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# National Human Rights Consultation

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## Submission to the National Human Rights Consultation Committee

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## Introduction

1. The Law Institute of Victoria (LIV) is pleased to contribute to the National Human Rights Consultation. The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. The LIV was a prominent and successful advocate for the Victorian *Charter of Human Rights and Responsibilities* (Victorian Charter) and has been a long-standing supporter of a national human rights instrument. The LIV working group established to contribute to this submission to the National Human Rights Consultation comprised members across the LIV, including members of the Administrative Law and Human Rights Section and the Young Lawyers' Section.
2. The Administrative Law and Human Rights Section of the LIV has members with a broad range of legal experience in administrative review, constitutional law and general human rights issues, as well as experience specific to Indigenous, refugee, migration, health, disability and discrimination law. The Section has an important role in raising awareness about human rights and social justice issues among lawyers and in the community. It also advocates and effects reform in administrative, constitutional and human rights law and policy. Members of the Section's Charter of Rights and Human Rights sub-committees have had oversight of the drafting of the submission through their participation in the LIV working group.
3. The LIV submission is strongly supported by the LIV's Young Lawyers' Section (YLS). The YLS is a dynamic group of approximately 6000 members which works to enhance the legal skills, knowledge and professional networks of members in the early stages of career development. The YLS aims to stimulate interest, to promote and facilitate discussion among young lawyers and to provide a voice for young lawyers. The LIV submission has been discussed in both the Community Issues and Law Reform sub-committees of the YLS and is strongly supported by their members. The YLS was involved in the drafting of the submission and has hosted a series of discussions and lectures in 2008 on the operation and effect of the Victorian Charter and lessons to be learnt for any federal charter or bill of rights. The YLS has actively encouraged young lawyers to contribute to the National Human Rights Consultation and has promoted and facilitated discussion amongst young lawyers on the topic.
4. The LIV is a constituent body of the Law Council of Australia (LCA) and generally supports the submission of the LCA calling for a National Human Rights Act.<sup>1</sup> The LIV position differs, however, from some aspects of the LCA submission. As detailed in this submission, the LIV considers that the range of remedies available for a breach of human rights should include damages and that a court's finding of incompatibility should make invalid a law that is found to be inconsistent with human rights.
5. In this submission, we address the three questions posed in the National Human Rights Consultation Committee's Terms of Reference. Our responses draw on our members' understanding and experience of the Victorian Charter. We have not reiterated the background information contained in the National Human Rights Consultation Background Paper and available elsewhere.<sup>2</sup>

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<sup>1</sup> Law Council of Australia, *A Charter: Protecting the Rights of All Australians* (9 May 2009) <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca)>.

<sup>2</sup> Attorney-General's Department, National Human Rights Consultation Background Paper (2008) <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778AD\\_AEC2E6EA8653D\)~National+Human+Rights+Consultation+Background+Paper.pdf/\\$file/National+Human+Rights+Consultation+Background+Paper.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778AD_AEC2E6EA8653D)~National+Human+Rights+Consultation+Background+Paper.pdf/$file/National+Human+Rights+Consultation+Background+Paper.pdf)>.

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## Summary

### Which human rights (including corresponding responsibilities) should be protected and promoted?

6. Australia must protect and promote:
  - a) all rights and responsibilities contained in international human rights instruments to which Australia is a party now and in the future.
  - b) all other human rights binding on or recognised in Australia.
7. The rights that Australia must protect and promote include civil and political rights – such as the rights to free speech and to vote for political representatives – set out in the *International Covenant on Civil and Political Rights* (ICCPR). These rights also include economic, social and cultural rights – such as the rights to education, work, and to health – set out in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Among other rights, it is imperative that Australia protects and promotes the right to self-determination and cultural rights of Indigenous Australians as recognised in both the ICCPR and the ICESCR.
8. The rights in international agreements to which Australia is a party include the rights of particular categories of people, such as the rights of women, of children, of people of a particular race, of indigenous peoples, of refugees, of workers and of people with disabilities. For example, women have a specific right not to be discriminated against on the basis of sex, children have a particular right to participate in public affairs, asylum seekers must not be forced to return to a country where their life or freedom would be threatened (right to ‘non-refoulement’) and persons with disabilities have a right of access to the physical environment, to transportation, to information and communications and to other public facilities and services.
9. Australia is also bound to protect and promote other human rights as part of customary international law. There are also some rights recognised in Australia which are not necessarily binding as a matter of international law. Rights recognised by but not binding on Australia might be rooted in rights internationally recognised in agreements to which Australia is not formally a party. Australia might also recognise rights that are only emerging internationally. A full review of rights recognised in Australia should be undertaken and the rights identified, including the:
  - rights of Indigenous Australians under the *Declaration on the Rights of Indigenous Peoples*
  - right to property described in the *Universal Declaration of Human Rights*
  - right to non-discrimination on the basis of sexual orientation or gender identity consistent with the 2008 *Statement to the General Assembly on Sexual Orientation and Gender Identity*
  - right to a secure, healthy and ecologically sound environment under the *Draft Declaration of Principles on Human Rights and the Environment*.
10. The LIV believes that Australia must protect and promote economic, social and cultural rights as well as civil and political rights. Australia is a party to both the ICCPR and the ICESCR and has committed to protecting and promoting all the rights under those treaties. The *Universal Declaration of Human Rights*, the United Nation’s predecessor to the ICCPR and ICESCR, contains economic, social and cultural rights as well as civil and political rights. Australia voted in favour of the adoption of the Universal Declaration and was a vocal and prominent supporter of the rights contained in it. At the time that the Universal Declaration was adopted, Australia stated that ‘[t]he General Assembly should see to it that the rights listed in the [Universal D]eclaration did not remain a dead letter and should ensure effective respect of those rights’.
11. The LIV considers that all persons – whether individuals or public or private entities – have a responsibility to observe human rights. Individual responsibilities to respect the human

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rights of others are contemplated, for example, in the preambles to the ICCPR and ICESCR, which refer to an individual 'having duties to other individuals and to the community to which [she or] he belongs' and 'a responsibility to strive for the promotion and observance of the rights recognised in the' ICCPR and ICESCR. The LIV believes, however, that 'responsibilities' are inherent in human rights and do not require separate articulation.

**Are these human rights currently sufficiently protected and promoted?**

12. Human rights are not currently sufficiently protected or promoted in Australia. The protection and promotion of human rights at the federal level is insufficient. There is better protection and promotion of human rights in Victoria and the Australian Capital Territory, which both have dedicated human rights legislation, but the protection and promotion of human rights at the state and territory level in general is also insufficient.
13. Australia's failure to adequately protect and promote human rights denies people one of the rights set out in the *Universal Declaration of Human Rights* (Article 8) and repeated in the ICCPR (Article 2(3)) – the right to an effective remedy by a competent authority for human rights violations. Australia's inadequate protection of human rights also falls short of the obligations in the ICCPR to take necessary steps to adopt laws and other measures necessary to give effect to human rights, and in the ICESCR to take steps within available resources to progressively realise human rights, including through the adoption of legislative measures.
14. The *Victorian Charter of Human Rights and Responsibilities* (Victorian Charter) has been a successful first step towards better protection and promotion of human rights in Victoria. The Victorian Charter has generated a greater awareness of human rights within public bodies and the general community and has facilitated the making of laws and decisions which are more sensitive to human rights concerns. Although it is too early to draw conclusions on its impact in legal proceedings, it is clear that the Victorian Charter has been an important advocacy tool for those people wanting to ensure that their rights are protected before any violation has occurred.
15. Consistent with the experience in many other countries, many of the concerns raised about possible negative impacts of the Victorian Charter have not transpired. Notably, one prominent claim that the Victorian Charter has 'failed' relied on a case in which the Victorian Charter was not applied to a legislative provision requiring conscientious objectors to pregnancy terminations to refer patients to health practitioners able to perform a termination. The failure was not with the Victorian Charter but with its non-application. Had it been applied, the Victorian Charter could have facilitated an open and comprehensive analysis of the rights at issue. The LIV is concerned about some deficiencies in the Victorian Charter and is likely to propose changes to address those deficiencies in the course of the four-year review of the Victorian Charter which is scheduled to be completed in 2011.

**How could Australia better protect and promote human rights?**

16. Australia could better protect and promote human rights by enacting a National Human Rights Act that provides for:
  - a) the protection of all human rights protected under international law and binding on Australia, including economic, social and cultural rights, and all other rights recognised in Australia; and
  - b) a right of enforcement and remedy.A National Human Rights Act would effect important changes to parliamentary procedures and governmental processes.
17. A National Human Rights Act could improve Australia's human rights performance through a single comprehensive law clearly stating which human rights are protected and promoted and how those human rights are to be protected and promoted in a manner consistent with Australia's international commitments. The rights and obligations would be clearly described for the public authorities required to abide by them, helping to create a culture of

