed to prevent that treatment.

Limitations analysis: Whilst the House of Lords found that some of the more extreme behaviour experienced by the parents and children on Ardoyne Road did constitute inhuman and degrading treatment, the response of the police was held to be appropriate in the circumstances. The State's positive obligation to prevent the infliction of inhuman and degrading treatment by third parties is to do all that can reasonably be expected of them to avoid that risk. In this case, the police had done all that they could do, given the circumstances of the case, the difficulty of the state taking precautions and the resources available.

(a) Treatment of absolute rights

278. The HRLRC submits that a Human Rights Act should recognise that certain rights are absolute. Absolute rights cannot be limited in any way, at any time, for any reason. They are

not subject to the limitations analysis above, and they are not subject to derogations (discussed below). Absolute rights in the ICCPR include:

(a) the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7);

(b) the right to be free from slavery and servitude (Articles 8(1) and (2));

(c) the prohibition on genocide (Article 6(3));

(d) the prohibition on prolonged arbitrary detention (elements of Article 9(1));

(e) the prohibition on imprisonment for failure to fulfil a contractual obligation (Article 11);

(f) the prohibition on the retrospective operation of criminal laws (Article 15);

(g) the right of everyone to recognition everywhere as a person before the law (Article 16); and

(h) the right to freedom from systematic racial discrimination (elements of Articles 2(1) and 26).

279. A Human Rights Act should expressly state that the above rights are absolute, and also that no limitation of, or derogation from, these rights is lawful. The Victorian Charter does not provide a distinct scheme for treatment of absolute rights, which is a weakness in the human rights protection provided by that instrument.[189] Instead, the Victorian Charter inserts a general limitations provision that states that *all* rights, including absolute rights, are subject to such reasonable limitations as can be demonstrably justified in a free and democratic society.[190]

280. As Julie Debeljak, Senior Lecturer with the Faculty of Law at Monash University, explains, 'Under international law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.'[191] Although some may argue that the courts will take into account the status of rights at international law when interpreting Charter rights, Julie Debeljak clearly articulates the problems with human rights legislation that does not acknowledge the absolute nature of certain rights. She sets out five problems with applying the general limitations provision to absolute rights:

> First, this argument incorrectly suggests that absolute rights are negotiable – that there will be instances, albeit rare, in which an absolute right can be limited. Secondly it introduces the relatively subjective assessment of proportionality into an area where proportionality assessments are usually excluded. Thirdly, it means that the representative arms will be

[189] See the in depth analysis in Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422, 435.

[190] See s 7(2) of the Victorian Charter.

[191] Debeljak, above n 189, 435.

> encouraged to enact laws that violate absolute rights and 'argue the toss' if they are challenged, rather than recognise that certain rights are non-negotiable. Fourthly, this is relatively unchartered territory. There is no international or regional guidance, and little domestic guidance, on how to assess the reasonableness and demonstrable justifiability of a limitation placed on an absolute right. Finally, assessing whether a limitation should be placed on an absolute right via the general limitations power in s 7(2) is therefore unsatisfactory and will amount to a violation of international human rights law.[192]

281. Therefore, any national Human Rights Act that permits limitation of rights that are absolute rights or peremptory norms under international law would itself be inconsistent with Australia's international human rights obligations.

(b) Derogation of rights in exceptional circumstances

282. Derogations allow a government, in extraordinary circumstances, to temporarily suspend human rights guarantees that it would otherwise recognise. This is consistent with international law, in which states are permitted to 'suspend part of their legal obligations, and thus restrict some rights, under certain circumstances'.[193] Derogation is used to enable a state to respond to a serious public emergency.[194] However, given that grave human rights violations can occur during public emergencies, derogations must be subject to a specific regime of safeguards.[195]

(a) **The existence of a serious and properly declared public emergency**: Derogations should only be allowed in 'a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.[196]

(b) **A limited period of time**: Any derogation should be temporary, prospective and usually limited in duration to the period of the state of emergency.[197]

---

[192] Ibid.

[193] Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd ed, 2008) 385. In accordance with that principle, art 4 of the ICCPR allows States that are party to the Covenant to temporarily derogate from their Covenant obligations in exceptional circumstances.

[194] See, eg, ICCPR, art 4, which states 'In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

[195] There is detailed discussion of the rationale and extent of safeguards in HRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

[196] This is consistent with the duty under art 4 of the ICCPR. The South African Bill of Rights (s 37) states that 'A state of emergency may be declared only in terms of an Act of Parliament, and only when: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.'

[197] See, eg, the South African Bill of Rights which states that a declaration of a state of emergency and any laws passed during the time of that declaration will only be valid prospectively, and only for 21 days from the date of the declaration, subject to further approval from the National Assembly: s 37(2).

(c) **Proportionality**: Any legislation enacted in consequence of a declaration of a state of emergency may only derogate from human rights to the extent that the derogation is *strictly required* by the emergency.[198]

(d) **Protection of absolute and non-derogable rights**: As stated above, absolute rights cannot be limited in any circumstances, including a declared state of emergency. Certain rights are also non-derogable, meaning that they cannot be suspended or restricted by derogation. There is some overlap between absolute and non-derogable rights, however the following non-exhaustive list of non-derogable rights cannot be suspended by derogation (although if they are non-absolute rights, the enjoyment may be limited where it is reasonable and proportionate):[199]

(i) the right to life;[200]

(ii) freedom from torture or cruel, inhuman and degrading treatment or punishment (also an absolute right);[201]

(iii) freedom from slavery and servitude (also an absolute right);[202]

(iv) freedom from medical or scientific experimentation without consent;[203]

(v) the right not to be imprisoned for failure to fulfil a contractual obligation (also an absolute right);[204]

(vi) the right of everyone to recognition everywhere as a person before the law (also an absolute right);[205]

(vii) the prohibition on retrospective criminal laws (also an absolute right);[206]

(viii) freedom from thought, conscience and religion;[207]

(ix) the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person;[208]

[198] This is the wording from the South African Bill of Rights, s 37(4). Under the ICCPR, States must only take derogating measures under the ICCPR 'to the extent strictly required by the exigencies of the situation', art 4.

[199] See HRC, *General Comment 29*, above n 195, [1].

[200] See art 4(2) of the ICCPR.

[201] Ibid.

[202] Ibid.

[203] Ibid.

[204] Ibid.

[205] Ibid.

[206] Ibid.

[207] Ibid.

[208] See HRC, *General Comment 29*, above n 195, [13(a)].

(x) some elements of the rights of persons belonging to ethnic, religious or linguistic minorities;[209]

(xi) the prohibition against taking hostages, abductions or unacknowledged detention;[210]

(xii) the prohibition on propaganda for war and advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence;[211] and

(xiii) abolition of the death penalty.[212]

(e) **Non-discrimination**: The measures taken must not be inconsistent with other international law obligations and must 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.[213]

283. In the Victorian Charter and the Canadian Charter, the 'override' provisions are intended to perform the domestic function of allowing derogations of rights in extraordinary circumstances. For example, the override provision in the Victorian Charter allows Parliament to expressly declare that an Act or a provision of an Act has effect despite being incompatible with the Charter (an ***override declaration***).[214] The effect of such a declaration is that the Charter will not apply to the Act or provision.[215] Override declarations are only to be made in 'exceptional circumstances'.[216]

284. A derogation or override provision has relevance in a Constitutional Charter model, such as in Canada, where the Charter *prevents* Parliaments from passing laws that are incompatible with human rights.[217] The override declaration is also relevant in a Canadian legislative model, which provides immunities to persons from the operation of Federal Canadian legislation that infringes rights.[218] The override declaration allows Parliament to declare that a law will

[209] Ibid, [13(c)].

[210] Ibid, [13(b)].

[211] Ibid, [13(e)].

[212] See Second Optional Protocol to the ICCPR, art 6 and discussion of same in HRC, *General Comment 29*, above n 195, [7].

[213] ICCPR, art 4.

[214] Victorian Charter, s 31(1).

[215] Ibid, s 31(6).

[216] Ibid, s 31(4).

[217] For further discussion and analysis of the necessity and difficulty of override provisions in legislative Charters, see Debeljak, above n 189.

[218] See the *Canadian Bill of Rights 1960* (**Canadian Bill of Rights**). Section 2 states that no law is to be 'construed and applied' in a way which abrogates, abridges or infringes any of the rights listed in s 1. The effect was to render persons immune from the operation of a law to the extent that it abrogated their rights. Notably, however, it does not authorise invalidation of legislation which is inconsistent with the Canadian Bill of Rights.

operate notwithstanding the Charter, so that Parliament can declare that a law is not subject to interpretation in accordance with Charter rights. In times of national emergency, Parliament may therefore require the power to derogate from certain rights in order to regain control.

285. However, override provisions are not at all necessary in the legislative dialogue model for a Human Rights Act proposed by the HRLRC. A legislative dialogue model preserves parliamentary sovereignty at all times by:

(a) allowing Parliament to pass laws that are inconsistent with human rights (subject to certain other procedural requirements to consider human rights); and

(b) not empowering the judiciary to strike down a law that is inconsistent with the human rights in the Act.

286. Further, override provisions are not necessary where there is a general limitations provision and where a Human Rights Act allows the consideration of international and comparative human rights law to inform its interpretation. If there is a genuine state of emergency that threatens the life of the nation, then the performance of a limitations analysis would allow for the proper restriction of rights, taking into account the gravity of the situation the country faced.

287. Although an override provision is strictly unnecessary, there may be some political will or necessity to include one in a Human Rights Act. If that is the case, the Human Rights Act should ensure that any override provision is subject to the safeguards set out above. That is, if a Human Rights Act allows for the Australian Government to make derogations from rights, it must only be in respect of non-absolute and non-derogable rights, in exceptional circumstances, for limited periods of time and subject to proper accountability mechanisms.

Recommendation 4: Restriction of rights in a Human Rights Act

288. A Human Rights Act should:

(a) set out the rights that are absolute and the rights that are not absolute;

(b) state that no limitation of absolute rights is allowed;

(c) state that non-absolute rights may be 'subject only to such reasonable limitations that can be demonstrably justified in a free and democratic society'; and

(d) if an override provision is deemed necessary, provide for the exceptional circumstances where derogation of the operation of certain rights is allowed.

12. What form should a Human Rights Act take?

289. Human rights instruments have taken a number of forms around the world. These can be characterised as constitutional, legislative and 'hybrid' models. This section briefly summarises the advantages and disadvantages of each of these models.

12.1 Constitutional model

290. The constitutional model for a Bill of Rights has been adopted in South Africa and the United States. Under these models, the Bill of Rights is 'entrenched' in the Constitution and can therefore only be amended in the manner provided for in the Constitution. For a Commonwealth Human Rights Act, this would require a referendum in accordance with section 128 of the Australian Constitution.

291. The main advantages of the constitutional model are:

(a) the Bill of Rights can only be amended as provided for in the Constitution, making human rights protection less vulnerable to the prevailing political climate;[219]

(b) an independent judiciary is empowered to invalidate legislative and executive actions where those actions are held to be in violation of the rights entrenched in the Constitution;[220] and

(c) there is important symbolic value in demonstrating the depth of Government's commitment to upholding and enforcing human rights.[221]

292. The main disadvantages of the constitutional model are:

(a) the restriction on the power of Parliament to pass laws that contravene human rights set out in the Bill and the ability of the judiciary to invalidate laws held to contravene those human rights can be perceived as an erosion of parliamentary sovereignty, and the placement of excessive power in the hands of an 'unrepresentative judiciary';[222]

(b) a constitutionally entrenched Bill of Rights may be difficult to amend (depending on the nature of any entrenching provisions) and may become, over time, less well adapted to changed societal values and developments in the human rights dialogue (although this is counter-balanced to some extent by the principle that constitutions should be interpreted according to prevailing community standards); and

---

[219] For example, s 128 of the Australian Constitution requires a referendum to be held.

[220] Julie Debeljak, 'Submission on how best to protect and promote human rights in Victoria', 1 August 2005, http://www.law.monash.edu.au/castancentre/publications/submissions.html, 7.

[221] Victorian Human Rights Consultation Committee, State Government of Victoria, *Report of the Human Rights Consultation Committee: Rights, Responsibilities and Respect* (November 2005), 5, 20.

[222] See, eg, ibid, 15, 20; John Howard, 'Australia Day address', (Speech delivered to the National Press Club, Parliament House, Canberra, 25 January 2006).

(c) empowering judges to strike down incompatible legislation may increase the politicisation of the judiciary and the judicial appointment process.[223]

12.2 Legislative dialogue model

293. Under the legislative dialogue model, adopted in various forms by the UK, New Zealand, the ACT and Victoria, a Human Rights Act is enacted into law as an ordinary piece of legislation. Subsequent legislation that breaches the rights set out in the Act is not invalidated, and the Act itself can be amended by passing ordinary amending legislation.

