Human Rights Council of Australia Inc.
C/- K Montgomery
GPO Box 5002
Sydney NSW 2001
Website: www.hrca.org.au
Email: hrcouncil@optusnet.com.au

15 June 2009

National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON ACT 2600
**Email: humanrightsconsultation@ag.gov.au**

Dear Committee Members

It is with pleasure that I enclose a submission by the Human Rights Council of Australia to the National Human Rights Consultation regarding the protection and promotion of human rights in Australia.

Yours faithfully

**Andrew Naylor**
Chairperson
Human Rights Council of Australia Inc.

encl.

# SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION ON THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

**HUMAN RIGHTS COUNCIL OF AUSTRALIA**

**JUNE 2009**

## HUMAN RIGHTS COUNCIL OF AUSTRALIA

The Human Rights Council of Australia Inc. (HRCA) is a private non-government organisation which promotes understanding of and respect for human rights for all persons without discrimination through adherence to the International Bill of Rights, and other human rights instruments, internationally and within Australia.

The HRCA was established in 1978 and for many years, under the leadership of James Dunn, has been an important link between the Australian human rights movement and human rights activists in other parts of the world. The HRCA is affiliated with the International League of Human Rights and has Special Consultative Status with the United Nations Economic and Social Council.

The HRCA is incorporated under the *Associations Incorporation Act 1984* (NSW) and is a non-profit organisation.

The members of the HRCA are as follows:

Mr Michael Curtotti (Vice-Chair)
Mr James Dunn (Convenor)
Associate Professor Andrea Durbach (Secretary)
Dr Mary Edmunds
Mr Patrick Earle
Mr André Frankovits (Executive Director)
Dr Roger Gurr
Dr Jeff Kildea
Professor David Kinley
Ms Kathy Montgomery (Treasurer)
Professor Meaghan Morris
Mr Sanushka Mudaliar
Mr Andrew Naylor (Chair)
Sister Pat Pak Poy
Professor Christopher Sidoti
Mr Harris van Beek
Mr Patrick Walsh

For further information regarding the HRCA, visit http://hrca.org.au/

The HRCA gratefully acknowledges the considerable assistance of Mr Benjamin Lee in the preparation of this submission.

# TABLE OF CONTENTS

**LIST OF ABBREVIATIONS & ACRONYMS** ..... **iii**

**EXECUTIVE SUMMARY** ..... **iv**

**1. WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?** ..... **1**

**1.1 Introduction** ..... **1**

**1.2 The International Bill of Rights** ..... **2**

**1.3 Select provisions of subsequent instruments** ..... **10**

**1.4 Additional protections for special and vulnerable groups** ..... **11**

**1.5 Equality and non-discrimination provision** ..... **12**

**1.6 General limitations provision applicable to derogable rights** ..... **15**

**1.7 Objects clause including responsibilities** ..... **17**

**2. ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?** ..... **18**

**2.1 Introduction** ..... **18**

**2.2 Limited incorporation of rights at international law** ..... **18**

**2.3 Constitutional rights** ..... **19**

**5̃4 Economic, social and cultural rights** ..... **20**

**2.5 Common law rights** ..... **21**

**2.6 Systemic deficiencies** ..... **21**

**3. HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?** ..... **23**

**3.1 Introduction** ..... **23**

**3.2 The most effective possible protection—a constitutional bill of rights** ..... **24**

**3.2 A statutory bill of rights** ..... **29**

**3.3 Content of a constitutional or statutory bill of rights** ..... **33**

3.3.1 Interpretation clause ..... 33

3.3.2 Enforceability of rights ..... 33

3.3.3 Scope of application ..... 36

3.3.4 Standing and cause of action ..... 37

**3.4 Promotion and implementation of human rights under a bill of rights** ..... **38**

3.4.1 Role of the parliament ..... 38

3.4.2 Role of the courts ..... 39

3.4.3 Role of public authorities ..... 40

3.4.4 Role of the Australian Human Rights Commission ..... 41

3.4.5 Test case litigation fund ..... 43

## LIST OF ABBREVIATIONS & ACRONYMS

| | |
|---|---|
| AHRC | Australian Human Rights Commission |
| CAT | Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment |
| CCP | Court Challenges Program of Canada |
| CCPR | United Nations Human Rights Committee |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| HRCA | Human Rights Council of Australia |
| HRLRC | Human Rights Law Resource Centre |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| NHRC | National Human Rights Consultation |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |

## EXECUTIVE SUMMARY

1. The Human Rights Council of Australia (HRCA) supports the introduction of a bill of rights as an important means of protecting and promoting human rights in Australia.

2. An Australian bill of rights should include the content of the International Bill of Rights. The International Bill of Rights comprises the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).

3. Consideration should also be given to including select provisions of other instruments that augment, expand or fill gaps in the content of the International Bill of Rights. In particular, additional provision should be made for special and vulnerable groups (for example, refugees and migrants), environmental rights protected at international law and a strong provision of general application guaranteeing equality and freedom from discrimination. (paras 17-30)

4. At the same time, section 25 of the Australian Constitution should be repealed (para 28).

5. The HRCA supports the insertion into the preamble of the Constitution of a statement that recognises Indigenous Australians (para 32).

6. An Australian bill of rights should include a general limitations provision to be applied only to derogable rights (para 33).

7. Any inclusion of responsibilities or duties in a bill of rights is best addressed in the bill's objects clause (para 37).

8. The extent to which the fundamental human rights referred to above are protected and promoted under current Australian law is manifestly inadequate

(para 39). Australia has failed to incorporate into domestic law all of the obligations that arise at international law under the ICCPR, the ICESCR and other human rights treaties to which Australia is a party (para 40). Nor have all of the core international human rights treaties been ratified by Australia (para 41). There is only very limited protection of rights under the Commonwealth Constitution (para 43). The gaps in domestic human rights protection are particularly profound with regard to economic, social and cultural rights (para 47). Only a limited number of fundamental human rights are protected by the common law (para 48). Not only are there significant gaps in the extent to which substantive fundamental rights are currently protected under Australian law, but there are deficiencies in Australia's constitutional and democratic institutional arrangements, the effect of which is that reliance cannot be placed upon the organs of government to ensure that rights are protected and promoted (para 49).

9. The HRCA supports the strongest and most effective form of legal protection of human rights. It therefore advocates a constitutionally-entrenched bill of rights. (paras 58-71).

10. If a constitutionally-entrenched bill of rights is not acceptable, the Commonwealth Parliament should enact a statutory bill or charter of rights that:

    (a) requires all federal legislation to be construed in a manner consistent with the protection and promotion of fundamental human rights, as far as this is possible consistent with the statutory purpose;

    (b) requires all federal public authorities, public-private partnerships or other private entities performing federal public functions to comply with the fundamental human rights delineated in the statutory bill of rights;

    (c) provides for judicially enforceable remedies for breaches of fundamental human rights as against federal public authorities, public-private partnerships or other private entities performing federal public functions;

(d) permits actions for breaches of rights to be brought by or on behalf of victims and persons acting in the public interest;

(e) enables State legislation to be declared invalid pursuant to section 109 of the Australian Constitution, to the extent that the State legislation is inconsistent with a federal statutory bill of rights;

(f) applies to both internal and external territories, to the extent that the territories make no other equivalent or adequate provision;

(g) where a court finds that a statute is inconsistent with the rights delineated in the statutory bill of rights—requires the Minister responsible for the legislation to table a statement in Parliament within six months responding to the court finding and indicating what, if any, measures have been or are to be taken to rectify the inconsistency;

(h) enables federal subordinate legislation to be declared invalid, to the extent that it is inconsistent with the statutory bill of rights and is not required by the primary legislation;

(i) applies to both internal and external territories, to the extent that the territories make no other equivalent or adequate provision. (paras 72-94)

11. A bill of rights should give the courts the power to:

(a) interpret all legislation consistently with the provisions of the bill of rights, as far as this is possible having regard to the purposes of the statute under consideration;

(b) consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right when interpreting the bill of rights and any other statutory provision;

(c) in the case of economic, social and cultural rights, judicially review the reasonableness of measures undertaken, within available resources, to progressively achieve the realisation of economic, social and cultural rights (para 96).

12. There should also be ancillary changes to federal parliamentary procedure to provide for:

(a) the tabling of a statement with each new legislative measure describing the extent to which it complies with the human rights delineated in the statutory bill of rights; and

(b) scrutiny of each new legislative measure by a Joint Committee on Human Rights. (para 95)

13. Public authorities should be required to act consistently with a bill of rights. In particular, public authorities should be required to:

(a) act compatibly with human rights provided for by a bill of rights particularly when exercising discretions (a substantive obligation);

(b) ensure that all policies and procedures are consistent with rights provided for in a bill of rights;

(c) otherwise ensure that proper consideration is given to human rights during decision-making processes and when implementing legislation (a procedural obligation). (para 97)

14. The role of the Australian Human Rights Commission (AHRC) should be enlarged to include the following in relation to a bill of rights:

(a) education and public awareness raising in relation to the bill of rights;

(b) dealing with complaints about violations of the bill of rights;

(c) generally, ensuring compliance with rights provided for by the bill of rights including undertaking audits and investigations of public agencies with respect to the degree to which policies and procedures comply with obligations created by the bill of rights;

(d) policy and legislative development based on the bill of rights. (paras 98-101)

15. The HRCA supports the establishment of a fund to support test case litigation under an Australian bill of rights (paras 102-103).