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- human rights protection that can prevent human rights violations and deal with any abuses quickly and openly if they happen.
18. The LIV supports a constitutionally entrenched national human rights charter. Constitutional entrenchment would protect the rights from abrogation by any future parliament. We acknowledge with regret that the National Human Rights Consultation Committee's Terms of Reference state that the options identified cannot include a constitutionally entrenched bill of rights. We accept, however, that constitutional amendment would in any event be unlikely in the near term. The LIV would, therefore, support a National Human Rights Act enacted as an Act of the federal parliament. The Act would not apply to past concluded matters, but it would apply to laws, policies and practices, whenever instituted.
  19. We agree with Justice Bell's observation that 'the interests of people and groups living in society sometimes conflict and must sometimes be balanced. Therefore, in certain cases, human rights might need to be limited'. A limitation on one person's freedom to seek and receive information might be justified, for example, when balanced with someone else's right to privacy. A National Human Rights Act should preserve absolute rights but provide for all other limitations on human rights which are permitted under international law. The LIV would support the inclusion of a general limitation provision similar to section 7 of the Victorian Charter, provided it is qualified in a way that preserves absolute rights and otherwise ensures that any limitations on human rights are consistent with international law.
  20. The human rights of all people must be protected and promoted under a National Human Rights Act; however, some groups or categories of persons warrant particular protection because they are particularly vulnerable to human rights abuses. In some circumstances, it is appropriate to qualify rights generally available to all people to take account of the historical or specific disadvantage suffered by particular people. The LIV proposes the inclusion in a National Human Rights Act of a section based on the following section 8(4) of the Victorian Charter: 'Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.'
  21. A National Human Rights Act should preserve all other human rights not covered or only partially covered in the National Human Rights Act. Like section 5 of the Victorian Charter, a National Human Rights Act could state that a right or freedom not included in the Act that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the states or territories) must not be taken to be abrogated or limited because the right or freedom is not included in the National Human Rights Act or is only partly included.
  22. A National Human Rights Act should, to the extent permitted under the Constitution, apply to the states and territories, including local government. To the extent it would not be permitted under the Constitution to apply the Act to the states and territories, the states and territories should be permitted to 'opt in' to the National Human Rights Act by enacting, for example, state and territory legislation that mirrors the National Human Rights Act.
  23. A National Human Rights Act should be designed to create an understanding and culture of human rights compliance at all stages of making and applying law and policy. A National Human Rights Act should require the federal government to produce, publish and report on compliance with human rights action plans. The composition of and compliance with those plans should be subject to independent reviews.
  24. A National Human Rights Act should state that all draft legislation introduced to parliament must be accompanied by a Human Rights Compatibility Statement. As is the case under the Victorian Charter (s.28(3)), statements of compatibility accompanying new legislation should explain in detail whether or not, and if so how, the legislation is compatible with human rights. Assessments of compliance with the National Human Rights Act for the purposes of a Human Rights Compatibility Statement must be genuine, comprehensive and properly described.
  25. Like section 30 of the Victorian Charter, a National Human Rights Act should require scrutiny by an appropriate parliamentary committee (e.g. the Scrutiny of Bills Committee or
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- an equivalent to the relevant UK committee, the Joint Committee on Human Rights). That committee should be required to consider any bill introduced into parliament and to report to parliament as to whether the bill is incompatible with human rights. A National Human Rights Act should also require an appropriate body or each government department to review all existing legislation and regulations and to report to parliament if it considers them to be incompatible with human rights.
26. A National Human Rights Act should require that all federal, state and territory statutory provisions must be interpreted in a way that is compatible with human rights. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right should be considered in interpreting a statutory provision. Similar to the equivalent provision of the Victorian Charter (s.32(1)), this interpretative obligation should apply to everybody, not just courts and tribunals.
  27. To the extent that the Australian Constitution allows, a National Human Rights Act should empower the Federal Court of Australia or the High Court of Australia to find a law to be incompatible with the rights protected under the Act. The finding should invalidate the law. However, the effect of the invalidation or the court's decision to make that finding could be suspended for a fixed period (e.g. six months) until after the federal parliament has had an opportunity to consider and decide whether to override the National Human Rights Act. The override would state that the legislation will apply despite or 'notwithstanding' the provisions of the National Human Rights Act and it would operate for a fixed but renewable period.
  28. Providing for a finding of incompatibility that has legal effect could avoid the constitutional issues that have been raised by commentators in their discussions of a declaratory power that has no legal effect. A finding of incompatibility with legal effect is more obviously within the limits of 'judicial power' for the purposes of the Constitution and is unlikely to be deemed a constitutionally unacceptable 'advisory opinion'. By providing for a parliamentary override of the finding of incompatibility, the National Human Rights Act would maintain parliamentary sovereignty.
  29. A National Human Rights Act should impose legally enforceable obligations on the state, through public authorities, to act in a way that is compatible with human rights and to give proper consideration to human rights when making decisions. Under a National Human Rights Act, it should be unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. A similar provision is contained in the Victorian Charter (s.38) although, as discussed below, the LIV considers that an equivalent provision in a National Human Rights Act should, in contrast to the Victorian Charter but like the UK Human Rights Act, give rise to a direct cause of action and remedy.
  30. The definition of a 'public authority' under a National Human Rights Act could be based on the definition in section 4 of the Victorian Charter, which includes public officials, entities exercising public functions, the police, local councils and councillors and ministers. Section 4 also lists factors to be taken into account in determining whether a function is of a public nature, including that the function is generally identified with functions of government or the entity is publicly funded to perform the function. In contrast to the definition in the Victorian Charter but consistent with the UK Human Rights Act (s.6(3)(a) HRA), we believe that courts and tribunals should be included in the definition of public authority, regardless of whether they are acting in an administrative, judicial or quasi-judicial capacity. Moreover, the application of a National Human Rights Act to courts and tribunals should not be limited by a provision equivalent to section 6(2)(a) of the Victorian Charter.
  31. A person who claims that a public authority has violated its obligations under the National Human Rights Act should be entitled under the National Human Rights Act to bring proceedings against that authority in an appropriate court or tribunal vested with federal jurisdiction. That court or tribunal should be empowered under the National Human Rights Act to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The right to bring proceedings and receive remedies would belong to all individuals – but not corporations – who are under Australia's jurisdiction whether or not they are physically within Australia's territory.
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32. The National Human Rights Act should provide for a public awareness and education programme as well as government reporting on, and a regular and independent review of, the implementation of the National Human Rights Act. The Australian Human Rights Commission might be an appropriate body to perform aspects of the education and review functions. A National Human Rights Act could also provide for a review after a period of several years to determine whether any improvements should be made to the Act or whether it should be constitutionally entrenched.
33. The federal government would need to ensure that appropriate resources are made available to support the effective implementation of a National Human Rights Act. Funding would be needed to employ and train public servants and authorities on the National Human Rights Act and their obligations under it. Funding would also be needed to support any review and education functions contained in a National Human Rights Act.
34. The LIV considers that any policy initiatives and law reforms must be preceded by a legislated National Human Rights Act, as opposed to implementing any changes in policy or law independently of a National Human Rights Act. We recognise, however, that several initiatives could be undertaken in the absence of a National Human Rights Act, including:
- a comprehensive review of existing laws, assessing their consistency with human rights, identifying any gaps in the protection of human rights and proposing amendments to those laws found to be inconsistent with human rights or proposing new laws;
  - the assessment of any proposed new laws for their consistency with human rights and the preparation of compatibility statements;
  - the production and publication of human rights action plans designed to create an understanding and culture of human rights compliance at all stages of public decision-making and application of law and policy, together with reports on compliance with the plans and human rights compliance in general;
  - public awareness and education campaigns on human rights, aimed at the public service, schools and the wider community;
  - fulfilling the government's pledge to recognise Indigenous Australians in the Constitution;
  - building on the work of the Standing Committee of Attorneys-General to harmonise and improve Australia's anti-discrimination laws;
  - acting on proposals to place appropriate legislative limits on executive powers and discretion;
  - working with the Australian Human Rights Commission to identify how it can be better equipped to assist in the protection and promotion of human rights;
  - improving the methods of engaging civil society in the reform of law and policy, providing more opportunities and time for engagement, and building the capacity of civil society to participate effectively in those processes.

## Questions posed by the Consultation Committee

### 1. Which human rights (including corresponding responsibilities) should be protected and promoted?

35. Australia must protect and promote:
- c) all rights and responsibilities contained in international human rights instruments to which Australia is a party now and in the future
  - d) all other human rights binding on or recognised in Australia.

As discussed in part 3 below, the LIV considers that Australia must protect and promote these rights through the enactment of a National Human Rights Act.

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## 1.1 The Rights

### *International human rights instruments to which Australia is a party*

36. Australia has willingly agreed to protect and promote human rights contained in a host of international human rights instruments. These rights include civil and political rights – such as the rights to free speech and to vote for political representatives. These rights also include economic, social and cultural rights – such as the rights to education, to work and to health. They also include the rights of particular categories of people, such as the rights of women, of children, of people of a particular race, of indigenous peoples, of refugees, of workers and of people with disabilities. Human rights treaties are, however, not just a list of rights. Australia's legal obligations under human rights treaties require a systematic set of processes and interpretations, so that a list of human rights becomes a system and framework for protecting and promoting the human rights in the treaties. Understanding that the human rights treaties constitute a framework is vital. The framework includes principles of interpretation, such as the balancing of rights and the notion of special measures, discussed below, which are fundamental to the meaning of human rights.
37. The human rights in the two principal human rights international instruments to which Australia is a party – the *International Covenant on Civil and Political Rights*<sup>3</sup> (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*<sup>4</sup> (ICESCR) – are:
- right to enjoy human rights without discrimination, to be equal before the law and to the equal protection of the law without discrimination, and to laws prohibiting, and effective protection from, discrimination
  - right to life
  - right to freedom from torture and from cruel, inhuman or degrading treatment or punishment
  - right to freedom from slavery, servitude, or forced work
  - right to liberty and security of person
  - right to freedom from arbitrary arrest or detention
  - right to humane conditions of detention
  - right to freedom from imprisonment on grounds of inability to fulfil a contractual obligation
  - right to liberty of movement and freedom to choose where to live
  - right of lawful non-citizens to be deported only in accordance with the law
  - right to a fair and public hearing before a competent, independent and impartial tribunal
  - rights in criminal matters to:
    - be presumed innocent until proved guilty according to the law;
    - be informed of the charges;
    - have time and facilities to prepare a defence;
    - communicate with a lawyer or an advisor chosen by himself or herself;
    - be tried without unreasonable delay;
    - be tried in person and defended personally or with legal assistance chosen by herself or himself and be informed of that right;
    - receive free legal assistance if he or she has insufficient means to pay for legal assistance;
    - examine witnesses;
    - have free language interpretation services or other communication assistance;<sup>5</sup>
    - not be compelled to testify against herself or himself or to confess guilt;
    - in the case of children charged with criminal offences, a procedure that takes account of age and rehabilitation options;
    - review of criminal conviction or sentence by a higher court in accordance with law;

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<sup>3</sup> New York, 16 December 1966. Entry into force generally (except Article 41): 23 March 1976; entry into force for Australia (except Article 41): 13 November 1980; Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993.

<sup>4</sup> New York, 16 December 1966. Entry into force generally: 3 January 1976. Entry into force for Australia: 10 March 1976.

<sup>5</sup> Note that free communication assistance is derived from the Victorian Charter, s.25(2)(j).

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- compensation for wrongful conviction;
  - not be tried or punished more than once for an offence;
  - be free from retrospective application of criminal laws
  - right to be recognised as a person before the law
  - right to non-interference with privacy, family, home or correspondence and freedom from unlawful attacks on reputation
  - right to freedom of thought, conscience and religion and belief
  - right to freedom of opinion and expression, including freedom to seek, receive and impart information and ideas in any medium chosen by herself or himself
  - right to have war propaganda and hate speech prohibited by law
  - right of peaceful assembly
  - right to freedom of association with others, including the right to form and join trade unions and the right to strike
  - right to protection of family, to consensual marriage and to found a family
  - right of parents during a reasonable period before and after childbirth to special protection, including paid or social security benefits for working parents<sup>6</sup>
  - rights of children to be protected without discrimination, including to be protected from economic or social exploitation, to be registered after birth and named, and to acquire a nationality
  - rights to take part in public affairs, to vote or be elected at genuine periodic elections and to have access to the public service
  - right to work with the state's support for technical and vocational guidance and training programmes, policies and techniques
  - right to just and favourable conditions of work, including fair and equal wages to a level that supports a decent living, safe and healthy working conditions, equal opportunity for promotion, rest and leisure, reasonable limitation of working hours and paid holidays
  - right to social security, including social insurance
  - right to an adequate standard of living for herself or himself and her or his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions
  - right to the enjoyment of the highest attainable standard of physical and mental health with state support to reduce baby and infant deaths, ensure the healthy development of children, improve environmental and industrial hygiene, prevent, treat and control diseases and provide medical services
  - right to education including compulsory and free primary education, access to secondary and higher education
  - right of self-determination for peoples, including the right to freely determine their political status and freely pursue their economic, social and cultural development
  - right of minority groups to enjoy their own culture, to profess and practise their own religion or to use their own language
  - right to take part in cultural life and to enjoy the benefits of scientific progress and its applications
  - right to copyright protection.

38. Other or more detailed international rights are contained in other international agreements to which Australia is a party, such as the:

- *Convention on the Rights of the Child (CRC)*
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*
- *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*
- *International Convention for the Suppression of the Traffic in Women and Children*
- *United Nations Convention on the Rights of Persons with Disabilities (Disabilities Convention)*

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<sup>6</sup> Note ICESCR extends this right to 'mothers' as opposed to 'parents'.

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- *Convention and Protocol relating to the Status of Refugees (Refugees Convention) and the Convention relating to the Status of Stateless Persons.*
39. Australia is also party to several international labour agreements such as the:
- *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*
  - *ILO Convention (No. 155) concerning Occupational Safety and Health and the Working Environment and*
  - *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.*<sup>7</sup>
40. Australia is a party to many other agreements that, although not specific to human rights, contain provisions concerning human rights, such as the *Convention on Biological Diversity* and the *United Nations Framework Convention on Climate Change*.

*All other human rights binding on or recognised in Australia*

41. Australia is also bound to protect and promote other human rights as part of customary international law. There are also some rights recognised in Australia which are not necessarily binding as a matter of international law. Rights recognised by but not binding on Australia might be rooted in rights internationally recognised in agreements to which Australia is not formally a party. Australia might also recognise rights that are only emerging internationally.
42. Other human rights in customary international law or otherwise recognised in Australia include or could include:
- rights of Indigenous Australians, in addition to those contained in CERD, including the rights contained in the *Declaration on the Rights of Indigenous Peoples* (see below)<sup>8</sup>
  - the right in Article 14 of the *Universal Declaration of Human Rights* to seek and to enjoy in other countries asylum from persecution and the right to non-refoulement (see below)<sup>9</sup>
  - rights to property, which are described in: the *Universal Declaration of Human Rights* (Article 17) as the right to own property alone as well as in association with others and the right not to be arbitrarily deprived of property; the Australian Constitution (s.51(xxxi)) as the right to have property acquired by the state on 'just terms'; and the Victorian Charter (s.20) as the right not to be deprived of property other than in accordance with law
  - rights arising under the Australian Constitution, such as the right to a trial by jury, as recognised in s.80 of the Australian Constitution<sup>10</sup> and implied rights such as the right to free political communication<sup>11</sup>
  - the right to a secure, healthy and ecologically sound environment which is described in Article 2 of the *Draft Declaration of Principles on Human Rights and the Environment* and contained in national constitutions around the world (see below).<sup>12</sup>

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<sup>7</sup> Examples of other treaties to which Australia is a party are available at [http://www.austlii.edu.au/au/other/dfat/subjects/Human\\_Rights.html](http://www.austlii.edu.au/au/other/dfat/subjects/Human_Rights.html); <http://www.austlii.edu.au/au/other/dfat/subjects/Labour.html>; [http://www.austlii.edu.au/au/other/dfat/subjects/Citizenship\\_Migration.html](http://www.austlii.edu.au/au/other/dfat/subjects/Citizenship_Migration.html).

<sup>8</sup> See below, para 58.

<sup>9</sup> See below, para 69.

