

**AMNESTY  
INTERNATIONAL**



**Submission to the  
NATIONAL HUMAN RIGHTS CONSULTATION**

**Submitted by  
AMNESTY INTERNATIONAL AUSTRALIA**

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## EXECUTIVE SUMMARY

Amnesty International regards the National Human Rights Consultation as a fundamentally important step towards meeting our long-standing international obligations to protect the human rights of people in Australia.

Australia is now the only liberal democracy without overarching human rights protection at a national level. Amnesty International believes the current provisions that protect human rights are insufficient to ensure that the human rights of people in Australia are comprehensively protected and promoted. They also fall short of fulfilling the Federal Government's obligations with regard to international human rights law.

Australia's current non-compliance with its international obligations, the ad hoc approaches to human rights protection at federal, state and territory levels and the lack of available remedies for violations, motivate Amnesty International's call for better human rights protection in Australia. This goal reflects our aspiration for a society where the rights, dignity and freedoms of all people are recognised, respected and promoted. Furthermore, maintaining the status quo in relation to human rights protection in this country means that Australia would remain in breach of its international treaty obligations.

In making this submission, and in order to address the issues and goals outlined above, Amnesty International makes one key recommendation:

**The Federal Government should introduce a Human Rights Act for Australia.**

**This Human Rights Act should:**

- 1. Protect the rights of all people in Australia.**
- 2. Respect the principle that all human rights are universal, indivisible, interdependent and interrelated, and therefore recognise all civil, cultural, economic, political and social rights.**
- 3. Incorporate Australia's obligations under international human rights law, as contained in the Universal Declaration of Human Rights and the various international covenants and conventions to which Australia is already a party, as well as having the flexibility to allow the implementation of the obligations of subsequent treaties.**
- 4. Promote a system of education and training for human rights-based approaches, so that policy development, day-to-day service provision and decision-making are conducted with due consideration of the responsibility to recognise the dignity and rights of all people.**
- 5. Establish effective and independent accountability mechanisms, including appropriate and accessible remedies for breaches.**

A Human Rights Act should ensure that the rights of all people in Australia are better protected – particularly those most vulnerable to human rights violations, including Aboriginal and Torres Strait Islander people, women, people with disability and mental illness, the elderly, the young, the socially and economically disadvantaged and those from culturally and linguistically-diverse communities.

## ABOUT AMNESTY INTERNATIONAL

Amnesty International is a global movement of people who campaign for human rights for everyone. We work to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights instruments. Amnesty International conducts research, campaigns and mobilises to prevent and end grave abuses of these rights. Amnesty International is impartial and independent of any government, political persuasion or religious belief.

Amnesty International is the world's largest independent human rights organisation, comprising more than 2.2 million supporters in 160 countries and more than 80,000 supporters in Australia.

Amnesty International Australia is on the steering committee of the Australian Human Rights Group, an umbrella organisation representing more than 70 organisations campaigning for a Human Rights Act for Australia.

## SCOPE OF SUBMISSION

Amnesty International's submission draws on Australia's obligations under international human rights law and identifies the areas in which Australia is currently non-compliant. It outlines the reasons why Australia needs an overarching national human rights protection mechanism. The submission also incorporates our international policies for human rights protection mechanisms.

Amnesty International supports human rights protection through constitutional mechanisms based on the principle that we work for the highest possible standard of human rights protection possible. However, we are mindful that the Australian Government has at this stage ruled out a constitutionally-entrenched model. Consequently, this submission recommends a Human Rights Act as the best available way to ensure the protection and promotion of human rights in this country.

This submission addresses the three questions in the consultation's terms of reference, as well as outlining how a Human Rights Act would benefit Australia.

Amnesty International has also encouraged people to participate in the consultation process and will continue to actively contribute to public debate when the committee's recommendations are released and the government responds to these recommendations later this year.

## WHICH HUMAN RIGHTS SHOULD BE PROTECTED AND PROMOTED?

Article 1 of the *Universal Declaration of Human Rights* (UDHR) states that "All human beings are born free and equal in dignity and rights". This founding principle, which Amnesty International supports, establishes that human beings should be able to live in a society where the rights, dignity and freedoms of all people are recognised, respected and promoted. For Australia to achieve this goal, it needs to have a comprehensive system of human rights protection modelled on the standards provided by international human rights law.

Amnesty International disagrees strongly with the view that some rights (civil and political rights) are more important, and/or easier, to protect than others (economic, social and cultural rights).<sup>1</sup> The UDHR and its corresponding covenants, that together form what is commonly referred to as the International Bill of Rights, should all be included in a Human Rights Act for Australia.

International human rights principles reflect the common understanding and experiences of people in their everyday lives. The ability for a person to realise their right to vote or to freedom of expression if they have not been provided with an adequate education is just one example of many that demonstrate the universal, indivisible, interdependent and interrelated nature of human rights.

In its Concluding Observations on Australia's compliance to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the UN Human Rights Committee stated in May that:

"The Committee affirms the principle of interdependency and indivisibility of human rights and calls on the State party to include economic, social and cultural rights when considering the submissions received"<sup>2</sup>.

Therefore a Human Rights Act for Australia should include equal protection and promotion of civil, cultural, economic, political and social rights, as well as incorporate measures to adequately protect and promote all the rights prescribed in the international human rights framework described below.

It is a widely-established principle of international human rights law that the rights outlined in the UDHR are universal, indivisible, interdependent and interrelated and therefore must be protected equally, as recognised in Article 5 of the Vienna Declaration.<sup>3</sup> The Australian Government should provide equal and non-discriminatory protection to all rights contained in the UDHR and is obliged to implement domestically those prescribed by international covenants and conventions to which Australia is a signatory. Any national human rights protection mechanism which is considered for introduction in Australia needs to incorporate all civil, cultural, economic, political and social rights.

<sup>1</sup> Amnesty International welcomed the establishment of the National Human Rights Consultation on the 60th anniversary of the *Universal Declaration of Human Rights*. However, we expressed profound disappointment that the Terms of Reference for the consultation invited selection among internationally-recognised human rights as though some might warrant protection and others might not, according to popular demand. This contradicts the principle that all human rights are universal, indivisible, interdependent and interrelated.

<sup>2</sup> UN Human Rights Committee concluding observations on Australia ICESCR Periodic Review, 22 May 2009, [www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc](http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc) (accessed 30 May 2009)

<sup>3</sup> UN World Conference on Human Rights, Vienna, 1993

Australia played a key role in the drafting of the UDHR prior to its adoption by the General Assembly of the United Nations on 10 December 1948.<sup>4</sup> Not only did Australia's foreign minister at the time, Dr Herbert Vere Evatt, hold the Presidency of the General Assembly at the time, but he and the Australian delegation offered strong support for some of the key protections that are being considered in this current consultation.

