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ENGAGE, EDUCATE, EMPOWER:
National Human Rights Consultation
Submission on Measures and Initiatives to
Promote and Protect Human Rights

April 2009



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (d) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;
- (e) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (f) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and
- (g) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

This submission was prepared with research assistance from Mallesons Stephen Jaques and Robin Perry.

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Acronyms

Australian Human Rights Commission	AHRC
Community Legal Centre	CLC
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW
Convention on the Elimination of Discrimination in Education	CEDE
Convention on the Rights of the Child	CROC
Deductible Gift Recipient	DGR
Human Rights Committee	HRC
Human Rights Impact Assessments	HRIAs
Human Rights Law Resource Centre	HRLRC
Income Tax Assessment Act 1997 (Cth)	ITAA
Income Tax-Exempt Charity	ITEC
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
Joint Parliamentary Committee on Human Rights	JPCHR
National Association of Community Legal Centres	NACLC
Non-Government Organisation	NGO
Public Interest Law Clearing House (Vic)	PILCH
United Nations Educational, Scientific and Cultural Organisation	UNESCO
Universal Declaration of Human Rights	UDHR

1. Introduction

1.1 Scope of this Submission

1. This submission of the Human Rights Law Resource Centre (**HRLRC**) is the second of two submissions to the National Human Rights Consultation:
 - (a) the **first submission** considers the current protection of human rights in Australia and legislative measures to strengthen the protection and promotion of human rights in Australia, including the enactment of a comprehensive Human Rights Act; and
 - (b) the **second submission** looks at a range of other measures to strengthen the protection and promotion of human rights in Australia, in addition to the legislative measures outlined in the first submission.
2. This submission focuses on the third 'key question' raised in the Committee's Terms of Reference, namely, 'how could Australia better protect and promote human rights?' The recommendations contained in this submission are stand-alone responses to this question. In addition, the recommendations are necessary complements to human rights legislation (covered in the HRLRC's first submission). For instance, implementing initiatives designed to improve human rights education (recommendations 9-11) is also essential to the effective implementation and operation of a federal Human Rights Act.
3. This submission does not consider in any detail ways in which Australia could better protect and promote human rights abroad. Rather, it focuses on the improved protection of the human rights of people within Australia's territory.

2. Executive Summary

4. The model of legislative human rights protection proposed in the HRLRC's first submission is intended to build a culture of human rights, rather than simply introduce a new sphere of legal activity. Of course, cultural change is not achieved through the enactment of laws alone. Reform in the following areas (each of which is considered in this submission) is also necessary to strengthen the protection and promotion of human rights in Australia:
- (a) the role, power and resourcing of the Australian Human Rights Commission (**AHRC**);
 - (b) human rights education;
 - (c) access to justice;
 - (d) support for and engagement with human rights NGOs;
 - (e) international engagement;
 - (f) monitoring and compliance;
 - (g) equality legislation; and
 - (h) business and human rights.
5. This list is not intended to be exhaustive. The HRLRC considers that the protection and promotion of human rights is an ongoing process which should be periodically reviewed and reconsidered by Government.

2.1 Recommendations

Recommendation 1: Expand the functions and powers of the Australian Human Rights Commission (AHRC)

The functions of the AHRC should be expanded so that it can conduct inquiries on any matter affecting human rights in Australia, and the AHRC should be granted the powers necessary to conduct such inquiries appropriately, such as the power to compel the provision of information and documents.

Recommendation 2: AHRC to consider the human rights implications of legislation

The powers of the AHRC be expanded to enable it to consider (on its own motion) and report on the human rights implications of any existing or proposed Commonwealth, state or territory legislation.

Recommendation 3: Increase the investigative powers of the AHRC

The AHRC should be given the power to:

- initiate investigations of its own motion where it becomes aware of potential infringements of anti-discrimination legislation and other human rights instruments; and
- conduct those investigations appropriately, including where necessary using powers to enter and search premises and to compel the production of information and evidence.

Recommendation 4: AHRC to seek enforcement of conciliation agreements

The AHRC should be given the power to, on its own motion, seek enforcement of conciliation agreements that are entered into as a result of AHRC procedures.

Recommendation 5: AHRC to make codes of conduct for complaints resolution

The AHRC should be given the power to make binding codes of conduct or guidelines setting out the process for the resolution of complaints by the AHRC under Federal anti-discrimination law and other human rights instruments.

Recommendation 6: AHRC to have a court intervention role

The AHRC should be given the right to intervene in all proceedings where significant human rights issues arise.

Recommendation 7: Increase recurrent funding to the AHRC

The Commonwealth Government should increase recurrent funding of the AHRC to levels where it will be able to properly protect and promote human rights through its policy development, education, research, and inquiry functions.

Recommendation 8: AHRC's funding to increase as its responsibilities grow

In the event that the AHRC receives any additional responsibilities in the future, the Government should provide additional funding so that the AHRC can properly undertake the activities required of it.

Recommendation 9: Appointment of discrimination Commissioners

The Australian Government should appoint a full-time Race Discrimination Commissioner, Disability Discrimination Commissioner and a separate Commissioner responsible for Age Discrimination.

Recommendation 10: All teachers should be provided with human rights education training

All pre-service and in-service teachers should be provided with human rights education training.

Recommendation 11: AHRC to receive additional funding for developing human rights education materials

Additional funding and resources should be provided to AHRC for the continuing development of human rights education materials and for the systematic distribution of this material to schools.

Recommendation 12: Increase government funding for community legal centres

Government funding for community legal centres should be increased to enable them to continue to provide access to justice for those who are unable to afford private legal assistance and do not qualify to receive legal aid.

Recommendation 13: Introduce mandatory contractual pro bono requirements for legal firms participating in the Commonwealth legal scheme

The Attorney-General should introduce a mandatory contractual requirement that each legal firm that is a participant of the Commonwealth legal scheme must commit to provide pro bono services of at least 5% of the value of the legal fees they derive under the panel arrangements.

Recommendation 14: Implement the recommendations from the 2007 National Legal Aid Report

The Government should implement the recommendations contained in the 2007 National Legal Aid Report, *A New National Policy for Legal Aid in Australia*, including actions in the following six priority areas of need as identified by Australia's eight Legal Aid Commissions:

- (a) supporting Australian families and protecting vulnerable family members;
- (b) supporting Australians at risk of social exclusion due to poverty;
- (c) supporting Indigenous Australians at risk of social exclusion;
- (d) supporting Australians at risk of social exclusion due to special circumstances;
- (e) supporting a fair criminal justice system;
- (f) supporting human rights and equal opportunity.

Recommendation 15: Hold Annual Conversations between government and human rights organisations

An Annual Conversation should be held between the Commonwealth Government (relevant minister or parliamentary secretary) and human rights organisations.

Recommendation 16: Establish a Human Rights Leadership Group

A Human Rights Leadership Group comprising key government decision makers, local government representatives, peak human rights NGOs, human rights experts and human rights advocacy organisations should be established to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of a federal Human Rights Act.

Recommendation 17: Establish an annual summit for human rights organisations

An annual summit for human rights organisations should be established and funded.

Recommendation 18: Amend the Income Tax Assessment Act to include human rights as a charitable purpose

The *Income Tax Assessment Act* should be amended to include 'the promotion and protection of human rights' as a charitable purpose, so as to allow human rights organisations to access deductible gift recipient and income tax-exempt charity concessions.

Recommendation 19: Increase funding for human rights organisations

Funding for human rights organisations should be reviewed and increased in light of the government's commitment to human rights, and the crucial role human rights organisations play in achieving a human rights culture.

Recommendation 20: Establish grants for human rights organisations

Specific human rights grants should be made available for organisations that aim to protect and promote human rights.

Recommendation 22: Australian Government to engage with UN human rights bodies

The Australian Government should commit to robust engagement with UN human rights bodies and support the effective operation of these bodies through:

- (g) taking a principled and consistent approach to human rights internationally; and
- (h) resourcing non-government participation in UN processes.

Recommendation 23: Government to conduct a human rights audit of its relationship with other States

The Australian Government should conduct a human rights audit of its relationship with developing countries in particular, including in the areas of aid, trade, defence co-operation and business engagement. Australia's human rights obligations should be mainstreamed in each of these areas.

Recommendation 24: Promoting the human rights responsibilities of business

The government should convene a forum in which both soft and hard power options for promoting the human rights responsibilities of business are considered.

Recommendation 25: Government should implement measures to protect against corporate human rights violations

The government should implement legislative and non-legislative measures to enhance the effective discharge of its obligation to protect against corporate human rights violations. Specifically, positive consideration should be given to the following initiatives:

- (i) incorporating human rights-based provisions in government contracts;
- (j) requiring human rights impact assessments on government and PPP projects;
- (k) resourcing and supporting human rights market indices and certification programs;
- (l) commissioning and resourcing the AHRC to take an active role in relation to the human rights implications of business activity; and
- (m) promoting, enhancing and, where necessary, resourcing the OECD National Contact Point to ensure that it is well understood as a mechanism for complaints against corporations.

Recommendation 26: Hold a public inquiry into the merits of an Equality Act

The Government should hold a national, public inquiry into the merits of a single, comprehensive Equality Act.

Recommendation 27: An Equality Act to include a provision for a constitutional amendment inquiry

A Federal Equality Act should include a provision mandating that after three years of operation an inquiry be held into a constitutional amendment aimed at enshrining the right to equality.