<sup>10</sup> See also right to vote contained in s.41; freedom of interstate trade contained in s.92, and right to be compensated for acquisition of property on just terms contained in s.51(xxxi); prohibition on law to establish a religion or to prevent free exercise of religion contained in s.116, right to be free from discrimination because of interstate residence contained in s.117.

<sup>11</sup> *Lange v ABC* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>12</sup> E/CN.4/Sub.2/1994/9

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bceaa18025675c005779c3?Opendocument>>;

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## 1.2 Select Issues

### *The protection of economic, social and cultural rights*

43. The LIV believes that a National Human Rights Act must protect economic, social and cultural rights as well as civil and political rights. Australia is a party to both the ICCPR and the ICESCR and has committed to protecting and promoting all the rights under those treaties. The *Universal Declaration of Human Rights*, the United Nation's predecessor to the ICCPR and ICESCR, contains economic, social and cultural rights as well as civil and political rights. Australia voted in favour of the adoption of the Universal Declaration and was a vocal and prominent supporter of the rights contained in it.
44. In its speech to the United Nations General Assembly at the time of the adoption of the Universal Declaration, the Australian delegation said that it 'attached particular importance to articles [in the Universal Declaration] which dealt with economic and social rights, and particularly with the right to social security, equitable and satisfactory working conditions, rest and leisure and an adequate standard of living to ensure the health and well-being of every [person] and his [or her] family'.<sup>13</sup> Mr Watt, for the Australian delegation, went on to explain that the economic and social rights in the Universal Declaration 'flowed from certain provisions which had been incorporated in the [United Nations] Charter on Australia's suggestion, namely, the provisions of Articles 55 and 56, under which Member States pledged themselves to take joint and separate action in co-operation with the United Nations, so as to ensure higher standards of living, full employment and universal respect for, and observance of, human rights and fundamental freedoms'.<sup>14</sup> Mr Watt further stated that '[t]he General Assembly should see to it that the rights listed in the [Universal D]eclaration did not remain a dead letter and should ensure effective respect of those rights'.<sup>15</sup>
45. Economic, social and cultural rights and civil and political rights are 'universal, indivisible and interdependent and interrelated'.<sup>16</sup> The UN Committee responsible for overseeing the implementation of the ICESCR has specifically affirmed that 'the rights recognized in the [ICESCR] are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, ... is recognized and reflected in the system in question'.<sup>17</sup>
46. In Victoria, the Australian Capital Territory and elsewhere in the world, human rights charters are limited, for the most part, to the protection of civil and political rights. The limited scope of the rights protected is sometimes justified on the basis that civil and political rights require only that the state refrains from acting in a manner that violates the rights and that the state's performance with respect to civil and political rights is readily assessed and judged. It is the view of some commentators that economic, social and cultural rights, in contrast, require proactive measures and potentially unlimited spending by the state and, because these rights are fulfilled over time, compliance cannot be definitively assessed and judged.<sup>18</sup> The LIV disagrees with these views.
47. Rights under both the ICCPR and the ICESCR might require proactive measures and spending by the state. Measuring compliance can be complex with respect to all rights. It is nevertheless possible for Australia to protect and promote economic, social and cultural

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Note also Earth Justice, *Environmental Rights Report (2008)* <<http://www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf>>.

<sup>13</sup> United Nations General Assembly, Record of the 181<sup>st</sup> Plenary Meeting, held at the Palais de Chaillot, Paris, Friday 10 December 1948 at 10.45am, 875.

<sup>14</sup> Ibid 875-6.

<sup>15</sup> Ibid 876.

<sup>16</sup> UN World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993.

<sup>17</sup> CESCR, General Comment 3, *The nature of States parties obligations* (art 2, para 1 of the Covenant) (Fifth session, 1990), para 8. See also, CESCR, General Comment 9, *The domestic application of the Covenant* (General Comments): 03/12/98. E/C.12/1998/24.

<sup>18</sup> See, Legal and Constitutional Committee, Parliament of Victoria, *Human Rights Reference, A Bill of Rights for Victoria? Some Issues*, Discussion Paper No. 1 (February 1986).



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rights without creating unreasonable burdens on government spending. The right to life in the ICCPR, for example, requires a legal system capable of prosecuting murder, undertaking investigations, performing coronial functions and laws to control, for example, the use of guns and other weapons.

48. The application of economic, social and cultural rights under the South African Constitution provides some guidance as to how such rights can be tested before the courts and resolved without placing unreasonable demands on government resources. Some provisions in the South African Constitution that provide for economic, social and cultural rights are limited to requiring the state to take only 'reasonable' measures within 'available resources' to achieve the progressive realisation of those rights.<sup>19</sup> In examining the application of economic, social and cultural rights – such as the right to housing and to health care, food, water and social security – the South African Constitutional Court has deferred to the political organs and interpreted 'reasonable' measures broadly to include a 'wide range of possible measures'.<sup>20</sup> Commentators have concluded that:

'In the absence of available state resources, the failure of the state to address socio-economic rights is therefore not a violation of the rights. However, should resources become available, it will be difficult for the state to justify its failure to devote those resources to the fulfilment of the rights.'<sup>21</sup>

49. The UN Committee on Economic Social and Cultural Rights has taken a similar approach to the South African commentators, stating that '[i]n 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'.<sup>22</sup>

### *Rights and responsibilities*

50. As discussed below,<sup>23</sup> the LIV considers that all persons – whether individuals or public or private entities – have a responsibility to observe human rights. Individual responsibilities to respect the human rights of others are contemplated, for example in the preambles to the ICCPR and ICESCR, which refer to an individual 'having duties to other individuals and to the community to which [she or] he belongs' and 'a responsibility to strive for the promotion and observance of the rights recognised in the' ICCPR and ICESCR.
51. The preamble to the Victorian Charter also states that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others'. In interpreting the Victorian Charter, Justice Bell has put the concept of responsibility in the following terms: 'Individual people live in society, which involves mutual respect and responsibility. By accepting personal responsibility to respect the human rights of others, people can expect their own human rights to be respected in return. Individual respect for human rights begets respect for individual human rights'.<sup>24</sup>
52. The LIV believes, however, that a National Human Rights Act should not articulate responsibilities separately from rights and that it should impose legally enforceable obligations only on the state, through public authorities, to act in a way that is compatible with human rights and to give proper consideration to human rights when making

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<sup>19</sup> See, e.g. ss.26(2) and 27(2) of the South African Constitution, referring respectively to housing and to health care, food, water and social security.

<sup>20</sup> See, e.g. *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1969 [29]; *Government of South Africa v Grootboom* [2001] 1 SA 46 [41]; *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271.

<sup>21</sup> De Waal, Currie and Erasmus, 'The Bill of Rights Handbook 423' in Linda Jansen van Rensburg, 'Interpreting Socio-Economic Rights – transforming South African Society?' (2003) *Special Edition Potchefstroom Electronic Law Journal*

<<http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issuepages/2003Special/linda.pdf>>.

<sup>22</sup> CESCR, General Comment 3, *The nature of States parties obligations* (art 2, para 1 of the Covenant) (Fifth session, 1990), para 10.

<sup>23</sup> See below, para 125.

<sup>24</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [24].

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decisions. Imposing obligations or ‘responsibilities’ on public authorities – as the state’s representatives or agents<sup>25</sup> – is consistent with Australia’s international commitments under treaties, such as the ICCPR, to ‘respect and to ensure to all individuals ... the rights in the [ICCPR]’.<sup>26</sup>

53. There have been international discussions, and draft instruments have been prepared, on individual and corporate ‘responsibilities’ beyond those imposed under international criminal law.<sup>27</sup> Typically, however, the ‘responsibilities’ are not considered mandatory. Human ‘responsibilities’ have been suggested to include, for example, ‘the duty not to legitimize or incite religious fanaticism, as well as to promote respect for the beliefs of others’ or ‘the duty to participate in ... political life ... in particular, by exercising his or her right to vote and by serving ethically in elected positions’.<sup>28</sup> However, the articulation of individual responsibilities at the international level remains limited. The LIV would not support the inclusion in a National Human Rights Act of responsibilities binding on private individuals although we would welcome further consideration of the issue at a later stage in the life of a National Human Rights Act.<sup>29</sup>

### *Rights of all people*

54. The human rights of all people must be protected and promoted by Australia. Human rights belong, in our view, to all individual human beings: they do not belong to corporations. Human rights derive from the inherent dignity of the human person.
55. Under the ICCPR, Australia must respect and ensure the human rights of all individuals ‘within its territory and subject to its jurisdiction’. Australia must protect the rights of individuals even where those individuals are outside the Australian territory but within physical or effective control or the control direction or influence of Australia.<sup>30</sup> Moreover, the conduct of an organ placed at the disposal of Australia by another State shall be considered an act of Australia under international law if the organ is acting in the exercise of elements of the governmental authority of Australia.<sup>31</sup> Accordingly, Australia is responsible for any human rights violations in territories such as Christmas Island or where

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<sup>25</sup> See further, Draft Articles on *Responsibility of States for Internationally Wrongful Acts*, Part I, Chapter II Attribution of conduct to a State (2001)

<[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)>. In particular, note Article 4 Conduct of organs of a State 1: ‘The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.’

<sup>26</sup> ICCPR, art 2.

<sup>27</sup> With respect to human responsibilities, see e.g. ‘pre-draft’ Declaration of Human Social Responsibilities in Miguel Alfonso Martínez, *Human rights and human responsibilities, Final report of the Special Rapporteur* (2003), study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277, Commission on Human Rights, 59<sup>th</sup> Session, 2003

<[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/52c520c7be26d11dc1256d040055f1b0/\\$FILE/G0312023.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/52c520c7be26d11dc1256d040055f1b0/$FILE/G0312023.pdf)>; see also InterAction Council, *A Universal Declaration Of Human Responsibilities* (1 September 1997)

<[www.interactioncouncil.org/udhr/declaration/udhr.pdf](http://www.interactioncouncil.org/udhr/declaration/udhr.pdf)>. With respect to corporate responsibilities, see e.g.

UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* <<http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>>; See further, Special Representative of the Secretary-

General on human rights and transnational corporations and other business enterprises

<[http://www2.ohchr.org/english/issues/trans\\_corporations/index.htm](http://www2.ohchr.org/english/issues/trans_corporations/index.htm)> ; Australian Human Rights

Commission, *Corporate Responsibility*

<[http://www.hreoc.gov.au/Human\\_Rights/corporate\\_social\\_responsibility/corporate\\_social\\_responsibility.html](http://www.hreoc.gov.au/Human_Rights/corporate_social_responsibility/corporate_social_responsibility.html)>.

<sup>28</sup> Articles 18 and 19 respectively of the ‘pre-draft’ *Declaration of Human Social Responsibilities*, *ibid.*

<sup>29</sup> See further, L Kostakidis-Lianos and G Williams, ‘Bills of Responsibilities: Is one needed to counter the “excesses” of the ACT Human Rights Act 2004?’ (2005) 30 *Alternative Law Journal* 58.

<sup>30</sup> *Namibia (South West Africa Case)* [1971] ICJ Reports 1971; *Military and Paramilitary Activities Case (Nicaragua v US)* [1986] ICJ Reports 65 [115]; *Bosnia and Herzegovina v Yugoslavia* [1993] ICJ Reports 24 [52].

<sup>31</sup> Draft Articles on *Responsibility of States for Internationally Wrongful Acts* (2001) Article 6

<[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)>.



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a foreign state – such as Nauru – is undertaking the detention and processing of asylum seekers applying for asylum in Australia.

### *Rights of particular groups or categories of persons and ‘special measures’*

56. The human rights of all people must be protected and promoted. However, some groups or categories of persons warrant particular protection because they are particularly vulnerable to human rights abuses. Women, children, people of a particular race, workers, minorities, refugees, and people with disabilities, for example, have specific human rights contained in general treaties or treaties specific to them. We address in later sections some of the issues of rights protection relevant to some of these groups – namely Indigenous Australians, refugees, women, children, lesbian, gay, bisexual and transgender people and people with a disability.
57. In some circumstances, it is appropriate to qualify rights generally available to all people to take account of the historical or specific disadvantage suffered by particular people. The general right to equality and non-discrimination should, for example, be qualified by the need, in some circumstances, for special measures. Special measures are permitted, for example, under CERD (Article 1(4)) and under CEDAW (Article 4) and are expressed in Australian discrimination laws such as the *Age Discrimination Act 2004*.<sup>32</sup> The LIV proposes the inclusion in a National Human Rights Act of a section based on the following section 8(4) of the Victorian Charter: ‘Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.’