294. The main advantages of the legislative dialogue model are:

(a) parliamentary sovereignty is preserved because:

- Parliament retains the power to pass laws that contravene the human rights set out in the Act; and
- even where a court declares a law to be inconsistent with the human rights set out in an Act, such a declaration does not invalidate the law in question;[224]

(b) it is flexible, in that Parliament can amend the Act by passing amending legislation, adapting it to changes in societal values and the development of the human rights dialogue;[225] and

(c) a finding by a court that legislation is inconsistent with the Act presents a strong political incentive for Parliament to review the inconsistent legislation in question and make changes where the legislature and executive consider it appropriate.[226]

295. The main disadvantages of a legislative dialogue model are:

(a) later legislation overrides prior legislation to the extent of any inconsistency, so human rights can be amended or repealed by simple parliamentary majority. The relative ease with which the Act can be amended means that human rights are protected to a lesser extent than would be the case if they were constitutionally entrenched;[227] and

(b) as courts are unable to strike down inconsistent legislation, laws, once passed, are effectively subject only to declaratory relief in the courts. This model relies on the

[223] ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (May 2003), Canberra, Publishing Services, 43.

[224] Kate Beattie, *How the UK brought rights home* (22 March 2006), available at http://www.humanrightsact.com.au/index2.php?option=com_content&task=view&id.

[225] Victorian Human Rights Consultation Committee, above n 221, 21.

[226] According to the DCA Review, as at July 2006, 15 Declarations of Incompatibility had been made. Of those, five Declarations were overturned on appeal (and two remain subject to appeal).

[227] Victorian Human Rights Consultation Committee, above n 221, 22.

political will of the legislature to either ensure that laws are consistent with the Act, or to otherwise justify any incompatibility.[228]

296. The effectiveness of an Act in this form is therefore dependent upon political factors, such as the willingness and capacity of the opposition and media to place political pressure on a Government whose actions contravene human rights. In a healthy democracy, this poses no problem, but it is when democratic institutions are eroded that the protection of human rights afforded by a Human Rights Act becomes of the utmost importance.

12.3 Canadian legislative model

297. The Canadian legislative model is based on the 1960 Canadian Bill of Rights, which is a federal Canadian statute.[229] The Canadian Bill of Rights provides that no law is to be 'construed and applied' in a way which abrogates, abridges or infringes any of the rights listed in it. The effect of this is to render persons immune from the operation of a law to the extent that it abrogates their rights. Notably, the Canadian Bill of Rights does not authorise invalidation of legislation which is inconsistent with the Bill. The Canadian Bill of Rights allows Parliament to declare that a particular law will operate notwithstanding the Candian Bill of Rights, essentially enabling Parliament to override the operation of the Charter in respect of that law.

298. If this model were used at a Commonwealth level, it would be an Act of the Australian Parliament that would require a rights-consistent interpretation of all Federal legislation (or, as former High Court judge Michael McHugh AC QC puts it, all legislation is to be read subject to the human rights legislation).[230] It would also empower the federal courts to invalidate state and territory legislation to the extent that such legislation is inconsistent with a Human Rights Act.

299. The main advantages of the Canadian legislative model are:[231]

(a) Parliamentary sovereignty is preserved by the availability of a 'notwithstanding' clause (or 'override clause'), that allows Parliament to expressly state that legislation it is to have effect notwithstanding the Human Rights Act.

---

[228] Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-7.

[229] The Charter of Right and Freedoms is now entrenched in the Canadian Constitution pursuant to the Constitution Act 1982. Although the Charter effectively replaced the Canadian Bill of Rights as the instrument for human rights protection in Canada, the Bill of Rights does, strictly speaking, continue to have force and effect in addition to the Charter: See E R Alexander, 'The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms' (1990) 40(1) *University of Toronto Law Journal* 1, 7.

[230] The Hon Michael McHugh, 'A Human Rights Act, the courts and the Constitution', (Speech delivered at the AHRC, Sydney, 5 March 2009), 35.

[231] Ibid, 9, 35-6.

(b) '…private citizens would have judicially enforceable human rights that were not affected by State, Territory or federal legislation inconsistent with those rights and would have immediate judicial remedies for breach of those rights.'

(c) By operation of section 109 of the Australian Constitution, state laws that are inconsistent with human rights legislation would be invalid and inoperative to the extent of the inconsistency.

300. The main disadvantages of the Canadian legislative model are:

(a) As with the legislative dialogue model, later legislation overrides prior legislation to the extent of any inconsistency, so human rights can be amended or repealed by simple parliamentary majority. The relative ease with which the Act can be amended means that human rights are protected to a lesser extent than would be the case if they were constitutionally entrenched.[232]

(b) Parliament can include a notwithstanding clause and thereby choose to remove the operation of the human rights legislation from particular laws, effectively submitting individual rights to the operation of the law.

12.4 Constitutional / legislative hybrid

301. Canada has now instituted a model which is a combination of the constitutional and legislative models. The Canadian Charter of Rights and Freedoms empowers the judiciary to invalidate legislation that breaches the rights contained in the Canadian Charter on the basis that the legislation is unconstitutional.[233] The Canadian Charter can only be amended by the process of amendment provided for in the Canadian Constitution.[234] However, parliamentary sovereignty is ultimately preserved by an 'override provision', or 'notwithstanding clause', which allows Parliament to enact contravening laws where the legislation expressly declares that it will operate notwithstanding a provision of the Canadian Charter.[235]

302. The main advantage of the hybrid model is the ability of the judiciary to invalidate legislation on the basis that it breaches the rights set out in the Canadian Charter, while preserving parliamentary sovereignty. Parliament is required to act to preserve the validity of legislation by either amending it to make it consistent with the Canadian Charter, or by using the 'override' provision.[236]

303. The main disadvantages of the hybrid model are:

---

[232] Victorian Human Rights Consultation Committee, above n 221, 22.

[233] Debeljak, above n 220.

[234] The procedure for amending the Canadian Constitution is set out in s 39 of the *Constitution Act 1982* (Can).

[235] Canadian Charter s 33(1).

[236] Victorian Human Rights Consultation Committee, above n 221.

(a) override provisions enable Parliament to pass laws that contravene human rights;[237]

(b) where a constitution does not contain restrictive procedures for its amendment, the Charter can be amended by an Act of Parliament, and is therefore subject to the prevailing political climate; and

(c) where a constitution does contain restrictive procedures, the Charter may be more difficult to amend, and become, over time, less well adapted to contemporary circumstances and values (although this is counterbalanced by the principle that constitutions should be interpreted according to prevailing community standards).

12.5 The legislative models for Australia

304. The HRLRC submits that there are many forms that a Human Rights Act could take. In some ways a constitutional model is to be preferred, as it provides a human rights instrument that is not vulnerable to being repealed or amended merely by a subsequent act of Parliament. A constitutional model would also operate effectively to prevent the Commonwealth from passing laws that are inconsistent with human rights. However, the constitutional model may in some cases be less attractive because of its immutable nature, which can mean that without a robust interpretation of the rights, or without an interpretation of the Constitution as a living instrument, the rights contained within it can become out of step with societal norms.[238] In any event, the terms of reference for this consultation expressly exclude the option of constitutional reform to include a bill of rights.

305. This submission proposes two possible appropriate forms for the Human Rights Act:

(a) first, a legislative dialogue model, similar to that adopted in the UK, the ACT and Victoria; and

(b) secondly, the Canadian legislative model used in the Canadian Bill of Rights

(together referred to as the ***legislative models***).

306. A legislative dialogue model is to be preferred for three reasons:

(a) the model is currently used for human rights legislation in the UK, Victoria and the ACT and has the benefit of having been tested, to some extent, in those jurisdictions;

(b) the model is proven to have created important systemic and cultural change within governments towards the protection and promotion of human rights; and

(c) provided that the model is drafted to operate within the Australian constitutional context, the model does not raise constitutional concerns.

---

[237] Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study' [2002] *VUWLRev* 21, [57]-[58], available at http://www.nzlii.org/nz/journals/VUWLRev/2002/21.html.

[238] For example the right to bear arms in the US constitution may have had relevance in the context in which the Bill of Rights was written (ie the War of Independence), but is arguably now unnecessary and relied upon to the detriment of the right to life.

307. Both are legislative instruments. However, as legislation is susceptible to amendment by ordinary majority, it should be carefully drafted to ensure that human rights are given the fullest protection afforded by that model.

(a) Legislative dialogue model

308. The legislative dialogue model proposed would be 'dialogical' in nature, meaning that it requires that human rights are explicitly taken into account when developing, interpreting and applying law and policy, thereby protecting human rights without significantly altering the constitutional balance between the legislature, the executive and the judiciary.[239]

309. The 'dialogical' model proposed by the HRLRC is so called because it creates a dialogue between the three arms of government – the legislature, the executive, and the judiciary – and has the following key characteristics:

(a) each Bill tabled in Parliament must be accompanied by a Statement of Compatibility setting out whether and how the Bill is compatible with or contravenes any of the human rights set out in the Human Rights Act;

(b) all legislation, including subordinate legislation, must be considered by a parliamentary committee for the purpose of reporting to Parliament on whether the legislation is compatible with the human rights set out in the Human Rights Act;

(c) 'public authorities' must act compatibly with the human rights set out in the Human Rights Act and also give proper consideration to those rights in any decision-making process;

(d) as far as possible, courts and tribunals must interpret and apply legislation consistently with the human rights set out in the Human Rights Act;

(e) courts may have regard to relevant international, regional and comparative domestic human rights law and jurisprudence in the interpretation and application of the human rights set out in the Human Rights Act;

(f) the Federal Court and High Court have the power to declare that a law cannot be interpreted and applied consistently with the human rights set out in the Human Rights Act and to issue a Declaration of Incompatibility;

(g) the Government must respond to a Declaration of Incompatibility within six months; and

(h) a government body (such as the Human Rights Commission) is given responsibility for monitoring and reporting on the implementation and operation of the Human Rights Act and for community education on rights and responsibilities under the Human Rights Act.

[239] In relation to the experience in the UK, see the DCA Review.

310. There has been some commentary that questions the constitutional validity of Declarations of Incompatibility that might be included in a legislative dialogue model. Whilst we acknowledge the arguments around the validity of Declarations of Incompatibility, the HRLRC notes that their validity has not been tested in the courts. Former High Court Justice Michael McHugh AC QC canvasses some constitutional problems with Declarations of Incompatibility, but he does not state that the dialogic model is unconstitutional in his opinion. Rather, he states that that there is a possibility that the High Court might find Declarations of Incompatibility to be. He concedes that there are strong opposing arguments to support the constitutionality of the Bill and that he would not be surprised 'if the High Court upheld legislation in the form of the dialogue model'.[240]

311. In any event, a legislative dialogue model need not include Declarations of Incompatibility to be workable. While drawing a finding of incompatibility to the Parliament's attention is an important aspect of the legislative dialogue model of human rights, it can be achieved in other ways. For example, the Human Rights Commission could be authorised, on the application of a party to the matter or of its own motion, to forward to the Attorney-General a copy of any judgment in which a court made a finding of incompatibility. The Attorney, or the responsible Minister, would be required to table this notification in federal Parliament. The Government would be then required to respond to this notification within a defined period (for example, 6 months). Following the Government's response, Parliament might decide to amend the law in question to ensure its consistency with the Act. It would not, however, be required to do so. This process would ensure that Parliament was notified of significant cases in which a court was not able to interpret legislation consistently with human rights. Having been notified of this inconsistency, Parliament would retain the final say about whether the law should be changed. The Australian Human Rights Commission, together with some of Australia's leading constitutional and human rights lawyers, have agreed that this process for Declarations of Incompatibility would be constitutionally sound.[241]

312. If the government is not minded to enact a legislative dialogue model, the HRLRC submits that the Canadian legislative model provides an appropriate and workable alternative model.

(b) Canadian legislative model

313. The Canadian legislative model would be similar to the legislative dialogue model, except that courts exercising federal jurisdiction would not be granted the power to issue Declarations of Incompatibility. Instead, the Canadian legislative model would have the following attributes:[242]

---

[240] McHugh, above n 230, 15.

[241] AHRC, *Constitutional Validity of an Australian Human Rights Act*, Statement arising out of the meeting of Australian constitutional and human rights lawyers on 22 April 2009, 2 available at: http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html.

[242] Ibid, 35-36.

(a) courts exercising federal jurisdiction would have power to invalidate state and territory legislation to the extent that such legislation is inconsistent with a Human Rights Act;

(b) all federal legislation would be read subject to the human rights set out in the Act (as far as it is possible to do so consistently with the statutory purpose);

(c) parliamentary sovereignty would be preserved by the availability of a 'notwithstanding' clause (or 'override clause'), that allows Parliament to expressly state that legislation is to have effect notwithstanding the Human Rights Act; and

(d) in the absence of a 'notwithstanding' clause, individuals would have judicially enforceable remedies, flowing from an immunity from the operation of laws, including the common law, that are inconsistent with the rights set out in the Human Rights Act.

314. Whether and how the Canadian legislative model would be constitutional in the Australian context has not been the subject of significant discussion or consideration. Certainly there have been some concerns expressed that the notwithstanding clause in the Canadian model would be unconstitutional in so far as it sought to impose a manner and form requirement on the passage of Commonwealth law by future Parliaments.[243]

315. The legislative dialogue model is preferred to some extent, given that it has received significantly more consideration by academia, courts and governments in recent years than the Canadian model.