These same Australian representatives argued for the agreed values to be binding on States, rather than a non-binding declaration.<sup>5</sup> It was also the Australian representatives who ensured the inclusion of social and economic rights in the declaration, with Australian diplomat Allan Watt assisting with the drafting of Article 22 (which serves as the preamble to the economic, social and cultural rights section of the declaration).<sup>6</sup> It was Dr Evatt who said, when Eleanor Roosevelt formally handed the UDHR to him in the General Assembly: "Millions of men, women and children, all over the world, will turn for help, guidance and inspiration to this document".<sup>7</sup>

More than 60 years later, Australia now has the opportunity to realise the intentions of those who represented us on an international stage at that defining moment in history, by incorporating all of the rights in the UDHR into a Human Rights Act for Australia. Furthermore, having ratified numerous human rights covenants and treaties, Australia is also obliged under international law to ensure that its domestic legislation complies with the provisions and rights prescribed in these instruments.<sup>8</sup>

The UN Commissioner for Human Rights identifies nine core international human rights treaties, each of which has established a committee of experts to monitor implementation of the treaty provisions by its State parties.<sup>9</sup> These are:

- International Convention on the Elimination of all forms of Racial Discrimination (CERD)
- International Covenant on Civil and Political Rights (ICCPR) and its optional protocols.
- International Covenant on Economic, Social and Cultural Rights and its optional protocol.
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and its optional protocol.
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its optional protocol.
- Convention on the Rights of the Child and its optional protocols.
- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.
- International Convention for the Protection of all Persons from Enforced Disappearance.
- Convention on the Rights of Persons with Disabilities and its optional protocol.

Australia is a signatory to seven of these nine core human rights treaties and most of the optional protocols.

The exceptions are the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *Protection of All Persons from Enforced Disappearance*, and the *Optional Protocol of the Covenant on Economic, Social and Cultural rights*. Amnesty International calls on the Australian government to become a signatory to these instruments.

Australia is also a signatory to the *Convention relating to the Status of Refugees* and its optional protocol and recently endorsed the *Declaration on the Rights of Indigenous Peoples*.<sup>10</sup>

The Australian Government has an obligation to comply with all of the treaties to which it is a signatory. As such, Amnesty International recommends that a Human Rights Act for Australia

4 Geoffrey Robertson, *Statute of Liberty* (Sydney: Random House, 2009), Australia, p 30

5 Ibid. p 32-33

6 Ibid. p35-36

7 Ibid.p 38

8 Each treaty contains a provision requiring State parties to take necessary legislative measures to give effect to the rights protected therein. See for example Article 2 CERD and Article 3 ICCPR.

9 Office of the United Nations Commissioner for Human Rights, [www2.ohchr.org/english/law/](http://www2.ohchr.org/english/law/) (accessed 3 June 2009)

10 By supporting the *Declaration on the Rights of Indigenous Peoples*, the government is bound to addressing the disparity between Indigenous and non-Indigenous Australians in the enjoyment of rights. The Declaration reaffirms the rights of all Indigenous peoples, both as a collective and as individuals, including rights to security, consultation, participation in decision-making and freedom from discrimination. It outlines that particular attention should be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities in its implementation.

recognise all of our international obligations for human rights protection, incorporating our international obligations into domestic law.

In addition to this, Australia should support the international community in continuing to improve human rights protection by becoming a party to future international conventions and covenants, implementing their provisions through future amendments to the Human Rights Act.

Amnesty International strongly asserts that any mechanism introduced should protect and promote the rights of all people in Australia. It should also include the power to promote and protect the rights of those sections of society that are particularly at risk of violations of human rights, including: Aboriginal and Torres Strait Islanders; women; children; people with disabilities; refugees; and people from culturally and linguistically-diverse communities.

## **CASE STUDY: INDIGENOUS POVERTY – WHY ECONOMIC, SOCIAL AND CULTURAL RIGHTS NEED TO BE BETTER PROTECTED**

By human development standards, Australia is the third richest country in the world.<sup>1</sup> The past decade of economic growth has afforded most Australians an average increase in disposable income per person of 2.9 per cent each year since 1996–1997.<sup>2</sup> But wealth is much more than income. Even with the recent downturn in the economy, most Australians have the opportunity to “develop their full potential and lead productive, creative lives in accordance with their needs and interests and have the knowledge and resources needed for a decent standard of living and to be able to participate in the life of the community.”<sup>3</sup> In other words, most Australians are afforded a life of inherent dignity, in which our fundamental human rights are protected, upheld and fulfilled.

But this decade of growth has been matched by a decade of decline for Australia’s most marginalised. In the same period that most Australians were enjoying the benefits of growth, the number of Australians living in poverty increased. Income poverty rose by 2.3 per cent from 1994 to 2004<sup>4</sup> and it is estimated that 2–3.5 million people in Australia live in poverty.<sup>5</sup> This poverty manifests not just as a lack of income but also as discrimination, exclusion and powerlessness. People living in poverty experience violations of rights that most of us take for granted. They have less access to knowledge, poorer nutrition, fewer health services, less secure livelihoods, more vulnerability to crime and physical violence and fewer political and cultural freedoms. Australia does not have a national poverty reduction strategy and there is no guarantee of a minimum income. Social security payments are paid below the Henderson Poverty Line – a significant contributor to people either living in, or being at risk of, poverty.<sup>6</sup>

The increasing poverty within Australia and the failure of Australia to take concrete action to combat it, is in breach of its obligations to provide its citizens with an adequate standard of living as outlined in Article 11 of ICESCR. The Australian Government does not take a rights-based approach to its planning and procedures and there is no overall rights framework.<sup>7</sup> The failure of this approach is evidenced by the standard of living of many Aboriginal and Torres Strait Islander peoples.

### **Housing**

The UN Special Rapporteur on Housing recently described Aboriginal and Torres Strait Islander housing as some of the worst in the world.<sup>8</sup> Overcrowding and poor housing stock are central to this humanitarian

1 Based on human development indicators, in the United Nation’s Development Program’s Human Development Report 2007/2008. <http://hdr.undp.org/en/reports/global/hdr2007-2008/> (accessed 14 April 2009)

2 Australian Bureau of Statistics, The Economy and Economic Resources, 12 June 2008 [www.abs.gov.au/AUSSTATS/abs@.nsf/39433889d406eeb9ca2570610019e9a5/f87840718d7659ceca2572c7001ace20?OpenDocument#NATIONAL%20INCOME081](http://www.abs.gov.au/AUSSTATS/abs@.nsf/39433889d406eeb9ca2570610019e9a5/f87840718d7659ceca2572c7001ace20?OpenDocument#NATIONAL%20INCOME081) (accessed 14 April 2009).

3 United Nation’s Development Program’s Human Development Report (2007) <http://hdr.undp.org/en/reports/global/hdr2007-2008/> (accessed 14 April 2009)

4 ACOSS *Australia Fair report: Australia slipping behind other rich nations* (2007) at [www.acoss.org.au/News.aspx?displayID=99&articleID=3081](http://www.acoss.org.au/News.aspx?displayID=99&articleID=3081) (accessed 8 June 2008).