### *The right to self-determination and other rights of Indigenous Australians*

58. Australia has endorsed the United Nations *Declaration on the Rights of Indigenous Peoples*.<sup>33</sup> The Declaration is an important articulation of the human rights of Australian Indigenous peoples which should be protected and promoted in Australia. The proper recognition of the human rights of Indigenous Australians through a legislatively enacted National Human Rights Act can contribute to a common understanding and appreciation of Indigenous values, beliefs and customs.<sup>34</sup> As discussed further below,<sup>35</sup> a constitutional amendment recognising the rights of Indigenous peoples is also necessary.
59. It is imperative that a National Human Rights Act includes the right to self-determination as recognised in both the ICCPR and the ICESCR. The right applies to everyone but has particular relevance to Australian Indigenous peoples who have long been denied the right in Australia. The right is clearly expressed in the international treaties to which Australia is a party as: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’<sup>36</sup> During the international discussions of the then draft United Nations *Declaration on the Rights of Indigenous Peoples*, Australia stated that:

‘Events in all parts of the world show us that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their

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<sup>32</sup> See Speech of Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, 3 April 2009, <<http://www.alp.org.au/media/0409/speia030.php>>.

<sup>33</sup> Adopted by General Assembly Resolution 61/295 on 13 September 2007 (later endorsed by Australia) <<http://www.un.org/esa/socdev/unpfii/en/drip.html>>

<sup>34</sup> See e.g. P Seidel and A Coles, ‘Inherent rights of Indigenous people – the need for recognition’ (2004) 78(12) *LJ* 54.

<sup>35</sup> See below, para 137.

<sup>36</sup> Article 1 of ICCPR and of ICESCR.

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languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments.<sup>37</sup>

60. The right to self-determination has been described by the now Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people as having two aspects, related respectively to the right of peoples to 'freely determine their political status' and the right to 'freely pursue their economic, social and cultural development' as described in the ICCPR and the ICESCR.<sup>38</sup> With respect to political status, the right has been described as requiring 'that individuals and groups be accorded meaningful participation, commensurate with their interests, in procedures leading to the creation of or change in the institutions of government under which they live'.<sup>39</sup> With respect to development, the right has been described as requiring 'a governing institutional order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.<sup>40</sup>
61. A subsequent definition in the now Australian Human Rights Commission 2002 *Social Justice Report* describes the right to self-determination in the following terms:
- [Self-determination is] an ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.<sup>41</sup>
62. As demonstrated in other countries, it is possible to protect and promote collective rights, particularly with respect to Indigenous Australians who are readily identified as a 'peoples'. It might, in any event, be appropriate to conceive of the right as an individual right.<sup>42</sup> Importantly, the inclusion of the right to self-determination in a National Human Rights Act need not raise concerns about any threat to Australia's sovereignty as a matter of international law and can readily be accommodated within Australia's current federal structure of government.<sup>43</sup>
63. It is also imperative that a National Human Rights Act includes particular reference to rights derivative of the right to self-determination or otherwise specific to Indigenous peoples.

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<sup>37</sup> Australian Government Delegation, *Speaking Notes on Self-Determination*, Session of the United Nations Working Group on Indigenous Populations (24 July 1991) 2, cited in S James Anaya, *Indigenous Peoples in International Law* (2<sup>nd</sup> ed, 2004) 111.

<sup>38</sup> S James Anaya, 'A contemporary definition of the international norm of self-determination' (1993) 3 *Transnational Law & Contemporary Problems* 145; see also, S James Anaya, *Indigenous Peoples in International Law* (2<sup>nd</sup> ed, 2004).

<sup>39</sup> S James Anaya, 'A contemporary definition of the international norm of self-determination' (1993) 3 *Transnational Law & Contemporary Problems* 145.

<sup>40</sup> S James Anaya, 'A contemporary definition of the international norm of self-determination' (1993) 3 *Transnational Law & Contemporary Problems* 151.

<sup>41</sup> Human Rights and Equal Opportunity Commission, *Social Justice Report* (2002) <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport02/summary.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport02/summary.html)>.

<sup>42</sup> On individual rights see S James Anaya, *Indigenous Peoples in International Law* (2<sup>nd</sup> ed, 2004).

<sup>43</sup> See e.g. Report of the Human Rights Consultation Committee *Rights, Responsibilities and Respect* (Victoria, December 2005) p 38 fn 19; Sarah Pritchard, 'The rights of indigenous peoples to self-determination under international law' [1992] *Aboriginal Law Bulletin* 16 <<http://www.austlii.edu.au/au/journals/AboriginalLB/1992/16.html>>; Melissa Castan and David Yarrow, Castan Centre for Human Rights Law, Memorandum attached to the Victorian Aboriginal Legal Service submission to the Human Rights Consultation Committee in response to *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (16 February 2006) <<http://www.vals.org.au/news/submissions/61VALS%20revised%20submission%20in%20response%20to%20HR%20Report%20sent%20170206.pdf>>; F Brennan, 'Self-Determination for Aborigines: Limits and Possibilities under the Optional Protocol' (Paper presented at University of Melbourne, Melbourne, 10 December 1991).

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Such rights include proper land rights and specific cultural rights. Section 19(2) of the Victorian Charter is a useful model for the articulation of such rights although further guidance can be gained from the United Nations *Declaration on the Rights of Indigenous Peoples*.<sup>44</sup>

64. Section 19(2) of the Victorian Charter states:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

- a) to enjoy their identity and culture; and
- b) to maintain and use their language; and
- c) to maintain their kinship ties; and
- d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

65. Article 31(1) of the United Nations *Declaration on the Rights of Indigenous Peoples* states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

66. Section 19(2) of the Victorian Charter and Article 31(1) of the UN Declaration are important steps towards recognising the right of Indigenous communities to their culture and traditional knowledge. Indigenous culture in Australia is intimately connected to the land. As Mick Dodson has explained: '[c]ulture is the land, the land and spirituality of Aboriginal people, our cultural beliefs and our reason for existence is the land.'<sup>45</sup> Rights to land – in a broad sense that is not necessarily reflected in current laws or proprietary concepts – are therefore linked to Indigenous cultural rights.

67. The disadvantage experienced by Indigenous peoples in Australia illustrates the failure of government programs and laws to protect their human rights. The federal government's efforts to close the gap between Indigenous and non-Indigenous people in a range of areas is positive but progress to date has been slow and it is not guaranteed.<sup>46</sup> The ease with which the rights of Indigenous peoples have been expressly overridden in legislation<sup>47</sup> or denied in common law<sup>48</sup> demonstrates the need for real legal protections.

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<sup>44</sup> Adopted by General Assembly Resolution 61/295 on 13 September 2007 (endorsed by Australia on 3 April 2009)

<[http://www.un.org/esa/socdev/unpfii/documents/Australia\\_endorsement\\_UNDRIP\\_Michael\\_Dodson\\_statement.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_endorsement_UNDRIP_Michael_Dodson_statement.pdf)>; <<http://www.un.org/esa/socdev/unpfii/en/drip.html>> or <<http://www2.ohchr.org/english/issues/indigenous/docs/declaration.doc>>

<sup>45</sup> Michael Dodson, 'Indigenous Protected Areas in Australia' (Paper presented at an International Expert Group Meeting on Indigenous Peoples and Protection of the Environment, Khabarovsk, Russian Federation, 27-29 August 2007) <[http://www.un.org/esa/socdev/unpfii/documents/workshop\\_IPPE\\_dodson.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_dodson.doc)>.

<sup>46</sup> See Australian Government, 2009-2010 Budget 'Closing the Gap between Indigenous and Non-Indigenous Australians' <[http://www.aph.gov.au/budget/2009-10/content/ministerial\\_statements/indigenous/html/index\\_indigenous.htm](http://www.aph.gov.au/budget/2009-10/content/ministerial_statements/indigenous/html/index_indigenous.htm)>; see also <<http://www.abc.net.au/news/stories/2009/02/26/2502447.htm>>.

<sup>47</sup> E.g. *Native Title Amendment Act 1998* (Cth) and the NT Intervention amendments, namely the *Northern Territory National Emergency Response Act 2007* (Cth), *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response) Bill 2007* (Cth) and *Social Security and Other Legislation Amendment (Welfare Reform) Bill 2007* (Cth).

<sup>48</sup> E.g. *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1.

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### *The right of non-refoulement and other rights of asylum-seekers and refugees*

68. People seeking asylum in Australia and refugees in Australia have rights that must be protected and promoted by Australia. Many of these rights have been mentioned above in terms of general rights, including the right to freedom from arbitrary arrest or detention and the right to humane conditions of detention. Asylum seekers and refugees also have specific rights, including the right of 'non-refoulement'.
69. As a party to international treaties such as the *Convention relating to the Status of Refugees*, and in accordance with its customary international law obligations, Australia must allow people to seek and to enjoy in Australia asylum from persecution (see e.g. Article 14 of the *Universal Declaration of Human Rights*). This 'right to asylum' means at a minimum that people must not be forced to return to a country where their life or freedom would be threatened or where they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment ('non-refoulement' requirement in Article 33 of the Refugee Convention, under Article 3 of CAT and under customary international law).<sup>49</sup>
70. Although there might be some debate as to whether people have a right to asylum under customary international law and what such a right might entail, the converse right of 'non-refoulement' is a binding obligation on Australia under the Refugee Convention and the CAT.<sup>50</sup> In our view, the right to asylum and the right to non-refoulement should be protected and promoted by Australia.
71. It is also implicit in the Refugee Convention that people seeking asylum must be given access to procedures to determine whether or not they are refugees (Article 1 of the Refugee Convention). Once found to be refugees, people are entitled to further rights under the Refugee Convention and other treaties to which Australia is a party, such as non-discrimination and freedom of religion as well as free access to courts, the right to work and freedom of movement. Significantly, Australia must not penalise refugees who enter Australia unlawfully (see Article 31 of the Refugee Convention). All of these rights must be protected and promoted by Australia.<sup>51</sup>

### *Right to non-discrimination on the basis of sex and other rights of women*

72. Discrimination against women and the abuse of other human rights of particular relevance to women is widespread in Australia. Evidence to a 2008 inquiry of the Senate Legal and Constitutional Affairs Committee highlighted issues around discrimination in employment – including lack of pay equity and inadequate access to paid parental leave – and sexual harassment.<sup>52</sup> Many of the Senate Committee's recommendations should be considered in articulating the rights of women in a National Human Rights Act.
73. In particular, a National Human Rights Act must properly reflect the rights of women in all of the relevant treaties to which Australia is a party – including the ICCPR, ICESCR, CEDAW and ILO Conventions – including a specific prohibition of sex discrimination and

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<sup>49</sup> Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, *Scope and Content of the Principle of Non-Refoulement* (Opinion given to the United Nations High Commissioner of Refugees, 20 June 2001); see also, Chris Harrington, *Following Them Home: The Fate of the Returned Asylum Seekers* and *A Well-Founded Fear* featuring Phil Glendenning, Director of the Edmund Rice Centre (SBS, 17 November 2008).

<sup>50</sup> Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, *Scope and Content of the Principle of Non-Refoulement* (Opinion given to the United Nations High Commissioner of Refugees, 20 June 2001).

<sup>51</sup> See generally, G S Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, 1996).

<sup>52</sup> See e.g. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality: Final Report* (December 2008) <[http://aph.gov.au/Senate/Committee/legcon\\_ctte/sex\\_discrim/report/report.pdf](http://aph.gov.au/Senate/Committee/legcon_ctte/sex_discrim/report/report.pdf)>; see also, Australian Human Rights Commission, *Plan of Action Towards Gender Equality* <<http://www.humanrights.gov.au/listeningtour/launch/action.html>>; Victorian Equal Opportunity & Human Rights Commission, *Women Rights and Equality – What do they want now?* (2007) <<http://www.humanrightscommission.vic.gov.au/publications/reports%20and%20discussion%20papers/women%20rights%20and%20equality.asp>>.