316. The elements of each of these legislative models are discussed in detail in the submission below.

12.6 How would the legislative models affect parliamentary sovereignty?

317. Both the legislative models afford practical protection of human rights, while at the same time preserving parliamentary sovereignty by:

(a) effectively reserving to Parliament the ability to pass laws that are inconsistent with human rights;

(b) in the case of the legislative dialogue model, giving courts the power to declare that laws are inconsistent with human rights, but (save for state and territory laws) not the power to strike them down for that inconsistency; and

(c) in the case of the Canadian legislative model, giving Parliament the option of including a 'notwithstanding' clause in legislation that would oust the operation of a Human Rights Act (including the Courts' statutory interpretation role in relation to human rights) in respect of particular legislation, as Parliament sees fit. As McHugh points

[243] Pamela Tait, 'Victoria's Charter of Human Rights and Responsibilities: A Contribution to the Debate on a National Charter', (Speech delivered to the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009), 19.

out, such a clause could be added to legislation even after a court decision adverse to the government's interests.

Further details of the legislative models of human rights protection are set out in the remainder of this submission.

Recommendation 5: The legislative model for a Human Rights Act

A Human Rights Act should be an Act of the Commonwealth Parliament, aimed at establishing a dialogue between the three arms of government about human rights using either the legislative dialogue model or the Canadian legislative model as a guide.

13. Who should have obligations to protect and respect human rights?

318. Given that the HRLRC proposes legislative models that aim to enhance, among other things, dialogue in government, it follows that a Human Rights Act should impose specific human rights obligations on the three arms of government:

(a) the Parliament;

(b) the Courts; and

(c) the Executive, including public authorities.

319. The nature and scope of the obligations of each arm of government is discussed in turn below.

13.1 Parliament's obligations

320. Under the legislative models for a Human Rights Act proposed by the HRLRC, laws that breach human rights are not invalidated (save that state laws that are inconsistent will be inoperative to the extent of that inconsistency). Rather, law-makers are encouraged, or required, to take protected rights into account in the course of the law-making process. The mechanisms employed under a Human Rights Act should include the following:

(a) preparation and tabling of Statements of Compatibility;

(b) the establishment of a specialist joint Parliamentary Human Rights Scrutiny Committee; and

(c) responding to Declarations of Incompatibility.

321. The Terms of Reference for the National Human Rights Consultation clearly require the preservation of parliamentary sovereignty in any model proposed for the protection of human rights in Australia. The Human Rights Act model proposed by the HRLRC enhances human rights protection by requiring substantive consideration of human rights to be part of Commonwealth law-making processes. However it also preserves parliamentary sovereignty by enabling Parliament to pass laws that infringe on human rights.

(a) Statements of Compatibility

322. A Human Rights Act should require the Parliamentarian responsible for a Bill to table a Statement of Compatibility at the time that the new Bill is introduced into Parliament. A Statement of Compatibility should state:

(a) whether the Bill is compatible with human rights, and if so, how it is compatible;[244]

[244] The Victorian Charter, ACT Human Rights Act and UK Human Rights Act each require law-makers to issue a 'Statement of Compatibility' at the time a law is introduced, indicating whether the law is consistent with protected rights.

(b) if the Bill is inconsistent, the nature and extent of the incompatibility and why the Bill should nevertheless be considered by the Parliament.[245]

323. Requiring the member or Minister responsible for a Bill to provide a Statement of Compatibility increases transparency and accountability in law-making. Even one of the most passionate critics of human rights law concedes that the provision in the Victorian Charter 'does seem to relate to the oft-proclaimed goal of making the elected legislature think more about rights before enacting laws'.[246] Although Australia's system of responsible government ostensibly means that Parliamentarians are accountable to the electorate for their decision-making, requiring Parliamentarians to consider rights and to make a public statement as to the likely impact a proposed law will have on human rights, reduces the likelihood of rights being inadvertently infringed.

324. A Human Rights Act should require Statements of Compatibility to be properly reasoned, so as to avoid the situation where Statements of Compatibility simply assert that provisions of an Act are human rights compliant, without giving any justification for that point of view. This very problem has caused delays in the scrutiny process in the UK, where the UK Joint Committee on Human Rights has been delayed in its scrutiny of Acts by the need to write to Ministers to ask for proper reasons for their assertions of rights compliance in Statements of Compatibility.[247]

(b) 'Notwithstanding' clauses or override provisions

325. If either the Canadian legislative model or a legislative dialogue model is used, Parliament could be given an override power, essentially allowing it to state that legislation will have an effect notwithstanding the Human Rights Act (**notwithstanding clause**). The notwithstanding clause preserves the power of Parliament to pass laws that are inconsistent with human rights. Where a notwithstanding clause is used, the Human Rights Act will not apply to the law in question, so that the particular federal law would not be required to be construed subject to the rights set out in the Act. As the Hon Michael McHugh states 'it would be open to the Parliament after any decision [of the court] with which it disagreed to insert a 'notwithstanding' clause in the legislation which the court had [previously] said should be ignored in determining rights and obligations'.[248]

[245] If the law is not consistent with protected rights, the Victorian Charter and ACT *Human Rights Act* require the statement to include details of the nature and extent of the inconsistency.

[246] James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 920.

[247] See Joint Committee on Human Rights, *The Work of the Committee in 2007-08, Second Report of Session 2008-09*, HL Paper 10/HC 92, (26 January 2009), 18, available at http://www.publications.parliament.uk/pa/jt/jtrights.htm.

[248] McHugh, above n 230, 36.

(c) Parliamentary Human Rights Committee

326. A Human Rights Act should establish a joint Parliamentary Human Rights Committee to:

(a) scrutinise all Bills and subordinate legislation for compatibility with protected rights;

(b) conduct thematic inquiries into human rights issues; and

(c) assist in government responses to Declarations of Incompatibility and other court and tribunal decisions and judgments such as those of the UN Human Rights Committee that concern Australia.

327. The UK Joint Committee on Human Rights has similar functions and is an example of an extremely effective parliamentary committee.[249] It has been described as 'one notable way in which parliamentary accountability is being enhanced.'[250]

328. The scrutiny of new and existing legislation for compatibility with protected rights is an important preventative measure that can reduce the risk of legislation infringing human rights. The Committee should be given the power to review all legislation – proposed or existing, primary or subordinate – of its own motion, in response to a report from an independent body such as the AHRC, or following referral from either House of Parliament. The Committee should have the usual powers of parliamentary committees, including receiving submissions from relevant stakeholders and reporting back to Parliament with findings and recommendations.

329. Other roles for a Parliamentary Human Rights Committee are set out in the HRLRC's submission *Engage, Educate, Empower*: *Submission on Measures and Initiatives to Promote and Protect Human Rights*.

(d) Response to Declarations of Incompatibility

330. Using the legislative dialogue model, where legislation or a legislative provision is inconsistent with human rights, a Human Rights Act should allow the High Court or Federal Courts to declare that the legislation or provision is inconsistent (a ***Declaration of Incompatibility***). The issuing of Declarations of Incompatibility is a key difference between the legislative dialogue model and the Canadian legislative model.[251] A Declaration of Incompatibility will not affect the validity of the law in question, but the Human Rights Act should require that:

(a) the responsible Minister prepare a written response to the Declaration of Incompatibility within six months; and

---

[249] See the discussion of the Committee's functions in Joint Committee on Human Rights, above n 247.

[250] Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 1, 2.

[251] In comparison, under the Canadian legislative model suggested by The Hon Michael McHugh the court would not make Declarations of Incompatibility at all, but would instead be required to (i) invalidate state or territory legislation that is inconsistent with human rights in the Human Rights Act; (ii) read all federal legislation in accordance with the Human Rights Act: McHugh, above n 230, 8-9.

(b) the responsible Minister cause a copy of the Declaration of Incompatibility and his or her response to it to be –

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.[252]

331. Requiring a response within a given time period enhances the likelihood that Parliament will take appropriate action in response to any Declarations of Incompatibility.[253] The UK experience offers insight into the effectiveness of this mechanism. As at July 2006, there had been fifteen Declarations of Incompatibility made by UK courts and remitted to Parliament. Parliament's response has generally been to remedy the legislative breach of human rights by way of amending legislation.[254]

332. A Declaration of Incompatibility is a central element in the 'dialogical' human rights model. That is because the issuing of a Declaration of Incompatibility will result in reconsideration of the legislation by Parliament.

333. The HRLRC considers that the integrity of the dialogical process would also be afforded significant protection by the availability of a writ of mandamus against the Minister responsible for the legislation which is the subject of a Declaration of Incompatibility, in the event that the Minister has not responded to the Declaration within six months of issue.[255]

334. Parliamentary sovereignty is clearly enhanced by a Declaration of Incompatibility, when compared with empowering the courts to strike down inconsistent laws. This is because the process of tabling and responding to Declarations ensures a high degree of scrutiny, transparency and accountability but Parliament retains the power to determine whether legislation should be amended in accordance with a the Declaration.

Recommendation 6: The role of Parliament under a Human Rights Act

335. Under a Human Rights Act:

(a) The parliamentarian responsible for a Bill should table a reasoned Statement of Compatibility at the time that the new Bill is introduced into Parliament, stating whether and how the Bill is compatible with human rights, and if the Bill is inconsistent, the nature and extent of the incompatibility.

(b) If a Canadian legislative model is used, Parliament should be given the power to

[252] This approach is consistent with the approach in the Victorian Charter, see s 37.

[253] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 27.

[254] Although a number of Declarations of Incompatibility were 'still under consideration with a view to remediation': DCA Review 17. See also HRLRC, *Human Rights Law Resource Manual* (2006) 50 at http://www.hrlrc.org.au/resources/manual/.

[255] The Hon Michael McHugh states that a court is likely to be able to issue an order in the nature of mandamus to the Attorney General for a breach of the obligations that flow from the making of a Declaration of Incompatibility: McHugh, above n 230, 17.

include a notwithstanding clause in legislation that would render the Human Rights Act inoperative in relation to that legislation.

(c) A specialist Joint Committee on Human Rights should be established to:

(i) scrutinise all Bills and subordinate legislation for compatibility with protected rights;

(ii) conduct thematic inquiries into human rights issues; and

(iii) assist in government responses to Declarations of Incompatibility and other court judgments such as decisions of the Human Rights Committee that concern Australia.

(d) If a legislative dialogue model is used and the courts make a Declaration of Incompatibility in relation to a legislative provision, the Human Rights Act should require that the responsible Minister prepare a written response to the Declaration of Incompatibility within 6 months; and his or her response be

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.[256]

13.2 Courts' role and statutory interpretation

(a) Overview of the role of the courts

336. Using either a Canadian legislative model or a dialogue model, a Human Rights Act would not empower the courts to invalidate (or 'strike down') federal legislation that is inconsistent with human rights. However, the courts would still play an important role, including:

(a) interpreting laws in a way that is consistent with protected rights;

(b) using international and comparative human rights jurisprudence; and

(c) in the case of a legislative dialogue model, declaring that laws are incompatible with protected rights; or

(d) in the case of a Canadian legislative model, declaring that laws are incompatible with protected rights and are inoperative to the extent of that inconsistency.

337. The HRLRC acknowledges criticisms that a Human Rights Act would provide a disproportionate amount of power to unelected judges. The legislative models proposed by the HRLRC each have appropriate safeguards in place for the preservation of parliamentary sovereignty (such as 'notwithstanding' clauses and the parliamentary response mechanism to Declarations of Incompatibility).

[256] This approach is consistent with the approach in the Victorian Charter, see s 37.

338. However, it is important to recognise that in Australia parliamentary sovereignty is already limited by the constitutional framework. The constitution provides for a democratic process of checks and balances on the exercise of executive and parliamentary power. In this context, the judicial function should not be seen as contrary to democratic processes but an essential part of a healthy functioning democracy. As former Senor Law Lord Thomas Bingham stated in respect of the UK system:

> There is an inevitable and proper tension between the wish of governments to take (and be seen to take) effective action, and the judges' insistence that such action should not transgress the bounds of what is lawful. This is not an outcome to be deprecated, still less is it indicative of a constitutional crisis. Provided the judges do not overstep the proper limits of the judicial function, which they take care to respect, it is evidence that the organs of government are functioning as, in a democracy, they should. There are countries in which all the decisions of the courts find favour with the powers that be, but they are not places that most people would wish to live. [257]

339. Judicial power is, of course, limited by the jurisdiction of the relevant court and also by the matters that are brought before the court.

(b) Interpretation of laws

340. One of the core tasks of courts is to interpret the meaning of the laws that are passed by Parliament, and to apply those laws in specific situations. A Human Rights Act should require that all Commonwealth legislation be interpreted and applied (and, if necessary, read up or down) in a manner compatible with human rights (the **Interpretive Principle**). This is a codification and extension of the well established common law principles that any ambiguity in legislation should be construed in favour of human rights and that legislation should not be deemed to abrogate fundamental rights without clear and express words evincing that intention.