5 HRLRC *Freedom Respect Equality Dignity: Action NGO Submission to the UN committee on ESCR* (2008)

6 A/HRC/4/18/Add.2 11 May 2007 Human Rights Council Fourth session, Item 2 of the provisional agenda IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED ‘HUMAN RIGHTS COUNCIL’ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari Addendum Mission to Australia (31 July to 15 August 2006)

7 A/HRC/4/18/Add.2 11 May 2007 Human Rights Council Fourth session, Item 2 of the provisional agenda IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED ‘HUMAN RIGHTS COUNCIL’ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari Addendum Mission to Australia (31 July to 15 August 2006)

8 Report of the Special Rapporteur, above.

tragedy. An estimated one third of Aboriginal and Torres Strait Islander households are overcrowded, which is a much higher proportion than other Australian households.<sup>9</sup> Overcrowding and poor housing are not a simple case of cause and effect. In an assessment from independent tradespersons who repaired and categorised over 41,000 jobs completed in Aboriginal communities in remote and regional Australia, only 10 per cent were due to householder damage, overuse, misuse or vandalism.<sup>10</sup> The major causes of housing failure are a lack of routine maintenance and poor initial construction and not, as commonly attributed, a failure to consider issues of cultural appropriateness or the longstanding myth that Aboriginal people destroy their homes.

## Health

Aboriginal people get sicker and die younger than non-Indigenous Australians. Life expectancy at birth is approximately 17 years lower for Indigenous Australians.<sup>11</sup> In 2000–2002, Aboriginal and Torres Strait Islander mothers were twice as likely to give birth to low weight babies and Aboriginal and Torres Strait Islander infants were three times as likely to die.<sup>12</sup> Two out of the three leading causes of death for Aboriginal and Torres Strait Islander people are chronic diseases of the circulatory system and cancer.<sup>13</sup> The Western Australian Aboriginal Child Health Survey reported that 18 per cent of Aboriginal children had a recurring ear infection, 12 per cent had a recurring chest infection, 9 per cent a recurring skin infection and 6 per cent had a recurring gastrointestinal infection.<sup>14</sup>

And yet, despite higher rates of ill-health, Aboriginal people have much lower rates of accessing healthcare services. Over a three-year period in the mid–1990s, Aboriginal Medicare-users born in the 1940s received just over \$1,000 in benefits, while non-Aboriginal people received nearly \$1,800.<sup>15</sup> In 2001–2002, Medicare expenditure for Aboriginal and Torres Strait Islander peoples was only 39 per cent of that for other Australians, for dental services it was 24 per cent, and for pharmaceuticals, 33 per cent. Per-capita spending on medicines through the Pharmaceutical Benefits Scheme (PBS) in 2001–2002 was \$73.23 overall for Indigenous Australians, compared with \$220.29 for other Australians. This conservatively amounts to \$67 million annual underspend, based on the national average, or a significantly higher shortfall if based on need.<sup>16</sup> This does not constitute budgetary prioritisation as envisaged by Article 2 of ICESCR, which reads in part:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

9 Ibid

10 Paul J. Torzillo et al 'The state of health hardware in Aboriginal communities in rural and remote Australia', *Australian and New Zealand Journal of Public Health* 2008 vol 32 no1

11 HREOC Social Justice Report 2005 (2005) at [www.hreoc.gov.au/social\\_Justice/sj\\_report/sjreport04/Appendix2RDAandSRAs.html](http://www.hreoc.gov.au/social_Justice/sj_report/sjreport04/Appendix2RDAandSRAs.html) (accessed 14 April 2009)

12 Ibid

13 HREOC, as above.

14 Ibid

15 Gavin Mooney 'Institutionalised Racism in Australian Public Services' *Indigenous Law Bulletin* (2003) 47

16 Sophie Couzos and Dea Delaney Thiele 'The International Covenant on Economic, Social and Cultural Rights and the right to health: is Australia meeting its obligations to Aboriginal peoples?' *Medical Journal of Australia*, volume 186, number 10, 21 May 2007.

## ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

Despite Australia being a signatory to the international treaties detailed above, human rights protection in Australia is inadequate and ad hoc at best. This is due to a number of factors, including:

- international treaties not being fully implemented through domestic law
- insufficient protection of human rights in current constitutional, statute and common law
- reliance on inconsistent legislation and policies
- a lack of effective remedies.

In an opinion poll commissioned by Amnesty International in March 2009, there was significant public support for a Human Rights Act for Australia. The Nielsen survey results found that 81 per

cent of people surveyed would support the introduction of a law to protect human rights in Australia. In addition to this, 85 per cent of those who supported the introduction of human rights legislation believed its introduction should be a high or very high priority for the Australian Government.

The survey found that while 84 per cent of respondents believe their human rights are sufficiently protected at present in Australia, when asked to what extent their human rights are protected under Australian law, only 38 per cent said that their rights are protected completely. Some 54 per cent believed their rights are only partially protected, while 2 per cent feel their rights are not protected at all.

Amnesty International believes that while the survey shows that a majority of Australians feel reasonably confident that their rights are protected, they clearly realise that the protection is fragile or incomplete, and support the introduction of a law to protect human rights in Australia more comprehensively. It is not acceptable to have only some rights protected, and have other rights insufficiently protected.

## International Treaties

In Australia, international treaties and conventions are not automatically or systematically incorporated into Australian federal law after their ratification. Rather, federal legislation needs to be enacted by Parliament for the provisions of a convention to be binding.<sup>11</sup> Unfortunately, Australia has not fully implemented in domestic law a number of treaties to which it is a party. This is despite an election campaign commitment by the current government to “support both the promotion of human rights internationally and the development of standards and mechanisms for the protection and enforcement of these rights ... Labor will adhere to Australia’s international human rights obligations and will seek to have them incorporated into the domestic law of Australia and taken into account in administrative decision making”.<sup>12</sup>

Over the years, the UN Human Rights Committee has repeatedly criticised Australia for failing to fully incorporate its treaty obligations into domestic law.<sup>13</sup> In 2000 the committee stated, “that in the absence of a constitutional Bill of Rights, or constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system.” The committee went on to note that there remain, “areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated”.<sup>14</sup>

## Constitutional, statute and common law

Amnesty International believes that the current protections for human rights under the Federal Constitution, statute law and common law are insufficient to meet the Federal Government’s obligation to uphold, protect and promote the human rights of people in Australia.

Since it came into force, only five rights have been explicitly provided for or interpreted as flowing from the Australian Constitution<sup>15</sup>:

- the prohibition against giving preference to a particular religion
- freedom from discrimination on the basis of state residence
- trial by jury
- acquisition of property on just terms
- political expression.