3. The Australian Human Rights Commission

3.1 Introduction

6. The AHRC is Australia's independent statutory human rights body at the Federal level.¹ Currently, the AHRC develops human rights education programs, advises the Australian Government on human rights issues, conducts research into human rights issues, and inquires into and conciliates complaints of unlawful discrimination.² Given these important functions, a strong and effective AHRC is essential for the adequate protection and promotion of human rights in Australia.
7. The HRLRC submits that in addition to the above functions, the AHRC should have a broader role in relation to human rights and anti-discrimination law in Australia, in order for it to comply with international standards for national human rights institutions.
8. The following sections set out:
 - (a) the applicable international standards for national human rights institutions;
 - (b) the changes required to the AHRC's functions and powers to bring the AHRC into line with international standards; and
 - (c) the resourcing required for the AHRC to function appropriately.

3.2 International Obligations and Norms

(a) ***Australia's international obligations***

¹ The AHRC was known as the Human Rights and Equal Opportunity Commission (**HREOC**) until September 2008. This submission will use 'AHRC' consistently to refer to this body.

² See generally, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1) (**HREOC Act**); Human Rights and Equal Opportunity Commission, *Annual Report 2007–2008* (2008). The AHRC is responsible for administering the following Commonwealth laws: the *Age Discrimination Act 2004*; the *Disability Discrimination Act 1992*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984* and the *Human Rights and Equal Opportunity Commission Act 1986*. The AHRC also has specific responsibilities under the *Native Title Act 1993* (to report on the exercise and enjoyment of the human rights of Indigenous Australians with regards to native title, a role specifically undertaken by the Aboriginal and Torres Strait Islander Social Justice Commissioner), and the *Workplace Relations Act 1996* (in relation to federal awards and equal pay, a role specifically undertaken by the Sex Discrimination Commissioner).

9. While international law does not expressly prescribe the powers required to be given to national human rights bodies, under article 2(3) of the *International Covenant on Civil and Political Rights (ICCPR)*³ Australia is required to:
- (a) enact laws to implement Australia's obligations under the ICCPR;
 - (b) provide an effective remedy for individuals whose human rights have been violated; and
 - (c) institutionally safeguard rights by way of procedural guarantees, the establishment of legal institutions and other positive legislative, administrative, political or judicial measures.⁴
10. The UN's Human Rights Committee (**HRC**) has observed that under article 2(3) of the ICCPR, State parties have a general obligation to investigate violations of human rights through independent and impartial bodies. Administrative mechanisms, such as national human rights institutions endowed with appropriate powers, can contribute to the fulfilment of that obligation.⁵ A failure by a State party to adequately investigate allegations of human rights violations could, in and of itself, give rise to a separate breach of the ICCPR.⁶
- (b) The 'Paris Principles'**
11. The principle source of normative standards for national human rights bodies is the 'Paris Principles', endorsed by both the UN Commission on Human Rights (now the UN Human Rights Council) and the General Assembly. Amongst the various norms they set out, the Paris Principles state, importantly, that a human rights institution's role, powers and mandate should be as broad as possible.⁷ Of relevance to the AHRC, human rights institutions are said to be more effective in protecting and promoting rights when they, among other things:⁸
- (a) treat human rights issues systematically;
 - (b) handle individual complaints speedily and effectively;

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

⁴ M Nowak, *UN Covenant Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 38.

⁵ UN HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004), [15].

⁶ *Ibid.*

⁷ *Paris Principles*, UN DOC A/RES/48/134 (20 December 1993), principle 2.

⁸ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005), p 7.

- (c) have a broad and non-restrictive mandate;
- (d) have an all-encompassing jurisdiction; and
- (e) have the power to monitor compliance with their recommendations and advice.

3.3 Broadening the Role and Functions of the AHRC

12. While the HRLRC acknowledges that the AHRC already has a number of important functions and powers, its current functions fall short of the norms provided in international law and the Paris Principles. In particular, the AHRC does not have power to:
- (a) conduct formal inquiries into a broad range of matters affecting human rights across Australia;
 - (b) examine all Australian laws for compliance with human rights;
 - (c) properly investigate breaches of anti-discrimination laws and human rights instruments on its 'own motion' without an individual complaint;
 - (d) effectively monitor compliance with conciliation agreements; and
 - (e) intervene 'as of right' in litigation where human rights issues are raised.
13. The HRLRC submits that expanding the AHRC's powers to include the powers set out above would lead to better compliance with Australia's international human rights obligations — particularly under the Paris Principles — and generally contribute to the better protection of human rights in Australia. Each of these amendments is discussed in turn below.
- (a) Formal powers of inquiry into systemic human rights violations**
14. Under section 11 of the *Human Rights and Equal Opportunity Act*, the AHRC has power 'to inquire into any act or practice that may be inconsistent with or contrary to any human right'. This inquiry power is limited to 'acts' or 'practices':
- (a) of the Commonwealth or Territory governments;
 - (b) done under an enactment of the Commonwealth or Territory; or
 - (c) engaged in wholly or partly within an Territory.⁹

⁹ HREOC, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex Discrimination Act 1984* (2008), p 222. Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(f), the AHRC has the power to inquire 'into any act or practice that may be inconsistent with or contrary to any human right'. However this power is limited in the fashion described above by the definitions of 'act' and 'practice' in sub-section 3(1).

These limitations severely limit the AHRC's ability to inquire into systemic human rights concerns that do not involve the Commonwealth (for example systemic human rights issues arising out of state government acts, practices and laws) and which occur wholly within states.¹⁰

15. Although the AHRC can respond to individual complaints of human rights violations in relation to a wide range of actors, the AHRC does not currently have 'a general power to conduct inquiries independent of a complaint into many of the broad public issues' related to human rights protection in Australia.¹¹ Further, the AHRC does not have the necessary powers, such as the power to compel the giving of information or the production of documents, which are required to conduct an effective inquiry.¹²
16. The ICCPR and the Paris Principles require that the powers of national human rights bodies should be broadly exercisable on the widest range of individual or collective issues.¹³ For the above reasons, the AHRC's powers to inquire into human rights concerns currently fall short of those required by the ICCPR and the Paris Principles.
17. The HRLRC submits that it is important that the AHRC has broad power to conduct formal inquiries into any act or practice which may be inconsistent with human rights, regardless of whether the entity responsible is a state, territory or the Commonwealth Government or where the act or practice occurs in Australia. This broad power is vital to enabling the AHRC to address systemic human rights problems.
18. The AHRC's powers of inquiry should also be expanded to include the usual inquiry powers such as the power to compel the giving of information or production of documents. The HRLRC also submits that it would be appropriate to consider imposing a requirement similar to that which exists in South Africa, which positively requires all organs of government to afford

¹⁰ By contrast, the AHRC has broad powers to investigate discrimination in employment, including systemic discrimination and the acts or practices of a state authority or done under state law. Under sub-section 31(b) of the HREOC Act, the AHRC can to conduct inquiries into discrimination in employment, including systemic discrimination and including the acts or practices of a state authority or under state law. Sub-section 30(1) of the HREOC Act expands the definition of 'act' and 'practice' in this instance to cover state law and actions of state authorities; see also *Ibid*.

¹¹ Evidence to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex Discrimination Act 1984, Committee Hansard, 9 September 2008, p 23 (The Hon John von Doussa QC, former President of AHRC).

¹² Sub-section 33(c) of the HREOC Act; HREOC, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry*, above n 9, pp 222–223.

¹³ See above n 7 and accompanying text.

the AHRC such assistance as may be reasonably required for the effective exercise of its powers and the performance of its duties and functions.¹⁴

19. Furthermore, there should be a formal obligation on the Government to publicly respond to the AHRC's reports that result from these inquiries. To this end, consideration should be given to introducing a requirement for the tabling of these reports in the Australian Parliament.¹⁵

Recommendation 1: Expand the functions and powers of the Australian Human Rights Commission (AHRC)

The functions of the AHRC should be expanded so that it can conduct inquiries on any matter affecting human rights in Australia, and the AHRC should be granted the powers necessary to conduct such inquiries appropriately, such as the power to compel the provision of information and documents.

(b) Examination of all Australian laws

20. Section 11(1)(e) of the HREOC Act provides that the AHRC has the power to:
- Examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination.
21. Under this provision, the AHRC can only examine Commonwealth and Territory enactments and can only consider *proposed* enactments in these jurisdictions when specifically requested by the Government.¹⁶ The AHRC cannot examine state legislation.
22. As stated above, the ICCPR and the Paris Principles require that the powers of national human rights bodies be broadly exercisable on the widest range of individual or collective issues.¹⁷ The restrictions imposed as to the legislation that the AHRC can examine means that the AHRC's powers in this area fall short of those requirements. It is extremely important

¹⁴ South African *Human Rights Commission Act*, no 54 of 1994, s 7(2). The South African Human Rights Commission is established under the *Constitution of the Republic of South Africa* and assists in the administration of South Africa's constitutional Bill of Rights.

¹⁵ Currently the AHRC only provides its reports to the Federal Attorney-General: HREOC Act s 11(1)(f)(ii), (j) and (k).

¹⁶ HREOC Act s 11(1)(e).

¹⁷ See above n 7 and accompanying text.

that the AHRC have powers to examine all existing and proposed Commonwealth, state and territory legislation for compliance with human rights.

Recommendation 2: AHRC to consider the human rights implications of legislation

The powers of the AHRC be expanded to enable it to consider (on its own motion) and report on the human rights implications of any existing or proposed Commonwealth, state or territory legislation.