# 1. WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?

## 1.1 Introduction

1. The Human Rights Council of Australia (HRCA) supports the introduction of a bill of rights as an important means of protecting and promoting human rights in Australia. Foremost, it would allow for the content of international human rights treaties to which Australia is a party to be brought home and consolidated into a single law.[1]

2. All human rights are universal, indivisible, interdependent and interrelated.[2] An Australian bill of rights should therefore include the content of the International Bill of Rights. The International Bill of Rights comprises the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).

3. An Australian bill of rights should adopt the same approach to distinguishing between absolute, derogable and non-derogable rights as is done under international law (see below).

4. A bill of rights should also incorporate select provisions of international human rights instruments ratified or endorsed by Australia other than those that comprise the International Bill of Rights where those rights augment, expand or fill gaps in the content of the International Bill of Rights.[3] In particular:

---

[1] Australia is a dualist system. As Charlesworth et al state: "[i]n Australia, international treaties do not form part of Australian law unless they have been implemented into law by domestic legislation… Domestic legislation is therefore often necessary to ensure Australia is in a position to comply with treaty obligations." Charlesworth, H., Chiam, M., Hovell, D. and Williams, G., *No Country Is An Island – Australia and International Law*, UNSW Press, 2006 at 29.

[2] Per part I., para 5 of the 1993 *Vienna Declaration and Programme of Action*.

[3] Australia is party to the: ICCPR and its optional protocols; ICESCR; *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD); *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and its optional protocol; *Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); *Convention on the Rights of the Child* (CRC) and its optional protocols; the *Convention on the Rights of Persons with Disabilities;* and the *Convention Relating to the Status of Refugees*.

(a) additional provision should be made for special and vulnerable groups;

(b) consideration should also be given to the inclusion of environmental rights in so far as they relate to and affect internationally recognised human rights;

(c) it is important that there be a strong provision of general application guaranteeing equality and freedom from discrimination.

5. These rights are discussed further below.

6. The HRCA submits that responsibilities are best addressed in an objects clause.

7. As far as possible, any bill of rights should use the terminology contained within the relevant international human rights instruments from which the rights are drawn and to which the relevant obligation at international law relates. This will help to ensure ease of application of international, regional and national jurisprudence, as well as the decisions and general comments of the United Nations (UN) human rights treaty bodies.

## 1.2 The International Bill of Rights

8. A bill of rights should include civil and political rights as well as economic, social and cultural rights.

9. Civil and political rights are recognised at international law as being absolute and non-derogable or as being derogable. Economic, social and cultural rights are not categorised in this way but are subject to an obligation of progressive implementation 'to the maximum of available resources'.[4]

---

Further, on 3 April 2009, the Australian Government announced its support for the *Declaration on the Rights of Indigenous Peoples*.

4 ICESCR Article 2.

10. Absolute rights are those from which there may be no derogation, nor may they be limited by reference to the principles of reasonableness and proportionality. Rights recognised at international law as being absolute include the following:[5]

    (a) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (ICCPR, Article 7);

    (b) the right not to be held in slavery or servitude (ICCPR, Article 8(1), (2));

    (c) the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (ICCPR, Article 11);

    (d) the right not to be found guilty of a criminal offence that was not an offence at the time it was committed and not otherwise recognised as being criminal under international law (prohibition on retrospective criminal laws) (ICCPR, Article 15);

    (e) the right to recognition everywhere as a person before the law (ICCPR, Article 16).

11. Non-derogable rights are those from which there may be no derogation pursuant either to Article 4 of the ICCPR or peremptory norms of international law. Article 4 of the ICCPR provides:

> "*1. In time 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.*
>
> *2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*

[5] Joseph, S., Schultz, J. and Castan M., *The International Covenant on Civil and Political Rights—Cases, Materials and Commentary*, 2nd ed, 2003, Oxford University Press, [25.75].

> 3. *Any State Party to the present Covenant availing itself of the right to derogation shall immediately inform other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*"

12. Based on the legal status of absolute and non-derogable rights, a bill of rights should include, without restriction, the absolute civil and political rights referred to above, together with the following:

    (a) the right not to be returned to a state where there is a risk of being subjected to persecution (the prohibition on *refoulement*);[6]

    (b) the right to life,[7] complemented by a provision prohibiting capital punishment;

    (c) the right to protection from imprisonment on the ground of inability to fulfil a contractual obligation;[8]

    (d) the right to freedom of thought, conscience and religion;[9]

    (e) equality and non-discrimination (see below);[10]

    (f) the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the person;[11]

    (g) prohibition on the taking of hostages, abductions and unacknowledged detention;[12]

---

6 *Convention Relating to the Status of Refugees*, Article 33; see also UDHR, Article 14.1.
7 *International Covenant on Civil and Political Rights* (ICCPR), Article 6.1.
8 ICCPR, Article 11.
9 UDHR, Article 18; ICCPR, Article 18.
10 Implied by the qualification to Article 4 of the ICCPR.
11 United Nations Human Rights Committee (CCPR), General Comment 29, para 13(a); ICCPR, Art 10(1).
12 CCPR, General Comment 29, para 13(b).

(h) prohibition against genocide;[13]

(i) right to be free from deportation or forced displacement from places in which the person is lawfully present;[14]

(j) prohibition on propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;[15]

(k) right to an effective remedy for the violation of rights under the ICCPR;[16] and

(l) aspects of the right to a fair trial that are protected under international humanitarian law.[17]

13. Derogable rights are civil and political rights other than those referred to above from which States Parties may derogate in times of public emergency. The extent of derogation must be proportionate, reasonable and limited in time to the period necessitated by the emergency. The following derogable rights should be included in a bill of rights with appropriate restrictive provisions:

(a) the right to equality before the law and entitlement to the equal protection of the law without discrimination;[18]

(b) freedom from arbitrary interference with privacy, family, home or correspondence;[19]

(c) freedom of movement and residence within the state;[20]

---

[13] CCPR, General Comment 29, para 13(c).
[14] CCPR, General Comment 29, para 13(d).
[15] CCPR, General Comment 29, para 13(e).
[16] CCPR, General Comment 29, para 14.
[17] CCPR, General Comment 29, para 16.
[18] UDHR, Articles 6 and 7; ICCPR, Article 16.1.
[19] UDHR, Article 12; ICCPR, Article 17.
[20] UDHR, Articles. 13.1 and 13.2; ICCPR, Article 12.

(d) freedom of expression;[21]

(e) freedom of peaceful assembly and association;[22]

(f) freedom of expression or practice of religion;[23]

(g) the right to liberty and security of the person;[24]

(h) the right to marry and found a family,[25] and to the protection of the family;[26]

(i) the right to acquire a nationality;[27]

(j) the right to political participation;[28]

(k) the right to protection of the law, including the due process rights and the rights of persons deprived of their liberty contained in the UDHR and the ICCPR;[29]

(l) the right to self-determination;[30]

(m) the right to special protection of children, including protection from exploitation,[31] registration at birth,[32] and the separation of children from adults in custody.[33]

---

[21] UDHR, Article 19; ICCPR, Article 19.
[22] UDHR, Article 20, ICCPR, Articles 21 and 22.
[23] UDHR, Article 18; ICCPR, Article 18.
[24] UDHR, Article 3; ICCPR, Article 9.
[25] UDHR, Article 16.1; ICCPR, Article 23.
[26] UDHR, Article 16.3; ICCPR, Article 23; ICESCR, Article 10.
[27] UDHR, Article 15; ICCPR, Article 24.1.
[28] UDHR, Article 21; ICCPR, Article 25.
[29] See UDHR Articles 6-11; and ICCPR Articles 9, 10, 14, 15, 16 and 26.
[30] ICCPR and ICESCR, Common Article 1.
[31] ICESCR, Article 10.3.
[32] ICCPR, Article 24.
[33] ICCPR, Article 10.2(b). Australia, however, has entered a reservation against this article.

14. A number of economic, social and cultural rights should also be included in a bill of rights, specifically:

(a) the right to a standard of living adequate for health and well-being of self and family, including adequate food, clothing, housing and continuous improvement of living conditions;[34]

(b) the right to education;[35]

(c) the right to enjoyment of the highest attainable standard of physical and mental health;[36]

(d) the right to property ownership;[37]

(e) the right to social security and services;[38]

(f) the right to special protection of mothers, including the provision of paid leave or adequate social security for a reasonable period before and after childbirth;[39]

(g) the right to work, including: free choice of employment, protection against unemployment;[40] just and favourable remuneration;[41] equal pay for equal work without discrimination;[42] safe and healthy working conditions and the opportunity for promotion in employment;[43]

---

34 UDHR, Article 25; ICCPR, Article 11.
35 UDHR, Article 26; ICESCR, Article 13.
36 ICESCR, Article 12.
37 UDHR, Article 17.
38 UDHR, Articles 22 and 25; ICESCR, Articles 9 and 10.2.
39 ICESCR, Article 10.
40 UDHR, Article 23.1; ICESCR, Articles 6 and 7.
41 UDHR, Article 23.3; ICESCR, Article 7.
42 UDHR, Article 23.2; ICESCR, Article 7.
43 ICESCR, Article 7.