The promotion and protection of human rights in Australia therefore relies on the ability and motivation of federal, state and territory governments to enact adequate legislation and related policies as well as common law. While some statutes and common law provide a level of protection for some rights, such as protection against some forms of discrimination in federal and state/territory legislation, and the right to a fair trial in common law, these protections are far from comprehensive

11 *Australian Constitution Act* s. s.51 (xxix)

12 ALP 2007 National Platform Chapter 13 – Respecting Human Rights and a Fair Go for All.

13 UN Human Rights Committee concluding observations on Australia ICCPR Periodic Review, 2 April 2009, [www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc](http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc) (accessed 14 May 2009)

14 Concluding Observations of the Human Rights Committee: Australia, 24 July 2000, UN Doc. A/55/40, at paras 514-515.

15 The *Commonwealth of Australia Constitution Act (1900)*. Attorney-General’s Office, at [http://fedlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/\\$FILE/ConstitutionAct.pdf](http://fedlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/$FILE/ConstitutionAct.pdf)



and fall far short of meeting our international obligations. Such measures do not provide sufficient safeguards, are potentially inconsistent across states and territories and can also be suspended or subject to exemptions at the level of the individual jurisdiction.

The following examples demonstrate the danger of relying upon the Australian Government in the current legal framework to protect human rights and reinforce the need for overarching human rights protection for all people in Australia:

- **Children** who are undocumented arrivals in Australian territory are automatically placed in administrative detention (either facility or community-based), contravening Article 37 of the *Convention on the Rights of the Child* which requires that children are detained only as a last resort and for the shortest possible time.<sup>16</sup>
- Australia's current immigration detention policies allows for arbitrary detention of **asylum seekers** which violates Article 9 of the ICCPR.
- Australia has no entrenched legal guarantee prohibiting discrimination against **women** and upholding the principle of equality between men and women as required by Article 2 of CEDAW.
- The Commonwealth, Tasmania and the Northern Territory have no legislation criminalising serious acts of **racial hatred** or incitement to racial hatred, a failure to fully implement Article 4(a) of the CERD.
- The UN Committee on the Elimination of Racial Discrimination noted that **prejudice** against "people of Middle Eastern appearances" in Australia has increased and that the enforcement of anti-terrorism legislation may have an indirect discriminatory effect on these communities in contravention of Articles 4 and 5 of CERD.<sup>17</sup>
- It is difficult for complainants to successfully litigate under the *Racial Discrimination Act 1975* as direct evidence of **racial discrimination** is required. This goes against Articles 4 and 6 of CERD.<sup>18</sup> Some rights under CERD are directly incorporated into the *Racial Discrimination Act 1975*. These rights were suspended by a subsequent Act of parliament as part of the 2007 Northern Territory intervention.<sup>19</sup>
- The diminution of native title rights established in *Mabo v Queensland [1992]* impinges on the right to enjoyment of **Indigenous cultural rights** under Article 15 of CERD. The committee has previously expressed concerns about the impact of the *Native Title Act 1993* on land rights, recommending, "that the State party refrain from adopting measures that withdraw existing guarantees of Indigenous rights and that it make every effort to seek the informed consent of Indigenous peoples before adopting decisions in relation to their rights or land".<sup>20</sup>
- **Anti-terrorism laws** have caused a shift in the legal and evidentiary burden of proof contrary to the right to be presumed innocent in Article 14(2) of the ICCPR. The burden of proof is reversed in several offences in the *Criminal Code Act 1995* as amended by anti-terror laws, including ss101.4, 101.5, 102.3, 102.5, 102.6 and 102.8. The vagueness of offences in the *Criminal Code Act 1995*, as amended by anti-terrorism laws, is inconsistent with the requirement of Article 15 of the ICCPR to ensure certainty in the law.<sup>21</sup> The association offence and the membership offence contained in the *Criminal Code Act 1995*<sup>22</sup> as amended by the anti-terrorism laws may breach the right to freedom of association in Article 22 of the ICCPR. The establishment of Preventative Detention Orders and Control Orders effectively allow for a detention without charge or trial in contravention of Article 9 of the ICCPR.
- The Marriage Act 1961 defines **marriage** as "the union of a man and a woman to the exclusion of all others". This discriminates against the rights of same-sex couples to equality before the law, marriage and family life.
- Increased state **policing powers**. For example, during the Asia Pacific Economic Cooperation (APEC) in November 2007 New South Wales Police were given additional search and detention powers, the presumption against bail for certain offences and the ability to develop an excluded

16 CRC, *Concluding Observations: Australia*, 20 October 2005, CRC/C/15/Add.268, p 13.

17 CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 14 April 2005, CERD/C/AUS/CO/14, p3.

18 CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 14 April 2005, CERD/C/AUS/CO/14, p3.

19 See the *Northern Territory National Emergency Response Act 2007*.

20 CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 14 April 2005, CERD/C/AUS/CO/14, para 21.

21 See for example ss101.4, 101.5, 102.3 and 102.7 of the Criminal code Act 1995 (Cth).

22 Ss102.3 and 102.8.

- persons list from restricted areas. Among others, these powers went against Articles 9, 11 and 15 of the ICCPR and risked being subject to abuse.
- The *Building and Construction Industry Improvement Act 2005* places severe restrictions on the right of **workers** to freedom of association with others, including the right to form or join trade unions for the protection of their interests as specified in Article 22 of ICCPR.<sup>23</sup>

It is clear from the above that relying on parliamentary democracy in the absence of a legislated regime of human rights standards to ensure protection of rights is inadequate. This is particularly the case when it comes to ensuring that the rights of the most vulnerable and marginalised in society are upheld and promoted. While we might expect that the interests of all would be protected by the majority in a community that is socially, economically and culturally diverse, there is substantial evidence to suggest that in diverse communities with significant, entrenched inequality, it is difficult for people who suffer disadvantage to enjoy equal rights without specifically-targeted action on the part of government and strong mechanisms for the protection of their rights.

## Inconsistent legislation and policies

Amnesty International welcomed the establishment of the Victorian *Charter of Human Rights and Responsibilities Act 2006* as well as the Australian Capital Territory's *Human Rights Act 2004* and would encourage other states and the Northern Territory to develop their own human rights protection mechanisms. It is also critical that the Federal Human Rights Act is harmonised with the states and territories. These have proven to be effective measures and have already had real, positive impacts on the lives of people in Victoria and in the ACT. Amnesty International is pleased to note that other jurisdictions are considering implementing similar systems and would encourage all jurisdictions to respect the principle that human rights are universal, indivisible, interdependent and interrelated, and thus should incorporate all civil, cultural, economic, political and social rights.

These measures are however inadequate in providing national human rights protection in Australia. State and territory human rights legislation provides no guarantee of protection in the areas where the Federal Government has exclusive or potential legislative competence. This includes important areas such as immigration, national security and external affairs.

## Lack of effective remedies

Australia's legal remedies for violations of human rights are significantly less than comprehensive. The fragility of protections offered by Australian statute law is evident in the explicit overriding of the *Racial Discrimination Act 1975* in legislation passed in the last decade, first in the *Native Title Amendment Act 1998* and more recently in the *Northern Territory National Emergency Response Act 2007* and associated legislation. Likewise, protections in common law are patchy at best, and subject to being overridden by legislation, as evidenced by Australia's laws enacted to combat terrorism. Developments in Australian jurisprudence have resulted in an increasingly narrow role for internationally-recognised human rights standards that have not been explicitly recognised in legislation or government policies. One significant example of this is the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh (1994)*.<sup>24</sup> In this case the principle was established that individuals can rely on a "legitimate expectation" that decision-makers will take human rights treaties ratified by the Australian Government into consideration when making decisions. However, this principle is still disputed and has never been effectively enshrined in Australian law.