(c) Investigative powers of the AHRC

23. The AHRC should be empowered to initiate its own investigations into an individual violation in circumstances where it becomes aware of potential infringements of human rights. Currently the AHRC must first receive a complaint in order to investigate any potential misconduct; it cannot act of its own initiative even where it independently becomes aware of infringements. The HRLRC submits that the AHRC's current powers under Part IIB of the HREOC Act to investigate and refer complaints of unlawful discrimination in individual cases are not broad enough. This compares unfavourably with the situation in Canada, where the Canadian Human Rights Commission has the power to initiate complaints for breaches of the *Canadian Human Rights Act*.¹⁸
24. The AHRC's powers to investigate potential anti-discrimination breaches are also out of step with those Australian bodies that administer laws relating to occupational health and safety, corporate misconduct and trade practices. For example, at the Commonwealth level, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission are able to exercise broad powers if they suspect a contravention of the laws they administer. In particular, these agencies have the power to enter premises, seize property and require a person to furnish information.¹⁹ Workplace health and safety

¹⁸ See *Canadian Human Rights Act, RS 1985, c H-6, s 40(3)*

¹⁹ *Trade Practices Act 1974 (Cth) Part XIX; Australian Securities and Investments Commission Act 2001 (Cth) Part 3.*

- agencies in each state have similar powers,²⁰ with the obstruction of inspectors criminalised in most jurisdictions.²¹
25. The HRLRC also submits that in undertaking investigations, AHRC officers should be given broader powers of investigation, including powers to enter premises and to compel the production of information and evidence. Australian practice has demonstrated that the availability and use of such powers in other areas has at least partly contributed to a far greater compliance culture. To the extent that a similar culture could be fostered in relation to the promotion of equality and prevention of discrimination through investigative powers, such additional powers should be granted to the AHRC.
26. Broader powers of investigation are available in a number of other countries, including Canada, the UK, and Ireland. In Canada, an investigator considering a complaint under the *Canadian Human Rights Act* may, with a warrant, at any reasonable time enter and search any premises in order to carry out their inquiries,²² and may require any individual found in any premises entered to produce material that may be relevant to the investigation being conducted by the investigator.²³ In addition, the Canadian Human Rights Commission's compliance officers have a general power to conduct compliance audits on an employer.²⁴ Compliance officers also have the power to enter premises and to require the production of material.²⁵
27. In South Africa, the South African Human Rights Commission has the power to designate an investigation officer to investigate a complaint. That officer may require a person to appear before the Commission and produce any documents which are relevant to the investigation.²⁶ Any person so required to appear will be compelled to answer all questions put to him or her

²⁰ *Occupational Health and Safety Act 1989* (ACT) Part 6; *Occupational Health and Safety Act 2000* (NSW) Part 5 Div 2; *Workplace Health and Safety Act 2007* (NT) Part 7; *Workplace Health and Safety Act 1995* (Qld) Part 9; *Occupational Health, Safety and Welfare Act 1986* (SA) s 38; *Workplace Health and Safety Act 1995* (Tas) s 36; *Occupational Health and Safety Act 2004* (Vic) Part 9; *Occupational Safety and Health Act 1984* (WA) Part V.

²¹ *Occupational Health and Safety Act 2000* (NSW) s 136; *Workplace Health and Safety Act 2007* (NT) s 73; *Workplace Health and Safety Act 1995* (Qld) s 173; *Occupational Health, Safety and Welfare Act 1986* (SA) s 38(8); *Workplace Health and Safety Act 1995* (Tas) s 37; *Occupational Health and Safety Act 2004* (Vic) s 125; *Occupational Safety and Health Act 1984* (WA) s 47.

²² *Canadian Human Rights Act*, s 43(2.1).

²³ *Ibid*, s 43(2.4).

²⁴ *Canadian Employment Equity Act*, SC 1995, c 44.

²⁵ *Ibid*, s 23(1).

²⁶ *South African Human Rights Commission Act*, no 54 of 1994, s 9(1)(c).

regarding any fact or matter connected with the investigation notwithstanding that the answer may incriminate him or her.²⁷

Recommendation 3: Increase the investigative powers of the AHRC

The AHRC should be given the power to:

- initiate investigations of its own motion where it becomes aware of potential infringements of anti-discrimination legislation and other human rights instruments; and
- conduct those investigations appropriately, including where necessary using powers to enter and search premises and to compel the production of information and evidence.

(d) Powers to monitor and seek enforcement of compliance

28. The ICCPR and the Paris Principles require that bodies such as the AHRC be empowered to investigate and ascertain compliance with orders that may be issued as a result of their investigations. The AHRC should therefore be given the additional power to, on its own motion, seek compliance with the conciliation agreements that are entered into as a result of AHRC procedures. These powers would be particularly useful where a complaint has been resolved in the context of a continuing relationship between the parties (for example, in respect of employment or tenancy arrangements).
29. Where the AHRC finds that a conciliation agreement is not being complied with, the AHRC should be empowered to seek enforcement of compliance in the courts. In the UK, the Equality and Human Rights Commission (**EHRC**) is empowered to make an application to a County Court for an injunction restraining (or interdict prohibiting) a person from committing an unlawful act.²⁸ The EHRC can also issue 'unlawful act notices' to persons under investigation or who have committed an unlawful act related to human rights. Such notice can, for example, require a person to prepare an action plan to avoid continuation of an unlawful act. Action plans can be enforced by court order.²⁹ The EHRC can also enter into an agreement with a person under which the person undertakes not to commit an unlawful act of a specified kind

²⁷ Ibid, s 9(2)(a)(i).

²⁸ UK *Equality Act*, s 24(1).

²⁹ Ibid, s 22(6).

and take, or refrain from taking, other specified action. Again, the EHRC is empowered to enforce such undertakings in the courts.³⁰

30. In addition, anti-discrimination compliance in Australia would be greatly assisted by giving the AHRC the power to make binding codes of conduct or guidelines regarding the process for the resolution of all complaints under Federal anti-discrimination law and concerning human rights. Such codes could be binding on the Commission as well as the parties to a complaint. Such a power exists in Canada.³¹ The availability of guidelines would go some way to removing the 'legalese' involved in the administration of anti-discrimination laws, and would provide employers and the community with greater clarity regarding their rights and responsibilities under Federal anti-discrimination and human rights law. Such powers would also be similar to those currently afforded to occupational health and safety agencies³² and the federal Privacy Commissioner.³³

Recommendation 4: AHRC to seek enforcement of conciliation agreements

The AHRC should be given the power to, on its own motion, seek enforcement of conciliation agreements that are entered into as a result of AHRC procedures.

Recommendation 5: AHRC to make codes of conduct for complaints resolution

The AHRC should be given the power to make binding codes of conduct or guidelines setting out the process for the resolution of complaints by the AHRC under Federal anti-discrimination law and other human rights instruments.

(e) Court intervention role

³⁰ Ibid, s 23(1).

³¹ See *Canadian Human Rights Act*, s 27(2). These guidelines are binding on the Canadian Human Rights Commission and any member or panel assigned under the *Canadian Human Rights Act* with respect to the resolution of a complaint under the *Canadian Human Rights Act* in respect of a case falling within the description contained in the guidelines.

³² *Occupational Health and Safety Act 1989 (ACT)* s 206; *Occupational Health and Safety Act 2000 (NSW)* ss 40-46; *Workplace Health and Safety Act 2007 (NT)* s 61; *Workplace Health and Safety Act 1995 (Qld)* s 41; *Occupational Health, Safety and Welfare Act 1986 (SA)* ss 63 and 63A; *Workplace Health and Safety Act 1995 (Tas)* s 22; *Occupational Health and Safety Act 2004 (Vic)* s 12; *Occupational Safety and Health Act 1984 (WA)* s 57. However, these guidelines are intended to provide practical guidance to employers only, and a failure to meet these guidelines or codes does not constitute a breach in its own right.

31. The AHRC has a limited ability, subject to the leave of a Court, to appear as amicus curiae in cases where human rights principles are in issue.³⁴ In Victoria, under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), the Victorian Equal Opportunity and Human Rights Commission has the ability to intervene as of right in any proceedings where a question of law arises in relation to the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter.³⁵ The HRLRC considers that the AHRC should be given a similar ability to intervene as of right so that it can more readily bring its significant expertise in human rights to bear in human rights-related proceedings.

Recommendation 6: AHRC to have a court intervention role

The AHRC should be given the right to intervene in all proceedings where significant human rights issues arise.

3.4 Resourcing the AHRC to Discharge its Functions

(a) Increase recurrent funding

32. The AHRC's ability to contribute to the protection and promotion of human rights in Australia depends on it being adequately resourced. However, it has been noted by many, including by the AHRC itself, that the AHRC has been persistently underfunded.³⁶ The effectiveness of the current legal protection of human rights in Australia is jeopardised in circumstances where the functioning of the principal governmental institution concerned with human rights enforcement and education has been 'significantly constrained due to available resources'.³⁷
33. In the financial year 2008–09, the AHRC's budget was reduced by approximately 12.5% from the previous year.³⁸ This is despite, for example, an increase of 67% since 2004–05 in the

³³ *Privacy Act 1988* (Cth) ss 17, 18BF, 95, 95A and 95AA.

³⁴ HREOC Act ss 46PV, 48(1)(gb).

³⁵ Charter s 40.