(h) the right to form and join trade unions[44] and the right to strike;[45]

(i) the right to participate in the cultural life of the community, to enjoy the arts, and to enjoy the benefits of scientific progress and its applications;[46] and

(j) the right to rest and leisure.[47]

15. The classification of rights as absolute, non-derogable and derogable does not apply to economic, social and cultural rights in the same way as to rights provided for under the ICCPR. Nevertheless, the rights between the two covenants remain interdependent, indivisible and universal. While the effect of the progressive realisation requirement in Article 2 of the ICESCR is not such as to require immediate protection and promotion of all of the rights provided for in the Covenant, it is clear that States Parties cannot delay in working towards the goal of full realisation. Moreover, where significant portions of the population of a State Party would be disadvantaged by a failure to protect a right under the ICESCR such as the right to adequate food (Article 11), the obligation to ensure protection of the right is immediate. As the Committee on Economic, Social and Cultural Rights (CESCR) has noted:[48]

> "*9. ... The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful context. It is on the one hand a necessary flexibility device, reflecting the realities of the real work and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase*

---

44 UDHR, Article 23.4; ICESCR, Article 8.
45 ICESCR, Article 8.1(d).
46 UDHR, Article 27; ICCPR, Article 15.
47 UDHR, Article 24; ICESCR, Article 7(d).
48 CESCR, General Comment 3, (1990), UN Doc E/1991/23, paras 9-10.

*must be read in the light of the overall objective, indeed the raison d'être of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified….*

*10. … [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*"

16. Very recently, in responding to Australia's periodic report, the CESCR expressed regret that the National Human Rights Consultation's (NHRC) terms of reference "do not specifically call for the consideration of economic, social and cultural rights".[49] Affirming "the principle of interdependency and indivisibility of all human rights", the CESCR called on the Government "to include economic, social and cultural rights when considering the submissions received".[50]

[49] Concluding Observations, examination of Australia's fourth periodic report under ICESCR, 22 May 2009 at 10 (E/C.12/AUS/CO/4.

[50] Ibid.

### 1.3 Select provisions of subsequent instruments

17. The HRCA submits that, in addition to the abovementioned rights, consideration should also be given to including select provisions of other instruments that augment, expand or fill gaps in the content of the International Bill of Rights. Such instruments, either ratified or endorsed by Australia, include the following:

    (a) *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD);

    (b) *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW);

    (c) *Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);

    (d) *Convention on the Rights of the Child* (CRC)*, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on the Involvement of Children in Armed Conflict*;

    (e) *Convention on the Rights of Persons with Disabilities* (CRPD); and

    (f) *Declaration on the Rights of Indigenous Peoples.*

18. Environmental rights should also be protected to the extent provided for in international law. The enjoyment of a number of the rights protected under the ICESCR are tied to the integrity of the environment.[51] The *Declaration on the Rights of Indigenous Peoples* also includes environmental rights. For example, it affords Indigenous peoples the right to conservation and protection of the environment and charges states with: establishing and implementing assistance programmes; ensuring that hazardous waste is not stored or disposed of on

[51] For instance, the rights to: food; housing; the highest attainable standard of physical and mental health; and the continuous improvement of living conditions.

Indigenous lands; and implementing programmes aimed at monitoring, maintaining and restoring the health of Indigenous peoples.[52] The Declaration also acknowledges that Indigenous knowledge, cultures, spirituality and traditional practices are inherently linked to the environment and contribute to the "*sustainable and equitable development and proper management of the environment*".[53]

19. The importance of environment rights has been recognised by the CESCR, which recently encouraged Australia to:

> "*take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples, and put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander peoples, so to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation).*"[54]

### 1.4 Additional protections for special and vulnerable groups

20. The HRCA submits that consideration be given to including additional or specific protections for persons belonging to special or vulnerable groups. Again, these rights can be drawn from the human rights instruments to which Australia is party or which Australia has endorsed.

21. Special and vulnerable groups to receive additional or specific protections in a bill of rights could include: asylum seekers and refugees; children; ethnic, religious and linguistic minorities;[55] Indigenous peoples; migrants; persons with disabilities; and women.

---

52 Article 29.

53 Preambular paragraphs 10 and 11.

54 Concluding Observations, examination of Australia's fourth periodic report under ICESCR, 22 May 2009 at 27 (E/C.12/AUS/CO/4).

55 Article 27 of the ICCPR states: "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

22. Relevant provisions could be drawn from the human rights treaties listed at paragraph 17, above, as well as additional instruments, such as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* and the *Convention relating to the Status of Refugees*. Australia's failure to ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, however, remains an obstacle to the domestic incorporation of the internationally recognised human rights of migrants.

## 1.5 Equality and non-discrimination provision

23. Inherent within and fundamental to the concept of human rights and its embodiment in the norms set out in the UDHR, the major human rights covenants and other human rights treaties, is the principle that all human beings are equal in dignity and rights and that all rights are to be enjoyed without discrimination. This is the foundation for the doctrine of universality. It is vital that the principle of equality and of freedom from discrimination and equality before the law be embodied within a bill of rights.

24. Australian domestic law lacks comprehensive protection of equality and non-discrimination, both within the Constitution and under statute. Attempts to have the High Court of Australia to read a substantive doctrine of equality into the Australian Constitution have failed.[56] Existing statutory protection against discrimination is piecemeal – divided between four federal anti-discrimination laws,[57] only one of which provides a general right to equality.[58]

---

[56] Refer to *Leeth v Commonwealth* (1992) 174 CLR and *Kruger v Commonwealth* (1997) 190 CLR 1.

[57] The *Racial Discrimination Act* 1975, *Sex Discrimination Act* 1984, *Disability Discrimination Act* 1992, and *Age Discrimination Act* 2004.

[58] Section 10 of the *Racial Discrimination Act 1975*:

> "Rights to equality before the law (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin".

25. Section 109 of the Constitution enables federal equality and anti-discrimination laws to invalidate discriminatory State laws. The weakness with this system is that statutes can be amended or repealed; they are not entrenched, in the same way as the Constitution. The 1998 amendments to native title legislation[59] and the *Northern Territory Emergency Response Act* 2007 have demonstrated how fundamental rights can be infringed by fresh federal legislation that overrides federal anti-discrimination laws.[60]

26. Also of major concern are sections 25 and 51(xxvi) of the Constitution. Section 25 allows the States to disqualify people from voting on the basis of their race. Section 51(xxvi) -– the races power -– has been construed as allowing for the making of both adverse and beneficial laws in relation to persons belonging to a particular race.[61] The races power renders Australia's Constitution perhaps the only one in the world that allows its national parliament to make racially discriminatory laws.[62]

27. The UN Human Rights Committee (CCPR) has expressed the following opinion:

> "[Australia] *should adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.*"[63]

28. The HRCA submits that the rights to equality and non-discrimination should be enshrined in a bill of rights. Consistent with the approach taken by the HRCA, these guarantees should be protected by the Constitution. At the same time, section 25 of the Constitution should be repealed. In the alternative, the rights

---

59 *Native Title Amendment Act* 1998.

60 The laws overrode the provisions of the *Racial Discrimination Act*. In response, the CCPR recently recommended that Australia "redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act… and the Covenant"; Concluding Observations after considering Australia's fifth periodic report under the *ICCPR*, April 2009 at 14.

61 The *Hindmarsh Island Bridge Case* (*Kartinyeri v Commonwealth* (1998) 195 CLR 337) established that the Parliament may act to the detriment of a particular race.

62 See Williams, G., 'Racist premise of our constitution remains', *The Sydney Morning Herald*, 7 April 2009.

63 CCPR, Concluding Observations after considering Australia's fifth periodic report under the ICCPR, April 2009. CCPR/C/AUS/CO/5 at 12.

to equality and non-discrimination should be protected by a federal statutory bill of rights. The protection should be based on Article 26 of the ICCPR, which provides:

> "*[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"

29. While the ICCPR's list of proscribed grounds of discrimination is non-exhaustive, the HRCA recommends the inclusion of additional grounds. The recently developed *Declaration of Principles on Equality*[64] presents arguably the most comprehensive list of proscribed grounds of discrimination. It builds on Article 26 of the ICCPR, adding: descent; pregnancy; maternity; civil, family or carer status; economic status; association with a national minority; sexual orientation and gender identity; age; disability; heath status; and genetic or other predisposition toward illness.[65]

30. Consideration should be given to the equality and anti-discrimination provisions employed in other bills of rights.[66] The relevant provision in the South African Constitution, for instance, prohibits both direct and indirect discrimination, and includes proscribed grounds not listed in Article 26, namely: gender; sexual orientation; disability; pregnancy; age; conscience; and ethnic origin.[67]

31. In relation to section 51(xxvi) of the Australian Constitution, while its repeal has been the subject of debate, the HRCA submits that the insertion into the Constitution of an equality and non-discrimination protection would prevent the making of laws detrimental or adverse to persons belonging to a particular race,

---

64 Produced in 2008 by The Equal Rights Trust. Visit http://www.equalrightstrust.org.

65 Principle 5.

66 For instance, the *Constitution of the Republic of South Africa* 1996 and the *Canadian Charter of Rights and Freedoms* 1982.