Of further concern is the limited power provided to the Australian Human Rights Commission and other administrative oversight bodies such as the State and Federal Ombudsmen. While these bodies have the power to investigate complaints in relation to certain rights, for example in the area of discrimination, their findings are not enforceable and are in fact frequently ignored by executive government.

<sup>23</sup> The Office of the Australian Building and Construction Commissioner (ABCC) was created in 2005 to enforce industrial relations laws and 'criminalise' much union-related activity on construction sites. Workers can be required to attend secret interrogations, and failure to cooperate may lead to a jail term. The right of everyone to form trade unions and join the trade union of their choice, subject only to the rules of the organisation concerned, is protected by the ICESCR and ILO Conventions, to which Australia is a party. By imposing restrictions upon union activity, the ABCC impedes upon this right. A Human Rights Act would require the ABCC, as a public authority, to exercise its power in accordance with the human rights of workers. It would also allow for scrutiny of the legislation governing the Commissioner.

<sup>24</sup> The High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273*, [www.austlii.edu.au/au/cases/cth/HCA/1995/20.html](http://www.austlii.edu.au/au/cases/cth/HCA/1995/20.html) (accessed 28 May 2009). See also discussion in W. Lacy 'The End For Teoh? Re Minister for Immigration and Multicultural Affairs; Ex parte Lam, paper presented at the Constitutional Law Conference, Sydney, 20 February 2004, [www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59\\_WendyLacey.doc](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59_WendyLacey.doc) (accessed 28 May 2008).

One option available to individuals – to seek enforcement of their rights through UN treaty bodies with oversight of human rights – is often not a viable one, because of the potentially prohibitive costs associated with exhausting all domestic avenues prior to making a complaint to the international body. This is exacerbated by the Australian Government in recent years consistently ignoring the recommendations from these bodies requiring effective remedies of individual complaints. The remedies available to individuals who have had their rights violated are therefore limited at both a domestic and international level.

## HUMAN RIGHTS AND WOMEN

There is a need for substantive equality for women in Australia. The right to equality is not the same as the right to be free from discrimination. Governments have a positive obligation to take action to fulfil rights in addition to the obligations to respect and protect rights. Amnesty International advocates for the rights of women to be specifically recognised and acknowledged in any mechanism introduced by the Australian Government. In formulating clear national standards on the position of women in Australian society, a Human Rights Act must seek to eliminate direct and indirect discrimination against women in the areas of education, political and public life, employment, economic and social life and in matters relating to family and family relations.

A Human Rights Act should improve women's enjoyment of human rights in all areas of economic participation and opportunity, educational attainment, political empowerment and health and survival. Amnesty International supports the enactment of the following human rights relevant to women, including:

- The right to equality before the law.
- The right to an adequate standard of living, including adequate food, clothing and housing.
- The right to education.
- The effective right to work and to fair working conditions, involving flexible work arrangements to account for family responsibilities. Women's protection in the workplace should extend to all aspects of employment.
- Sexual and reproductive rights, in the areas of assisted reproductive technology, surrogacy and adoption as well as access to comprehensive sexual and reproductive health information and services.
- The right to be safe and free from violence.
- The specific need to protect and promote the rights of Aboriginal and Torres Strait Islander women.<sup>1</sup>

<sup>1</sup> Indigenous women in Australia are nearly ten times more likely to die as a consequence of assault as non-Indigenous women, and 35 times more likely than other Australian women to be admitted to hospital for family violence-related injuries. Given these extremely high rates of violence, specific attention is needed to address violence against Indigenous women and recognise their specific needs and how they relate to wider racial discrimination.

## HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

Amnesty International strongly believes that a Human Rights Act for Australia is the best available way to ensure the human rights of all people in Australia are protected and promoted. A Human Rights Act would provide enforceable legal rights and obligations, as well as promoting a rights-based culture within our society. A single document as a reference point for human rights would be a powerful recognition of what people in Australia value and aspire towards.

However, to provide human rights protection this document must be more than aspirational. In addition to outlining all of the human rights that would be protected, the Human Rights Act should also outline the responsibilities of decision makers (politicians and the judiciary), as well as those who implement those decisions (the executive, public authorities, public servants and service providers) to respect, protect and fulfil individual human rights. Furthermore, it would clarify and strengthen our national position on rights protection and the shared values of our society, allowing us to join with the international community in a shared understanding of, and commitment to, human rights protection.

Amnesty International recommends that such an Act is made explicitly applicable to all parts of the Federal Government, and harmonised with State and Territory legislation, so that there are no gaps in its application and so that it provides a framework where abuses of human rights can be addressed effectively. It is important that such an Act emphasises the universal applicability of human rights standards to all persons in Australia.

Amnesty International submits that an effective Human Rights Act for Australia should:

- Be principally and clearly defined in terms of international human rights law and include the power to promote and protect all civil, cultural, economic, political and social rights.
- Integrate with and build on existing structures and systems of rights protection, and provide stronger and more thorough protection of human rights for all people in Australia.
- Be instrumental in shaping government policy. Human rights concerns should be raised when developing a proposal for new legislation and through the subsequent legislative process – providing a reference point against which the executive proposes legislation and a marker for parliament when considering it.
- Ensure a greater awareness of human rights considerations among public authorities (law enforcement officials, judiciary, healthcare providers, social workers) in their day-to-day activities and interactions with people.
- Foster a rights-respecting culture, founded on understanding, tolerance and education. It would send an important message that human rights are to be prioritised and respected by governments, other authorities and the Australian community.
- Ensure that as a democratic society everyone bears the responsibility to protect the rights of others.

A Human Rights Act for Australia should be a legislative mechanism that ensures the State respects, protects and fulfils its international obligations with regard to the human rights of all people in Australia.

In order to realise these obligations, a Human Rights Act for Australia should include effective and independent accountability mechanisms, including appropriate remedies for breaches, an independent and effective national human rights institution, as well as human rights education and training.

A Human Rights Act would not affect the current balance of the separation of powers between the legislative, executive and judicial arms of government in Australia. Put simply, a Human Rights Act, like any other Act of parliament, would be drafted and passed by the democratically-elected members of parliament, implemented by the executive and applied by the judiciary. There would be no transfer of power between the three branches. The role of the judiciary would remain that of arbiter, administering civil and criminal justice, impartially, according to law, as defined by parliament. This is supported by the *Review of the UK Human Rights Act 2006* which found that the Act had “not altered the constitutional balance between Parliament, the Executive and the Judiciary”.<sup>25</sup>

## Remedies for breaches

For human rights to be adequately respected, protected and fulfilled there must be effective remedies for people who have had their rights violated. Compensation and reparation are an accepted part of human rights law and therefore need to be recognised and included in a Human Rights Act to ensure the protection of human rights.