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sexual harassment.<sup>53</sup> Building on the prohibition against sex discrimination and reflecting rights in international treaties, a National Human Rights Act should provide for a right of employees to request flexible working arrangements, to accommodate family or carer responsibilities<sup>54</sup> and the protection of working parents for a period before and after childbirth.<sup>55</sup> The protection of women from violence through possible elaborations on, for example, the right to life and the right to health, should also be considered.<sup>56</sup>

### *Rights of participation and other rights of children and young people*

74. Australia's abuse of the human rights of children was given particular national attention in the course of the now Australian Human Rights Commission's 2004 inquiry into children in immigration detention.<sup>57</sup> Although some welcome changes have been made for children in immigration detention, Australia's protection of the rights of children and young people continues to attract criticism.<sup>58</sup> A National Human Rights Act must specifically provide for the rights of children and young people in the *Convention on the Rights of the Child* and elsewhere, particularly with respect to their participation in public life,<sup>59</sup> protection from violence<sup>60</sup> and their rights to food, housing, clothing and education.<sup>61</sup>
75. The Victorian Equal Opportunity and Human Rights Commission has addressed the human rights of children and young people in its *2008 Report on the Operation of the Victorian Charter of Human Rights and Responsibilities: Emerging Change*.<sup>62</sup> The report contains specific analysis of the participation of children and young people in public affairs, revealing 'a strong desire on the part of young people to have input into setting the agenda for their communities both generally, as well as in relation to matters directly affecting them'.<sup>63</sup> It is essential for Australia to ensure that the right to participate in public affairs is protected and promoted for all Australians, including children and young people.

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<sup>53</sup> See [11.24].

<sup>54</sup> See [11.34], which describes an obligation to accommodate requests, as opposed to a right to make the request.

<sup>55</sup> See e.g. Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children Inquiry Report* (May 2009) <[http://www.pc.gov.au/data/assets/pdf\\_file/0003/86232/parental-support.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/86232/parental-support.pdf)>.

<sup>56</sup> See further, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) <[http://apo.org.au/sites/default/files/Time\\_for\\_action.pdf](http://apo.org.au/sites/default/files/Time_for_action.pdf)>.

<sup>57</sup> Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (April 2004) <[http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/report/PDF/alr\\_complete.pdf](http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf)>

<sup>58</sup> See Human Rights Committee of the United Nations, *Consideration of reports submitted by states parties under article 40 of the covenant: Concluding observations of the Human Rights Committee, Australia*, UN Doc CCPR/C/AUS/CO/5 (16 March – 3 April 2009), <<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>> para 24; see also Australian Human Rights Commission, 'Children in immigration detention' in the *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (January 2009) [http://www.hreoc.gov.au/human\\_rights/immigration/idc2008.html#Heading252](http://www.hreoc.gov.au/human_rights/immigration/idc2008.html#Heading252).

<sup>59</sup> Australian Human Rights Commission 'The right to vote is not enjoyed equally by all Australians' (October 2007) [http://www.hreoc.gov.au/human\\_rights/vote/index.html](http://www.hreoc.gov.au/human_rights/vote/index.html); Victorian Equal Opportunity and Human Rights Commission, *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change* (2008) <<http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>>.

<sup>60</sup> Office of the United Nations High Commissioner for Human Rights, *The United Nations Study on Violence against Children* (2006) <<http://www2.ohchr.org/english/bodies/crc/study.htm>>; National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) <[http://apo.org.au/sites/default/files/Time\\_for\\_action.pdf](http://apo.org.au/sites/default/files/Time_for_action.pdf)>; See also Prime Minister's media release of 30 April 2009 <[http://www.pm.gov.au/media/Release/2009/media\\_release\\_0945.cfm](http://www.pm.gov.au/media/Release/2009/media_release_0945.cfm)>.

<sup>61</sup> See generally <[http://www.humanrights.gov.au/human\\_rights/children/index.html](http://www.humanrights.gov.au/human_rights/children/index.html)>

<sup>62</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change* (2008) <<http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>>.

<sup>63</sup> *Ibid*, 129.



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### *Non-discrimination on the basis of sexual orientation or gender identity*

76. Lesbians, gay men and bisexuals face widespread discrimination on the basis of their sexual orientation, as do persons of transgender identity.<sup>64</sup> Australia's international human rights obligations require governments to take all necessary measures to eliminate such discrimination. However, current Australian laws provide only limited protection against discrimination and lack uniformity.
77. Recent legislative changes – such as *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–General Law Reform) Act 2008* (No. 144, 2008) and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Act 2008* (No. 134, 2008) – demonstrate some willingness on behalf of the federal government to address discrimination in laws against same-sex couples. They do not, however, address the wide range of discriminatory laws and policies that affect lesbian, gay, bisexual and transgender people, both in government and the private sector arenas. They make stark the lack of a federal anti-discrimination law on sexual orientation and gender identity.
78. In 2007, the LIV adopted a policy on the 'Removal of Discrimination against People on the Basis of Gender Identity or Sexual Orientation'.<sup>65</sup> The LIV considers that a National Human Rights Act should specifically include an express right to non-discrimination on the basis of sexual orientation or gender identity, encompassing equal rights and freedom from discrimination for lesbian, gay, bisexual and transgender people consistent with the 2008 Statement to the General Assembly on *sexual orientation and gender identity* which was supported by Australia.<sup>66</sup>

### *Rights of access and other rights of people with disabilities*

79. Australia is a party to the *United Nations Convention on the Rights of Persons with Disabilities*. The Disabilities Convention contains rights which are of particular relevance to the one in five people in Australia who are reported to have a disability.<sup>67</sup> The intention of the Disabilities Convention is to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities. The Disabilities Convention recognises economic, social, cultural, political and civil rights and is strongly based on the belief that equality for persons with disabilities depends on empowerment, access to opportunities and a shift from the welfare model to a goal of participation and inclusion.
80. The LIV notes that the Disabilities Convention does not create new rights. Rather, it builds on existing rights and principles with the aim of creating a human rights culture in relation to persons with disabilities. Importantly, the Disabilities Convention uses empowering language, emphasising that persons with disabilities are first and foremost persons with human rights: rights which are indivisible and which belong to all humans. The LIV regards the focus on 'persons with disabilities' rather than on 'disability' or 'disabled' as a positive step towards changing attitudes and challenging institutionalised discrimination.
81. The LIV suggests that, in light of the Disabilities Convention, Australia should be protecting and promoting the rights of people with a physical or mental disability, to ensure they have opportunities, freedoms and a standard of living equal to those of people without a disability. In particular, Australia must, in accordance with Article 9 of the Disabilities Convention, 'ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including

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<sup>64</sup> Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, Final Report* (May 2007) <[http://www.humanrights.gov.au/human\\_rights/samesex/report/index.html](http://www.humanrights.gov.au/human_rights/samesex/report/index.html)>.

<sup>65</sup> Available at <<http://www.liv.asn.au/members/sections/admin/pdf/2007discriminationPolicyStatement.pdf>>.

<sup>66</sup> General Assembly, Sixty-third Session, 70th plenary meeting, Thursday, 18 December 2008, 10 a.m. New York, Statement made by Argentina, A/63/PV.70, 30 <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/660/58/pdf/N0866058.pdf?OpenElement>>; see also report at <http://www.hrw.org/en/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>>.

<sup>67</sup> Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings* (2003) <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/978A7C78CC11B702CA256F0F007B1311/\\$File/44300\\_2003.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/978A7C78CC11B702CA256F0F007B1311/$File/44300_2003.pdf)>.

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information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas’.

82. Access can improve the capacity of people with disabilities to participate in the workforce and community life – through, for example, better access to education, public transport and buildings. A failure to protect the rights of Australians with disabilities reduces their quality of life by preventing their full participation in the community, leading to social exclusion, and reducing their capacity to live independently and to work.

### *The right to environment and other human rights recognised in Australia*

83. As noted above, the LIV considers that Australia should protect and promote rights recognised in Australia which are not necessarily binding as a matter of international law. As noted above, rights recognised by but not binding on Australia might be rooted in rights internationally recognised in agreements to which Australia is not formally a party. Australia might also recognise rights that are only emerging internationally. A full review of rights recognised in Australia should be undertaken.
84. An important example of a right that could be characterised as having been recognised in Australia even if it might not be binding as a matter of international law is the right to a secure, healthy and ecologically sound environment. Various articulations of a right to environment can be found in Article 2 of the *Draft Declaration of Principles on Human Rights and the Environment* and in binding human rights instruments and in national constitutions around the world.<sup>68</sup> It is not clear whether the right to environment is binding on Australia under customary international law.<sup>69</sup> It is, however, arguable that the cumulative effect of federal, state and territory laws aimed at environmental protection, combined with Australia’s international environmental commitments, amount to the recognition of a right to environment that must be protected and promoted by Australia.<sup>70</sup>

## **2. Are these human rights currently sufficiently protected and promoted?**

85. Human rights are NOT currently sufficiently protected or promoted in Australia. The protection and promotion of human rights at the federal or ‘Commonwealth’ level is insufficient. There is better protection and promotion of human rights in Victoria and the ACT, which both have dedicated human rights legislation, but the protection and promotion of human rights at the state and territory level in general is also insufficient. We have already identified above some of the inadequacies of Australia’s protection and promotion of human rights in our calls for the specific protection of certain rights.<sup>71</sup> Further detail is set out below.

### 2.1 Federal level protection and promotion of human rights

86. The Australian Constitution, federal legislation and common law provide only limited protection of human rights at the Commonwealth level. The Australian Constitution contains a limited number of express rights and there is only limited scope for implying rights from the Constitution. The protection of rights through federal legislation – such as the Commonwealth Racial, Sex, Disability and Age Discrimination Acts – and common law

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<sup>68</sup> UN Doc E/CN.4/Sub.2/1994/9 (1994).

<<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument>>; see also Earth Justice, *Environmental Rights Report* (2008) <<http://www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf>> and Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (2008). <<http://www2.ohchr.org/english/issues/environment/waste/index.htm>>.

<sup>69</sup> See Alice Palmer, ‘An international right to environment: A new generation?’ (2006) 15 *Interights Bulletin* 141.

<sup>70</sup> See Donald K Anton, ‘Greening the Australian Capital Territory Bill of Rights (2002) *Social Science Research Network*, < <http://ssrn.com/abstract=1148567>>.

<sup>71</sup> See above, section 1.2, ‘Select Issues’.



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– such as the right to a fair trial – is piecemeal and readily overridden by Parliament following the politics of the day.<sup>72</sup>

87. With respect to human rights contained in international agreements to which Australia is a party, Australia has helped to frame the rights and has joined the international community in undertaking to protect and promote those rights. However, Australia's methods for incorporating those rights into its national legal and policy framework are inadequate. Australia's international legal obligations under treaties and customary international law have no binding effect in Australia until the parliament passes a law incorporating them into Australian law.<sup>73</sup> Although there are some common law rules that mean that international human rights law that has not been incorporated into Australian law can still influence the interpretation or application of Australian laws,<sup>74</sup> the scope of those rules, as evidenced by the decision of the majority in the *Al-Kateb* case,<sup>75</sup> is very limited. It should also be noted that although the Australian Human Rights Commission and the state and territory bodies charged with monitoring their governments' human rights performance help to identify human rights issues in Australia, there is no systemic or systematic planning for human rights compliance by Australian public bodies.
88. In addition to its poor *methods* for protection, Australia's *practice* in protecting and promoting human rights is inadequate. Several issues – the treatment of Indigenous Australians, aspects of Australia's counter-terror laws, the treatment of migrants and refugees, discrimination against lesbian, gay, bisexual and transgender people and violence and discrimination against women – have highlighted the inadequacies of Australia's human rights compliance and the need for better protection of human rights at the national level. These issues have been well documented in Australian and international reports.<sup>76</sup> The 2009 Concluding Observations of the United Nations Human Rights and Economic, Social and Cultural Rights Committees provide an overview of the current concerns about the inadequacy of Australia's protection and promotion of human rights.<sup>77</sup>

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<sup>72</sup> See e.g. s.132 of the *Northern Territory National Emergency Response Act 2007* (Cth), which states 'The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.'

<sup>73</sup> Australia's international legal obligations have no binding effect until incorporated into domestic law by the Commonwealth parliament, see Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View*, (2<sup>nd</sup> ed, 2006), 112 [4.30].

<sup>74</sup> Common law rules of statutory interpretation include: governments intend to legislate consistently with their international obligations unless there is an express statutory indication to the contrary, see e.g. *Polites v Commonwealth* (1945) 70 CLR 60 and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; legislation that affects human rights is to be construed strictly, see *Coco v The Queen* (1994) 179 CLR 427; and Australia's entry into an international treaty without domestic interpretation gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with that treaty unless there is a contrary indication by the executive or legislature, see *Minister for Immigration and Ethnic Affairs v Teob* (1995) 183 CLR 273.

<sup>75</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>76</sup> See e.g. MJ Clarke QC, *Report of the Clarke Inquiry into the case of Dr Mohamed Haneef* (November 2008), <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report>>; Australian Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (May 2004); *Bakhtiyari v Australia*, UN Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2002), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/8662db397d948638c1256de2003b3d6a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8662db397d948638c1256de2003b3d6a?Opendocument)>; Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/HRC/10/3 (4 February 2009); Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), <[http://www.hreoc.gov.au/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf)>; Mick Palmer AO APM, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* ('the Palmer Report') (July 2005), <<http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf>>; Human Rights and Equal Opportunity Commission, *It's about time: Women, men, work and family – Final Paper* (2007), <[http://www.hreoc.gov.au/sex\\_discrimination/its\\_about\\_time/docs/its\\_about\\_time\\_2007.pdf](http://www.hreoc.gov.au/sex_discrimination/its_about_time/docs/its_about_time_2007.pdf)>.