67 Section 9.3 of the South African Constitution provides: "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". We note here the South African Constitution's incorrect inclusion of "unfairly" and oppose its use in Australian law.

on the basis of their race. Further, the repeal of section 51(xxvi) could prove counterproductive as a number of 'beneficial' services (including migrant support and indigenous services) rely upon the races power.

32. The HRCA supports the insertion into the preamble of the Constitution of a statement that recognises Indigenous Australians.[68]

### 1.6 General limitations provision applicable to derogable rights

33. The HRCA submits that a bill of rights should include a general limitations provision to be applied only to derogable rights. Such a provision could draw from Article 29(2) of the UDHR and the provisions contained in subsequent bills and charters of rights. Article 29(2) provides:

> "*[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*"

34. The *Canadian Charter of Rights and Freedoms* 1982[69] and the *Constitution of South Africa* have built on this article, requiring limitations to be reasonable, prescribed by law, and demonstrably justified in a democratic society. While the South African Constitution is the more prescriptive of the two instruments in determining when rights may reasonably be limited,[70] the jurisprudence of the

---

[68] As supported by the Australian Labor Party in its National Platform and Constitution 2007. See point 9 under Constitutional Reform on page 177, which states "Labor supports the inclusion of a new preamble to the Constitution which recognises Indigenous Australians and the core elements of Australia's history and democracy and appropriately expresses the values, aspirations and ideals of the Australian people".

[69] Section 1 states "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[70] Section 36 includes the following factors to be taken into account when determining whether rights in the bill of rights may be limited: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

Supreme Court of Canada has expanded upon the Charter's general limitations provision.[71]

35. The general limitations provisions in the Australian Capital Territory (ACT) *Human Rights Act* 2004 and the *Victorian Charter of Human Rights and Responsibilities Act 2006* are near carbon copies of the South African provision.[72] The *Victorian Charter*, however, also includes a provision that mirrors common Article 5(1) of the ICESCR and the ICCPR,[73] providing that nothing in the *Charter* authorises the limitations of rights (to a greater extent than provided for in the *Charter*) or for the destruction of any person's human rights.[74]

36. With the addition of a sub-paragraph that identifies which rights are non-derogable (thus excluding them from limitation, restriction or suspension)[75] section 7 of the *Victorian Charter* provides a good template for a general limitations provision. It allows for derogable rights to be limited but only where the limitation is reasonable and proportionate. Section 7 of 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*

---

71 The Hon Michael McHugh AC QC, former Justice of the High Court of Australia, cites the *Oakes* test (*R v Oakes* [1986] 1 S.C.R 103 used to assess legislation by asking

> "(1) Is the objective of the legislation pressing and substantial; (2) Is there a rational connection between the government's legislation and its objective? (3) Does the government's legislation minimally impair the *Charter* right or freedom at stake? (4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?"

McHugh states that '[i]f the legislation fails under any one test, it cannot be justified. See McHugh, M., 'A Human Rights Act, the courts and the Constitution', presentation given at the Australian Human Rights Commission, 5 March 2009 at 7-8.

72 See section 28 of the ACT Human Rights Act and section 7 of the *Victorian Charter*.

73 Common article 5.1 of ICESCR and the ICCPR states: "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant".

74 Per section 7(3) of the Charter.

75 Per article 4.2 of the ICCPR, which identifies articles in the Covenant from which there may be no derogation.

*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.*"

## 1.7 Objects clause including responsibilities

37. The HRCA submits that any inclusion of responsibilities or duties in a bill of rights is best addressed in the bill's objects clause. Rights and duties, while complementary, are legally distinct, and it is dangerous and erroneous to represent the entitlement to rights as contingent upon or conditional to the performance of corresponding responsibilities or duties.

38. The UDHR links the enjoyment of rights to membership of the community,[76] respect for the rights of others,[77] and a universal responsibility to promote human rights.[78] While clear in presenting human rights as the unconditional

[76] Article 29.1 of the UDHR provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible". To Francesca Klug "[t]he wording of this Article expresses two interconnected ideas. First, that individuals have responsibilities as well as rights. Second, that individuals do not exist in the world as isolated beings but live in societies, or more specifically communities, towards which they must act responsibly if they are to develop their true humanity." Klug, F., *Values For A Godless Age – The Story of the United Kingdom's New Bill of Rights*, Penguin, London, United Kingdom, 2000 at 113.

[77] Article 30 of the UDHR states that nothing in the Declaration "may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein". Klug states that "[t]his formulation puts individuals and groups on an equal footing with states in this Article… The intended message to all people was that in exercising rights you are not entitled to use them to destroy those of others". Klug, F., *Values For A Godless Age* at 115.

[78] The UDHR's final preambular paragraph, proclaiming the Declaration "a common standard of achievement for all peoples and all nations", requires "every individual and every organ of society, keeping this Declaration constantly in mind' to 'strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…". To Klug, this paragraph is a "moral

birthright of each person, it calls on each of us, as rights-holders, to respect other rights-holders.[79] The common preamble of the ICESCR and the ICCPR also recognises the duties that each individual has to other individuals and to the community, as well as their responsibility to strive for the promotion and observance of human rights.[80] The formulations used in the International Bill of Rights provide an excellent template for an objects clause addressing duties/responsibilities.[81]

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

### 2.1 Introduction

39. The extent to which the fundamental human rights referred to above are protected and promoted under current Australian law is manifestly inadequate.[82] This submission does not attempt to catalogue or describe in detail how and in what ways these human rights are and are not protected under the current law; some excellent resources are available which examine this topic at length.[83] For present purposes, it suffices to make the following observations.

### 2.2 Limited incorporation of rights at international law

---

exhortation" which "at its heart is about creating a better world for all". Klug, F., *Values For A Godless Age* at 117.

79 Article 1 states that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

80 Common preambular paragraph five of the Covenants states: "…[t]he individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

81 The *Declaration on the Rights of Indigenous Peoples* also addresses responsibilities with regard to the community. Article 35 states: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities'.

82 Byrnes *et al* point out that '[t[he four Australian State and Territory non-parliamentary inquiries into bill of rights from 2002 to 2007 have all concluded that the existing system of human rights protection, although extensive, is inadequate, and that a coherent statement of human rights principles is required'. *Bills of Rights in Australia – History, politics and law* at 56.

83 See, for instance, Lynch, P. and Knowles, P., *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, 2009. Available at http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/engaging-in-the-debate/; and Byrnes, A., Charlesworth, H., and McKinnon G., *Bills of Rights in Australia – History, politics and law*, UNSW Press, 2009.

40. Australia has failed to incorporate into domestic law all of the obligations that arise at international law under the ICCPR, the ICESCR and other human rights treaties to which Australia is a party. As Byrnes *et al* have noted, "[t]he overall picture is of limited and selective incorporation of human rights into the Australian legal system".[84]

41. Nor have all of the core international human rights treaties been ratified by Australia. Significantly, Australia has failed to ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and the *International Convention for the Protection of All Persons from Enforced Disappearance.*

42. In fact, in some respects, the situation under Australian domestic law is worse than a mere failure or omission to act to protect rights; some statutory provisions are in direct contradiction to Australia's international obligations. For example, in *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562, the High Court upheld the validity of provisions of the *Migration Act 1958* (Cth) that had the effect of permitting indefinite definite administrative detention of unlawful non-citizens. The CCPR has recognised that these provisions are in breach of the prohibition on arbitrary detention in Article 9 of the ICCPR.[85] While the right to be free from arbitrary detention is derogable in certain circumstances, the extent to which the *Migration Act* derogates from Article 9 does not comply with the public emergency exception in Article 4 of the ICCPR. Nor, in any practical sense, is the provision for indefinite administrative detention a reasonable or proportionate response to the difficulties that are sometimes posed by asylum seekers.

### 2.3 Constitutional rights

43. There is only very limited protection of rights under the Commonwealth Constitution. These rights include: a prohibition upon laws of the Commonwealth affecting the free exercise of religion (section 116); right to

[84] Byrnes, A., *et* al., *Bills of Rights in Australia – History, politics and law*at 36.
[85] *A v Australia* (560/93), CCPR, 3 April 1997.

trial by jury for indictable federal offences (section 80); and freedom from discrimination on the basis of residency of any particular State (section 117).

44. Quite apart from the very limited number of constitutionally guaranteed rights, the rights themselves have limited application. For example, the right to trial by jury does not apply to federal offences that are not indictable. The prohibition upon laws affecting the free exercise of religion is not in any sense a guarantee of freedom of religion. It is a fetter on the legislative capacity of the Commonwealth and has no application to the States.

45. Some additional rights have been implied into the Constitution, for example, the freedom of political discourse. However, the extent to which rights can be implied is very limited. For example, as indicated above, despite some earlier indications that the Constitution implies a doctrine of legal equality[86] more recent authority has dispelled the notion that there is any constitutional guarantee of equality by or under the law. The existence of provisions such as the races power (section 51(xxvi)) which enables the Commonwealth parliament to make laws that discriminate against people of any race, militates against the recognition of any right to legal equality.[87]

46. The capacity of courts to imply rights ultimately depends upon existing institutional arrangements including the structure and content of the Constitution, the separation of powers, and the doctrine of responsible, Westminster-style government. Courts cannot imply rights for which there is no proper basis.