341. A Human Rights Act should contain a provision similar to section 3 of the UK Act or section 32 of the Victorian Charter. The UK Act requires that, as far as possible, primary and subordinate legislation must be read and given effect to compatibly with rights in the European Convention on Human Rights (the **ECHR**). Section 32(1) of the Victorian Charter similarly requires that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

342. A provision adopting the Interpretive Principle requires that, as a matter of law, an interpretation consistent with human rights be adopted whenever it is possible to do so, regardless of whether there is any ambiguity in the meaning of a provision, and regardless of how the provision in question may have been previously interpreted and applied.[258] For

[257] Thomas Bingham, 'Judges possess the weapon to challenge surveillance', *The Guardian* (UK), 17 February 2009, available at http://www.theguardian.co.uk.

[258] HRLRC, above n 254, 45.

example, the House of Lords, in *Ghaidan v Godin-Mendoza,*[259] applied the Interpretive Principle to give a construction to a provision that was contrary to an earlier decision which pre-dated the commencement of the UK Act.[260] According to Lord Nicholls of Birkenhead:[261]

> [T]he intention of Parliament in enacting section 3 [the interpretive provision in the UK Act] was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. … There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

343. An illustration of the limits of judicial interpretation for human rights consistency can be found in *R (Anderson) v Secretary of State for the Home Department.*[262] In that case, the House of Lords held that an interpretation consistent with the UK Act was not possible with regard to an express legislative power essentially enabling the Home Secretary to alter the duration of a prisoner's sentence. Lord Bingham said that to read the relevant section as precluding participation by the Home Secretary, if it were possible to do so, would not be 'judicial interpretation but judicial vandalism', giving the section an effect quite different from that which Parliament intended and going beyond the Interpretive Principle in the UK Act.

344. The HRLRC acknowledges the contention that the UK provision would be invalid to the extent that it allowed courts to modify legislation in a manner inconsistent with the purpose of the legislation. There is an argument that in such circumstances the judiciary would be exercising legislative power, in violation of separation of powers in the Constitution.[263] However, there are also those who argue against that proposition.[264] While this is may or not be correct, the HRLRC notes that this issue can be comprehensively overcome by using the Victorian provision as a model, which requires courts to interpret legislation in a manner that is compatible with human rights, but only to the extent that it is possible to do so *consistently with the statutory purpose*.[265]

345. The HRLRC acknowledges that the success of the Interpretative Principle is dependent upon the judiciary deploying it robustly, so that remedial action is encouraged. Human rights should

---

[259] [2004] AC 557.

[260] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

[261] *Ghaidan v Godin-Mendoza* [2004] AC 557 [32] – [33].

[262] [2003] 1 AC 837.

[263] McHugh, above n 230 27.

[264] Tait, above n 243, 6, 11-14.

[265] McHugh states that a provision based on the Victorian statutory interpretation provision is likely to be consistent with the doctrine of separation of powers at a federal level: McHugh, above n 230, 29.

be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.[266] Further, the Human Rights Act should be a 'living document' to be interpreted and applied in the context of contemporary and evolving values and standards.[267]

346. Importantly, it is not only the courts who must use the interpretive principle. All persons should be required by the Human Rights Act to interpret Commonwealth legislation and subordinate legislation according to the interpretive principle.

(c) The use of international and comparative human rights jurisprudence

347. Regardless of which legislative model is used, a Human Rights Act should expressly allow courts to have regard to international and comparative human rights jurisprudence when interpreting and applying the Human Rights Act and any other laws that impact on human rights. A provision such as section 32(2) of the Victorian Charter would be appropriate. It provides:

> International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

348. There are at least three reasons why courts should consider international and comparative jurisprudence:

(a) Common jurisprudence reduces the extent to which courts will be required to 'reinvent the wheel' and will better equip decision makers and courts to determine the substantive rights and issues that arise under the Human Rights Act by providing them with the opportunity to consider relevant international and comparative law jurisprudence.[268]

(b) Utilising international and comparative human rights jurisprudence is particularly important as it enables the courts to have regard to the instruments and bodies from which the rights in the Human Rights Act are derived.[269] International experience in the implementation of human rights laws is therefore likely to inform the mechanical provisions of an Australian Human Rights Act.

(c) Human rights are universal, so the development of human rights jurisprudence should be as consistent across all jurisdictions as is possible.[270]

---

[266] *Goodwin v United Kingdom (2002)* 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

[267] *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10; *Selmouni v France* (2000) 29 EHRR 403, [101].

[268] *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, paras 201-2 (Bell J).

[269] The rights protected in a Human Rights Act would be likely to be drawn from international law, especially the human rights treaties to which Australia is a signatory, such as the ICCPR and ICESCR. For example the jurisprudence of the HRC, which issues General Comments that elucidate the meaning of particular rights under the ICCPR and hears individual complaints under the First Optional Protocol to the ICCPR.

[270] In any event it is well established 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, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; *Povey v*

349. Further, given the limited extent to which courts currently use international or domestic overseas jurisprudence in statutory or constitutional interpretation and in the development of the common law,[271] a Human Rights Act should expressly provide for courts to have regard to those sources.

(d) Declarations of Incompatibility

350. As mentioned above, if a legislative dialogue model is used, where it is not possible for a law to be interpreted consistently with human rights, a Human Rights Act should empower courts exercising federal jurisdiction to issue a Declaration of Incompatibility, which would have the effect of declaring that a Commonwealth law is incapable of being construed consistently with the rights guaranteed by the Act

351. Whilst a Declaration of Incompatibility would not have the effect of invalidating or 'striking down' the inconsistent Commonwealth law, it would trigger the requirement for Parliament to respond to the Declaration (discussed in part 13.1(d) above).

(i) Would a Declaration of Incompatibility be constitutional?

352. The HRLRC acknowledges that there are differing views as to whether Declarations of Incompatibility are constitutional. To put the arguments simply, some people contend that if courts were to declare, but not enforce, the inconsistency of legislation, there would be no 'matter' before the court and declarations would be merely advisory opinions which the court has no jurisdiction to provide.[272] The Hon Michael McHugh AC QC states that he would not be surprised if a dialogue model was upheld as constitutional, but states that he thinks that the better view is that the High Court state that the provisions concerning Declarations of Incompatibility are invalid.[273] However, others argue that applications for Declarations of Incompatibility are likely to give rise to a 'matter', for example on the basis that it 'involves the determination of the consistency of disputed legislation with the protected rights within the bounds of an existing conflict between the parties'.[274]

353. The existing jurisprudence provides no clear guidance on this issue. However, given that the concerns have been raised it is possible for a Human Rights Act to be drafted in such a way as to minimise the likelihood of a successful constitutional challenge to the Declaration of Incompatibility provisions. For example, the Human Rights Act could require that where a Declaration of Incompatibility is sought, that it must be sought in conjunction with a separate

---

Qantas Airways Ltd (2005) 216 ALR 427, 433 per Gleeson CJ, Gummow, Hayne and Heydon JJ; *R v Asfaw* [2008] UKHL 31 (21 May 2008) [55]; *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 657B.

[271] The use of international law in domestic Australian law is discussed in detail in the HRLRC, above n 254, ch 4.

[272] See, eg, Greg Craven, 'Groundhog Day over Rights', *Financial Review*, 12 January 2009.

[273] See McHugh, above n 230, 15-18, 33.

[274] Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights', (2007) 12(1) *Deakin Law Review*, 1, 22; see also Tait, above n 243, 6.

cause of action for other remedies or relief.[275] A Declaration of Incompatibility could be sought alongside an application for prerogative writs against a public authority on the grounds that their conduct was unlawful for breach of human rights, or alongside a different application based on law unrelated to the Human Rights Act. This would mean that even if the court could not consider a Declaration of Incompatibility alone (which is by no means clear), the application for a Declaration of Incompatibility is associated with another 'matter' for determination by the court.

354. A separate but related argument against Declarations of Incompatibility is that they would not be an exercise of judicial power if the legal consequences of the Declarations of Incompatibility are not made binding on the parties. It is arguable that the consequence of the Declaration of Incompatibility is merely for the Minister responsible for the legislation (who may not be a party to the dispute) to table a response in Parliament. However, whether declarations are binding on the parties is a relevant factor in determining whether power is judicial, but it is not determinative, and there are very good arguments that, on balance, the power to make Declarations of Incompatibility is likely to be judicial power.[276]

355. Again, if there is concern that making a Declaration of Incompatibility would not be an exercise of judicial power on the basis that they are not binding on the parties, it is possible for a Human Rights Act to be drafted to take into account those concerns. One approach would be to require the Minister responsible for the Bill to be joined as a party to the proceeding before the court, and for the court to issue a writ of mandamus directing the Minister to respond to the declaration in accordance with the terms of the Human Rights Act. In that way, the declaration is clearly binding on a party to the proceeding.

356. Finally, if the concerns about Declarations of Incompatibility are seen as insurmountable, then such declarations need not be included in the legislative dialogue model for it to operate successfully.[277] As discussed above, the purpose of Declarations of Incompatibility is to bring to Parliament's attention the inconsistency of laws with human rights. This need not be done through a court declaration, but could be notified by the Australian Human Rights Commission or by the Registry.[278]

357. The HRLRC submits that the constitutionality of Declarations of Incompatibility is not clear, but that much will depend on the manner in which those provisions are drafted. There are ways in

[275] This would be similar to s 39 of the Victorian Charter, which effectively requires an action for relief against public authorities brought under the Charter to be attached to another non-Charter cause of action. However, a Commonwealth Human Rights Act need not limit the other action by requiring that it is not for breach of human rights under the Act.

[276] Dalla-Pozza and Williams, above n 274, 17.

[277] See Tait, above n 243, 6.

[278] AHRC, above n 241.

which the Human Rights Act could be drafted to enhance the likelihood of these provisions being constitutional.

Recommendation 7: The role of courts under a Human Rights Act

(a) A Human Rights Act should require that all Commonwealth legislation be interpreted and applied (and if necessary, read up or down) in a manner compatible with human rights.

(b) A Human Rights Act should expressly allow courts to have regard to international and comparative human rights jurisprudence when interpreting and applying the Human Rights Act and any other laws that impact on human rights.

(c) Where it is not possible for a law to be interpreted consistently with human rights, a Human Rights Act should empower courts exercising federal jurisdiction to issue a Declaration of Incompatibility.

13.3 Public authorities

358. The United Nations Office of the High Commissioner for Human Rights (**OHCHR**) has stated that:

> Perhaps the most important source of added value in the human rights approach is the emphasis it places on the accountability of policy makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability.[279]

359. This section considers the human rights obligations that should be imposed on policy makers and public service providers by a Human Rights Act, in order to achieve the added value referred to by the OHCHR. It then considers the extent to which parts of the executive should have these obligations.

(a) What obligations should public authorities have?

360. A Human Rights Act should bind all aspects of the executive arm of government and government service delivery. To this end, all aspects of the executive that are bound (in this submission referred to as 'public authorities') should be required:

(a) to act compatibly with human rights (a substantive obligation); and

(b) to give proper consideration to human rights when making decisions and implementing legislation (a procedural obligation).

361. This is consistent with both s 38(1) of the Victorian Charter and s 40B(1) of the ACT Human Rights Act, which impose both procedural and substantive obligations on public authorities, and make it unlawful for a public authority to fail to comply with either obligation. It is preferable for a Human Rights Act to be as explicit as possible in setting out the duties to be

[279] OHCHR, above n 24, 5.

imposed on public authorities. This would avoid ambiguity, assist public authorities to comply with their obligations, and promote a culture of human rights.[280]

(i) Substantive obligation

362. The substantive obligation, which requires public authorities to act in a way that is compatible with human rights, does not always prevent public authorities from acting in a way which limits or restricts a human right.[281] For example, an action will not be 'incompatible' with a human right if it can be demonstrably justified by the public authority as a reasonable limitation or restriction in the circumstances.[282] There should also be an exemption if the public authority could not reasonably have acted differently or made a different decision because of a statutory provision or otherwise under law.[283] Further, these obligations generally do not apply to acts or decisions of a private nature (section 38(3) of the Victorian Charter and sections 6(3) and (5) of the UK Human Rights Act).

363. It has been noted that while administrative law traditionally focuses on decisions and the procedures by which decisions are made, this obligation focuses on the *actions* of public authorities, departing from the traditional administrative law approach.[284] A Human Rights Act could provide that a failure to act compatibly with human rights is, on its face, unlawful and beyond power, entitling an affected person to seek injunctive and declaratory relief.

(ii) Procedural obligation

364. As discussed above, the procedural obligation requires a public authority to give 'proper consideration' to relevant human rights when making decisions. This means that public authorities must give real and genuine consideration to human rights, where relevant. The use of the word 'proper' indicates a higher standard than the usual administrative law standard for relevant considerations. The concept is likely to imply notions of proportionality and require that appropriate weight be given to human rights issues (which will vary according to the circumstances).

365. This is in contrast to the traditional approach to relevant considerations which does not entitle courts to consider the weight given to a particular consideration, unless it is so unreasonable that no reasonable decision-maker could have acted that way.[285] Therefore, a 'tick the box'

---

[280] Victorian Human Rights Consultation Committee, above n 221, 63.