³⁶ See further, Legal Aid Queensland, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex Discrimination Act 1984* (Submission No 26, 2008), p 1.

³⁷ HREOC, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry*, above n 9, [627] (speaking specifically of AHRC's work relating to addressing gender discrimination).

³⁸ *Ibid* [618]. The funding reduction was primarily the result of a decision to discontinue the additional \$1.8 million per annum which had been provided to assist the AHRC to cope with the dramatic increase in complaints it received following the introduction of WorkChoices (an increase of 67% since 2004–05): at *Ibid* [619]–[620].

number of complaints that the AHRC receives under Federal anti-discrimination laws.³⁹ The AHRC noted that the latest funding cut represents⁴⁰

the greatest decrease in [AHRC's] budget since 1996 when the [AHRC's] total funding base was reduced by 40% over four years. The effect of the decrease in 1996 was that staffing across the [AHRC] had to be reduced by approximately 60.

34. To accommodate this reduction, all of the AHRC's units had their operating budgets reduced by 14.5%.⁴¹ In respect of its work combating gender discrimination under the *Sex Discrimination Act 1984* (Cth), the AHRC found that its capacity to 'progress significant work' depended on securing additional funds, pro bono assistance or partnership opportunities 'in light of the limited resources currently available'.⁴² As a result, the AHRC's work to 'address systemic discrimination and to progress gender equality ... is significantly constrained'.⁴³
35. In the current economic climate it is particularly important that the AHRC is protected from any additional governmental funding cuts, as its work, especially in relation to the enforcement of anti-discrimination laws, is usually of direct benefit to those in the community who are most marginalised and put at risk by difficult economic conditions.
36. If the AHRC is assigned any additional responsibilities, the Australian Government must provide additional recurrent funding commensurate with AHRC's new role.

Recommendation 7: Increase recurrent funding to the AHRC

The Commonwealth Government should increase recurrent funding of the AHRC to levels where it will be able to properly protect and promote human rights through its policy development, education, research, and inquiry functions.

Recommendation 8: AHRC's funding to increase as its responsibilities grow

In the event that the AHRC receives any additional responsibilities in the future, the Government should provide additional funding so that the AHRC can properly undertake the activities required of it.

³⁹ Ibid [620].

⁴⁰ Ibid [618].

⁴¹ Ibid [622].

⁴² Ibid [626].

⁴³ Ibid [627].

3.5 Appointment of Full-Time Commissioners

37. The HRLRC also recommends that the Australian Government appoint a full-time Race Discrimination Commissioner, Disability Discrimination Commissioner and a separate Commissioner responsible for Age Discrimination.⁴⁴ Full-time positions are necessary so that these important areas for the protection of human rights receive the dedicated attention of a high-level official that they deserve.

Recommendation 9: Appointment of discrimination Commissioners

The Australian Government should appoint a full-time Race Discrimination Commissioner, Disability Discrimination Commissioner and a separate Commissioner responsible for Age Discrimination.

⁴⁴ Currently the position of Commissioner responsible for Age Discrimination is a non-statutory office which AHRC created to assist with the administration of the *Age Discrimination Act*. The Sex Discrimination Commissioner is assigned to the position. The HRLRC submits that the Australian Parliament should also consider amending that Act to provide for this office and to vest it with additional powers appropriate to enforce the Act.

4. Human Rights Education

4.1 Australia's Obligation to Provide Human Rights Education

38. Education is an integral component of building a culture that understands, respects, and is committed to upholding human rights for all members of society.⁴⁵
39. Under international law, Australia has a duty to commit to providing human rights education. This duty is set out in several conventions to which Australia is a signatory, including the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,⁴⁶ the *Convention on the Rights of the Child (CROC)*,⁴⁷ the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*,⁴⁸ the *Convention on the Elimination of Discrimination in Education (CEDE)*⁴⁹ and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.⁵⁰
40. In addition, article 26(2) of the UDHR specifies that the education provided to all persons as a human right shall be directed to strengthening a respect for human rights and fundamental freedoms. Article 26(2) was introduced into the text of the UDHR to clarify that the right to education meant an education in alignment with human rights principles.⁵¹

⁴⁵ Office of the United Nations High Commissioner for Human Rights and United Nations Educational, Scientific and Cultural Organisation, 'Plan of Action: World Programme for Human Rights Education First Phase', 2006, available at: http://www2.ohchr.org/english/issues/education/training/docs/PlanofActioninbrief_en.pdf.

⁴⁶ ICESCR, opened for signature 16 December 1966, 003 UNTS 3 (entered into force 2 January 1976), article 13.

⁴⁷ CROC, opened for signature 20 November 1989, 1249 UNTS 13 (entered into force on 2 September 1990), article 29.

⁴⁸ CERD, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), article 7.

⁴⁹ CEDE, open for signature 14 December 1960 429 UNTS 93 (entered into force 22 May 1962), article 5.

⁵⁰ CEDAW, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), article 10.

⁵¹ Dr 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), p 31. (According to Gerber, participants in the UDHR drafting committees were wary that education in Hitler's Germany had been well-organised, but directed to appalling outcomes, and wanted to ensure that the right to education was enshrined for beneficent purposes.)

41. On 2 April 2009 the HRC released its Concluding Observations on Australia.⁵² The Concluding Observations are an authoritative report on the extent to which Australia is currently complying with its obligations under the ICCPR and what the government needs to do to improve compliance. In its Concluding Observations the HRC notes that Australia lacks a framework and programme to promote knowledge of the ICCPR and the Optional Protocol among its population and recommends that Australia:⁵³

consider adopting a comprehensive plan of action for human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on rights protected under the Covenant and the First Optional Protocol. Human rights education should be incorporated at every level of general education.

42. The HRC's comments indicate that the government has an obligation under international law to prioritise this issue.

4.2 What Does this Obligation Require Australia to Do?

43. The specific content of the education to be provided to all persons is not prescribed by international law. However, international law does set down principles that must guide the content of such education.
44. The UN has emphasised that human rights education comprises of two necessary components:⁵⁴
- (a) the teaching of human rights laws and norms through curriculum, and
 - (b) the imparting of human rights values through the experience of education.
45. The first component, human rights education as a curriculum subject, requires the teaching of key United Nations documents so that all people are aware of their rights (and responsibilities) as citizens of the world. The second component, human rights education as an experience, requires that teaching and learning 'are oriented towards human values allowing the realisation of peace, social cohesion and the respect for human dignity'.⁵⁵

⁵² Human Rights Committee, *Concluding Observations on the Human Rights Committee: Australia*, CCPR/C/AUS/CO/5, 2 April 2009.

⁵³ *Ibid* [27].

⁵⁴ See, for example, United Nations Educational, Scientific and Cultural Organisation, 'Peace and Human Rights Education', available at: http://portal.unesco.org/education/en/ev.php-URL_ID=4731&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁵ *Ibid*.

46. The UNESCO *Convention on the Elimination of Discrimination in Education (CEDE)* also provides guidance about the content of the right to education. Article 5 specifies that education shall be directed to 'the strengthening of respect for human rights and fundamental freedoms' and should promote 'understanding, tolerance and friendship'.
47. Perhaps the most detailed guidance on the content of education to be provided by way of right to all children is set out in the CROC. Article 29 of CROC requires Australia to direct children's education towards, *inter alia*:
- (a) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (b) the development of respect for the child's cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own; and
 - (c) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of Indigenous origin.
48. Article 29 is deemed to be of 'far-reaching importance' by the Committee on the Rights of the Child (CRC).⁵⁶ In General Comment No 1, the Committee confirms the link between human rights education and a human rights culture, stating that the educational principles espoused in article 29 reflect:⁵⁷
- the vital role of appropriate educational opportunities in the promotion of all other human rights and the understanding of their indivisibility. A child's capacity to participate fully and responsibly in a free society can be impaired or undermined not only by outright denial of access to education but also be a failure to promote an understanding of the values recognised in this article.
49. The HRLRC's submissions in this section primarily address the right to human rights education by way of primary and/or secondary schooling, reflecting the focus of the United Nations' statements in this area.

4.3 Current Approach to Human Rights Education in Australia

50. Human rights education in Australia is currently undertaken by:
- (a) individual schools; and

⁵⁶ United Nations Committee on the Rights of the Child, General Comment 1: The Aims of Education (Art 29(1)), 17 April 2001, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument).

⁵⁷ *Ibid.*

(b) the AHRC.

51. The way in which these delivery methods are currently operating in Australia is discussed in detail below.

(a) Human rights education in schools

52. Recent research on the topic of human rights education in Australian schools has found it to be ad hoc and 'well short of what is mandated by Article 29 of CROC'.⁵⁸

53. Faith Hill's study found that more than 80% of surveyed students did not receive any human rights education during their formal years of schooling.⁵⁹ Hill's research, along with results from a 2006 National Assessment Program Report into Civics and Citizenship Years 6 and 10, indicates that Australia has not achieved a systematic and integrated approach to human rights education.⁶⁰

54. Paula Gerber's research concluded with similar findings about the ad hoc nature of human rights education. Her survey of Melbourne state secondary school teachers about the nature and extent of human rights education in their schools found that:⁶¹

the limited amount of human rights education occurring in Melbourne schools is not because of any legal imperative, but rather because there are teachers who feel strongly that students should learn about human rights, and [the teachers] strive to provide human rights education notwithstanding the numerous impediments.