<sup>77</sup> Human Rights Committee of the United Nations, *Consideration of reports submitted by states parties under article 40 of the covenant: Concluding observations of the Human Rights Committee, Australia*, UN Doc CCPR/C/AUS/CO/5 (16 March – 3 April 2009), <<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRPI.doc>>; Committee on Economic, Social and Cultural Rights of the United Nations, *Consideration of reports*

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89. Australia's failure to adequately protect and promote human rights denies people one of the rights in the *Universal Declaration of Human Rights* (Article 8) and repeated in the ICCPR (Article 2(3)) – the right to an effective remedy by a competent authority for human rights violations. Australia's inadequate protection of human rights also falls short of the obligations in the ICCPR to take necessary steps to adopt laws and other measures necessary to give effect to human rights and in the ICESCR to take steps within available resources to progressively realise human rights, including through the adoption of legislative measures.

## 2.2 Victorian protection and promotion of human rights

90. The *Victorian Charter of Human Rights and Responsibilities* came into full effect on 1 January 2008. The Victorian Charter creates procedures to ensure that law-makers and public decision-makers take account of human rights. The rights protected fall primarily under the banner of 'civil and political' rights (such as free speech or the right to privacy) although it does contain a right to property and cultural rights. The Victorian Charter does not create an express independent cause of action to enforce human rights against public authorities.
91. The LIV is of the firm view that the Victorian Charter has been a successful first step towards better protection and promotion of human rights in Victoria. The Victorian Charter has generated a greater awareness of human rights within public bodies and the general community and has facilitated the making of laws and decisions which are more sensitive to human rights concerns. Although it is too early to draw conclusions on its impact in legal proceedings, it is clear that the Victorian Charter has been an important advocacy tool for those people wanting to ensure that their rights are protected *before* any violation has occurred.
92. Examples of effective reliance on the Victorian Charter are being collected and documented.<sup>78</sup> Instances of effective reliance range from individual advocacy with ultimate benefits for classes of people (e.g. a child with autism gaining access to disability assistance) to institutional engagement (e.g. the inclusion of human rights in planning by local government).<sup>79</sup> Notably, one prominent claim that the Victorian Charter has 'failed' relied on a case in which the Victorian Charter was not applied to a legislative provision requiring referral by conscientious objectors to health practitioners able to perform pregnancy terminations.<sup>80</sup> The failure was not with the Victorian Charter but with its non-application. Had it been applied, the Victorian Charter could have facilitated an open and comprehensive analysis of the rights at issue.
93. Consistent with the experience in many other countries, many of the concerns raised about possible negative impacts of the Victorian Charter have not transpired.<sup>81</sup> However, since

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*submitted by states parties under articles 16 and 17 of the covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia* E/C.12/AUS/CO/4 22 May 2009

<<http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>>.

<sup>78</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change* (2008)

<<http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>>; Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can promote dignity and address disadvantage*,

<<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>>.

<sup>79</sup> Ibid.

<sup>80</sup> Frank Brennan, 'The Place of the Religious Viewpoint in Shaping Law and Policy in a Pluralistic Democratic Society: A case study on rights and conscience' (Paper presented at the Values and Public Policy Conference, Fairness, Diversity and Social Change, Centre for Public Policy University of Melbourne, 26 February 2009) 21, <<http://www.public-policy.unimelb.edu.au/conference09/Brennan.pdf>>. The relevant law was not assessed by the government under the Victorian Charter because section 48 of the Victorian Charter states 'Nothing in this Charter affects any law applicable to abortion or child destruction'.

<sup>81</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change* (2008) <<http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>>; see also Christopher Michaelsen 'Charter of rights: lessons from Germany' *Australian Policy Online* 25 May 2009 <<http://apo.org.au/commentary/charter-rights-lessons-germany>>.

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coming into operation, several deficiencies in the Victorian Charter have become apparent, including inadequacies in the statements of compatibility and ambiguities in the relevance or application of the Victorian Charter to legal proceedings. Moreover, prior to the enactment of the Victorian Charter, the LIV had called for a state instrument to protect all human rights, including all economic, social and cultural rights and the right to self-determination which included a clear cause of action and effective remedies. The LIV is likely to propose changes to address deficiencies in the Victorian Charter in the course of the four-year review which is scheduled to be completed in 2011.

### **3. How could Australia better protect and promote human rights?**

94. Australia could better protect and promote (or 'respect, protect and fulfill') human rights through a range of policy initiatives and law reforms. The LIV strongly supports the creation of a single instrument – a 'National Human Rights Act' – that lists the human rights to be protected and promoted by Australia and establishes specific legal rights, obligations and procedures to protect and promote those rights. Details are set out in section 3.1 below. In addition, the LIV supports a range of policy initiatives and law reforms to Australia's existing human rights policies, laws and institutions. Details are set out in section 3.2 below.

#### **3.1 National Human Rights Act**

95. The LIV calls for the introduction of a National Human Rights Act which provides for:
- a) the protection of all human rights protected under international law and binding on Australia, including economic, social and cultural rights, and all other rights recognised in Australia; and
  - b) a right of enforcement and remedy.
- A National Human Rights Act would effect important changes to parliamentary procedures and governmental processes. Details are set out below.

#### *Reasons for a National Human Rights Act*

96. The LIV considers that any policy initiatives and law reforms must be preceded by a legislated National Human Rights Act as opposed to implementing any changes in policy or law independently of a National Human Rights Act.
97. A National Human Rights Act could improve Australia's human rights performance through a single comprehensive law clearly stating which human rights are protected and promoted and how those human rights are to be protected and promoted in a manner consistent with Australia's international commitments. The rights and obligations would be clearly described for the public authorities required to abide by them, helping to create a culture of human rights protection that can prevent human rights violations and deal with any abuses quickly and openly if they happen.
98. As demonstrated in Victoria, the ACT and abroad,<sup>82</sup> a National Human Rights Act could improve the delivery, transparency and accessibility of public services and enhance the accountability of the government and public service providers. Justice Bell's comments with respect to the Victorian Charter would apply equally to a National Human Rights Act: 'the Charter has communitarian purposes that go beyond the individual. These purposes

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<sup>82</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change* (2008) <<http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>>; Department of Justice and Community Safety (ACT), *Human Rights Act 2004: Twelve-Month Review – Report* (2006) <[http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve\\_month\\_review.pdf](http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf)>; Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), <[http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full\\_review.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf)>.

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include strengthening respect for the rule of law and our fundamental democratic institutions. This strengthens society itself, and every individual in society. Laws and public institutions that respect individual human rights are deserving of society's respect.<sup>83</sup>

99. A National Human Rights Act would also help to improve Australia's human rights standing in the international community.
100. A National Human Rights Act would not undermine the role of the Australian Parliament as law maker. Parliament would continue to make laws and the judiciary would continue to interpret and apply the laws but with the benefit of clear guidance from a single human rights instrument. In the words of the UK's Lord Bingham, 'the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself ... [i]t is wrong to stigmatise judicial decision-making as in some way undemocratic.'<sup>84</sup> As demonstrated in the UK and elsewhere,<sup>85</sup> a National Human Rights Act is unlikely to lead to a large and burdensome number of complaints or an unsustainable drain on government resources.
101. Moreover, the protections afforded by a National Human Rights Act would be applied universally and available to everyone, not just listed minorities or particular groups such as criminals or those accused of criminal offences.

### *An Act of Parliament*

102. The LIV supports a constitutionally entrenched national human rights charter. Constitutional entrenchment would protect the rights from abrogation by any future parliament. We acknowledge with regret that the National Human Rights Consultation Committee's Terms of Reference state that the options identified cannot include a constitutionally entrenched bill of rights. We accept, however, that constitutional amendment would in any event be unlikely in the near term. It is in itself an indictment of Australia's promotion of human rights that many Australians probably do not have a sufficient understanding of human rights protection to participate in an informed way in any referendum needed to effect constitutional change.<sup>86</sup>
103. The LIV would, therefore, support a National Human Rights Act enacted as an Act of the federal parliament. The Act would not apply to past concluded matters, but it would apply to laws, policies and practices, whenever instituted.<sup>87</sup> Although an enacted human rights instrument would be at risk of being repealed by future parliaments, it would still have a useful purpose in pulling together in one instrument all of Australia's human rights commitments and providing a focal point for improved law and decision-making. It would be the LIV's hope that an enacted National Human Rights Act could ultimately lead to a constitutionally entrenched human rights instrument or better constitutional protection of human rights.
104. The enactment of a National Human Rights Act raises many constitutional issues, which are discussed throughout the following sections. A threshold constitutional question

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<sup>83</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [26].

<sup>84</sup> *A (and Ors) v Secretary of State for the Home Department* [2004] UKHL56, [42].

<sup>85</sup> See Part 6 regarding resources in Department for Constitutional Affairs (UK), Review of the Implementation of the Human Rights Act (2006), <[http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full\\_review.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf)>.

<sup>86</sup> See, Amnesty International, 'Majority support the introduction of law to protect human rights in Australia' (Press release, 12 March 2009), <<http://www.amnesty.org.au/news/comments/20460/>>. The opinion poll shows that while support for such a law is high, 84 percent of respondents believe their human rights are sufficiently protected at present in Australia. However, when asked to what extent their human rights are protected under Australian federal law, only 38 percent of respondents say their rights are protected completely. The survey shows that 54 percent believe their rights are only partially protected, and two percent feel their rights are not protected at all. See also, Paula Gerber, From Convention to Classroom: The Long Road to Human Rights Education, in Newell and Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008).

<sup>87</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [334ff].

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concerns the power under which the federal parliament would enact a National Human Rights Act. The primary constitutional power under which the federal parliament could enact a National Human Rights Act is the so-called 'external affairs' power (s.51(xxix)). This power has been interpreted broadly by the High Court of Australia to permit the federal enactment of laws related to matters of international concern.<sup>88</sup> This includes international treaties to which Australia is a party,<sup>89</sup> but it has also included customary international law obligations<sup>90</sup> and provisions in certain non-binding international documents.<sup>91</sup> If any of the rights protected were considered to fall outside the scope of the external affairs power or other constitutional powers, it might be necessary to negotiate with the states for a reference of power to the Commonwealth (s.51(xxxvii) of the Constitution).<sup>92</sup>

### *Identifying the rights protected*

105. A National Human Rights Act should:

- a) list the human rights to be protected and promoted by Australia under the two principal international human rights instruments, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The language of the rights should be modified to reflect plain English and gender neutrality and to reflect the municipal rather than the international context, along the lines of the modifications made in the Victorian Charter;
- b) incorporate by reference the human rights contained in all other international human rights agreements to which Australia is a party;
- c) list all other human rights recognised in Australia;
- d) provide for amendments to be made to incorporate by reference the human rights contained in any international human rights agreements to which Australia becomes a party in the future or which are otherwise recognised in Australia in the future.

### *Limitations on and balance of rights*

106. The LIV agrees with Justice Bell's observation in *Kracke* that 'the interests of people and groups living in society sometimes conflict and must sometimes be balanced. Therefore, in certain cases, human rights might need to be limited'.<sup>93</sup> A limitation on one person's freedom to seek and receive information might be justified, for example, when balanced with someone else's right to privacy. Those limitations must, however, 'relate to societal concerns which are "pressing and substantial"'.<sup>94</sup> Moreover, '[t]he greater the limitation of

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<sup>88</sup> *Commonwealth v Tasmania (the Tasmanian Dam case)* (1983) 158 CLR 1; See further Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2<sup>nd</sup> ed, 2006), 127-130.

<sup>89</sup> See e.g. *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania (the Tasmanian Dam case)* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

<sup>90</sup> *Nulyarimma v Thompson* (1999) 165 ALR 621.

<sup>91</sup> *Victoria v Commonwealth* (ILO Case) (1996) 187 CLR 416, 483 (majority) and *Commonwealth v Tasmania (the Tasmanian Dam case)* (1983) 158 CLR 1, 171-172 (Murphy J); See also P Hanks, *Constitutional Law in Australia* (2<sup>nd</sup> ed, 1996), 430-432.