## 2.4 Economic, social and cultural rights

47. The gaps in domestic human rights protection are particularly profound with regard to economic, social and cultural rights. While recognising the principle of progressive realisation and the effect of resource constraints, there is little in the way of legal recognition of the rights set out in the ICESCR. Very recently,

[86] *Leeth v The Commonwealth*.
[87] *Kruger v Commonwealth* ("Stolen Generations case") [1997] HCA 27; (1997) 190 CLR 1.

the CESCR expressed concern at Australia's "lack of a legal framework for the protection of economic, social and cultural rights at the Federal level, as well as of an effective mechanism to ensure coherence and compliance of all jurisdictions in the Federation with the State party's obligations under the Covenant".[88] The CESCR recommended that the Federal Government:

> "*a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights.*"[89]

### 2.5 Common law rights

48. Only a limited number of fundamental human rights are protected by the common law. They include: the right to a fair trial;[90] the right not to be subjected to arbitrary arrest or detention; and the privilege against self-incrimination. Common law rights can be amended or removed at any time by legislation.

### 2.6 Systemic deficiencies

49. Not only are there significant gaps in the extent to which substantive fundamental rights are currently protected under Australian law, but there are deficiencies in Australia's constitutional and democratic institutional arrangements, the effect of which is that reliance cannot be placed upon the organs of government to ensure that rights are protected and promoted.

50. While an independent judiciary is a critically important feature of Australia's constitutional arrangements and it has served Australia well in relation to the protection, particularly, of some civil and political rights, the role of the

---

88 Concluding Observations, examination of Australia's fourth periodic report under ICESCR, 22 May 2009 at 11 (E/C.12/AUS/CO/4).

89 Ibid.

90 *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292.

judiciary is necessarily limited to interpreting the law. While judges can and do make law, as a general proposition the judiciary will stop short of an approach towards construction of a statute or common law requirement if to do so would amount to a legislative function.[91]

51. Recent examples of parliamentary, governmental and bureaucratic disregard for human rights protections include such areas as immigration,[92] racial discrimination, counter-terrorism legislation, and the treatment of persons with mental illness.[93] This is associated with a general lack of awareness of Australia's human rights obligations amongst governments, parliamentarians, public authorities and the greater Australian public. Former High Court Justice Michael Kirby AC CMG recently remarked:

> "*[a] country, such as Australia, which has seen such serious injustices contrary to fundamental rights – to women, to Aboriginals, to Asian people, to homosexuals, to religious minorities and others – can hardly say that there is no need for the democratic lawmakers to have an occasional stimulus based upon fundamental principles of equality and basic human rights. Anything that is likely to stimulate the democratic process to such ends would seem, on the face of things, to be a step in the right direction so far as the quality of our governance is concerned.*"[94]

52. Australia's solitary status as a western democracy without a bill of rights has resulted in a legal isolation that has disqualified Australian courts from considering and applying the jurisprudence of superior courts in bill of rights affected jurisdictions such as Canada, New Zealand and the United Kingdom.

53. The HRCA submits that each of these deficiencies has and continues to allow for the violation of human rights in Australia, with the most vulnerable and

---

91 See eg *Gett v Tabet* [2009] NSWCA 76 at [265] per Allsop P.

92 Most notably, the frequently cited *Al-Kateb* case in which McHugh J stated "[e]minent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring and many would say a just criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights". *Al-Kateb v Godwin* [2004] HCA 64; (2004) 219 CLR 562 per McHugh J at [73].

93 In his paper 'Does Australia Need A Bill of Rights', McHugh, M., identifies each of these areas as "recent cases illustrating deficiencies in our protection of human rights". McHugh also includes in his list the indefinite detention of habitual criminal offenders.

94 Kirby, M. 'The National Debate About a Charter of Rights & Responsibilities – Answering Some of The Critics', President's Luncheon of the Law Institute of Victoria, Melbourne, 21 August 2008.

marginalized members of Australian society being disproportionate victims of rights violations. These persons include asylum seekers and refugees, the mentally ill, Indigenous Australians, persons with disabilities, the economically disadvantaged and persons belonging to other minority groups.

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

### 3.1 Introduction

54. The HRCA supports the strongest and most effective form of legal protection of human rights. It therefore advocates a constitutionally-entrenched bill of rights (see further discussion, below, at para 58 onwards). As part of Australia's supreme law, a constitutional bill of rights instructs government, parliament and the judiciary.[95] It is also only amended or repealed by the Australian people, according to the constitutional requirements for amendment, thus placing rights "beyond the reach of day-to-day politics".[96]

55. The HRCA submits, in the alternative, that the Commonwealth Parliament should legislate for a statutory bill of rights. In addition, there should be ancillary changes to federal parliamentary procedure to ensure that new legislative measures are appropriately scrutinised for compliance with fundamental human rights obligations.

56. In particular, the HRCA submits that there should be ancillary changes to federal parliamentary procedure to provide for the following:

---

[95] Byrnes *et al* build on this point, stating: "[g]overnments will take such a bill seriously to the extent that public opinion compels it to do so, courts too will be influenced in their approach to the bill of rights by their perception of public attitudes". *Bills of Rights in Australia – History, politics and law* at 156.

[96] Per McHugh, M., who cites as examples of such "day to day politics" the proposed amendments to the *Sex Discrimination Act* in 2001 to "allow discrimination against women on the basis of their marital status with the aim of preventing single or lesbian women from accessing reproductive services such as in vitro fertilization" and the Government's actions limiting "the operation of the Racial Discrimination Act under section 7 of the *Native Title Amendment Act* 1998, so as to allow for the introduction of its ten point plan in the area of native title" as two examples. See 'Does Australia Need a Bill of Rights' at 10-11.

(a) the tabling of a statement with each new legislative measure describing the extent to which it complies with the human rights delineated in the statutory bill of rights; and

(b) scrutiny of each new legislative measure by a Joint Committee on Human Rights.

### 3.2 The most effective possible protection—a constitutional bill of rights

57. The HRCA notes that the NHRC is limited to measures to 'better protect and promote human rights' in Australia which '*preserve the sovereignty of the Parliament and* [do] *not include a constitutionally entrenched bill of rights*'.[97]

58. In the HRCA's submission, the doctrine of parliamentary sovereignty is not a justifiable barrier for excluding debate about the appropriateness of a constitutionally-entrenched bill of rights. This is especially the case in Australia where there is no doctrine of parliamentary sovereignty. Australia has had a written constitution for almost 110 years and that Constitution limits the powers of all Australian parliaments and places sovereignty in the hands of the Australian people. Our constitutional system therefore is quite distinct from that of the United Kingdom and New Zealand and akin to that of Canada. To speak of 'parliamentary sovereignty' in the Australian constitutional system is wrong.

59. In any event, it is disappointing that the terms of reference of the NHRC were limited by excluding the consideration of a constitutional bill of rights. Exclusion of a possibility of a constitutionally-entrenched bill of rights is antithetical to the stated object of the consultation process, being to create "a chance to hear people's ideas about human rights and talk about ways to protect and promote human rights in the future".[98] It also runs counter to the

---

[97] Per the Consultation Committee's Terms of Reference, available at: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference.

[98] Visit: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation

Consultation Committee's charge to "seek out the diverse range of views held by the community about the protection and promotion of human rights".[99]

60. Moreover, it is incorrect to assume that a constitutionally-entrenched bill of rights would infringe upon the powers of the parliament in a manner that would have an adverse effect. On the contrary, a constitutionally-entrenched bill of rights would help to avoid the passage of legislation that is reactive and disproportionate. Regretfully, this risk is neither theoretical nor academic. Security legislation introduced into Federal Parliament in the wake of the terrorist attacks in New York on 11 September 2001 infringed a number of rights under the ICCPR, including freedom from arbitrary detention under Article 9(1).

61. To a very significant extent, the lack of proportionality in legislative policy-making is a consequence of imbalances caused by the party-political system that is a feature of Australian parliamentary democracy. The concept of the doctrine of parliamentary sovereignty in its truest Diceyan sense has not operated for quite some time even in systems based on that constitutional principle. It is unfortunate and somewhat disingenuous that the Federal Government has sought to rely upon this premise as a basis for limiting debate about the most appropriate means for protecting and promoting rights so fundamental as those enumerated in the International Bill of Rights.

62. The possibility that a constitutionally-entrenched bill of rights may in fact be the most appropriate means for protecting and promoting fundamental human rights in Australian law should also not be discarded on the basis that the likelihood of obtaining passage of suitable amendments at referendum seems low. There can be no denying that the history of constitutional amendments does tend to suggest that an amendment to incorporate a bill of rights seems unlikely to be approved easily or immediately. At the same time, it also seem undeniable that there has been a wholesale shift in public sentiment towards acceptance of a bill of rights compared with, say, six years ago when debate on the issue was

[99] Per the Consultation Committee's Terms of Reference.

formative and before the charters of rights had been enacted into the ACT and Victoria.