[281] It should be noted that 'act' includes not only a positive act, but also a failure to act and a proposal to act (see s 3(1) of the Victorian Charter and the Dictionary in the ACT Human Rights Act).

[282] Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 243-4.

[283] See s 38(2) of the Victorian Charter, s 40B(2) of the ACT Human Rights Act, and s 6(2) of the UK Human Rights Act.

[284] Pound and Evans, above n 282, 243-4.

[285] Evans and Evans, above n 85, 137.

approach (ie, merely examining whether or not a human rights issue was considered by a public authority) is unlikely to be sufficient to satisfy this obligation.

366. The intention of the procedural requirement is to promote human rights compliance, not to impose complex procedures on public authorities. UK case law has indicated that the issue for the court to consider is whether in the specific circumstances a person's human rights have been violated, not whether the public authority's decision was the product of a defective decision-making process.[286]

367. It should be noted that a court will not be able to substitute its own decision for that of the decision-maker.[287]

368. While a substantive obligation is important for the enforcement and enjoyment of human rights, the value of a procedural obligation should not be underestimated. A procedural requirement will assist in establishing a human rights culture in Australia because it will encourage proper consideration and integration of human rights in government administration. Merely being conscious of human rights and the effect of conduct and decisions on human rights should assist in protecting and upholding these rights.

(iii) Public authorities will have a 'margin of appreciation'

369. Considering the complexities involved in reviewing a public authority's compliance with the procedural and substantive obligations, and the expertise of public authorities, it is likely that courts will give them a 'margin of appreciation' in carrying out their public functions and recognise that there is a 'discretionary area of judgment' for public authorities. Therefore, as long as there is evidence that a public authority has given serious consideration to relevant human rights, and the decision is considered to be within the authority's 'discretionary area of judgment', courts may decline to find that the public authority has acted unlawfully.[288] Courts may also defer to the opinion of the legislature, executive or public authority when particularly sensitive issues, such as national security, criminal justice and economic policy, are involved.

(iv) Concerns and potential benefits

370. There may be some concern that incorporating human rights obligations into the process of policy creation and the delivery of public services could result in delay and the adoption of a risk averse approach to these tasks. However, many countries already require public authorities to comply with human rights obligations when carrying out public functions without adverse consequences. Further, it has been said that where human rights obligations have been imposed on public authorities in other jurisdictions, this has actually improved the services of those public authorities. This is because the public authorities are given a clear

[286] *R (Begum) v Denbeigh High School* [2006] 2 WLR 719.

[287] Evans and Evans, above n 85, 37–8.

[288] Pound and Evans, above n 282, 245.

set of fundamental standards with which they must comply, which provides guidance and creates certainty.[289]

371. Placing these procedural and substantive obligations on public authorities would impose another level of checks and balances on them to help improve the standard of public service delivery.[290]

(v) Action plans, audits and reporting mechanisms

372. Under a Human Rights Act, accountability of policy makers and public service delivery could be enhanced through audits and reports, as well as action plans. If public authorities do not have adequate auditing and reporting procedures, the implementation and incorporation of human rights requirements into policy development and service delivery stalls.

373. In the UK, the Audit Commission (an independent watchdog) found that '[o]ne local authority, where a number of unsuccessful human rights complaints had been brought, saw this as evidence of complying with the Act'.[291]

374. It is critical to the effective implementation of a Human Rights Act that any shortcomings in public authorities' understanding of their human rights obligations are quickly identified. Further training, education and assistance can then be provided when necessary.

375. A Human Rights Act should require that:

(a) all public authorities undertake an annual audit of their human rights compliance;

(b) all public authorities submit a detailed annual report to the authority responsible for the oversight and enforcement of the Human Rights Act (***responsible body***);

(c) each public authority include all complaints referred to the authority by the responsible body in its annual audit report;

(d) each public authority disclose any recommendations made by the responsible body and its response – if the authority decided against taking action in response to such a recommendation, the Human Rights Act might also require the report to include the reasons for that decision;

(e) external reviews be conducted of each authority's compliance with the Human Rights Act, with the results reported to the responsible body;

(f) appropriate senior ministers monitor the implementation and progress of the Human Rights Act; and

[289] Victorian Human Rights Consultation Committee, above n 221, 62; UK Department for Constitutional Affairs, above n 161.

[290] Victorian Human Rights Consultation Committee, above n 221, 63.

[291] Audit Commission, above n **Error! Bookmark not defined.**, 13.

(g) public authorities develop a plan for the protection and promotion of human rights (if public authorities were required to develop human rights action plans under a Federal Human Rights Act, they would need to be given sufficient support).

(b) Who is a public authority?

376. The crucial question then becomes 'who is a public authority?' Obviously, the definition of public authority in the Human Rights Act would play a pivotal role in determining which governmental arms, organisations and authorities have human rights obligations, which is in turn fundamental to the effectiveness of the Act as a means of protecting human rights.

377. The extensive and ongoing privatisation and outsourcing of traditional public functions (such as the delivery of employment services) means that many traditional public services are no longer being performed purely by government agencies, but rather by private entities contracted by the government. It is vital that a Human Rights Act bind those private entities in circumstances where those entities are exercising public functions. A Human Rights Act should also bind the executive government. It is useful to characterise these two types of entities as 'core public authorities' (the executive government itself) and 'functional public authorities' (entities exercising public functions).

(c) Core public authorities

378. Any definition of 'public authority' in a Human Rights Act should include an express list of core public authorities. Such a list would remove any doubt about whether those authorities were bound by the Act. For example, the definition contained in the Victorian Charter lists the following as public authorities:

(a) public officials, such as public sector employees, certain judicial employees and parliamentary officers;

(b) government departments and entities established by statutory provisions exercising functions of a public nature;

(c) Victoria Police (the Australian Federal Police should be bound in a Commonwealth Human Rights Act);

(d) Ministers;

(e) Parliamentary Committees; and

(f) other entities declared under the regulations to be 'core' public authorities.[292]

This list is just an example of the types of bodies that can be viewed as core public authorities – a Federal Human Rights Act could include different bodies.

[292] The Victorian Charter also lists 'local councils' as core public authorities, however such an inclusion would not be necessary in a Federal Human Rights Act.

(d) Functional public authorities

379. The definition of 'public authority' should be extended to include functional public authorities. This is intended to reflect 'the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services'[293] and to ensure that the protection given to human rights cannot be undermined by the outsourcing of governmental functions to private entities.

380. The Victorian Charter, the NZ Bill of Rights and the UK Human Rights Act all apply to functional public authorities.

381. The Human Rights Act should include a functional public authority definition similar to the one contained in the Victorian Charter. Section 4(1)(c) of the Victorian Charter states that a public authority is:

> any entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).[294]

382. Section 4(2) of the Victorian Charter provides a non-exhaustive list of factors that courts may take into account in determining whether a function is of a public nature:

> (a) that the function is conferred on the entity by or under a statutory provision;
>
> (b) that the function is connected to or generally identified with functions of government;
>
> (c) that the function is of a regulatory nature;
>
> (d) that the entity is publicly funded to perform the function; and
>
> (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

383. The fact that one or more of these factors is present does not necessarily establish that a particular function is of a public nature.[295] In particular, the fact that an entity receives public funding to perform a function does not necessarily mean that it is acting on behalf of the State or public authority.[296]

384. The list of factors found in the Victorian Charter has been derived from jurisprudence and commentary on the relevant provisions of the UK Human Rights Act and the NZ Bill of Rights.[297] Providing a list of factors that a court can take into account is preferable to merely referring to entities performing 'functions of a public nature', as in the UK. The Victorian

---

[293] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 6, 4.

[294] By contrast, the relevant section of the UK Human Rights Act does not include a list of factors to be taken into account when deciding whether a body is performing such functions. It simply provides that a 'public authority' includes 'any person certain of whose functions are functions of a public nature': UK Human Rights Act s 6(3)(b).

[295] Victorian Charter s 4(3)(b).

[296] Victorian Charter s 4(5).

[297] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 6, 4.

Charter's non-exhaustive list of factors provides guidance about which entities should be considered functional public authorities without being overly prescriptive:

> The section is broad in its application and informative in its detail, such that our courts have been left in no doubt as to the scope of the section envisioned by Parliament, but have still been given the flexibility to ensure justice is done in every individual case.[298]

385. Further, to ensure clarity and consistency, a Human Rights Act would be enhanced by specifying certain functions that 'are taken to be of a public nature', as has been done in the ACT Human Rights Act. These functions are:[299]

> (a) the operation of detention places and correctional centres;
>
> (b) the provision of any of the following services:
>
> (i) gas, electricity and water supply;
>
> (ii) emergency services;
>
> (iii) public health services;
>
> (iv) public education;
>
> (v) public transport;
>
> (vi) public housing.

386. Given the extent of private and community sector involvement in public services, together with the diversity of organisational arrangements and structures to manage and deliver those services, a Human Rights Act must take a broad view of public authority to ensure that it has a broad application to government services. In the Second Reading Speech to the Victorian Charter Bill, the Attorney-General said that the intention of cl 4 of the Bill 'is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature'[300] and that 'the obligation to comply with the Charter extends beyond "core" government to other entities… performing functions of a public nature on behalf of the state. This reflects the reality that modern government utilise diverse organisational arrangements to manage and deliver their services'.[301] A similar statement was made in the Explanatory Memorandum to the Victorian Charter Bill.[302]

387. A broad interpretation of what constitutes a public authority is important to the achievement of the underlying purpose of the Human Rights Act. Under the Victorian Charter, public authorities have specific obligations imposed upon them by section 38 of the Charter, which is one of the principal means by which the Charter seeks to protect and promote human rights.

---

[298] Sue McGregor, *Public Bodies and Human Rights* (2008) 82(6) *Law Institute Journal* 66.

[299] *Human Rights Amendment Act 2008* (ACT) s 7. See, eg, ACT Human Rights Act s 40A(3) (to be inserted).

[300] The Hon Rob Hulls, Attorney-General, 'Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006', *Hansard*, Legislative Assembly, 4 May 2006, vol 470, 1293.

[301] Ibid, 1294.

[302] Charter *Explanatory Memorandum*, 4.

As Lord Nicholls observed in *Aston Cantlow Parochial Church Council v Wallbank*[303] in relation to the comparable provision of the UK Human Rights Act, '[g]iving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values…'.[304]

388. Although the UK House of Lords has stated that there should be a 'generously wide' and flexible interpretation of 'public function' so as to further the statutory object of promoting human rights, this has not always been the outcome of litigation.[305] The House of Lords has stressed that, in contrast to the category of core public authority, the category of functional public authority 'has a much wider reach and is sensitive to the facts of each case'.[306] Despite this, a number of UK cases have taken a narrow view of 'public authority'.[307] This has led to widespread calls for amendment to the definition to make it more broad, inclusive and flexible.

389. In particular, the UK Joint Committee on Human Rights has been highly critical of the restrictive approach that the UK courts have taken to the meaning of 'public authority'. This approach has prevailed notwithstanding, firstly, the House of Lords view that there should be a 'generously wide' interpretation of 'public authority' and 'functions of a public nature' so as to further the statutory aim of promoting human rights and remedying human rights breaches,[308] and, secondly, that in the course of parliamentary debates on the Act, the Home Secretary and the Lord Chancellor, 'made it clear that persons or bodies delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision'. The Joint Committee states that:[309]

> In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people… from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.

390. The Joint Committee continues, stating, [310]

---

[303] [2004] 1 *AC* 546.

[304] [2004] 1 AC 546 at [11]. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; [2001] EWCA Civ 595 at [58] per Lord Woolf CJ (for the Court of Appeal); and *YL v Birmingham City Council* [2008] 1 AC 95 at [4] per Lord Bingham.

[305] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [11].

[306] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [41].

[307] Such as *YL v Birmingham City Council* [2007] 3 All ER 957, which held that a private aged care home was not a public authority.

[308] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37.

[309] Joint Committee on Human Rights, *Ninth Report: The Meaning of Public Authority under the Human Rights Act* (2007), available at http://www.publications.parliament.uk/pa/jt/jtrights.htm.

[310] Ibid.

> In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation… are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.

391. Additionally, if a Human Rights Act applies to functional public authorities, it should specify that when an entity combines public functions with those of a private nature, the entity is *only* considered to be a public authority when it is exercising its public functions and is a private entity in respect of all its other functions and activities.[311] For example, a security firm that carried out work for a government prison and for a supermarket should be classified as a functional public authority when working for the government prison, but not when working for the supermarket.[312] This would prevent excessive restrictions being placed on entities that carry out work, typically as contractors, for both public and private clients.

13.4 Should a Human Rights Act bind the private sector?

392. Given that a Human Rights Act is directed at government action, private actors should only have direct obligations under a Human Rights Act where they are functional public authorities. That is, as stated above, the Act should bind the private sector in so far as private entities are performing functions of a public nature on behalf of the state or a public authority. This reflects and enhances the dialogical model of human rights protection, being a dialogue between the three arms of government. Given the increased outsourcing of government functions, it is vital that the definition of public authorities is broad enough to ensure that private entities performing outsourced public functions are part of that dialogue (as discussed above).