55. The impediments Gerber refers to are:

- (a) the absence of clear directives from government and school administrators, and lack of legislative mandate, to support human rights education as a priority area;
- (b) a lack of government-produced teaching materials relating to human rights education, forcing teachers to rely on materials produced by non-government organisations which teachers view as more radical and therefore less appropriate for the classroom; and
- (c) an overcrowded curriculum.

⁵⁸ Gerber, above n 51, p 37.

⁵⁹ Hill's research is documented in Faith Hill, 'An Education Revolution for 'the Common Good' – The Role of Human Rights Education', in Newell and Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008).

⁶⁰ *Ibid*, p 18.

Hill also points out that, although the Howard Government established a National Committee on Human Rights Education in 1998, 'no progress on the national implementation of human rights education in schools has been apparent'.⁶²

(b) The AHRC's role in human rights education

56. The AHRC also has the following educational functions:
- (a) to promote an understanding and acceptance, and the public discussion, of human rights in Australia; and
 - (b) to undertake research and educational programs for the purpose of promoting human rights.
57. The AHRC's human rights education program is designed to support the goals and direction of the United Nations' World Programme for Human Rights Education. The main components of the AHRC's program are the production of human rights education resources for teachers, and awareness-raising and professional development by way of attendance at teacher conferences.
58. The AHRC's educational resources (all of which are linked to state and territory curricula) are designed to introduce students to human rights in an engaging, relevant way. They comprise lesson plans, secondary resources and activities encompassing such topics as child rights, disability rights, Indigenous rights, multiculturalism, race relations and sexual harassment. Awareness-raising and professional development are achieved by AHRC staff presenting keynotes or conducting workshops at teacher conferences on an ad hoc basis.
59. The AHRC's ability to make teachers aware of its valuable human rights education materials (beyond simply providing the material on the AHRC website) is limited by funding constraints. The AHRC only has one education manager, and unfortunately this compounds the difficulty in disseminating knowledge of its human rights education resources to schools and teachers. Even when schools are made aware of the resources, lack of legislative mandate to include human rights in the curricula means these valuable resources are being under-utilised.

4.4 Suggested Approach to Human Rights Education in Australia

60. The HRLRC asserts that the Australian Government must comply with its obligations under international law by ensuring that all primary and secondary school students receive education

⁶¹ Gerber's research is documented in Gerber, above n 51.

⁶² Hill, above n 57, p 17.

about human rights. The HRLRC recommends that the following initiatives be implemented in order to ensure such compliance:

- (a) Governments must provide clear directives that human rights education is an essential component of the curriculum, and also state where human rights education fits within the curriculum.
- (b) All pre-service and in-service teachers should be provided with human rights education training.
- (c) More human rights education materials should be developed by government departments or organisations, such as the AHRC.

Recommendation 9: The government should encourage human rights education

Governments should (a) provide clear directives that human rights education is an essential component of the curriculum, and (b) clearly state where human rights education fits within the curriculum.

Recommendation 10: All teachers should be provided with human rights education training

All pre-service and in-service teachers should be provided with human rights education training.

Recommendation 11: AHRC to receive additional funding for developing human rights education materials

Additional funding and resources should be provided to AHRC for the continuing development of human rights education materials and for the systematic distribution of this material to schools.

5. Access to Justice

5.1 What is Access to Justice?

61. The phrase 'access to justice' encompasses all the prerequisites that are necessary to enable individuals to access systems of justice (ie to understand and enforce their legal rights) and to access substantive justice (ie to ensure the formulation and application of the law is fair and equal for all persons). In the words of Murray Gleeson, former Chief Justice of the High Court of Australia, the concept involves 'bringing people to an understanding of the law, and helping them to develop their capacity to take advantage of that understanding'.⁶³
62. Various practical resources are required to give individuals knowledge of, and the ability to enforce, their legal rights. Access to justice necessarily requires such practical facilities as 'access to lawyers, access to courts, litigation processes which produce justice... and laws which are just'.⁶⁴ The Law and Justice Foundation of New South Wales has identified the following four requirements as being necessary to achieving access to justice:
- (a) the ability to obtain legal assistance;
 - (b) the ability to participate effectively in the legal system via access to courts, tribunals and alternative dispute resolution;
 - (c) the ability to obtain assistance from non-legal advocacy and support; and
 - (d) the ability to participate effectively in law reform processes.⁶⁵

5.2 Why is Access to Justice Important for Human Rights?

63. Effective protection of human rights requires that all people know their rights, and have the capacity to enforce those rights. Access to justice is a human right in itself and a critical element of the promotion, protection and fulfilment of other human rights.

⁶³ Murray Gleeson – Former Chief Justice of the High Court of Australia, 'Access to Justice' (speech delivered at the 2006 National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006), available at: http://www.hcourt.gov.au/speeches/cj/cj_11aug06.pdf.

⁶⁴ Julian Burnside QC, 'Access to Justice', (speech delivered at the 2006 National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006), available at: <http://www.nationalprobono.org.au/page.asp?from=5&id=123>.

⁶⁵ Louis Schetzer, Joanna Mullins and Roberto Buonamano, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of NSW, Sydney, 2003, available at: <http://lawfoundation.net.au/report/background>.

64. International human rights treaties to which Australia is a party, particularly the ICCPR, oblige the Federal Government to protect and respect the right to a fair trial,⁶⁶ certain rights in respect of criminal cases,⁶⁷ and the right to recognition as a person before the law.⁶⁸
65. In its recent review of Australia, the Human Rights Committee noted the 'lack of adequate access to justice for marginalized and disadvantaged groups, including indigenous people and aliens' and recommended that Australia:⁶⁹
- take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including Indigenous people and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services.
66. International and comparative jurisprudence highlights that fulfilment of the duty to ensure the right to a fair hearing requires positive action by the state, and thus a positive duty to ensure effective access to the courts for all.⁷⁰ The availability of legal assistance will often determine whether individuals can access and participate in the justice system in a meaningful way.⁷¹ In order to facilitate equal access to the justice system, States party to the ICCPR are encouraged to provide free legal aid to those who do not have the means to pay for it.⁷²
67. The right to a fair hearing is regarded as a fundamental and non-derogable norm of international human rights law that must not be compromised in the interests of mere cost and convenience.⁷³ The HRC has emphasised that, while States party to the ICCPR should report on how this right is interpreted in their respective legal systems, it cannot be left to the sole discretion of domestic law to determine the essential content of this guarantee.⁷⁴
68. Pursuant to the ICCPR, the basic elements of the right to a fair hearing are:⁷⁵
- (a) equal access to, and equality before, the courts;

⁶⁶ ICCPR, above n 3, article 14.

⁶⁷ *Ibid*, article 15.

⁶⁸ *Ibid*, article 16.

⁶⁹ Human Rights Committee, *Concluding Observations: Australia*, above n 52 [25].

⁷⁰ UN Human Rights Committee, General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial (23 August 2007), [10].

⁷¹ *Ibid*.

⁷² *Ibid* [6].

⁷³ See, eg, *R v McBride* [2007] ACTSC 8, [7] (Connolly J).

⁷⁴ UN Human Rights Committee, General Comment No. 32, above n 67, [1-2].

⁷⁵ See above n 3, article 14.

- (b) the right to legal advice and representation;
 - (c) the right to procedural fairness;
 - (d) the right to a hearing without undue delay;
 - (e) the right to a competent, independent and impartial tribunal established by law;
 - (f) the right to a public hearing; and
 - (g) the right to have the free assistance of an interpreter where necessary.
69. The importance of access to justice in ensuring human rights was confirmed by Federal Attorney-General Robert McClelland at the National Access to Justice and Pro Bono Conference in November 2008, when he stated that 'access to justice is one of my highest priorities... a key aspect of the rule of law. It is fundamental to upholding human rights.'⁷⁶
70. Access to justice in Australia is currently facilitated primarily by the community legal sector, state and territory legal aid systems and pro bono legal service providers.

5.3 Improving Access to Justice

71. In June 2004, the Senate Legal and Constitutional References Committee conducted an inquiry into Legal Aid and Access to Justice. The Committee's terms of reference were to inquire into the capacity of legal aid and access to justice arrangements to meet the community need for legal assistance. The Committee's report (**2004 Report**) recommended, *inter alia*, the reform of legal aid funding arrangements, the collection of data on demand for legal aid and unmet legal need, that funding for family law matters be increased, that specialty legal advice services be introduced for Indigenous Australians, people living in rural and remote areas, refugees and migrants, that duty solicitor services be expanded, and that funding for community legal centres be increased.⁷⁷

(a) Community legal centres

⁷⁶ Robert McClelland – Australian Attorney-General, 'A new Federalism – increasing collaboration to bridge the gaps in access to justice' (speech delivered at the 2008 National Access to Justice and Pro Bono Conference, Sydney, 15 November 2008), available at: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_15November2008-NationalAccessToJusticeandProBonoConference.

⁷⁷ Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), Executive Summary, available at: http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf.