<sup>92</sup> See e.g. Gerard Carney, 'Uniform personal property security legislation for Australia: A comment on constitutional issues' 14(1) *Bond Law Review* (2002), <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1222&context=blr>>, for a discussion of issues arising from a reference of power from the states in a different context.

<sup>93</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [27].

<sup>94</sup> *Ibid* [145], citing *R v Oakes* [1986] 1 SCR 103.



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the right, the more compelling must be its justification<sup>95</sup> and 'the harm done [in limiting a right] must be proportionate to the benefits achieved'.<sup>96</sup>

107. Under international law, some human rights are 'absolute'<sup>97</sup> but most can be limited in certain circumstances. Under the ICCPR, most rights can be limited in times of public emergency<sup>98</sup> and some rights have 'built-in' limitations that apply all the time. For example, people can be deprived of their right to liberty provided it is done in accordance with the law.<sup>99</sup> A person's rights to freedom of movement and freedom to manifest religious beliefs can also be limited provided it is necessary and prescribed by law. In addition, Australia has made reservations which limit some rights under the ICCPR. Human rights protected under the ICESCR can be subject to 'such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.<sup>100</sup>
108. A National Human Rights Act should preserve absolute rights but provide for all other limitations on human rights which are permitted under international law. The LIV would support the inclusion of a general limitation provision similar to section 7 of the Victorian Charter, provided it is qualified in a way that preserves absolute rights and otherwise ensures that any limitations on human rights are consistent with international law.<sup>101</sup> We note in this respect Justice Bell's analysis of the relationship between section 7 and built-in limitations. His Honour suggests that the built-in limitations are 'an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s.7(2)'.<sup>102</sup> While this analysis might currently reflect the law in Victoria, it is not clear that Justice Bell's approach is how the relationship between a general and built-in limitation would be resolved for the purposes of international law.

#### *Preserving other rights and application in states and territories*

109. A National Human Rights Act should preserve all other human rights not covered or only partially covered in the National Human Rights Act. Like section 5 of the Victorian Charter, a National Human Rights Act could state that a right or freedom not included in the Act that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the states or territories) must not be taken to be abrogated or limited because the right or freedom is not included in the National Human Rights Act or is only partly included.
110. In particular, the National Human Rights Act should expressly state that it *is intended* to operate together with and in addition to laws of the states and territories. Put another way in terms used in equal opportunity legislation, the National Human Rights Act should state that it *is not intended* to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with it.<sup>103</sup> It is important to ensure that the Victorian Charter, for example, is not invalidated by virtue of section 109 of the Constitution.<sup>104</sup>

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<sup>95</sup> Ibid [150].

<sup>96</sup> Ibid [153].

<sup>97</sup> E.g. right to be free from genocide contained in ICCPR, art 6(3); right to be free from slavery and servitude, and systematic racial discrimination contained *Restatement of the Law Third, Foreign Relations Law of the US* (1987).

<sup>98</sup> ICCPR, art 4; ICESCR, art 4.

<sup>99</sup> ICCPR, art 9(1).

<sup>100</sup> ICCPR, art 4; ICESCR, art 4.

<sup>101</sup> See e.g. Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422.

<sup>102</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [109], [747].

<sup>103</sup> See e.g. *Racial Discrimination Act 1975* (Cth), s.6A; *Sex Discrimination Act 1984* (Cth), s.10; *Disability Discrimination Act 1992* (Cth), s.13; and *Age Discrimination Act 2004* (Cth), s.12(3), designed to avoid invalidity of state laws pursuant to s.109 of the *Constitution*.

<sup>104</sup> See e.g. *Viskauskas & Anor v Niland* (1983) 57 ALJR 414, cited and discussed in CCH Australia Limited, *Australian & New Zealand Equal Opportunity Law and Practice* (1984), [2-860].

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111. As discussed in more detail in the relevant paragraphs below, a National Human Rights Act should, to the extent permitted under the Constitution, apply to the states and territories, including local government. To the extent it would not be permitted under the Constitution to apply a National Human Rights Act to the states and territories, the states and territories should be permitted to 'opt in' to the National Human Rights Act by enacting, for example, state and territory legislation that mirrors the National Human Rights Act.

#### *Human rights planning*

112. A National Human Rights Act should be designed to create an understanding and culture of human rights compliance at all stages of making and applying law and policy. A National Human Rights Act should require the federal government to produce, publish and report on compliance with human rights actions plans. The composition of and compliance with those plans should be subject to independent reviews.

#### *Compatibility statements*

113. A National Human Rights Act should state that all draft legislation introduced to parliament must be accompanied by a Human Rights Compatibility Statement. As is the case under the Victorian Charter (s.28(3)), statements of compatibility accompanying new legislation should explain in detail whether or not, and if so how, the legislation is compatible with human rights. Assessments of compliance with the National Human Rights Act for the purposes of a Compatibility Statement must be a genuine, comprehensive and properly described. A Human Rights Compatibility Statement should not be a 'rubber stamp' or an after the fact endorsement of draft laws: the assessment process must be genuine and allow for any appropriate amendments to be made before the draft legislation is introduced to parliament.

#### *Parliamentary scrutiny of new and old laws*

114. Like section 30 of the Victorian Charter, a National Human Rights Act should require scrutiny by an appropriate parliamentary committee (e.g. the Scrutiny of Bills Committee or an equivalent to the relevant UK committee, the Joint Committee on Human Rights). That committee should be required to consider any Bill introduced into Parliament and to report to the Parliament as to whether the Bill is incompatible with human rights. A National Human Rights Act should also require an appropriate body or each government department to review all existing legislation and regulations and to report to Parliament if it considers them to be incompatible with human rights.

#### *Statutory interpretation*

115. A National Human Rights Act should require that all federal, state and territory statutory provisions must be interpreted in a way that is compatible with human rights. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right should be considered in interpreting a statutory provision.
116. The interpretative obligation should preserve parliamentary sovereignty and should be drafted on the basis that 'judges have the role of interpreting legislation and parliament has the role of enacting and amending legislation'.<sup>105</sup> To this end, it might be appropriate to limit the interpretative obligation to interpretations that are *consistent with the purpose* of the statutory provision at issue.<sup>106</sup> We would, however, support a broad reading of the

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<sup>105</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [230].

<sup>106</sup> As is the case in s.32 of the Victorian Charter. See also, Michael McHugh AC, QC, 'A Human Rights Act, the Courts and the Constitution' (Speech delivered at the Australian Human Rights Commission, 5 March 2009), where at p 29 McHugh maintains that, for constitutional reasons, the liberal reading of the interpretative obligation in the UK (which is not so qualified) would not be valid in Australia because it would, in effect, authorise courts exercising federal jurisdiction to amend federal Acts of Parliament. McHugh calls for 'legislation that empowers courts invested with federal jurisdiction to hold that State and Territory legislation that is



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interpretative obligation such that it might require a court 'to depart from original Parliament's intention'.<sup>107</sup>

117. Similar to the equivalent provision in section 32(1) of the Victorian Charter, this interpretative obligation should apply to everybody, not just courts and tribunals. It should be drafted to apply 'to the courts, tribunals, government officials, public authorities and "to everyone else who may have to interpret and give effect to legislation"'.<sup>108</sup> This means that the interpretative obligation applies regardless of whether those affected by the interpretation are private individuals or public authorities and the interpretative obligation will be subject to 'appeal or review in the usual way'.<sup>109</sup>
118. Consistent with our position on findings of incompatibility and proceedings and remedies below, the LIV does not consider it appropriate to include in a National Human Rights Act a provision equivalent to section 32(3) of the Victorian Charter – which states that the interpretative obligation does not affect the validity of an Act that is incompatible with a human right.

### *Findings of incompatibility*

119. To the extent that the Australian Constitution allows, a National Human Rights Act should empower the Federal Court of Australia or the High Court of Australia to find a law to be incompatible with the rights protected under the Act. The finding of incompatibility should invalidate the law. However, the effect of the invalidation or the court's decision to make that finding of incompatibility could be suspended for a fixed period (e.g. six months) until after the federal parliament has had an opportunity to consider and decide whether to override the National Human Rights Act. An override would state that the legislation will apply despite or 'notwithstanding' the provisions of the National Human Rights Act and it would operate for a fixed but renewable period.<sup>110</sup>
120. In providing that the finding of incompatibility would invalidate the law, a National Human Rights Act would differ, for example, from the Victorian Charter, which provides in section 36(5) that a 'declaration of inconsistent interpretation' by the Supreme Court of Victoria does not invalidate the law at issue or create a legal right or cause of action. Providing in a National Human Rights Act for a finding of incompatibility that has legal effect could avoid the constitutional issues that have been raised by commentators in their discussions of a declaratory power that has no legal effect.<sup>111</sup> A finding of incompatibility with legal effect is more obviously within the limits of 'judicial power' for the purposes of the Constitution and is unlikely to be deemed a constitutionally unacceptable 'advisory opinion'.
121. Importantly, by providing for a parliamentary override of the finding of incompatibility, the National Human Rights Act would maintain parliamentary sovereignty. Suspending the invalidation of the finding of incompatibility until after a decision is taken by parliament as to whether or not to override the human rights violation would avoid a situation in which a plaintiff might be able to claim a remedy for that violation in the period before any override is applied.

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inconsistent with the human rights legislation is invalid and that federal legislation is to be read subject to the *Bill of Rights Act* that gives effect to 'the ICCPR and ICESCR' (see p 19),

<[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>.

<sup>107</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [230].

<sup>108</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [206], citing *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

<sup>109</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [207].

<sup>110</sup> Similar to clause 33 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

<sup>111</sup> See e.g. Michael McHugh AC, QC, 'A Human Rights Act, the Courts and the Constitution' (Speech delivered at the Australian Human Rights Commission, 5 March 2009),

<[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>; Dominique Dalla-Pozza and George Williams, 'The constitutional validity of declarations of incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1.

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122. Although a finding of incompatibility with legal effect could avoid some constitutional issues, it might raise other constitutional or legal concerns. For example, is it within the federal courts' power to invalidate legislation under statute (i.e. the National Human Rights Act) if it would otherwise be permitted under the Constitution? Arguably yes, if that power has been granted by parliament and concerns the relationship of one piece of legislation (the National Human Rights Act) with another (the law at issue). Can an override power 'retrospectively' state parliament's intention? Arguably yes. Again, the comparison is between two legislative acts, not a legislative act and the Constitution.<sup>112</sup> Ultimately, a National Human Rights Act would be an entirely new type of Australian law and it will not be possible to resolve all of the constitutional questions until it is put to the test.
123. A finding of incompatibility with legal effect combined with an override power might also be criticised for providing only false security for parliamentary sovereignty. How likely is it that a parliament will be willing to positively state that its laws are intended to violate human rights?<sup>113</sup> The Australian Parliament has not been shy in expressly excluding human rights protections in previous legislation (e.g. exclusion of the *Racial Discrimination Act 1975* in the *Northern Territory National Emergency Response Act 2007*). It has also maintained legislation despite highly reputable findings that it is inconsistent with human rights (e.g. mandatory detention of non-citizens despite findings of the Human Rights Committee and the observations made in *Al-Kateb*).<sup>114</sup> If, however, the Parliament did refrain from applying an override, that decision would itself be an expression of parliamentary sovereignty, informed by the electorate's expectations.

### *Obligations of public authorities*

124. Under a National Human Rights Act, it should be unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. A similar provision is contained in the Victorian Charter (s.38) although, as discussed below, the LIV considers that an equivalent provision in a National Human Rights Act should, in contrast to the Victorian Charter but like the UK Human Rights Act, give rise to a direct cause of action and remedy.
125. The LIV considers that all persons – whether individuals or public or private entities – should be legally bound to observe human rights. We would, however, support a National Human Rights Act that imposed obligations to protect and promote human rights only on 'public authorities' (including private entities with public functions). The definition of a public authority could be based on the definition in section 4 of the Victorian Charter, which includes public officials, entities exercising public functions, the police, local councils and councillors and ministers. Section 4 also lists factors to be taken into account in determining whether a function is of a public nature, including that the function is generally identified with functions of government or the entity is publicly funded to perform the function.

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<sup>112</sup> In *University of Wollongong v Metwally* (1984) 158 CLR 447 the High Court found that the Commonwealth Parliament cannot retrospectively revive a state law previously found inconsistent with the Constitution. In that case the majority of the High Court held that the Commonwealth could not uncover the field and retrospectively revive a state law which had been previously invalidated under s.109 of the Constitution, as this would permit an ordinary Commonwealth statute to prevail over the Constitution.