393. The ACT Human Rights Act has a provision allowing entities that are not public authorities under that Act to opt-in to the obligations on public authorities (ie obligations to give proper consideration to human rights and to act in accordance with human rights).[313] The opt-in procedure came into force on 1 January 2009 and is intended to promote a meaningful dialogue within the community about human rights, engender cultural change by developing a rights-consciousness in the ACT and to recognise the contribution of the private sector to the well-being of society.[314] No business has chosen to opt-in to the ACT Human Rights Act to date.

---

[311] See, eg, Victorian Charter.

[312] Victorian Human Rights Consultation Committee, above n 221, 58.

[313] See s 40D of the ACT Human Rights Act.

[314] See Explanatory Statement to Human Rights Amendment Bill 2007, Presented by Mr Simon Corbell MLA, Attorney General.

394. The HRLRC recognises that business and private entities acting in a private capacity can (and already do) make important contributions to the enjoyment of human rights, and conversely can have a significant detrimental impact on the enjoyment of human rights. The HRLRC supports the purpose of the ACT opt-in provision. A meaningful dialogue between business, government and non-government sectors of the community should be created, or where it exists it can be enhanced, to aid the development of rights-consciousness across the community. However at this stage, it is not clear that an opt-in clause for business is the most effective means by which to achieve this dialogue.

395. There is a risk that creating an opt-in process:

(a) will not effectively create a meaningful cross-sectoral dialogue, if only the 'usual suspects' choose to opt-in;

(b) will create an often false perception that firms that do not opt-in will not have any human rights obligations under the Human Rights Act or otherwise; and

(c) will diminish the inherent value of human rights, by inferring that human rights do not inhere in human persons and do not apply in certain circumstances.

396. To some extent, the aims of an opt-in process are already promoted through existing laws and mechanisms. Business and private actors are already subject to legislative human rights obligations (such as Occupational Health and Safety laws and anti-discrimination laws) and other non-legislative, non-judicial human rights complaints mechanisms (such as the OECD National Contact Point 'Specific Instance' procedure). Indeed, the very existence of a Human Rights Act will increase awareness of rights across the community. Even a Human Rights Act that does not bind business directly will lead to increased awareness in the business community about the content and role of human rights, particularly where business is contracting with government or performing public functions.

397. Further, many multi-nationals are already engaged with international voluntary programmes such as the UN Global Compact and are developing a rights-consciousness within their businesses. Through these mechanisms there has been meaningful communication and development of rights-consciousness in the private sector. However, there is clearly more work that can be done to develop that understanding.

398. The HRLRC submits that there are existing human rights laws as well as many other non-legislative means, including non-judicial complaint and dispute resolution processes, by which a meaningful dialogue on human rights with the private sector can be enhanced. The effectiveness of these existing means deserves proper consideration, and may be better adapted to developing right-consciousness and dialogues throughout the community, including the private sector. The HRLRC notes in particular the UN Special Representative for Business and Human Rights, Professor John Ruggie, and the important work he is doing to understand how best to bring business in to the human rights dialogue.

399. The non-legislative and non-judicial dispute resolution approaches to business and human rights are discussed in more detail in the HRLRC's submission '*Engage, Educate, Empower*: Submission on Measures and Initiatives to Promote and Protect Human Rights'.

13.5 Application of the Human Rights Act to states

400. Given Australia's federal system of government, it may not be possible for a Commonwealth law to fully implement human rights at state level.[315] A Human Rights Act would not apply to state Parliaments and the Interpretive Principle would not be used to construe state legislation. However, Australia's obligations under Article 50 of the ICCPR and Article 28 of the ICESCR extend 'to all parts of federal States without any limitations or exceptions'. Australia has in fact declared that the implementation of the ICCPR will be effected by Commonwealth, state and territory governments, having regard to their respective powers and arrangements concerning their exercise.[316]

401. However, despite the limitations of the Human Rights Act's application to state Parliaments and statutory construction, the Act can have two important applications to state bodies and laws:

(a) first, the Act can bind most state public authorities; and

(b) secondly, in certain circumstances, the Human Rights Act would operate to invalidate state laws or provisions that are inconsistent with the Human Rights Act.

Each of these applications of the Human Rights Act is discussed below.

(a) Application of the Human Rights Act to state public authorities

402. The HRLRC submits that a Human Rights Act should apply to state public authorities in much the same way as the Commonwealth *Sex Discrimination Act* applies to state bodies. In order for this to occur, the Human Rights Act should contain a provision that it is intended to bind the Crown in the right of the Commonwealth and the states.

403. The HRLRC acknowledges that a Commonwealth Human Rights Act cannot bind all the instruments of a state government that can be bound at Commonwealth level. This is because of the implied limitation on Commonwealth power to pass laws that operate to curtail the continued existence of the states or their capacities to run as governments.[317] However, the state bodies that would not be bound would be a small subset of state public authorities,

---

[315] Australia has a federal system of government. The distribution of legislative, executive and judicial powers between the Commonwealth and the States is derived from the Constitution. Under these constitutional arrangements the Interpretive Principle and the parliamentary reporting requirements that flow from Declarations of Incompatibility can only apply to Commonwealth laws and the Commonwealth Parliament. .

[316] For Australia's reservation, see the ICCPR. Note, however, the provisions of the *Draft Articles of Responsibility of States for Internationally Wrongful Acts*, arts 2-5.

[317] See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82; *Austin v Commonwealth* (2003) 215 CLR 185, 249-56.

and are likely to include only courts, Parliaments, Ministerial offices and a handful of other functions that are closely related to the exercise of constitutional power by the states.

404. The benefits of the Human Rights Act applying to state public authorities are that:

(a) there would be consistency in human rights compliance and treatment across all Australian jurisdictions, and the development of a truly national rights-consciousness;

(b) Australia's obligations to implement its treaty obligations would be enhanced by protecting the rights of persons interfacing with state public authorities;

(c) it would impose a broader, more comprehensive scheme for human rights protection across Australia; and

(d) the human rights protection afforded to persons in Australia would not be contingent upon the state or territory in which they found themselves.

405. We note that the Commonwealth government could use the external affairs power[318] in the Constitution to implement this aspect of a Human Rights Act, as provisions that govern the actions of state public authorities are unlikely to fall within matters incidental to the executive power of the Commonwealth (Constitution, section 51(xxxix)).

(b) Effect of a Human Rights Act on inconsistent state laws

406. Section 109 of the Constitution provides that where a law of a state is inconsistent with a law of the Commonwealth, the state law is invalid to the extent of the inconsistency. To the extent that any law of a state is inconsistent with a Human Rights Act (and regardless of which legislative model is used), the state law would therefore be inoperative.[319]

407. Broadly speaking, there are three situations in which laws of the states are held to be inconsistent with laws of the Commonwealth under section 109 of the Constitution:

(a) where the state law and the Commonwealth law cannot be obeyed simultaneously;[320]

(b) where one law takes away a right or privilege conferred by the other;[321] and

(c) where Federal Parliament intends the Commonwealth law to be the only law on the subject – that is, where the Commonwealth law 'covers the field'.[322]

408. The HRLRC submits that a Human Rights Act should expressly provide that the Act is not intended to cover the field. The High Court has said that the intention of Federal Parliament will be decisive in almost every case where the question of whether a law covers the field

[318] Section 51(xxix) of the Constitution supports the Commonwealth government to pass laws that implement treaty obligations: *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.

[319] *Butler v Attorney-General (Victoria)* (1961) 106 CLR 268.

[320] *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266.

[321] *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J).

[322] Ibid, 489 (Isaacs J).

arises.[323] This would allow for states to introduce human rights legislation that would operate concurrently with the Commonwealth Human Rights Act, in much the same way as, for example, the *Sex Discrimination Act* operates concurrently at state and Commonwealth levels. This would also enhance human rights protection at all levels of the federal system. Given the limits of Commonwealth power, to some extent the states must legislate for human rights protection in order for Australia's international obligations to be fulfilled.

409. However, state laws that infringe human rights in ways not permitted by the Human Rights Act would still be capable of being inconsistent, and therefore inoperative, on the basis of either of the first two bullet points above. A similar result has occurred where state legislation has been held to be inconsistent with the *Racial Discrimination Act*.[324]

410. Whilst the application of section 109 of the Constitution would lead to a different treatment of state laws (which would be invalid to the extent that they are inconsistent with human rights) to Commonwealth laws (which would be subject only to Declarations of Incompatibility and a Parliamentary response), this differential approach is simply the result of the constitutionally provided for system of dealing with inconsistencies between state and Commonwealth laws. The possibility of inconsistency will also enhance human rights protection at state level by creating a culture whereby state governments consider human rights in law-making processes.

13.6 Obligations on public authorities when operating outside of Australia

411. It is important that a Human Rights Act have extraterritorial effect so that the actions of Australian public authorities operating overseas will be subject to the procedural and substantive human rights obligations of all public authorities under the Act.

412. There are three good rationales for extra-territorial application of a Human Rights Act.

(a) the universal nature of human rights;

(b) Australian public authorities overseas should be responsible for matters within their control; and

(c) the real potential for Australian officials overseas to impact on the enjoyment of human rights.

413. First, human rights by their nature are universal, as they inhere in the individual by virtue of their being a human person, and regardless of the jurisdiction of the individual.[325] Conversely, a human rights law, once enacted, would not of its nature have any particular application to Australia geographically, but would be of general application. These two matters suggest that

[323] *University of Woollongong v Metwally* (1984) 158 CLR 447, 446 (Gibbs CJ); 460–1 (Mason J); 469 (Murphy J); 472 (Wilson J); 474 (Brennan J); 483 (Dawson J).

[324] One prominent example is *Mabo* (1988) 166 CLR 186.

[325] See Preamble to ICCPR, which states that 'rights derive from the inherent dignity of the human person'.

a Human Rights Act, to the extent possible, should regulate conduct by Australian public authorities both inside and outside of Australia's borders. The Australian government has previously given extraterritorial effect to laws regulating human rights abuses. For example the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) made it an offence for an Australian citizen to have sex with children overseas.[326]

414. Secondly, public authorities should be responsible for matters which fall within their control, regardless of whether those matters are within Australia or not. If Australian departments are operating overseas they should be equally subject to the application of the Human Rights Act. In relation to the responsibility under the ICCPR of States to ensure the rights of persons 'within its territory and subject to its jurisdiction', the Human Rights Committee has stated:[327]

> …it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

For example, if the Australian Federal Police are operating overseas, they should still be required to provide persons within their custody or control the human rights guaranteed in the Human Rights Act. The use of extraordinary rendition to transfer detainees to places in which they may be subject to torture highlights the need for officials of a State to be subject to the human rights laws of their home State, regardless of the jurisdiction in which they are operating.

415. Finally, the work of Australian public authorities overseas could realistically lead to human rights abuses in those jurisdictions. For example, the AFP operates a Transnational Crime Centre in Indonesia, which aims to cement law enforcement efforts to fight crime in South East Asia and the wider region.[328] This is a laudable effort, however it may lead to arrests of persons in jurisdictions where they may be subject to the death penalty or a criminal justice system that does not properly provide for the right to a fair hearing. If the Human Rights Act were to apply to AFP officers overseas, these matters could be taken into account and persons may, for example, be arrested in jurisdictions that afford appropriate human rights protections to persons accused.

[326] See also *International Criminal Court (Consequential Amendments) Act 2002* (Cth), which created offences in Australia that are the equivalent of the crimes of genocide, crimes against humanity and war crimes in international law, and inserted same into the Commonwealth Criminal Code.

[327] *Lopez v Uruguay* (29 July 1981) 68 ILR 29, [12.3]; *Celiberti de Casariego v Uruguay* (29 July 1981) 68 ILR 41, [10.3]

[328] See Australian Federal Police, 'AFP supports transnational crime centre in Indonesia' (Press Release, 2 July 2004), available at http://www.afp.gov.au/media_releases/national/2004/afp_supports_transnational_crime_centre_in_indonesia.htm.

Recommendation 8: The Human Rights Act should bind public authorities

A Human Rights Act should bind all Commonwealth and state public authorities, including where those public authorities are acting outside of Australia.

The definition of a 'public authority' should include government departments, statutory authorities, police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the Commonwealth, when they are performing those public functions. The following functions should be presumed to be functions of a public nature:

- the operation of detention places and correctional centres;
- the provision of any of the following services:
  - gas, electricity and water supply;
  - emergency services;
  - public health services;
  - public education;
  - public transport; and
  - public housing.[329]

All public authorities should be required:

- to act compatibly with human rights (a substantive obligation); and
- to give proper consideration to human rights when making decisions and implementing legislation (a procedural obligation).

[329] ACT Human Rights Act ss 7, 40A(3).

14. What should happen if an individual's rights are breached?

14.1 Obligation to ensure effective remedies for a breach of human rights

416. A Human Rights Act should ensure that:

(a) people whose rights are violated have an 'effective remedy';

(b) people claiming a remedy should have their rights to the remedy determined by a competent authority; and

(c) remedies should be enforced where granted.[330]

This is consistent with Australia's obligations under the ICCPR and the ICESCR.