72. Community legal centres (**CLCs**) are independent community organisations that provide free legal services to the public. There are around 200 CLCs in Australia, most of which are partially funded by state or Commonwealth governments or philanthropic organisations, but some of which receive no funding and are staffed entirely by volunteers.⁷⁸ In its 2004 Report, the Senate Legal and Constitutional References Committee recognised that ‘the community legal sector is a crucial part of providing access to justice for all Australians’.⁷⁹
73. The HRLRC recommends that government funding for CLCs be continually increased to enable them to continue to provide access to justice for those who are unable to afford private legal assistance and cannot receive legal aid.
74. The evidence in favour of investing in CLCs is compelling. For example, the National Association of Community Legal Centres (**NACLC**) has found that investing in access to justice issues reaps benefits for the individual, the community and the economy.⁸⁰ As well as the intrinsic benefits of providing legal and welfare services to vulnerable individuals, CLCs undertake preventative work by engaging in community education, law reform and policy reform work.⁸¹ The HRLRC agrees that ‘the value of this preventative work is far greater than the reactive costs that would be incurred in the absence of such services’.⁸²
75. Indeed, NACLC estimates that, for every dollar invested in CLCs, around \$100 may be saved by CLC clients, government and other affected parties.⁸³ For this reason, an upfront investment in CLCs is more cost-effective than not investing (or inadequately investing) in CLCs.⁸⁴ However, in spite of the strong economic rationale for investing in CLCs, funding has failed to keep pace with the increased costs of providing these services.⁸⁵ The NACLC estimates that, over the last decade, CLCs have in fact experienced an 18% reduction in levels of funding.⁸⁶ The HRLRC supports recommendations that funding for CLCs should be

⁷⁸ National Association of Community Legal Centres, available at: <http://www.naclc.org.au/topics/2000.html>.

⁷⁹ Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, above n 74.

⁸⁰ Institute for Sustainable Futures, *The Economic Value of Community Legal Centres* (February 2006), p 4 available at: <http://www.naclc.org.au/multiattachments/2305/DocumentName/EconValueISFRpt0306.pdf>.

⁸¹ *Ibid.*

⁸² Emma Partridge in National Association of Community Legal Centres, *Community Legal Centres Across Australia: An Investment Worth Protecting* (January 2008), [7], available at: http://www.naclc.org.au/multiattachments/2300/DocumentName/NACLC_fund08_CMYK.pdf.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ See above n 79, p 2.

⁸⁶ *Ibid.*

steadily increased to enable them to build capacity and maximise benefits to the individual and the wider community.⁸⁷

Recommendation 12: Increase government funding for community legal centres

Government funding for community legal centres should be increased to enable them to continue to provide access to justice for those who are unable to afford private legal assistance and do not qualify to receive legal aid.

(b) Pro bono legal services

76. Pro bono legal services are those legal services provided by private law firms without charge or for a substantially reduced fee *pro bono publico* (for the public good). A survey conducted in 2008 by the National Pro Bono Resource Centre found that the top 25 law firms in Australia had contributed in total almost 200,000 hours of pro bono legal work in the previous 12 months.⁸⁸
77. The 2004 Report also recognises the important contributions of private firms to access to justice, noting that pro bono legal work is ‘an important and growing part of the response to the need for legal assistance... however it is neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in other publicly-funded legal services’.⁸⁹
78. The HRLRC supports the recommendation of the Public Interest Law Clearing House (Vic) (**PILCH**), that ‘the Government has a responsibility to promote and support the professionalism of pro bono legal services in the private sector through Government policy designed to increase socially responsible outcomes’.⁹⁰
79. The Government should support the pro bono sector through its participation in the legal services market. Such a scheme operates successfully in Victoria where law firms that are selected as providers on the Victorian government legal service panel must commit to provide

⁸⁷ *Ibid*, p 6.

⁸⁸ National Pro Bono Resource Centre, *Report on the pro bono legal work of 25 large Australian law firms* (September 2008), available at: https://wic030u.server-secure.com/vs155205_secure/CMS/files_cms/Firms%20survey%20report%20FINAL%20100908.pdf.

⁸⁹ Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, above n 74.

⁹⁰ PILCH, *Submission to the Commonwealth Government Legal Services Review* (6 June 2008), available at <http://www.pilch.org.au/Assets/Files/PILCH%20Submission%20Commonwealth%20Legal%20Services%20Reform.pdf>.

pro bono services of at least 5% of the value of the legal fees they derive.⁹¹ The firms obtain extra weighting for pro bono services in the tender by committing to provide up to 15% of the value of the work undertaken, to a maximum weighting of 10.⁹²

80. A 2006 review of the Victorian scheme determined that it had:⁹³
- (a) raised the profile of pro bono work and encouraged 'cultural change' across the legal profession in Victoria;
 - (b) encouraged an increase in pro bono directed towards 'approved causes' and access to justice;
 - (c) been an impetus for firms to develop and formalise their pro bono programs;
 - (d) created a clear model for government support for pro bono services;
 - (e) provided lawyers with help in making pro bono a priority on their firm's agendas; and
 - (f) encouraged support to pro bono clinics through firms membership fees.

Recommendation 13: Introduce mandatory contractual pro bono requirements for legal firms participating in the Commonwealth legal scheme

The Attorney-General should introduce a mandatory contractual requirement that each legal firm that is a participant of the Commonwealth legal scheme must commit to provide pro bono services of at least 5% of the value of the legal fees they derive under the panel arrangements.

(c) Legal Aid

81. Legal aid providers are jointly funded by the Commonwealth and the relevant state or territory to provide access to justice for marginalised and economically disadvantaged people. Legal aid commissions provide services that are essential to ensuring access to justice, such as:
- (a) legal representation in court proceedings for people who cannot afford a lawyer;

⁹¹ Department of Justice, 'Pro bono Fact Sheet - Government Legal Services', Victoria, October 2007.

⁹² For further information on the Victorian Government scheme, see PILCH, Submission to the Commonwealth Government Legal Services Review, above n 87.

⁹³ Department of Justice, *Report on the Review of Legal Services to Government Panel Contract* (2007).

- (b) duty lawyer services, allowing legal representation on the day for people who attend court without a lawyer;
 - (c) legal advice and information about legal rights and remedies; and
 - (d) community legal education, publications and other programs about the law and legal rights.
82. Unfortunately, not all people who require legal aid in order to access justice are able to secure legal aid assistance. As former Chief Justice of the Family Court Alistair Nicholson has noted, 'there is undoubtedly a gap, if you like, between qualification for legal aid and the ability to fund your own legal proceedings. Too many people fall into that gap... A lot of these people have no hope of being able to pay for legal expenses.'⁹⁴
83. In 2007, Australia's eight Legal Aid Commissions worked together to create a vision for a 'new Commonwealth approach to legal aid in Australia that will deliver comprehensive access to justice to disadvantaged Australians'. The report identifies priority areas of need and makes recommendations, with costings, for reforms designed to ensure that all Australians enjoy access to justice.⁹⁵

⁹⁴ Quoted in Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, above n 74.

⁹⁵ National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007), available at: http://www.lsc.sa.gov.au/cb_pages/images/A%20New%20National%20Legal%20Aid%20Policy.pdf.

Recommendation 14: Implement the recommendations from the 2007 National Legal Aid Report

The Government should implement the recommendations contained in the 2007 National Legal Aid Report, *A New National Policy for Legal Aid in Australia*, including actions in the following six priority areas of need as identified by Australia's eight Legal Aid Commissions:

- (a) supporting Australian families and protecting vulnerable family members;
- (b) supporting Australians at risk of social exclusion due to poverty;
- (c) supporting Indigenous Australians at risk of social exclusion;
- (d) supporting Australians at risk of social exclusion due to special circumstances;
- (e) supporting a fair criminal justice system;
- (f) supporting human rights and equal opportunity.

6. Support for and Engagement with Human Rights NGOs

6.1 The Importance of a Strong Civil Society

84. 'Civil society' generally refers to groups and organisations independent from government which aim to transform policies and social structures in favour of particular interests. The human rights civil society consists of those non-governmental organisations (**NGOs**) that aim to protect and promote human rights (either as their primary cause, or as a method of achieving their primary cause).
85. A robust civil society is crucial to the realisation of human rights. Former High Court judge Michael Kirby recognised this when he asserted that 'human rights organisations and civil society bodies have a vital function to advance and protect human rights'.⁹⁶ According to the People's Movement for Human Rights Learning:⁹⁷

⁹⁶ Michael Kirby - Former High Court Judge, 'Strengthening the Judicial Role in the Protection of Human Rights – An Action Plan', (speech to the Inter-Regional Conference on Justice and Human Rights, 20 September 2006), available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20sep06.pdf.

⁹⁷ People's Movement for Human Rights Learning, *Human Rights Learning: a People's Report* (2006), available at: <http://www.pdhre.org/pdhre-report-2006.pdf>.

Universal and indivisible human rights can be a living reality only in a society which practices solidarity in the respect, defense and promotion of these rights... In this respect, the increasingly important role played by non-governmental organisations is one of the most encouraging phenomena in recent decades. By lending their voice to those whose voices are stifled and their hands to those whose hands are bound, they provide a striking example of solidarity in the defense of human rights.

86. The HRLRC submits that government plays a crucial role in promoting and supporting a strong civil society by way of constructive dialogue and engagement, law reform and funding. A strong and vibrant sector is necessary to provide guidance and assistance to government and to 'bring human rights home' to marginalised and disadvantaged communities and groups.

6.2 Engagement with Human Rights NGOs

87. The HRLRC considers that a strong civil society requires meaningful engagement and dialogue between government and human rights organisations. Only when government is listening to civil society, can these two distinct bodies work together to achieve a human rights culture.

88. The HRLRC considers that engagement between human rights organisations and government, and between human rights organisations themselves, could be achieved by implementing the following initiatives.