<sup>113</sup> See e.g. Julie Debeljak, 'Parliamentary sovereignty and dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the line between judicial interpretation and judicial law-making' (2007) 33(1) *Monash University Law Review* 9, where Debeljak discusses the Canadian perspective, stating that of legislation found to have violated human rights, 97% was found by the courts to be reasonable limitations (at p. 19) and that in the remaining 3% of cases, the legislature has been ready to respond (at p. 22). Hilary Charlesworth, 'Who wins under a Bill of Rights?' (2006) 25 *The University of Queensland Law Journal* 39.

<sup>114</sup> See e.g. *A v Australia*, Communication No 560/1993, UN Human Rights Committee, UN Doc CCPR/C/59/D/560/1993 (1993), <<http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument>> ; *Děv E v Australia*, Communication No 1050/2002, UN Human Rights Committee, UN Doc CCPR/C/87/D/1050/2002 (2002), <<http://www.unhchr.ch/TBS/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/9dbcb136a858ebc5c12571cc00532f41?OpenDocument>>.

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126. In contrast to the definition in the Victorian Charter but consistent with the UK Human Rights Act (s.6(3)(a) HRA), we believe that courts and tribunals should also be included in the definition of public authority, regardless of whether they are acting in an administrative, judicial or quasi-judicial capacity. Moreover, the application of a National Human Rights Act to courts and tribunals should not be limited by a provision equivalent to section 6(2)(a) of the Victorian Charter.<sup>115</sup>
127. Constitutional constraints might mean that the obligation on public authorities should be limited to Commonwealth public authorities.<sup>116</sup> It might, however, be appropriate to provide for a mechanism by which states could ‘opt in’ to this obligation.<sup>117</sup> A similar ‘opt in’ opportunity could also be extended to private entities along the lines of that in the ACT.<sup>118</sup>

#### *Proceedings and remedies for all individuals*

128. A person who claims that a public authority has violated its obligations under the National Human Rights Act should be entitled under the National Human Rights Act to bring proceedings against that authority in an appropriate court or tribunal vested with federal jurisdiction. That court or tribunal should be empowered under the National Human Rights Act to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The inclusion of a right to an effective remedy in a National Human Rights Act would be consistent with the *Universal Declaration of Human Rights* (Article 8) and the ICCPR (Article 2).
129. As noted above,<sup>119</sup> the right to bring proceedings and receive remedies would belong to all individuals – but not corporations – who are under Australia’s control, whether or not they are physically within Australia’s territory.
130. The federal Attorney-General and the Australian Human Rights Commission should be adequately notified of and permitted to intervene in proceedings. Equivalent provisions are contained in the Victorian Charter (ss34 and 40) and have been the subject of a practice note by the Supreme Court of Victoria.<sup>120</sup>
131. In contrast, for example, to the UK Human Rights Act (ss 7-8), the Victorian Charter does not provide for a direct cause of action or remedies for a violation of a public authority’s obligation to comply with human rights. Instead, the Victorian Charter provides that a Charter violation may be raised only in connection with another cause of action and states that no damages can be awarded for a Charter breach (s.39). In the LIV’s view, the Victorian Charter’s limitation on proceedings and damages is inappropriate and unclear and should not be replicated in the National Human Rights Act.
132. It might also be appropriate to provide for non-judicial complaints mechanisms and relief which could be used before resorting to a court or tribunal. The Australian Human Rights Commission or the Commonwealth Ombudsman’s Office might be an appropriate body to manage a complaints mechanism, although it would require adequate resources and powers.

#### *Education, reporting and review*

133. The National Human Rights Act should provide for a public awareness and education programme as well as government reporting on, and a regular and independent review of, the implementation of the National Human Rights Act. The Australian Human Rights

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<sup>115</sup> See further, *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009), Part C ‘Application of Charter to Courts and Tribunals’.

<sup>116</sup> The limits on federal powers under the Australian Constitution might mean that state public authorities cannot be bound by obligations imposed under a federal act.

<sup>117</sup> Any ‘opt-in’ by the states and territories would have to be done in accordance with any procedures necessitated by the Australian Constitution.

<sup>118</sup> See s.40D of the *Human Rights Act 2004* (ACT).

<sup>119</sup> See above, para 55.

<sup>120</sup> Supreme Court Practice Note No. 3; Notification of Matters Arising Under the *Charter of Human Rights and Responsibilities Act 2006*.

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Commission might be an appropriate body to perform aspects of the education and review functions. A National Human Rights Act could also provide for a review after a period of several years to determine whether any improvements should be made to the Act or whether it should be constitutionally entrenched.

134. Human rights education could be greatly enhanced by a specific mandate in a National Human Rights Act for a national human rights body such as the Australian Human Rights Commission as well as for appropriate education bodies. In elaborating on the right to education, the *Universal Declaration of Human Rights* specifically states that '[e]ducation shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms' (Article 26). Rights to education on human rights are also found in several treaties to which Australia is a party, including the *Convention on the Rights of the Child* (Article 29).<sup>121</sup> Australia's performance in implementing these rights is, however, very poor.<sup>122</sup> Reasons cited for Australia's poor human rights education in schools include a crowded educational curriculum, the lack of a government mandate and corresponding resources, and a lack of training.<sup>123</sup> Any mandate for human rights education would need to address impediments to its implementation.

### Resources

135. The federal government would need to ensure that appropriate resources are made available to support the effective implementation of a National Human Rights Act. Funding would be needed to employ and train public servants and authorities on the National Human Rights Act and their obligations under it. Funding would also be needed to support any review and education functions contained in a National Human Rights Act.

### 3.2 Human rights policy initiatives and law reforms

136. The LIV considers that a National Human Rights Act enacted by the parliament as described in section 3.1 above would help to improve Australia's protection and promotion of human rights. Our vision for a National Human Rights Act would require the federal government to establish procedures, employ and train staff and provide funding to enable, for example:

- A **comprehensive review of existing laws**, assessing their consistency with human rights, identifying any gaps in the protection of human rights and proposing amendments to those laws found to be inconsistent with human rights or proposing new laws. One outcome of this process in Victoria is the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009* (Vic). Major legislative reviews, such as Victoria's review of the Mental Health Act, are also required to take account of the Victorian Charter.<sup>124</sup>
- The **assessment of any proposed new laws** for their consistency with human rights and the preparation of compatibility statements. In Victoria, many compatibility statements have been produced, with varying success, but nevertheless transparent, in assessing the human rights implications of new laws.<sup>125</sup>

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<sup>121</sup> See e.g. ICESCR, art 13, *Convention on the Elimination of Racial Discrimination*, art 7, *Convention on the Elimination of Discrimination Against Women*, art 10; UNESCO *Convention on the Elimination of Discrimination in Education*, art 5.

<sup>122</sup> See Human Rights Committee of the United Nations, *Consideration of reports submitted by states parties under article 40 of the covenant: Concluding observations of the Human Rights Committee, Australia*, UN Doc CCPR/C/AUS/CO/5 (16 March – 3 April 2009), <<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>>; See also Paula Gerber, 'From Convention to Classroom: The Long Road to Human Rights Education' in Newell and Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008).

<sup>123</sup> Paula Gerber, 'From Convention to Classroom: The Long Road to Human Rights Education' in Newell and Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008).

<sup>124</sup> Minister for Mental Health, Hon Lisa Neville MP, *Mental Health Act 1986 Review, Terms of Reference* (2008), <<http://www.health.vic.gov.au/mentalhealth/mhactreview/termsofref.pdf>>.

<sup>125</sup> Victorian Equal Opportunity and Human Rights Commission, *Register of Compatibility Statements*, <<http://www.humanrightscommission.vic.gov.au/human%20rights/the%20victorian%20charter%20of%20human%20rights%20and%20responsibilities/>>.

- The **production and publication of human rights action plans** designed to create an understanding and culture of human rights compliance at all stages of public decision-making and application of law and policy, together with reports on compliance with the plans and human rights compliance in general.
  - The **instruction of decision-makers and public authorities** on their obligations to act compatibly with human rights, to take human rights into account in their decisions and planning, and to interpret laws in a way that is compatible with human rights. The Victorian Department of Justice guide to legislation and policy officers is an example of how public servants are being informed of their obligations under the Victorian Charter.<sup>126</sup>
  - **Public awareness and education campaigns** on human rights, aimed at the public service, schools and the wider community. In Victoria, the Victorian Equal Opportunity and Human Rights Commission has been charged with the role of educating the wider community and has developed a range of resources and programmes in this capacity.<sup>127</sup>
137. A National Human Rights Act would be an overarching legislative instrument: some human rights would still require **more detailed constitutional or legislative protection**. To this end, the federal government could improve Australia's protection and promotion of human rights by, for example:
- fulfilling its pledge to recognise Indigenous Australians in the Constitution<sup>128</sup>
  - building on the work of the Standing Committee of Attorneys-General to harmonise and improve Australia's anti-discrimination laws<sup>129</sup>
  - acting on proposals to place appropriate legislative limits on executive powers and discretion.<sup>130</sup>
138. In addition to specific law reforms, the federal government could introduce **systemic reforms** to improve Australia's protection and promotion of human rights by, for example:

<sup>126</sup> Department of Justice, Guidelines for Charter,

<<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter/JUSTICE+-+Guidelines+for+Charter+of+Human+Rights>>. Note also relevant amendments to the Public Administration Act 2004 (Vic) effected by s47 and the Schedule to the Victorian Charter.

<sup>127</sup> Victorian Equal Opportunity and Human Rights Commission, Making rights real: Seminars on how to use human rights and equal opportunity laws in the community, at work, at school and in sport – January to June 2009,

<<http://www.humanrightscommission.vic.gov.au/education%20and%20training/community%20workshops/>>; see also Department of Justice,

<<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter/JUSTICE+-+Human+Rights+Training+and+Communication>>.

<sup>128</sup> See, Natasha Robinson and Samantha Maiden, 'No rush to Indigenous amendment to Constitution' *The Australian*, 25 July 2008, <<http://www.theaustralian.news.com.au/story/0,25197,24074088-5013871,00.html>>.

<sup>129</sup> See, National Anti-Discrimination Law Information Gateway, <[www.antidiscrimination.gov.au](http://www.antidiscrimination.gov.au)>; See also, Standing Committee of Attorneys General, *Communiqué* (November 2008),

<[http://www.scag.org.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC/\\$file/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC](http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/$file/SCAG_Communique_6-7_November_2008_FINAL.DOC)>.

<sup>130</sup> There has been an increasing trend in federal law and policy to introduce and use broad executive powers at the expense of procedural fairness, the rule of law and fundamental human rights: see e.g. Senate Select Committee on Ministerial Discretion in Migration Matters, The Parliament of Australia, *Report* (March 2004), <[http://www.aph.gov.au/senate\\_minmig/report/report.pdf](http://www.aph.gov.au/senate_minmig/report/report.pdf)>; Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/HRC/10/3 (4 February 2009); Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), <[http://www.hreoc.gov.au/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf)>; Law Council of Australia, *Northern Territory National Emergency Response Legislation: Submission to the Senate Standing Committee on Legal and Constitutional Affairs* (9 August 2007),

<[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=8C764CFA-1C23-CACD-22D9-5C6BB80CE5FF&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C764CFA-1C23-CACD-22D9-5C6BB80CE5FF&siteName=lca)>.



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- working with the Australian Human Rights Commission to identify how it can be better equipped to assist in the protection and promotion of human rights<sup>131</sup>
  - improving the methods of engaging civil society in the reform of law and policy, providing more opportunities and time for engagement, and building the capacity of civil society to participate effectively in those processes.

139. It would be possible for the federal government to undertake many of the initiatives listed above before the enactment by parliament of a National Human Rights Act, possibly developing a human rights 'declaration' to guide the initiatives. Amendments to existing federal counter-terror laws, migration laws and laws affecting Indigenous communities could, for example, be developed on the basis of Australia's human rights commitments in the absence of a National Human Rights Act. A National Human Rights Act would, however, provide an important mandate and impetus for such initiatives.

## Conclusion

140. The LIV is committed to the establishment of a National Human Rights Act. We consider it a vital measure to better protect and promote human rights in Australia. As an organisation representing the Victorian legal profession and their colleagues in the legal sector, we consider ourselves well placed to provide input into the nature and content of a National Human Rights Act. Our experience of the Victorian Charter informs our contribution to the national discussion. We would be grateful for any opportunity to elaborate on the issues raised in our submission in person or through further written submissions.

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<sup>131</sup> See eg, Attorney-General, Robert McClelland, Australia and International Human Rights: Coming in from the cold (Speech delivered at the Human Rights and Equal Opportunity Commission, 23 May 2008), <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_HumanRightsandEqualOpportunityCommission](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_HumanRightsandEqualOpportunityCommission)>.