417. 'Effective remedies' is a broad term, encapsulating a range of 'reparations' that can be made to individuals whose rights have been violated. Such reparations may include:[331]

> restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non−repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

418. In general, the availability of an effective remedy requires that 'individuals be able to seek enforcement of their rights before national courts and tribunals'.[332] However, in some circumstances, an effective remedy may be administrative in nature.

419. A Human Rights Act should provide for a range of judicial and non-judicial remedies for breaches of the rights under the Act. Potential remedies for a person whose human rights have been infringed range from:

(a) seeking redress in the courts; to

(b) engaging in dispute resolution processes such as conciliation and mediation;[333] to

(c) lodging a complaint with a Human Rights Commissioner or the Ombudsman;[334] to

(d) seeking redress with the violating public authority (for example by requesting an internal review where appropriate).

420. Court proceedings provide an aggrieved person with legal redress. The remedies available could include compensation, declarations and injunctions, or orders that the conduct or activity

[330] See, eg, ICCPR art 2(3); CERD art 6; CAT art 14; CROC art 39.

[331] UNHRC, *General Comment 31*, above n 16, [6].

[332] See, eg, CESCR, *General Comment 9: The Domestic Application of the Covenant,* [10], *UN E/C.12.1998/24* (1998).

[333] Victorian Human Rights Consultation Committee, above n 221, ch 6, 120.

[334] Ibid, 122.

amounting to a breach of human rights be stopped. The process of judicial review and/or tribunal review of administrative decisions could also be available.

14.2 The pros and cons of judicial and non-judicial remedies

421. Court proceedings provide an aggrieved person with legal redress. The remedies available could include compensation, declarations and injunctions, or orders that the conduct or activity amounting to a breach of human rights be stopped. The process of judicial review and/or tribunal review of administrative decisions could also be available.

422. Although judicial remedies are considered to be important because they enforce and ensure observance of human rights, the judicial processes are often criticised as being inaccessible because they tend to be slow, intimidating and expensive.[335] Judicial remedies are also not always the most appropriate or desirable solution for an aggrieved person.[336] In some cases a non−judicial response (eg, engaging in a dispute resolution process, or lodging a complaint with a Human Rights Commission or the Ombudsman) is appropriate and sufficient. For example, an aggrieved person may be satisfied with a formal apology.

423. Relative to judicial remedies, non-judicial remedies are typically inexpensive, efficient, informal, accessible and less intimidating.[337] They can also be more focused on cooperative compliance and less adversarial than judicial remedies.[338] Non-judicial remedies can sometimes be more appropriate and often have greater potential to be tailored to a given situation.[339] They are also likely to be more effective in encouraging a change in administrative behaviour and attitude as a general review of practices can be undertaken by non-judicial bodies and there is potential for more direct and general[340] communication between non-judicial bodies and public authorities.[341] However, the availability of non-judicial remedies could result in an increased number of complaints being made (because of their accessibility), and some sort of adjudication or final determination process would probably still be required to deal with complaints that cannot be resolved.[342] Further, some people have raised concerns that non-judicial bodies may be less impartial or less representative of mainstream opinion than judicial bodies and may be influenced by activist agendas.[343]

---

[335] Ibid,115.

[336] The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Welsh Assembly Government Paper No 187 (2008) 7.

[337] Victorian Human Rights Consultation Committee, above n 221, ch 6, 120.

[338] Ibid, 123.

[339] The Law Commission, above n 336, 7.

[340] In contrast, litigation is piecemeal and specific to the particular case before the courts.

[341] The Law Commission, above n 336, 8.

[342] Victorian Human Rights Consultation Committee, above n 221, ch 6, 120.

[343] Ibid, 121.

424. The benefits of dispute resolution are that the process is voluntary and conciliatory, which can be therapeutic and lead to greater satisfaction. Further, the process is flexible, providing a wide range of solutions.[344] Although at times the confidential nature of dispute resolution may be desirable, in a human rights context this may be a drawback because accountability and transparency in administrative matters are often an important part of redress. Confidential settlements may create suspicion that administrative failures are being covered up.[345] There are also often significant power imbalances between the parties which could make the dispute resolution process unfair (ie, the parties do not have equal bargaining power). In addition, dispute resolution only serves to address the particular case and does not provide guidance on issues of general importance, unlike court proceedings.[346]

425. Seeking redress directly with the violating public authority can be relatively efficient and inexpensive, and has the advantage of the review being handled by an expert (ie, someone within the area responsible for making those decisions). This can lead to improved morale within the public authority and promote reformed attitudes to human rights.[347] However, internal reviews generally lack independence and impartiality and, where the review is conducted by the same decision-maker who made the original decision, there is a risk that little may be achieved by the process. Further, an aggrieved person may not know how to lodge a complaint for review, and the process may be restricted (eg, to written complaints, and with no oral hearings etc).[348]

426. The HRLRC considers that judicial remedies and non-judicial responses to alleged breaches should, in fact, be complementary. It is important that people have legal redress where their rights have been breached, but in many cases a non-judicial response (eg, lodging a complaint with the Human Rights Commission) will be appropriate. The availability of both judicial and non-judicial responses provides the legal redress identified as essential in the ICCPR and the ICESCR, but also allows people to seek a resolution of their complaint without having to resort to litigation.

14.3 Judicial remedies

427. The HRLRC prefers the Canadian legislative model to a legislative dialogue model in so far as the Canadian model provides for judicially enforceable rights (in the absence of a 'notwithstanding clause'). Under a Canadian legislative model, individuals affected by laws that are inconsistent with human rights would have access to the courts for breaches of their rights.

---

[344] The Law Commission, above n 336, 14-15.

[345] Ibid.

[346] Ibid.

[347] Ibid, 12–14.

[348] Ibid.

428. In contrast, the legislative dialogue model provides for the making of a Declaration of Incompatibility where an Act is inconsistent with human rights, but such a declaration would only require the Parliament to respond within six months. Although the experience in the UK is that this process is sufficient to prompt the legislature to amend the infringing law to make it rights compliant, this is not by order of law but dependent on Parliamentary will to make such an amendment.[349]

(a) The need for free-standing cause of action under a Human Rights Act

429. Regardless of which legislative model is used, a Human Rights Act should provide a free-standing cause of action for breaches of the rights protected by the Act. An independent cause of action is necessary in order to provide effective remedies for human rights breaches.

430. One exception to the free-standing cause of action is an action for a Declaration of Incompatibility (which apply if a legislative dialogue model is used). For the reasons set out in section 13.2(d)(i) above, an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.

431. We acknowledge that some models for a Human Rights Act would only allow an aggrieved person to seek relief for a human rights breach if that person already has a cause of action other than under a Human Rights Act. However, we submit that this would not provide effective remedies. Under such a model there would be no ability to commence court proceedings solely on the ground that there has been a breach of human rights . However, if there is no freestanding cause of action, it would be necessary to establish another cause of action and find a way of linking human rights arguments to that other cause of action.[350] This would increase the difficulty of bringing court proceedings where human rights have been breached and is likely to prevent certain individuals from being able to bring proceedings at all (ie, due to an absence of a non-Human Rights Act cause of action). This limits the effectiveness of a Human Rights Act in addressing human rights breaches and enforcing human rights obligations and may create the impression that human rights will not be treated with the seriousness and importance that they deserve.[351]

432. We acknowledge the concern that a freestanding cause of action could 'open the floodgates' of litigation and could be costly for the government and public authorities as a result of awards of compensation against them.[352] However the 'floodgates' argument is not borne out by the evidence and experience in other jurisdictions with independent causes of action. Neither

[349] The UK Courts have made 17 Declarations of Incompatibility. In each case the UK Parliament has amended the legislation in question to make it compatible with the UK Human Rights Act: McHugh, above n 230, 36.

[350] Carolyn Evans, 'Responsibility For Rights: The ACT Human Rights Act' (2004) *Federal Law Review* 291.

[351] Ibid 300, 302.

[352] Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australia National University, 2, available at http://acthra.anu.edu.au/publications/index.html.

outcome has eventuated in either the UK, where the UK Human Rights Act provides for a freestanding cause of action for a breach of human rights, or in New Zealand, where courts have implied a right of action and entitlement to a remedy for a breach of human rights.[353] Although the UK experienced an increase in the number of human rights cases from immediately after the introduction of the Human Rights Act in 2000 up until 2002-2003, there has since been a gradual decline.[354] Courts report that the Human Rights Act has not resulted in an overall increase in the length or cost of litigation.[355] On the contrary, the numbers of human rights cases before the courts has halved in the last eight years.[356]

(b) Who should be able to bring human rights claims?

433. A Human Rights Act should allow for persons whose human rights are directly breached to bring claims. However, the Act should also allow third parties to have standing and act on behalf of aggrieved persons who are unable to bring a complaint on their own behalf. As with habeas corpus,[357] such a right may be necessary because a person whose rights to liberty have been infringed may be unable to seek redress in person.

434. The HRLRC submits that the Human Rights Commission should be given the power to bring claims on behalf of aggrieved persons. Additionally, the Human Rights Act should adopt a provision similar to section 38 of South Africa's Bill of Rights, which provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

[353] Ibid.

[354] See Sweet and Maxwell, 'UK courts see further decline in the use of Human Rights arguments' (Press Release, 19 February 2007), available at https://www.smlawpub.co.uk/pressroom/2007/190207.html#table. It states: 'The number of reported cases on Sweet & Maxwell's Lawtel & Westlaw service employing Human Rights arguments peaked during 2002-2003 with 541 cases making use of the Act, but over the past three years there has been a gradual decline.'

[355] Bingham, above n 180. See also Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002* (2003). The report found no evidence of an increase in the volume, length or costs of litigation.

[356] Robert Verkaik, 'Lawsuits on human rights halve despite European Act', *The Independent Online*, 20 April 2009.

[357] Habeas corpus is a legal action requiring a detained person to be brought before the court and for the State to show that its detention of the person is lawful.

(c) Breaches of economic, social and cultural rights

435. The HRLRC acknowledges that there are concerns as to how economic, social and cultural rights might be interpreted by the courts, should the Human Rights Act provide for such rights to be directly enforceable.[358] Consistent with the international human rights framework, the Human Rights act should ideally provide 'appropriate means of redress…to any aggrieved individual or group', whether the redress is for a breach of economic, social or cultural rights or civil and political rights.[359]

436. The HRLRC's strongly preferred position would be for the Human Rights Act to provide for directly enforceable economic, social and cultural rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights. However, judicial enforcement is not the only important aspect of human rights protection. Ensuring that policy makers and law makers integrate a human rights-based approach in their work should be a very high priority. The creation of a rights-compliant culture is possible through education and does not always require legal enforcement. We also note that judicial challenges to economic, social and cultural rights are more likely to result in the courts providing government with a range of reasonable options that are considered to be rights-compliant (and findings of breach will be largely left to the most stark factual circumstances).

437. Further, the HRLRC is aware that, in light of concerns expressed in relation to economic, social and cultural rights, the Australian Government may be reluctant to go down the path of direct enforceability – at least not initially. The HRLRC therefore puts forward, as an alternative, a model which provides judicial and non-judicial remedies for breaches of civil and political rights, and, at first instance, only non-judicial remedies for breaches of economic, social and cultural rights.

438. The HRLRC submits that, as an alternative to providing, from the outset, for judicial remedies for breaches of economic, social and cultural rights, a Human Rights Act could provide for a Human Rights Commissioner (or existing body such as the Equal Opportunity Commission) to receive complaints from individuals who allege a breach of their economic, social and cultural rights.[360] The Commissioner could consider all complaints received (using policies, guidelines or regulations made for the purpose), to determine whether the complaint raises any issues which, in the Commissioner's opinion, should be addressed by the relevant public authority.

439. All complaints would be required to be referred, within a specified period, to the public authority (or public authorities) which the Commissioner considers the most appropriate in the circumstances. The Commissioner must include with the referred complaint his or her

---

[358] See eg, ACT Department of Justice and Community Safety, above n 158.

[359] CESCR, *General Comment 9*, above n 332, [2].

[360] An important related issue will be the implementation of a public education program to ensure that people are made aware of the distinction between their civil and political rights and economic, social and cultural rights: see s 9.

conclusions as to the action that should be taken by the public authority. The HRLRC envisages that the Commissioner would have available three alternative recommendations (but this does not preclude the possibility that more options may become apparent with further consideration):

(a) the complaint does not disclose a shortcoming in the conduct, policies or procedures of the public authority or an officer thereof, and no remedial action by the public authority is recommended;

(b) the complaint does disclose a failure of conduct, policy or procedure by a public authority or officer thereof, and the Commissioner recommends that action be taken to remedy the shortcoming(s), in which case the public authority must either:

(i) take action to remedy the shortcoming; or

(ii) if, after giving the complaint and recommendation due consideration, it decides not to take action, publish its reasons for making that decision; or

(c) the complaint does not give rise to a need for corrective actions by the public authority, but the Commissioner is of the opinion that the person's complaint may be resolved by arbitration or conciliation (leading to potential results such as an apology).