The Human Rights Committee, in a general comment about the legal obligation imposed on state parties in relation to the ICCPR, explains:

“Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ... is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials,

<sup>25</sup> UK Department of Constitutional Affairs, 2006, *Review of the implementation of the Human Rights Act*, [http://learnx.iriss.ac.uk/IntraLibrary?command=open-preview&learning\\_object\\_key=1791n167406t](http://learnx.iriss.ac.uk/IntraLibrary?command=open-preview&learning_object_key=1791n167406t) (accessed 31 May)

guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>26</sup>

While effective remedies are an integral part of implementing Australia’s international human rights obligations by ensuring that violations are adequately dealt with, it is only one element of what should be seen as a positive human rights framework that can be realised through a Human Rights Act.

Through the establishment of independent, effective, well resourced and funded institutions and programs to support the protection and promotion of human rights, the need for legal remedies should be minimised, to ensure the government respects, protects and fulfils its obligations.

## Importance of independent and effective national human rights institutions

National Human Rights Institutions (NHRI) occupy a unique place between the judicial and executive functions of the State and the elected representatives of the people in relation to human rights protection, and have been recognised as a crucial element in ensuring international human rights obligations are effectively incorporated at a domestic level. Amnesty International’s policy on NHRIs is based on international best practice and should be considered alongside other international guidelines such as the *Paris Principles*.<sup>27</sup> A summary of the recommendations from this policy in relation to the role of NHRIs is summarised below.

Amnesty International recommends that the Australian Human Rights Commission be recognised as Australia’s national human rights institution in the Human Rights Act for Australia and accordingly be established as independent from the executive arm of government in order to perform the following functions in relation to the Act.<sup>28</sup>

Advising governments on legislation by:

- Reviewing the effectiveness of existing legislation or administrative provisions in protecting human rights. The Commission should be able to make recommendations for the amendment of such legislation or the introduction of new legislation.
- Examining bills and proposals for new legislation put forward by the government or parliament to assess its conformity with international human rights standards.

Participation in domestic legal cases by:

- Initiating legal action to protect the rights of individuals or to promote changes in law and practice.
- Undertaking legal action on behalf of those who may be unable to bring cases to protect their rights themselves.
- Seeking judicial review to challenge the legality of executive action and to obtain judicial orders to remedy the situation, particularly where the executive has ignored the NHRIs recommendations on an issue.
- Submit advice to the courts on legal issues within its field of expertise in an independent capacity, as an *amicus curiae*.

Investigations and inquiries by having the power to:

- Conduct wide-ranging national enquiries on human rights concerns.
- Investigate on its own initiative situations and cases of reported human rights violations.

In addition, the Commission should be able to:

- Provide human rights training to people who may have to consider human rights issues, such as police, social service providers, military personnel, health providers and public servants.
- Follow up recommendations and reports of international bodies, such as UN human rights treaty bodies, made in relation to Australia’s compliance with international human rights standards.
- Promote a culture of respect for human rights through education and raising awareness.

<sup>26</sup> [www.unhcr.ch/tbs/doc.nsf/0/58f5d464e861359c1256ff600533f5f?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/58f5d464e861359c1256ff600533f5f?Opendocument)

<sup>27</sup> See Amnesty International’s recommendations on national human rights institutions, October 2001, IOR 40/007/2001 and Principles relating to the status of national institutions (adopted in the UN Commission on Human Rights Resolution 1992/54, known as the *Paris Principles*)

<sup>28</sup> Amnesty International NHRI Policy, p 9–11

The Federal Government should be required to respond, within a reasonable time, to both case-specific and more general findings, conclusions and recommendations made by the Commission. In cases where the government fails to respond, or refuses to respond or implement recommendations, the Commission should have adequate independence from government to seek remedies from the government. This includes through the media, parliament and by bringing the case to the attention of the international human rights bodies.

## Human Rights Training and Education

Underlying a Human Rights Act for Australia is the need for a system of education and training about rights-based approaches so that human rights are considered in policy development, day-to-day service provision and decision making.

Human rights training across the Federal, State and Territory public services will improve the interaction between members of the public and the service providers. It will increase awareness among public servants of the need to respect everyone's human rights and help ensure that breaches are minimised. Those who will benefit the most from public servants being able to understand the importance of protecting and promoting everyone's human rights and respecting their dignity are those who are often at greatest risk of having their rights violated – including Aboriginal and Torres Strait Islander peoples, women, people with a disability or mental illness, the elderly, the young, the socially and economically disadvantaged, and those from culturally and linguistically-diverse communities.

Human rights education should be considered as integral to building a culture of respect for human rights and help prevent human rights violations. However, research undertaken by Amnesty International in 2007 and then in 2008–2009 indicates that the current state and national education curriculums lack a human rights perspective and that key stakeholders generally lack understanding of human rights issues.<sup>29</sup>

There is insufficient information about the extent of understanding about human rights by school age students. One source of information is the 2006 National Assessment Program<sup>30</sup> that examined students' knowledge of civics and citizenship including human rights issues such as "the rights and responsibilities of citizens in Australia's democracy" and an understanding of "the rights and responsibilities of citizens in a range of contexts". Findings indicated that:

"Formal, consistent instruction has not been the experience of Australian students in civics and citizenship ... Although young Australians appear to accept and appreciate their democracy, their level of knowledge and understanding of civics and citizenship is less than was expected by a range of experts in the field ... Subsequent National Civics and Citizenship Sample Assessments may show an improvement in student performance if students receive more consistent instruction in civics and citizenship".<sup>31</sup>

Amnesty International believes in the concept of the 'good citizen' as being a person who actively contributes to community cohesion both locally and globally. Citizenship education is now widely recognised in Australia as central to our national aspirations.<sup>32</sup> However, citizenship education, in its current state-based curriculum and in the proposed national curriculum, lacks an underpinning human rights framework. Amnesty International believes that citizenship education needs to be underpinned by a common set of human rights principles.

These principles should include:

- The right to education – the use of a rights-based framework to advocate for improvements in the quality of and access to education. This includes the view that a school curriculum provides an opportunity to transform our society based on principles such as the universality and interdependence of human rights.
- Explicit acknowledgement that the disciplines in any curriculum are vehicles to achieve broader educational goals, in particular, assisting young people to live as active citizens in a liberal and pluralist democracy.

<sup>29</sup> Amnesty International 2008, *Report of the 2007-08 AIA Survey with Implications for the Delivery of Teacher professional Learning*, internal report

<sup>30</sup> MCEETYA. 2006, National Assessment Program – Civics and Citizenship Years 6&10 Report, Carlton South, Victoria.

<sup>31</sup> MCEETYA. 2006, National Assessment Program – Civics and Citizenship Years 6&10 Report, Carlton South, Victoria, pages 93–94.

<sup>32</sup> MCEETYA, 2006 Statements of Learning for Civics and Citizenship [www.mceetya.edu.au/verve/\\_resources/Civics\\_SOL06.pdf](http://www.mceetya.edu.au/verve/_resources/Civics_SOL06.pdf) (accessed 31 May 2009)

- An understanding that being well-informed and possessing a range of skills are necessary precursors for engaging with local and global communities.
- Social learning as a critical element in a young person's education. Possessing a moral and ethical framework enables young people to engage in and enact appropriate community behaviours.