63. More generally, there is a need to update the Constitution. As former High Court Chief Justice Sir Gerard Brennan AC KBE QC has said, "the Constitution shows some strain after more than a century".[100] In Sir Gerard's opinion, "[i]t is time to overhaul its provisions to ensure that it meets the needs of the present and foreseeably future times".[101] This is not to say that the Constitution has not served us well. It is now well accepted that it needs to be construed as a 'living' document in the context of changes in the law and society. Originalist approaches towards construction have been all but abandoned. As former Justice Kirby has noted:

> "[t]*he lesson of the past century has been that the Constitution has proved remarkably adaptable to the ever-changing realities and needs of the society in which it has to operate."*[102]

64. Byrnes, Charlesworth and McKinnon make this same point, stating:

> "[t]*he claim of ossification or freezing of rights appears overstated in relation to constitutional bills of rights, and especially in relation to statutory ones. Many of the rights included in bills of rights have a long history, and are responses to commonly recurring threats to human dignity that still persist in the modern state. Their formulation in broad general terms means that they can be interpreted to respond to changing circumstances."*[103]

65. But even an informed approach to interpretation cannot displace the words themselves which, at least to some extent, have become anachronistic and less than reflective of current norms and societal values. Very much has changed since the Constitution was enacted. While there is no need to forsake in any way the institutions of government and the rule of law and, indeed, every reason to maintain the strength of institutional principles such as the independence of the judiciary and the separation of powers, it is only fair that the Australian

---

[100] 'The Constitution, Good Government and Human Rights', Human Rights Law Resource Centre, 12 March 2008.
[101] Ibid.
[102] 'The National Debate About a Charter of Rights & Responsibilities – Answering Some of The Critics'.
[103] *Bills of Rights in Australia – History, politics and law* at 69.

people have an opportunity to express their views on timely, considered and appropriate amendments to the Constitution that will reflect the most important and foundational changes in the values of Australian society. Two world wars, the promulgation of the UDHR, the pluralisation and multiculturalisation of Australian society are but a few important changes that have meant that the world we inhabit now is very different from that of the framers of the Constitution. A host of other overdue amendments are neatly referred to by Brennan.[104] The opportunity for real and vital constitutional reform should not be lost for reasons which, upon closer analysis, do not withstand scrutiny.

66. A constitutional bill of rights would also be a statement of collective values about the importance of fundamental human rights. As Kirby states:

> "[t]*he dangers for lawmaking in Australia today derive from what is, at once, the large challenge and great opportunity of life in Australia: its racial, religious and cultural diversity. It is when a society becomes so diverse that a need may present to collect and state the basic values that the society accepts as being held in common. Such principles then become part of a nation's narrative. They become the source of the idea that helps to forge a shared identity in the nation and indeed links with human beings everywhere.*"[105]

67. Philip Alston, former member of the CESCR and current UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, has expressed a similar opinion:

> "*What is needed is a document that reflects the deeply held values of Australian society in a way which is consistent with the international undertakings that it has given to uphold and ensure human rights, even, indeed especially, in times of hardship and threats to those values.*"[106]

68. Klug emphasises the values-based role of bills of rights, stating that "the modern idea of human rights has to be understood as a quest for common values

---

[104] Ibid.
[105] 'The National Debate About a Charter of Rights & Responsibilities – Answering Some of The Critics'.
[106] Philip Alston in Byrnes, A. *et al*., *Bills of Rights in Australia* at xii.

in an era of failed ideologies and multiple (including non-existent) faiths".[107] Speaking to the United Kingdom's experience, Klug continues:

> "*in a country where there is no one unifying religious or ethical world-view, human rights values have an as yet untapped potential to bind and cement a diverse society.*"[108]

69. Another argument in support of a constitutional bill of rights lies with the preventative role that bills of rights serve. The codification, implementation and enforcement of human rights norms in bills of rights operate to prevent human rights violations. Flowing from this, bills of rights also seek to remove the necessity for rebellion or uprisings against oppressive states. The UDHR captures the essence of this function in acknowledging that "*disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind…*"[109] and that "*it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*".[110]

70. The need for a constitutional bill of rights is all the more profound when regard is had to the necessary limitations that would obtain with a statutory bill of rights. Leaving aside legislative requirements in relation to the work of the executive, a statutory bill of rights would depend for its success upon matters being brought before the courts and courts interpreting statutes is a manner that, consistent with ordinary principles of statutory interpretation, enable limited enforcement remedies to be achieved. A statutory bill of rights is unable to address failings with the legislative system, in particular, the continuing capacity for parliament to make laws that are obviously disproportionate and reactive (see above). A constitutionally-entrenched bill of rights would preserve a real and vital role for an independent judiciary to act as a check on excesses of legislative and administrative power.

---

[107] *Values For A Godless Age* at 17.
[108] *Values For A Godless Age* at 18.
[109] Preambular paragraph 2.
[110] Preambular paragraph 3.

### 3.2 A statutory bill of rights

71. The HRCA submits that if a constitutionally-entrenched bill of rights is not acceptable, the Commonwealth Parliament should enact a statutory bill or charter of rights that:

(a) requires all federal legislation to be construed in a manner consistent with the protection and promotion of fundamental human rights, as far as this is possible consistent with the statutory purpose;

(b) requires all federal public authorities, public-private partnerships or other private entities performing federal public functions to comply with the fundamental human rights delineated in the statutory bill of rights;

(c) provides for judicially enforceable remedies for breaches of fundamental human rights as against federal public authorities, public-private partnerships or other private entities performing federal public functions;

(d) permits actions for breaches of rights to be brought on behalf of victims and persons acting in the public interest;

(e) enables State legislation to be declared invalid pursuant to section 109 of the Australian Constitution, to the extent that the State legislation is inconsistent with a federal statutory bill of rights;

(f) applies to both internal and external territories, to the extent that the territories make no other equivalent or adequate provision;

(g) where a court finds that a statute is inconsistent with the rights delineated in the statutory bill of rights—requires the Minister responsible for the legislation to table a statement in Parliament within six months responding to the court finding and indicating what, if any, measures have been or are to be taken to rectify the inconsistency;

(h) enables federal subordinate legislation to be declared invalid, to the extent that it is inconsistent with the statutory bill of rights and is not required by the primary legislation.

72. Popular support has gathered behind a statutory bill or charter of rights that is based on the 'dialogue model' employed in the United Kingdom,[111] Victorian, ACT, and New Zealand[112] human rights acts. This model seeks to promote dialogue between the executive, the legislature and the judiciary without disturbing the existing separation of powers. A constitutional bill of rights on Canadian lines is also a 'dialogue model' bill of rights as it enables the parliament to legislate contrary to a court decision of inconsistency with the bill of rights. In this way the *Canadian Charter of Rights and Freedoms* is very different from the bill of rights in the United States Constitution which does not permit any inconsistency and gives the Supreme Court the last word. The HRCA supports the dialogue model as the one most suited to the Australian constitutional and political context. It sees that as best incorporated constitutionally but, as an alternative to a constitutionally-entrenched bill of rights, it accepts a statutory bill of rights, at least as a first step. For the reasons set out above, it is preferable to have a statutory bill of rights than no bill of rights at all.

73. Former High Court Justice the Hon Michael McHugh AC QC has proposed the 1960 *Canadian Bill of Rights* as a viable alternative that occupies a middle ground between the dialogue and constitutional models, in part because of his grave concern that the dialogue model "may sow the seeds for constitutional destruction of similar legislation in Australia".[113,114] To McHugh, a charter based on the *Canadian Bill of Rights* would give:

---

[111] *Human Rights Act* 1998.
[112] *New Zealand Bill of Rights Act* 1990.
[113] 'A Human Rights Act, the courts and the Constitution' at 12-13.
[114] A key feature of the dialogue model is the ability of superior courts to issue a 'declaration of incompatibility' where a law is found to be inconsistent or incompatible the rights contained in the given charter. It is yet to be determined whether or not an issuance of a declaration of incompatibility would constitute an exercise of judicial power, per Chapter III of the Constitution, and while compelling arguments have been made to suggest that the issuance of a declaration of incompatibility would fall within judicial power (see Refer Dalla-Pozza, D. and Williams, G., 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights', Deakin

> "*effect to the International Covenant on Civil and Political Rights and, if thought necessary, the International Covenant on Economic, Social and Cultural Rights by legislation that empowers courts invested with federal jurisdiction to hold that legislation that is inconsistent with the human rights legislation is invalid in the case of State and Territory legislation and that, in the absence of an express statement to the contrary, all federal legislation is to be read subject to the human rights legislation of the Parliament. The result would be that 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 breaches of those rights.*"[115]

74. The HRCA notes that the enactment of the 1960 Canadian statutory bill of rights paved the way for the adoption of the constitutional *Charter of Rights and Freedoms* in 1982. The statute was a useful transitional procedure that introduced human rights protection to the legal system but its perceived ineffectiveness eventually led to its replacement with the constitutionally-entrenched Charter. As already noted, the *Charter of Rights and Freedoms* also employs the dialogue model, with the Parliament granted a post-judicial role. Importantly, the Canadian model demonstrates that constitutionally entrenched bills of rights can preserve the legitimate roles and powers of parliament.

75. The HRCA is not in favour of a statutory bill of rights model that upsets the separation of powers and creates a risk of judicial power being exercised otherwise than by a Chapter 3 court nor, alternatively, non-judicial power being exercised by a Chapter 3 court. Further, the mechanism of a declaration of incompatibility – which stops short of invalidation – will need to be carefully drafted if it is not to be constitutionally valid. These are key limitations of a statutory bill of rights. The absence of a provision enabling the courts to invalidate a law of the Commonwealth that is inconsistent or disproportionate with fundamental human rights is a key failing of the statutory model.