(a) 'Annual Conversation' with human rights NGOs

89. The HRLRC believes it is critically important for government to engage proactively and positively with human rights organisations, because civil society is strengthened (along with all the benefits that entails) when community organisations and government work together. The HRLRC submits that human rights organisations can play an integral part in delivering human rights objectives to the community, by working with government to foster a society that recognises and acts in congruence with the key principles of freedom, equality, dignity and respect for all.
90. The HRLRC proposes an 'Annual Conversation' between government and human rights non-governmental organisations, in order to facilitate understanding of human rights challenges and how best to address them. The HRLRC envisages this Annual Conversation would be similar to corporate models implemented by large companies, many of which have an annual conversation with interested NGOs. For example, BHP Billiton conducts annual dialogue

sessions with interested NGOs, which play a 'key role' in providing advice and challenging the company's position on matters of mutual interest.⁹⁸

91. The HRLRC also recommends that an Annual Conversation could take as its model the human rights dialogues that already take place between the Department of Foreign Affairs and Trade and NGOs, and also between the Attorney-General and NGOs. These consultations have proved to be valuable forums for exchanging information, insights and advice on human rights issues.⁹⁹ It is proposed that these consultations should be extended to other government departments (such as the Department of Immigration and Citizenship) and the NGO community. Furthermore, it would be sensible to assemble all relevant government departments in an overarching consultation with human rights NGOs. It is envisioned that this consultation would be led by the Department of Prime Minister and Cabinet, and would facilitate a 'whole of government' discussion of human rights issues.

Recommendation 15: Hold Annual Conversations between government and human rights organisations

An Annual Conversation should be held between the Commonwealth Government (relevant minister or parliamentary secretary) and human rights organisations.

(b) Human Rights Leadership Group

92. When the Victorian Charter was enacted, the Victorian Attorney-General, Rob Hulls, established a Human Rights Leadership Forum (**Forum**) to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of the Charter. The Forum comprises key government decision makers, local government representatives, peak non-governmental organisations whose clients would be affected by the Charter, human rights experts and human rights advocacy organisations.
93. Participants in the Forum consider it to be an exceptionally positive and beneficial experience, which contributed greatly to the successful launch and implementation of the Charter. So

⁹⁸ BHP Billiton, *Sustainability Report* (2006), available at: <http://sustainability.bhpbilliton.com/2006/sustainability/engagingStakeholders/ourStakeholders/nonGovernmentOrgs.asp>.

⁹⁹ See, for example, Department of Foreign Affairs and Trade, *Annual Report 2007 - 2008* (2008), available at: http://www.dfat.gov.au/dept/annual_reports/07_08/performance/1/1.1.9.html#human-rights.

valuable was the initial meeting of the Forum that its members decided to meet regularly for the first three years of the Charter's operation.

94. The HRLRC submits that in order to support a national Human Rights Act, a Human Rights Leadership Group (with the same terms of reference as the Forum, albeit in the national context) should be implemented at Commonwealth level.

Recommendation 16: Establish a Human Rights Leadership Group

A Human Rights Leadership Group comprising key government decision makers, local government representatives, peak human rights NGOs, human rights experts and human rights advocacy organisations should be established to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of a federal Human Rights Act.

(c) Annual summit for human rights NGOs

95. The HRLRC submits that the Government should provide support to allow human rights-focused community sector organisations around Australia to meet in an annual summit to discuss current issues and approaches.
96. One of the advantages of the human rights framework is that it enables people and groups from different sectors to use a common language to identify common interests and share information.
97. By facilitating information-sharing around how the human rights framework can be used across sectors, an annual summit for rights-focused community sector organisations would enhance the capacity of civil society to contribute to the protection and promotion of human rights in Australia.
98. In addition, communication and national coordination strengthen the ability of human rights organisations to provide guidance and assistance to government in the implementation of a human rights culture.

Recommendation 17: Establish an annual summit for human rights organisations

An annual summit for human rights organisations should be established and funded.

6.3 Resourcing Human Rights NGOs

99. The HRLRC considers that a strong civil society, and consequently strong protection and promotion of human rights, is not possible without further resourcing for civil society. The HRLRC considers there are two essential aspects of resourcing:

- (a) changes to taxation laws; and
- (b) funding.

(a) Changes to taxation laws

100. Human rights can be both facilitated and achieved through the encouragement of human rights-based laws and policies, and by increasing awareness of human rights issues. Human rights organisations are crucial to this process. The HRLRC considers that an important way to resource human rights organisations in civil society is to support their efforts to fundraise for themselves.

101. The ability of human rights organisations to fund themselves would be greatly assisted if amendments were made to the *Income Tax Assessment Act 1997* (Cth) (**ITAA**) so as to include 'the promotion and protection of human rights' as a charitable purpose. This would allow human rights organisations to more readily access deductible gift recipient (**DGR**) and income tax-exempt charity (**ITEC**) concessions, both of which are advantageous because organisations with one or more of these statuses are more likely to attract donations from philanthropic organisations and individuals donors.

102. Currently, the common law definition of 'charity' excludes organisations involved in political activities (such as advocacy or lobbying government), which means that organisations involved in advocating social or structural change in favour of recognising human rights are denied access to a number of tax concessions. This restrictive approach means that human rights organisations, which are not-for-profit entities working towards the betterment of society, are unlikely to fall within the ambit of legal concessions such as DGR and ITEC.

103. Recognition of the problems with taxation legislation is evident in government and in the courts.¹⁰⁰ Indeed, the United Kingdom government has recognised similar problems in that jurisdiction, prompting it to recently amend its *Charities Act 2006* to include 'the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial

¹⁰⁰ See: Inquiry into the Definition of Charities and Related Organisations, at <http://www.cdi.gov.au/>; Peter Costello – former Federal Treasurer, 'Government response to charities definition inquiry', (Press Release, 29 August 2002); 'Charities Bill 2003 – Exposure Draft', available at: http://www.taxboard.gov.au/content/downloads/charities_bill.pdf; Extension of *Charitable Purposes Act 2004* (Cth); *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983;

harmony or equality and diversity' as a charitable purpose. This has significantly enhanced the ability of organisations such as Human Rights Watch and Amnesty International to raise funds and undertake activities in the UK.

104. The HRLRC strongly encourages the Government to give positive consideration to amending the ITAA to include 'the promotion and protection of human rights' as a charitable purpose. This would significantly increase the ability and capacity of NGOs in Australia to raise funds and undertake a range of activities to promote human rights. It would also be consistent with the Government's commitment to support the promotion and implementation of human rights in Australia and internationally.

Recommendation 18: Amend the Income Tax Assessment Act to include human rights as a charitable purpose

The *Income Tax Assessment Act* should be amended to include 'the promotion and protection of human rights' as a charitable purpose, so as to allow human rights organisations to access deductible gift recipient and income tax-exempt charity concessions.

(b) Funding

105. The chronic under-resourcing of non-governmental organisations and community legal centres has been recognised and condemned by many.¹⁰¹ Consequently, after more than a decade of neglect, the capacity of the Australian human rights sector is very limited. For example, the HRLRC, Australia's only national specialist human rights legal service, does not receive any federal funding.
106. The HRLRC would warmly welcome any commitment by the government to build the capacity and resources of human rights NGOs in Australia as a very concrete and local aspect of its commitment to better promote and protect human rights. In particular, the HRLRC suggests:

¹⁰¹ See for example: Federation of Community Legal Centres, *Submission to the Attorney-General of Victoria on the Attorney-General's Justice Statement 2008* (May 2008), available at: http://www.communitylaw.org.au/fedclc/cb_pages/images/Federation%20Justice%20Statement%20Submission%202008.pdf; Suzie Forell, Emily McCarron and Louis Schetzer, 'Legal assistance services in NSW', in *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney (2005), available at: <http://www.lawfoundation.net.au/report/homeless/0DB7265D6F1F7D16CA2570760023710B.html>.

- (a) that funding to human rights organisations be reviewed and revised in light of the government's commitment to human rights, and the crucial role human rights organisations play in achieving a human rights culture; and
- (b) that specific human rights grants be made available for organisations that aim to protect and promote human rights. Currently, grants are only available to human rights organisations for offshore projects (via AusAid) or if they are community legal centres.

Recommendation 19: Increase funding for human rights organisations

Funding for human rights organisations should be reviewed and increased in light of the government's commitment to human rights, and the crucial role human rights organisations play in achieving a human rights culture.

Recommendation 20: Establish grants for human rights organisations

Specific human rights grants should be made available for organisations that aim to protect and promote human rights.

Recommendation 21: Establish a Joint Parliamentary Committee on Human Rights

The Government should establish a Joint Parliamentary Committee on Human Rights (JPCHR) to lead parliamentary engagement with and understanding of human rights issues and to monitor and report on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council.

7. Human Rights Monitoring and Compliance

7.1 Introduction

107. Compliance with obligations arising under both international and domestic human rights laws requires effective monitoring systems. This section examines mechanisms that should be established to monitor implementation of and compliance with Australia's human rights obligations.

108. Parliamentarians are 'essential actors' in the protection and promotion of human rights. According to a recent report by the Inter-Parliamentary Union titled 'Parliament and Democracy in the Twenty-First Century':¹⁰²

parliamentary activity as a whole - legislating, adopting the budget and overseeing the executive branch - covers the entire spectrum of political, civil, economic, social and cultural rights and has thus an immediate impact on the enjoyment by the people of their human rights...