The inclusion of a set of principles based on human rights is an opportunity to describe and shape the future of Australia's hopes for its young people. In many European countries there is a strong consensus that human rights provide the principle values which underpin the nation-state and the education of democratic citizens.<sup>33</sup>

Amnesty International believes that teachers, like the other professions mentioned above, need education in human rights as an integral part of their training.

## HOW WOULD A HUMAN RIGHTS ACT BENEFIT AUSTRALIA?

The introduction of a Human Rights Act in Australia will set the foundations for the development of a system of legislative and executive government that is more cognisant of, and compliant with, accepted human rights standards. As a tool to acknowledge and advocate for individual human rights, an Act will not only provide communities with human rights discourse, but also support and empower the development of equality. The need for attitudinal change towards human rights will also be assisted by the introduction of a Human Rights Act. Through grassroots and formalised training and education, greater understanding of the importance of human rights can be promoted in the community.

Outlined below are examples of how Australia would benefit from a Human Rights Act based on the model of the *Victorian Charter of Rights and Responsibilities*. The examples given draw on recent examples of human rights violations involving the Australian Government.

### Suspension of the Racial Discrimination Act 1975

The *Northern Territory Emergency Response Act 2007* (NTER) introduces measures that potentially breach the rights of Indigenous people, including the right:

- to equality before the law and the equal protection of the law (Article 26 ICCPR)
- to self-determination (Article 1 ICCPR)
- not to be arbitrarily deprived of property (Article 17 UDHR)
- to social security (Article 5(e)(iv) CERD).

A Human Rights Act would have provided for parliamentary scrutiny of the NTER on human rights grounds. It also would have allowed a court to issue a statement of incompatibility with the Human Rights Act. These measures would have drawn attention to the human rights violations inherent in the legislation.

### The rights of the elderly

In the last few months, there have been reports of serious abuse and neglect of elderly residents in nursing homes. These include two men, one an 89-year-old war veteran, being gnawed by rodents in Queensland, two elderly men being sexually assaulted, and two patients in Victoria who were found to be suffering from serious malnutrition and dehydration, weighing less than 25 kilograms. The Federal Minister for Aging, Justine Elliott, revealed in December 2008 that 199 nursing homes or hostels around Australia did not comply with established standards.<sup>34</sup>

The thousands of elderly residents in aged care facilities would benefit greatly from an Australian Human Rights Act, as it would provide them or their advocates with a platform to raise complaints and

<sup>33</sup> Council of Europe (2002), Recommendations, Committee of Ministers to Member States on Education for Democratic Citizenship, Strasbourg. Luke, A. 2005, 'Curriculum, Ethics, Metanarrative: Teaching and Learning Beyond the Nation' in Nozaki, Openshaw and A. Luke, ed., *Struggles Over Difference: texts, curriculum, and pedagogies in the Asia-Pacific* (Albany: State University of New York Press).

<sup>34</sup> Sydney Morning Herald 'Nursing home hunger scandal Spot checks ordered' 22.12.2008

ensure protection of their rights, including the right to dignity, physical and mental health and the right not to be subjected to cruel, inhumane or degrading treatment.<sup>35</sup>

## Mandatory detention of asylum seekers

The mandatory detention of asylum seekers is provided for in the *Migration Act 1958*. The Act infringes or enables the potential infringement of many of the basic rights of asylum seekers, including the right:

- Not to be subjected to arbitrary detention, torture or cruel, inhuman or degrading treatment or punishment.
- To challenge in court the legality of their detention.
- Not to be sent back to a country where their life or freedom would be threatened.
- To work, education and physical and mental healthcare.

If Australia had a Human Rights Act, it could:

- Ensure that the Federal Parliament considers how the *Migration Act 1958* and new laws impact on the human rights of asylum seekers. For example, parliament would need to consider whether a law requiring the mandatory detention of all “unlawful non-citizens” constitutes arbitrary deprivation of liberty.
- Ensure that the Federal Government consider human rights when developing policy. For example, when deciding on the working conditions attached to a bridging visa, the Department of Immigration would need to consider the right of asylum seekers to attain an adequate standard of living.
- Ensure that public servants consider human rights when making decisions and delivering services. For example, when deciding whether an immigration detainee can see a medical specialist, the Department of Immigration and detention service providers would need to consider the right of all persons to the highest attainable standard of physical and mental health.

A Human Rights Act would also allow the courts to interpret the provisions of the *Migration Act 1958* in a way that was consistent with existing human rights obligations. Where the language of the Act explicitly overrode human rights principles, the courts have to respect the supremacy of parliament. However, the existing provisions of the Act, in the absence of a stronger human rights protection framework, have led to serious human rights breaches on a number of occasions, breaches that could be avoided with greater executive and legislative awareness of Australia’s human rights obligations.

Most notably, in *Al-Kateb v Godwin*, the High Court was divided as to whether the *Migration Act 1958* allows for indefinite detention of asylum seekers. One of the majority judges in the case, Justice McHugh, affirmed the supremacy of parliament to make laws, and said in his judgement that “it is not for courts ... to determine whether the course taken by parliament is unjust or contrary to basic human rights”. Justice Kirby, in the minority, thought that the *Migration Act 1958* should not be read in a way which violated fundamental human rights, in the absence of clear words. A Human Rights Act would have provided the legal basis to allow for those considering this judgement to rely on basic principles of human rights.

## Rights of people with disabilities

“I make no apologies for seeing disability as an issue, not of resource allocation, but of basic civil rights. I believe it is the last frontier of practical civil rights in this country ... Rights remain theoretical, especially for people with severe disabilities and their carers, without adequate access to robust and specialist service systems.”

– The Hon Bill Shorten MP, Parliamentary Secretary for Disabilities and Children’s Services, April 2009.<sup>36</sup>

<sup>35</sup> See examples from the United Kingdom in British Institute of Human Rights, 2008, *Changing Lives* [www.bih.org.uk/documents/policy/the-human-rights-act-changing-lives](http://www.bih.org.uk/documents/policy/the-human-rights-act-changing-lives) (accessed 1 June 2009)

<sup>36</sup> The Hon Bill Shorten MP, *Right to an Ordinary Life*, Speech to the National Press Club 1 April 2009, [www.billshorten.fahcsia.gov.au/internet/billshorten.nsf/content/right\\_to\\_ordinary\\_life\\_01\\_4\\_09.htm](http://www.billshorten.fahcsia.gov.au/internet/billshorten.nsf/content/right_to_ordinary_life_01_4_09.htm) (accessed 5 June 2009)



The Australian Human Rights Commission estimates that more than one fifth of Australians, more than 3 million people, have some form of disability.<sup>37</sup> This figure is expected to rise with Australia's aging population. Additionally, 2.5 million Australians are caring for people with a disability.<sup>38</sup>

It is well documented that the existing mechanisms in place are inadequate in protecting the fundamental human rights of people with disabilities. A great proportion of people living with a disability have been severely marginalised within their communities and live in poverty, disadvantage and exclusion.