---

Law Review, Volume 12 No 1, 2007), there is nothing preventing the High Court from deciding otherwise, at which point the dialogue model would be deemed unconstitutional. McHugh considers the dialogue model so "fraught with constitutional difficulties in the federal sphere… that the campaign to enact it should be abandoned' ('A Human Rights Act, the courts and the Constitution" at 19).

[115] 'A Human Rights Act, the courts and the Constitution' at 35-36.

76. In relation to the proposal by McHugh for the adoption of a model emulating the original Canadian Bill of Rights, the HRCA supports the use of a federal statutory bill of rights to invalidate State and Territory legislation and federal subordinate legislation, to the extent of the inconsistency. It is somewhat questionable, however, the extent to which a federal statutory bill of rights can be effective in requiring federal primary legislation to be subjected to the bill of rights. The HRCA strongly supports the adoption, through a federal bill of rights, of a principle of statutory interpretation that requires federal legislation to be construed in a manner consistent with fundamental rights enumerated in a bill of rights, as far as is possible having regard to the purpose of the legislation. But ordinary principles of statutory interpretation should apply. A federal statutory bill of rights should not be capable of being used to invalidate another federal statute that is clearly and objectively inconsistent with a bill of rights. There is no proper constitutional basis for one statute to take precedence over another in this way. Such an approach is vital to the preservation of the separation of powers and the independence of the judiciary but it exemplifies the inherent failing in a statutory model that would be overcome by a constitutional model.

77. While the HRCA has no difficulty with a statutory re-statement of the common law principle of statutory interpretation that any intention to interfere with fundamental rights should be manifest, in terms of a proper approach to statutory construction, there would seem to be some risk that it may be at odds with the general principle to give effect to the purpose of the legislation. The HRCA accepts that the courts should not be entitled to change the obvious meaning of legislation.[116] That is a reflection of the strength and importance of a system of government based on the rule of law, separation of powers and, critically, independence of the judiciary. But it is at once also indicative of the potential for institutional failure. It demonstrates that essential deficiency in the system to respond to legislation that is unprincipled or disproportionate. Within the Australian context where the separation of powers is mandated by a written constitution that depends most importantly on Chapter 3 courts exercising

[116] cf *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [32].

judicial power only and no other kind of power, it is neither feasible nor desirable to adopt an approach that empowers the courts to change the clear meaning of legislation.

78. It is important that the current institutional structure of our constitutional arrangements be preserved. They are a very significant bulwark against tyranny and the protection of fundamental rights. But the inability of courts to give effect to fundamental rights in face of legislation that has a contrary purpose nevertheless demonstrates the failing in the current system. This is undesirable. Entrenching fundamental rights in the *Constitution* would serve to ensure proper observance of the principle that legislation should be construed subject to the bill of rights. This may not always be achieved with a statutory model.

### 3.3 Content of a constitutional or statutory bill of rights

#### 3.3.1 *Interpretation clause*

79. The HRCA submits that the interpretation clause of the proposed statutory bill of rights should be based on sections 32(1) and (2) of the *Victorian Charter*, which provide:[117]

> "*(1) 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*
>
> *(2) 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. To this could be added the decisions and general comments of the UN human rights treaty bodies.*"

#### 3.3.2 *Enforceability of rights*

80. As submitted above, a bill of rights should provide for judicially enforceable remedies for breaches of fundamental human rights as against federal public authorities, public-private partnerships or other private entities performing

[117] Section 32 of the *Victorian Charter*.

federal public functions. All civil and political rights should be fully and immediately enforceable. The HRCA submits that economic, social and cultural rights should also be immediately enforceable in relation to the most fundamental of these rights (referred to above). Such an approach is reasonable having regard to Australia's relative prosperity. As Saul notes:

> "*while an argument for "progressive realization" of economic and social rights may be compelling in relation to developing countries, it cannot be said that a wealthy, developed country such as Australia cannot yet afford to protect these basic rights.*"[118]

81. The HRCA notes the opposition towards the inclusion of economic, social and cultural rights in an Australian bill of rights. The opposition stems from fear of an upset in the division of powers, in particular, deprivation of the legislature of the power to decide how scarce resources should be allocated. Opponents argue that the enforcement of economic, social and cultural rights by courts might involve questions of policy and the allocation of resources and that these tasks are traditionally the preserve of parliament and the executive branch of government. Saul, however, argues that:

> "*this objection has always borne a somewhat artificial or contrived character. The courts already decide questions of resource allocation on a daily basis, as when they: (a) award large compensatory damages against the government, thus depriving it of control over significant resources; (b) prohibit certain government action (whether in the fields of construction, trade, finance, taxation and so on), possibly resulting in significant economic loss to government; or (c) are faced with ambiguity in the law and decisions must be made between competing policies and public interests, some of which may have starkly different economic consequences for governments.*"[119]

82. Similarly, Alston has argued that the suggestion that it would be inappropriate for the courts to decide questions of resource allocation is:

> " *... a specious argument, not only because courts very often hand down judgments which have major resource implications, but because there are many techniques which the courts in countries such as Canada, South Africa and even the United States have devised to ensure that resource*

[118] Saul, B., Gilbert + Tobin Centre of Public Law submission on the New Matilda Human Rights Bill, 7 July 2006 at 2.
[119] Ibid at 2.

*implications as well as the prerogatives of the legislature and the executive are taken fully into account. Their judgments are indeed often based upon detailed submissions by governments as to resource feasibility and related dimensions.*"[120]

83. The CESCR's General Comment 9 provides that ICESCR norms:

> "*must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of enduring governmental accountability must be put in place.*"[121]

84. The HRCA supports the need for the courts to have a role in relation to the enforcement of economic, social and cultural rights. It is submitted that the South African Constitution provides a good model for such an enforcement mechanism. The Constitution provides that the "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of economic, social and cultural rights, which include access to adequate housing, food, water, health care, education and social security. The South African Constitutional Court has taken a disciplined approach in interpreting this provision. The United Kingdom's Joint Committee on Human Rights has observed:

> "[t]*he South African Constitutional Court has used the English administrative law concept of "unreasonableness", which has a very high threshold, to ensure that the courts will only very rarely intervene to uphold social and economic rights. This model therefore gives some role to the courts, but not a very substantial one. Unlike the directive principles approach, it does not seek to eliminate the judicial role, rather it confines it within narrow parameters, so as to allow courts to respond only to very serious or large-scale violations.*"[122]

85. Useful examples of the South African Constitutional Court's jurisprudence on economic, social and cultural rights include:

---

[120] Philip Alston in Byrnes, A. *et al*., *Bills of Rights in Australia* at xiii.
[121] 1998 at 2. Available at http://www2.ohchr.org/english/bodies/cescr/comments.htm.
[122] Joint Committee on Human Rights, *A Bill of Rights for the United Kingdom?,* Twenty-Ninth Report, 10 August 2008, United Kingdom Parliament at 171.

(a) the provision of emergency accommodation to persons evicted from land that they occupied, thus rendering them homeless (the right to adequate housing);[123] and

(b) access by HIV-positive pregnant women to anti-retroviral drugs to prevent woman-to-foetus HIV transmission (the right to health).[124]

86. In these cases, the Constitutional Court found that the State had not taken reasonable steps to achieve the progressive realisation of the respective rights to adequate housing and health and ordered the state, in the first case, to devise and implement programs that included measures to provide relief to the homeless persons and, in the second case, to make anti-retroviral drugs available in public hospitals and clinics without delay.[125]

87. Importantly, these decisions addressed group rather than individual cases and provided remedies that promoted systemic changes to governmental and bureaucratic practices found to be unreasonable.

### 3.3.3 *Scope of application*

88. Following the example of the *Victorian Charter* a federal bill of rights should apply to public authorities.[126] Public authorities should include, in addition to the groups set out in the *Victorian Charter*,[127] federal, State and Territory public entities, private contractors performing public functions and public private partnerships.

---

[123] *Grootboom v Oostenberg Municipality et. al*, Case CCT 11/00, 4 October 2000.
[124] *TAC v Ministers of Health*, 2000 (10) BCLR 1033 (CC).
[125] For more information on both cases, refer to *Leading Cases on Economic, Social and Cultural Rights: Summaries*, *Working Paper No.3, ESC Rights Litigation Programme*, Centre on Housing Rights and Evictions (COHRE), January 2006.
[126] Section 6.2 of the *Victorian Charter*.
[127] Per section 4: (a) a public official within the meaning of the Public Administration Act 2004; or (b) an entity established by a statutory provision that has functions of a public nature; or (c) an 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); or (d) Police; or (e) a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or (f) a Minister; or (g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or (h) an entity declared by the regulations to be a public authority for the purposes of the Charter.