440. All public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations and any actions taken in response or the reasons for not taking remedial action, in their annual audit reports. The Commission, in its annual report, should also publish details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken. The information gained by this process would be extremely useful in allowing public authorities and Government to target policy areas that are in need of urgent attention, and will provide a basis for future reviews of the Human Rights Act to determine how and when to bolster the protection of economic, social and cultural rights.

(d) Judicial remedies for breaches of human rights

441. For breaches of all human rights, the HRLRC submits that the Human Rights Act should adopt the following judicial remedies available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom:

(a) where a legislative dialogue model is used, a declaration that a law is incompatible with human rights (ie a Declaration of Incompatibility) and requiring the government to respond to this incompatibility;[361]

(b) where a Canadian legislative model is used, a declaration that a law is incompatible with human rights and that the law is inoperative to the extent that it is invalid;

[361] See, eg, ACT Human Rights Act s 32; UK Human Rights Act s 4; Victorian Charter s 36.

(c) where either a legislative dialogue model or the Canadian legislative model are used:

(i) an order that a law, policy or program be implemented in accordance with human rights;

(ii) an injunction, declaration or order that conduct or activity amounting to a breach of human rights be stopped;[362]

(iii) compensation and reparations; and[363]

(iv) such remedies as are 'just and appropriate'.[364]

442. Judicial remedies should include damages or compensation (where there is no effective or appropriate alternative remedy). While some may be concerned about allowing for a breach of the Human Rights Act to sound in damages, that concern is unfounded. The UK Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.[365] However, damages are rarely awarded under the UK Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights. Nevertheless, the UK courts do retain the discretion to award damages where it is just and appropriate to do so. In the UK, only three cases in the 10 years since the Human Rights Act was enacted have resulted in the payment of compensation.[366]

443. The HRLRC submits that the Human Rights Act should adopt the UK approach. Where damages are awarded, they should be available to cover actual financial loss, for example loss of earnings, loss in the value of property, or loss of employment prospects. Damages should also be available for non-pecuniary loss such as anxiety or distress.

---

[362] UNHRC, *General Comment 31*, above n 16, [17], [19], and remedy available under the Victorian Charter, if the action for breach of a Charter Right is brought in conjunction with another cause of action for that relief; s 39.

[363] See, eg, *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; UK Human Rights Act, s 8. The UNHRC has stated that 'States Parties [are required to] make reparation to individuals whose … rights have been violated. Without reparation to individuals whose … rights have been violated, the obligation to provide an effective remedy, which is central to efficacy of art 2, paragraph 3 is not discharged': UNHRC, *General Comment 31*, above n 16, [16]. Note that in the 10 years since the passage of the UK Human Rights Act, only three cases have resulted in compensatory orders: UK Department for Constitutional Affairs, above n 161; UK Ministry of Justice, above n **Error! Bookmark not defined.**, 18.

[364] See, eg, UK Human Rights Act s 8.

[365] UK Human Rights Act s 8.

[366] According to the UK Department for Constitutional Affairs, there were only three reported cases by 2006 (6 years after the implementation of the UK Human Rights Act) that awarded damages under the UK Human Rights Act: *R (Bernard) v Enfield Borough Council* [2003] HRLR 111; *R(KB) v Mental Health Review Tribunal* [2004] QB 936; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360; UK Department for Constitutional Affairs, above n 161; UK Ministry of Justice, above n **Error! Bookmark not defined.**, 18.

14.4 Non-judicial remedies for breaches of all rights

444. A Human Rights Act should empower the Australian Human Rights Commission with the - handling and conciliation functions in response to allegations of breaches of human rights.

445. The AHRC should have the power to:

(a) receive complaints from individuals who allege a breach of their economic, social and cultural rights and their civil and political rights; [367] and

(b) instigate investigations into breaches of those rights on behalf of persons aggrieved.

446. The Human Rights Act should require all public authorities to publish in their annual audit reports the details of all complaints received, the Commissioner's recommendations as well as any actions taken, or alternatively, the reasons for not taking remedial action.

447. Additionally, the Commission may publish in its annual report details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken.

448. Access to a system for considering and processing complaints is considered to be an important measure of accountability.[368] It would also give content and meaning to protected human rights.[369] However, there is some concern that the Commissioner could be overwhelmed with a large number of individual complaints, distracting the Commissioner from its other roles of human rights monitoring, promotion and education. Therefore, it has been suggested that the Commissioner be given a discretion to refuse to investigate trivial or vexatious complaints, and that the Commission would require sufficient resources and staff to enable it to carry out its various functions adequately.[370]

Recommendation 9: Remedies under a Human Rights Act

A Human Rights Act should provide:

- A free-standing cause of action for breaches of civil and political rights protected by the Act. However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.

[367] An important related issue will be the implementation of a public education program to ensure that people are made aware of the distinction between their civil and political rights and economic, social and cultural rights. The Commissioner could consider all complaints received (using policies, guidelines or regulations made for the purpose), to determine whether the complaint raises any issues which, in the Commissioner's opinion, should be addressed by the relevant public authority.

[368] Victorian Human Rights Consultation Committee, above n 221, ch 6, 115.

[369] Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australia National University, 3, available at http://acthra.anu.edu.au/publications/index.html.

[370] Ibid.

- A full range of judicial remedies for breaches of all rights under the Act, including all such remedies as are just and appropriate.
- A full range of non-judicial remedies for breaches of all rights under the Act.

15. Myths and misperceptions about a Human Rights Act

449. This final section addresses a range of myths and misperceptions regarding the legislative protection of rights through a Human Rights Act.

450. Myth One: "We don't need a Federal Human Rights Act. Our rights are already protected by the Constitution, the common law, and our political system of representative democracy."

Fact: While some rights are protected, many, if not most, human rights are not adequately protected under our current system. Basic rights that many Australians take for granted – the right not to be tortured, the right to life, the right to vote, everyone's right to equality before the law – are not currently protected by legislation. While many Australians are in a position to enjoy 'the good life', we should not be complacent about our rights. Australia distinguishes itself by being the only liberal democracy without a national Human Rights Act.[371] Furthermore, as recent events have shown, the existing legal framework is not well-equipped to respond to many of the pressing human rights issues facing Australia.[372] A Human Rights Act is needed to strengthen the effectiveness and fairness of our current system. Likewise, it could provide a powerful tool for protecting the human rights of all Australians and for ensuring a more responsive and accountable government.

451. Myth Two: "The sovereignty of the Australian Parliament would be undermined by a Federal Human Rights Act."

Fact: A Federal Human Rights Act is perfectly compatible with Parliamentary sovereignty. Under the 'statutory weak' model of human rights protection envisaged for Australia, courts would not have the power to award damages for breaches of human rights or to invalidate (or 'strike down') a law that is incompatible with human rights. Courts would, however, be vested with the power to declare that a law is incompatible with human rights. Such a declaration would not affect the validity or the effect of the Act. Rather, it would compel Parliament to consider the human rights implications of the law in question. This type of Human Rights Act would strike the balance between preserving Parliamentary sovereignty on the one hand, and facilitating transparent and accountable government decision-making on the other. In the long term, this could help strengthen democratic processes in Australia.

---

[371] Amnesty International, *Human Rights Act for Australia* (13 January 2009) http://www.amnesty.org.au/yourhumanrights/comments/20080/

[372] For example, as the AHRC points out, the rights of Indigenous Australians, asylum seekers, homeless people, prisoners, working parents. and gay men and lesbians, have not been adequately protected under the current legal system. See: AHRC, *Let's Talk About Rights* (February 2009) 1, http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_questions.pdf.

452. Myth Three: "A Human Rights Act will only be used to protect the rights of minorities at the expense of the majority - most people just won't use it."

Fact: A Federal Human Rights Act will protect *all* Australians against the unjust or arbitrary exercise of public power. As the experience of other countries has shown, ordinary people stand to benefit from human rights protection.[373] This means that Australians from all walks of life – from a young mother seeking to escape domestic violence without a safe place to live, to people in remote locations without access to adequate health care or education – could potentially utilise a Human Rights Act.

Of course, human rights protection is particularly relevant to people who are vulnerable, marginalised or disadvantaged. Indeed, the true test of a Human Rights Act should be whether it provides effective protection for the least well-off members of society.[374] This view does not seek to promote the views of minorities over that of other people, rather it emphasises that "when those who are less well off in our society can find protection in the laws of this country, we have a better system of governance, a better society, and this is indeed a good outcome for every Australian".[375]

453. Myth Four: "Creating a Human Rights Act will be detrimental because it will limit our human rights to those contained in the Act."

Fact: A Federal Human Rights Act would not exclude other rights and freedoms not specifically contained in the Act. In other jurisdictions, the rights set out in the Act are in addition to other rights already protected. For example, the rights outlined in the Victorian Charter do not limit, or detract from, the rights that are recognised in any other source of domestic or international law.[376] Likewise, a Federal Human Rights Act would complement and strengthen the frameworks that already exist to protect human rights.

454. Myth Five: "A Federal Human Rights Act would take power away from elected politicians and give too much power to unelected judges. This is undemocratic."

Fact: The experience in the UK demonstrates that under a Human Rights Act, judges would not be metamorphosed into legislators.[377] The role of the judiciary would be to interpret and apply the Act, as they do with all other pieces of legislation. Moreover, judges are already involved in making decisions that require the careful balancing of competing rights.[378] As such, they are well-equipped to make reasonable and considered determinations under a

[373] Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (2009), 12.

[374] Professor Larissa Behrendt, *Making Human Rights Matter: How Can Rights Frameworks Help Us Create A Better Community?*, Dorothy Pearce Memorial Lecture (2006) 3, http://www.tascoss.org.au/Portals/0/Publications/Dorothy%20Pearce%20Address-Larissa%20Behrendt06.pdf

[375] Ibid.

[376] Victorian Charter s 5.

[377] Bingham, above n 180.

[378] Behrendt, above n 374, 17.

Human Rights Act. Furthermore a Human Rights Act preserves parliamentary sovereignty, as it would not prevent a Commonwealth Government from passing laws that are inconsistent with human rights, and the Courts would not have power to invalidate legislation that is inconsistent with human rights.

455. Myth Six: "A Human Rights Act could make mischief by creating a conflict between the government and judiciary."

Fact: Not all the decisions made by the judiciary under a Human Rights Act will be popular with the government. This is a good thing! It is inevitable that, in a democratic society, there should be a proper tension between the government and the judiciary.[379] In fact, as Lord Bingham points out, there would be cause for concern if the decisions of the judiciary 'consistently found favour with the powers that be'.[380] Lord Bingham argues that most governments would in fact "recognise that losing cases on occasion is part of the price to be paid for the rule of law". [381]

456. Myth Seven: "Human Rights Acts or Charters are usually just a 'Lawyers' Picnic" - lawyers will use the existence of an Act in order to create excessive litigation."

Fact: In jurisdictions that have a Charter of Human Rights, there has not been the expected flood of litigation – the courts have identified those cases that are meritorious and raise human rights concerns, and those that are not. Indeed, Geoffrey Robertson observes that, in the United Kingdom, human rights arguments have often simplified court proceedings by replacing "lengthier submissions based on endless old cases and precedents".[382] The experience of other jurisdictions indicates that a Human Rights Act will not lead to excessive litigation by opportunistic lawyers. In fact, the most significant effect of a Human Rights Act is likely to be educational: raising greater awareness of how to protect, promote and respect human dignity in Australia.[383]

457. Myth Eight: "Human rights are too individualistic. They give priority to individual needs over and above the greater good."

Fact: While some human rights are absolute (such as the prohibition against torture), most invite a balancing act between the rights of the individual and the rights of the community.[384] The role of a Federal Human Rights Act would be to strike a proper balance between these rights, and to ensure that public authorities act in a fair and consistent manner. Moreover, by

[379] Bingham, above n 180.

[380] Ibid.

[381] Ibid.

[382] Robertson, above n 373, 12.

[383] Ibid 94.

[384] Bingham, above n 180.

ensuring that individuals are afforded some recourse when their rights are breached, a Human Rights Act could in fact enhance the cohesiveness of Australian society.[385]

458. Myth Nine: "A Federal Human Rights Act will undermine religious freedom, particularly by constraining freedom of religious speech and expression."

Fact: Human rights and religious faith are not mutually exclusive – legislative recognition of human rights can strengthen our community values and ethics by fostering a culture of tolerance and respect. It is unlikely that religious speech and expression will be constrained under a Federal Human Rights Act. In other jurisdictions that have a Charter of Human Rights, public authorities have been excused from their human rights obligations where such an obligation will impede or prevent a religious body from acting in conformity with their religious doctrines. Religious freedom would not be undermined by a Federal Human Rights Act.

459. Myth Ten: "Human rights law is un-Australian. A Federal Human Rights Act will not reflect distinctively Australian values."

Fact: At their essence, human rights promote values such as equality, dignity and justice; in short, the idea that people are entitled to 'a fair go'. A Federal Human Rights Act would protect the rights that each Australian needs in order to live their life with dignity. Furthermore, the benefit of adopting a legislative human rights framework is precisely that it is not rigid or frozen in time. A Human Rights Act would be a fluid document that protects certain fundamental freedoms whilst also adapting to the changing conditions of Australian society.[386]

[385] Ibid 10.

[386] Behrendt, above n 374, 18.