A report published in early 2009 by the Australian Institute of Health and Welfare<sup>39</sup> outlined the strong correlation between socio-economic status and severe disability in capital cities. The report found that:

- Many people with disabilities were not in the labour force, with participation decreasing markedly with greater levels of disability. Labour force participation rate were between 15 per cent and 50 per cent. The rate for people without a disability was 81 per cent.
- People with disabilities experienced a higher unemployment rate (9 per cent) than those without a disability (5 per cent).
- People with a disability who were employed were more likely to work in a part-time job (37 per cent) than those who were employed and did not have a disability (29 per cent).

People with disabilities face many other form of discrimination, including access to premises, education, electoral access and public transport. In his recent speech Bill Shorten further admitted that despite the *Disability Discrimination Act* being in force for more than 16 years, most providers in the design, construction and development industries have failed to adequately address their responsibilities to ensure equitable access to and use of buildings for people with disabilities.

The full realisation of human rights of people with disability requires an integrated, rights-based approach to service delivery, policy, legislation and funding.

Alongside implementing into domestic law the *Convention of the Rights of Persons with Disabilities*, which Australia ratified last year, an Australian Human Rights Act would be an integral component of meeting our international obligations toward people with a disability and their carers.

## Rights of people with a mental illness

Amnesty International maintains that all right holders must be empowered in the decision making process whereby:<sup>40</sup>

- Any decision taken must consider the rights-holder's preferences and should be clearly communicated, explaining why that decision was taken.
- The rights-holder's views and opinions must be respected.
- Each rights-holder must be given the opportunity to express their view and the support to voice their concerns.
- These views must be given due weight in the decision-making process.

As recently as 6 June this year, the *Sydney Morning Herald* reported that the number of mental health patients forced to undergo electroconvulsive therapy continues to increase and a lack of legal representation is leaving "some of the state's most vulnerable patients without a say over their own treatment".<sup>41</sup> Despite all mental health patients being entitled to legal representation, the paper stated that only one in 10 patients is represented at Mental Health Review Tribunal hearings. If correct, this clearly violates the rights of mental health patients who themselves or their advocates and guardians have the right to be properly informed and consent to medical treatment.

37 'A great day for Australians with disability, but there is still much to achieve' Media Release by Australian Human Rights Commission, 18.7.09 [www.hreoc.gov.au/about/media/media\\_releases/2008/74\\_08.html](http://www.hreoc.gov.au/about/media/media_releases/2008/74_08.html) (accessed 5 June 2009)

38 Ibid

39 Australian Institute of Health and Welfare, 2009, 'The geography of disability and economic disadvantage in Australian capital cities' [www.aihw.gov.au/publications/dis/dis-54-10703/dis-54-10703-c00.pdf](http://www.aihw.gov.au/publications/dis/dis-54-10703/dis-54-10703-c00.pdf) (accessed 6 June 2009)

40 Amnesty International, 2009, Building Ireland's Future: A human rights handbook, [http://www.amnesty.ie/amnesty/upload/images/amnesty\\_ie/youth%20and%20students/A%20Human%20Rights%20Handbook.pdf](http://www.amnesty.ie/amnesty/upload/images/amnesty_ie/youth%20and%20students/A%20Human%20Rights%20Handbook.pdf)

41 Sydney Morning Herald, 6 June 2009 'Shock therapy forced on patients'

## The situation faced by David Hicks

A Human Rights Act may not have created a distinct cause of action for David Hicks if it had been in place prior to 2001.<sup>42</sup> However, it may have allowed him to raise human rights arguments when challenging the government on other grounds, as is provided for under section 39 of the Victorian Charter.

In 2007, Hicks sought orders from the Federal Court (*Hicks v Ruddock* [2007] FCA 299). Among other things, he sought to challenge the Executive's decision not to seek his relief and reparation, and he sought a prerogative writ of habeas corpus. If an Australia Human Rights Act had been in place at the time, Hicks would also have been able to seek a declaration that the Executive had acted unlawfully by failing to protect his human rights, including the right to liberty, right to be brought to trial without unreasonable delay and the right to a fair hearing. It is also possible, that subject to the evidence being accepted, that he could have asserted his right to be free from torture and cruel, inhuman and degrading treatment, in light of the allegations around the treatment of detainees in Guantánamo Bay more generally. A declaration on these grounds would have sent a powerful message to the government and the community that human rights cannot be ignored.

In a similar way, obligations to protect Australian citizens whose human rights were being violated, such as David Hicks and Mamdouh Habib, might have been more readily established through political and legal fora.

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<sup>42</sup> However, see for example *Omar Khadr and The Prime Minister of Canada, The Minister of Foreign Affairs, The Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police* 2009 FC 209.

## THE UK EXPERIENCE

A review of the *UK Human Rights Act* published in 2006<sup>1</sup> found it had improved the effectiveness and efficiency of policy, by ensuring it better met the needs of an increasingly diverse population. Contrary to some speculation, the UK Act has not turned the country into a litigation battlefield. In fact, most of the cases have been resolved before ever ending up in court. This is due to the public service and other service providers being aware of the Act and the need for greater respect of human dignity, as well as adopting new rights-based approaches to service delivery.

Key points of the UK Human Rights Act Implementation Review include:

- Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the government's ability to fight crime.
- The Human Rights Act has not altered the constitutional balance between parliament, the executive and the judiciary.
- Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, had improved transparency and parliamentary accountability.
- The review acknowledges that there are a number of myths and perceptions surrounding the Human Rights Act. The identified way forward for the government is to debunk many of the myths and ensure that the public sector as well as the wider public are better informed about the benefits the Human Rights Act has given ordinary people.
- Overall, the Human Rights Act can be shown to have had a positive and beneficial impact on the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect.

The British Institute of Human Rights published the *Changing Lives Report* in 2008.<sup>2</sup> The report highlighted examples of how everyday people had benefited from the *UK Human Rights Act*. The report states "The case studies show how human rights language is being used by and on behalf of a wide range of people, including young people, older people, victims of domestic violence, parents, asylum seekers, people living with mental health problems and disabled people, in the following areas:

- protecting human dignity
- challenging discrimination
- promoting participation
- challenging brutality
- taking positive steps to protect human rights
- using human rights where resources are an issue
- using human rights to challenge blanket policies
- protecting human rights in the context of contracted out services.

<sup>1</sup> UK Department of Constitutional Affairs, 2006, *Review of the implementation of the Human Rights Act*, [http://learnx.iriss.ac.uk/IntraLibrary?command=open-preview&learning\\_object\\_key=i791n167406t](http://learnx.iriss.ac.uk/IntraLibrary?command=open-preview&learning_object_key=i791n167406t) (accessed 31 May)

<sup>2</sup> British Institute of Human Rights, 2008, *Changing Lives* [www.bihhr.org.uk/documents/policy/the-human-rights-act-changing-lives](http://www.bihhr.org.uk/documents/policy/the-human-rights-act-changing-lives) (accessed 1 June 2009)