89. Consideration should be given to extending the application of the judicial enforcement provisions beyond public authorities to include private actors (individuals, corporations and other groups or entities with legal personality) that infringe rights.[128] Saul argues that while most national bills of rights are limited to the actions of public authorities, states also have an obligation to protect individuals from private violations of rights, which may:

> "*require States to take positive measures of protection (through policy, legislation and administrative action), or to exercise due diligence to prevent, punish, investigate or redress the harm or interference caused by private acts. These duties are related to the duty to ensure effective remedies for rights violations: ICCPR, art 2(3).*"[129]

90. Saul continues:

> "[if] *the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. The criminal and civil law remedies will not always provide sufficient redress for the violation of rights by private actors, and it is vital that Australians can seek remedies against private actors.*"[130]

### 3.3.4 *Standing and cause of action*

91. Failures by public authorities and private actors to ensure the protection and promotion of rights should be enforceable by the creation of appropriate causes of action and suitable remedies including damages, as well as public law remedies such as orders in the nature of *mandamus* and *prohibition*. In the case of economic, social and cultural rights, there should be scope for judicial and/or administrative review of the reasonableness of measures undertaken, within maximum available resources, to progressively achieve the realisation of these rights.

---

[128] See Saul, B., Gilbert + Tobin Centre of Public Law submission on the New Matilda Human Rights Bill at 3.
[129] Ibid.
[130] Ibid at 4.

92. Enforcement proceedings should be able to be brought by the following:

(a) individuals whose rights have been violated;

(b) persons, organisations or institutions acting on behalf of a person whose rights have been violated; and

(c) persons, organisations or institutions acting in the public interest.

93. Standing should extend to all natural persons within Australia's legal and territorial jurisdiction and natural persons outside the jurisdiction affected by actions of Australian public authorities.

### 3.4 Promotion and implementation of human rights under a bill of rights

> "…[I]*t is not a bill of rights in isolation that provides protection, but a bill of rights embedded in the existing system of institutions and protections.*"[131]

94. A bill of rights is just "*one piece of a mosaic of human rights protections*".[132] Institutional and cultural change to promote human rights is critical to the effectiveness of a bill of rights. Accordingly, a bill of rights should designate human rights-compliance, promotion and protection roles to parliament, the judiciary, and public authorities. It should also require the Government to conform with human rights standards when developing policy and in the delivery of services.

#### 3.4.1 *Role of the parliament*

95. In keeping with the ACT, Victorian and United Kingdom models, a bill of rights should prescribe roles to parliament that include:

---

[131] Byrnes *et al*., *Bills of Rights in Australia* at 56.
[132] Ibid.

(a) a requirement that all bills tabled in the Federal Parliament be accompanied by a human rights statement or declaration of compatibility, prepared and tabled by the Attorney-General or the member introducing the legislation;[133] and

(b) the establishment of parliamentary Joint Committees on Human Rights charged with scrutinising bills for their human rights compliance and more broadly with promoting and monitoring implementation of the bill of rights.

### 3.4.2 *Role of the courts*

96. As indicated above, a bill of rights should give the courts the power to:

(a) interpret all legislation consistently with the provisions of the bill of rights, as far as this is possible having regard to the purposes of the statute under consideration;[134]

(b) consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right when interpreting the bill of rights and any other statutory provision;

(c) invalidate State and Territory federal legislation and federal subordinate legislation that is inconsistent with the rights contained in the bill;

(d) determine claim for violations of rights provided for in the bill of rights;

---

[133] The Australian Human Rights Commission's (AHRC) 'Constitutional validity of an Australian Human Rights Act' statement provides that participants unanimously agreed that there is no constitutional impediment to the introduction of this requirement.

[134] The AHRC's 'Constitutional validity of an Australian Human Rights Act' statement, produced by the 'Australian constitutional and human rights lawyers' following a meeting of 22 April 2009, states that it was unanimously agreed that there is no constitutional impediment to introduction of the requirement that "courts interpret all legislation of the Commonwealth in a way that is consistent with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation".

(e) in the case of economic, social and cultural rights, judicially review the reasonableness of measures undertaken, within available resources, to progressively achieve the realisation of economic, social and cultural rights;

(f) in cases where it is determined that the reasonableness threshold has not been met, court may be permitted to:

(i) refer decisions back to the decision maker(s) for review;

(ii) quash or set aside the relevant decision(s);

(iii) issue an injunction to prohibit the actions of a public authority (or private actors, should standing extent to such persons) that would breach a progressive responsibility duty or requiring authorities (and private actors) to act in a way consistent with the progressive realisation of relevant economic, social and cultural rights; and

(iv) require federal, State and Territory governments to review policies that are inconsistent with the progressive realisation of relevant economic, social and cultural rights.

### 3.4.3 *Role of public authorities*

97. As indicated above, public authorities should be required to act consistently with a bill of rights. In particular, public authorities should be required to:

(a) act compatibly with human rights provided for by a bill of rights particularly when exercising discretions (a substantive obligation);

(b) ensure that all policies and procedures are consistent with rights provided for in a bill of rights;

(c) otherwise ensure that proper consideration is given to human rights during decision-making processes and when implementing legislation (a procedural obligation).[135]

### 3.4.4 *Role of the Australian Human Rights Commission*

98. The HRCA submits that the role of the Australian Human Rights Commission (AHRC) should be enlarged to include the following in relation to the proposed bill of rights:[136]

(a) education and public awareness raising in relation to the bill of rights;

(b) dealing with complaints about violations of the bill of rights;

(c) generally, ensuring compliance with rights provided for by the bill of rights including undertaking audits and investigations of public agencies with respect to the degree to which policies and procedures comply with obligations created by the bill of rights;

(d) policy and legislative development based on the bill of rights.

99. The AHRC is not presently mandated to address violations of economic, social and cultural rights.[137] It can only receive complaints of alleged breaches of the rights contained in select human rights instruments[138] and its investigative powers are limited to acts or practices of the Commonwealth. The AHRC is also rarely requested by the Federal Government to examine the human rights

---

[135] Cf *A Human Rights Act For All Australians – National Human Rights Consultation Submission on the protection and promotion of human rights in Australia,* HRLRC, May 2009, at 9-10.

[136] Visit http://www.hreoc.gov.au/about/index.html. Also cf *Engage, Educate, Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, Human Rights Law Resource Centre, April 2009.

[137] Section 3 of the *Human Rights and Equal Opportunity Commission Act* 1986 defines human rights as 'the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.'

[138] ICCPR, CRC, *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled Persons.*

implications of proposed laws, and the Government is not required to implement AHRC recommendations.

100. The Human Rights Law Resource Centre (HRLRC) has recommended the expansion of the AHRC's functions in a number of ways, each of which the HRCA supports.[139] These include:

(a) expanding the functions and powers of the AHRC to allow for the conducting of inquiries into any matters affecting human rights in Australia;

(b) empowering the AHRC to, at its own initiative, consider and report on the human rights implications of existing or proposed federal, State or Territory legislation;

(c) giving the AHRC the power to initiate investigations into potential infringements of anti-discrimination legislation and other human rights instruments, as well as the power to conduct such investigations appropriately by giving the AHRC powers to enter and search premises and to compel the production of information and evidence;

(d) giving the AHRC the power to seek enforcement of conciliation agreements entered into as a result of its procedures;

(e) giving the AHRC the power to intervene in all proceedings where a significant human rights issue arises;

(f) giving the AHRC the power to make binding codes of conduct or guidelines for complaints resolution;

(g) increasing the AHRC's recurrent funding and increasing its funding to account for increasing AHRC roles and responsibilities; and

[139] See *Engage, Educate, Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, HRLRC, April 2009.

(h) increasing AHRC funding and resources to support the continuing development of human rights education materials and for the distribution of these materials to schools.

101. The HRCA notes that the CESCR has called upon the Australian Government to extend the AHRC's mandate to cover ICESCR rights, and to ensure that the Commission is allocated adequate human and financial resources.[140]

### 3.4.5 *Test case litigation fund*

102. Programs funding test case litigation by individuals and groups challenging federal laws and policies that allegedly violate constitutional equality rights have been in place in Canada since 1985. The experience in Canada was that the Charter of Rights and Freedoms only came to life when test case litigation was supported. While the most recent incarnation, the Court Challenges Program of Canada (CCP) 1994,[141] was cancelled by the Canadian Government in 2006, the UN human rights treaty bodies have repeatedly expressed their support for the Program and have called for its re-establishment.[142]

103. The HRCA supports the establishment of a fund to support test case litigation under an Australian bill of rights. Test cases will bring meaning to the bill of rights by allowing for its provisions to be applied to real life human rights issues. The establishment of a program comparable to the CCP would also allow select litigants to claim their rights where, for financial reasons, they may

---

[140] Concluding Observations, examination of Australia's fourth periodic report under ICESCR, 22 May 2009 at 13 (E/C.12/AUS/CO/4).

[141] See http://www.ccppcj.ca.

[142] The CEDAW has urged Canada "to ensure that all women, particularly women belonging to vulnerable groups, have access to remedies for discrimination on the basis of sex by making available to them adequate mechanisms and access to legal aid so as to enable them to have legal representation and to seek and obtain redress from courts and tribunals for violations of their rights. In this connection, the Committee encourages the State party to reconsider its cancellation of the Court Challenges Programme". 'Concluding Observations of the CEDAW, 7 November 2008, at 22 (CEDAW/C/CAN/CO/7). The CESCR has recommended that Canada "extend the Court Challenges Programme to permit funding of challenges with respect to provincial and territorial legislation and policies"; Concluding Observations of the CESCR, 22 May 2006 at 42 (E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5).

otherwise be unable. Further, it would support the development of a rich body of domestic human rights jurisprudence.

**HUMAN RIGHTS COUNCIL OF AUSTRALIA**
**June 2009**