109. It is therefore important that a parliamentary body exist to monitor and take responsibility for the role of the legislature in protecting and promoting human rights. The HRLRC considers that the parliament and government should establish domestic mechanisms to monitor and report on the implementation of human rights obligations, including establishing a Joint Parliamentary Committee on Human Rights.

7.2 International Human Rights Review Mechanisms

110. Currently, Australia is subject to periodic review by UN treaty bodies established under each of the ICCPR, ICESCR, CAT, CRPD, CEDAW and CERD. These reviews provide an opportunity for a comprehensive analysis of the state of human rights in Australia and for a constructive dialogue as to how best to promote and protect these rights between the Government and independent international human rights experts.

111. Australia has also accepted the jurisdiction of the Committee against Torture, the HRC, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women to hear and determine individual complaints regarding Australia. The Government is also taking steps to ratify the *Optional Protocol on the*

¹⁰² Inter-Parliamentary Union, *Parliament and Democracy in the Twenty-First Century* (2006), available at: http://www.ipu.org/PDF/publications/democracy_en.pdf.

Convention on the Rights of Persons with Disabilities which would empower the Committee on the Rights of Persons with Disability to determine individual complaints under the CRPD.

112. In addition, the Special Procedures of the UN Human Rights Council may issue findings and recommendations on Australia under either country or thematic mandates.
113. While international scrutiny and accountability are important aspects of the promotion and protection of human rights, there are currently no formal domestic mechanisms to independently monitor and report on the implementation of the Concluding Observations of UN treaty bodies.
114. In the case of Individual Communications, the various UN Committees' Views are not enforceable or justiciable under Australian law and no effective domestic mechanisms have been established to ensure and monitor implementation of and compliance with Views.
115. In its recent review of Australia the HRC specifically recommended that Australia establish appropriate procedures' to implement the HRC's Views adopted under the *First Optional Protocol to the ICCPR*.¹⁰³

7.3 Joint Parliamentary Committee on Human Rights

116. The Government should establish a Joint Parliamentary Committee on Human Rights (**JPCHR**) to lead parliamentary engagement with and understanding of human rights issues and to monitor and report on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council.
117. The JPCHR may also perform other functions directed towards the promotion and protection of human rights (for example, by taking responsibility for the scrutiny of Bills before Parliament for human rights compatibility). However, this section focuses on the JPCHR's role in ensuring compliance with the findings and recommendations of international human rights bodies.
118. The position in Australia with respect to the role of Parliament in the implementation of Concluding Observations and Views of treaty bodies can be contrasted with monitoring and implementation mechanisms developed in other jurisdictions, including South Africa, the Netherlands and the United Kingdom.
119. In the United Kingdom, for example, the work of the Joint Parliamentary Committee on Human Rights includes:

¹⁰³ Human Rights Committee, *Concluding Observations: Australia*, above n 52, [10].

- (a) scrutinising Government responses to adverse judgments by the European Court of Human Rights; and
 - (b) scrutinising the Government's reports to the UN treaty bodies, the Concluding Observations of those treaty bodies, and the Government's implementations of the recommendations contained therein.
120. The Council of Europe has recommended the model and modalities of the UK Joint Parliamentary Committee on Human Rights as a model for other member states.¹⁰⁴
121. In South Africa, all national reports submitted under human rights treaties are debated in Parliament. In the course of debate, Parliament holds public hearings, calls in ministers and requests documents and reports from a wide range of departments and civil society groups. Members of Parliament are included in national delegations to the treaty bodies, ensuring that they better understand the treaty bodies' recommendations.¹⁰⁵
122. In the Netherlands, the law requires the government report to Parliament every four years on the implementation of the CEDAW before presenting its report to the Committee on the Elimination of Discrimination against Women. The concluding comments of the Committee are also presented to Parliament.¹⁰⁶

Recommendation 21: Establish a Joint Parliamentary Committee on Human Rights

The Government should establish a Joint Parliamentary Committee on Human Rights (**JPCR**) to lead parliamentary engagement with and understanding of human rights issues and to monitor and report on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council.

¹⁰⁴ Further information about the work of the Committee is available in their 2007 Annual Report at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/38/3802.htm>.

¹⁰⁵ Inter-Parliamentary Union, *Parliament and Democracy in the Twenty-First Century*, above n 99 at 160.

¹⁰⁶ *Ibid* at 160.

8. International Engagement

123. Domestic protection and promotion of human rights is enhanced through strong leadership and engagement with international human rights mechanisms. The Australian Government should enhance international engagement through robust participation in UN human rights bodies and processes.
124. UN human rights bodies afford Australians access to additional accountability mechanisms (for example, through treaty body reporting processes, Individual Communications and the Special Procedures of the UN Human Rights Council). In addition, acting as a model international human rights citizen demonstrates to Australians and to the world that the Government is committed to the effective implementation of its obligations under international human rights law.
125. The recent ratification of the *Convention on the Rights of Persons with Disabilities (CRPD)*¹⁰⁷ and the Optional Protocol to the CEDAW and the issue of a standing invitation to the Special Procedures of the UN Human Rights Council to make official visits to Australia are all indications that Australia is making significant and positive moves towards enhanced engagement with the UN.
126. When participating in UN bodies, Australia must take a principled and consistent approach so as to ensure that the integrity of the system is upheld. Focusing on national interest and bowing to the pressures of political compromise undermine the legitimacy and efficacy of the UN to the detriment of Australia and the international community as a whole.
127. Best practice and participation in UN treaty monitoring bodies and Special Procedures of the UN Human Rights Council is also enhanced by supporting and resourcing Australian civil society and non-government participation in these processes.¹⁰⁸

8.1 Areas for Further Consideration and Investigation

128. As stated in the introduction, this submission does not consider Australia's obligations to promote and protect human rights overseas.¹⁰⁹ However, it should be noted that Australia does have obligations in this regard. Article 2(1) of ICESCR provides that:

¹⁰⁷ CRPD, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

¹⁰⁸ See section 6 of this submission on Support and Engagement with Human Rights NGOS.

¹⁰⁹ Although the HRLRC's first submission on a Human Rights Act discusses the need for such an Act to have extra-territorial effect.

[e]ach State Party to the present Covenant undertakes to take steps, individual and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving the full realisation of the rights...

129. Article 2 makes it 'clear that it is the responsibility of all States, in their capacity as members of the international community, to take concrete, effective, targeted and expeditious steps to assist in realisation of rights of people beyond their borders.'¹¹⁰ This obligation is also articulated in the *Universal Declaration of Human Rights (UDHR)*¹¹¹ and in article 56 of the UN Charter, which requires Member States to take 'joint and separate action' for the realisation of human rights and fundamental freedoms for all.¹¹²
130. In order to adequately implement its international obligations, Australia should ensure that human rights are central to relationships with other nations. There are a number of areas in which the Australian Government should recognise and incorporate human rights. The most important of these are development aid, trade and defence co-operation.

Recommendation 22: Australian Government to engage with UN human rights bodies

The Australian Government should commit to robust engagement with UN human rights bodies and support the effective operation of these bodies through:

- (a) taking a principled and consistent approach to human rights internationally; and
- (b) resourcing non-government participation in UN processes.

Recommendation 23: Government to conduct a human rights audit of its relationship with other States

The Australian Government should conduct a human rights audit of its relationship with developing countries in particular, including in the areas of aid, trade, defence co-operation and business engagement. Australia's human rights obligations should be mainstreamed in each of these areas.

¹¹⁰ Kirsty Nowlan and Tim Costello, 'When Right Equals Rights: The International Obligation to Provide Assistance to Developing Countries' (2005) 30(4) *Alternative Law Journal* 2.

¹¹¹ See the Preamble to the UDHR and articles 22, 28 and 30, articles 11, 22 and 23 of ICESCR (in addition to article 2).

¹¹² *Charter of the United Nations*, articles 55 and 56.

9. Business and Human Rights

9.1 Introduction

131. Business entities can have a significant impact, both positive and negative, on the enjoyment of human rights. While Australian businesses are already subject to some human rights laws and mechanisms (discussed below), there is considerable scope to increase the human rights accountability of the corporate sector.
132. Under the Human Rights Act proposed by the HRLRC in the first submission, business entities will not have direct human rights obligations unless they are public authorities (that is, they are exercising public functions on behalf of the state.¹¹³ However, business is likely to be indirectly affected by a Human Rights Act in at least two ways:
- (a) the proposed Human Rights Act will have an impact on business activities to the extent that business contracts with public authorities which are bound to take human rights into account and act in accordance with human rights and public authorities may require contracting parties to report on or comply with human rights as part of the contracting relationship; and
 - (b) businesses may be indirectly influenced through the actions of regulators who are public authorities.
133. In addition, the HRLRC recommends that the government consider ways in which it could use its hard and soft powers to ensure that businesses respect human rights. Some of these options are outlined in this section.

Recommendation 24: Promoting the human rights responsibilities of business

The government should convene a forum in which both soft and hard power options for promoting the human rights responsibilities of business are considered.

¹¹³ See HRLRC, *Submission to the National Human Rights Consultation* (2009), section 5.4.

9.2 Corporate Human Rights Obligations in International Law

134. International law has traditionally imposed human rights obligations on non-State actors only in exceptional situations, for example, in relation to the prohibition of slavery and genocide.¹¹⁴ Consequently, business entities do not, strictly-speaking, have direct, legal obligations under international law to the same extent as States. However, they are under a duty to respect human rights.
135. In addition, international law imposes a direct legal obligation on States to protect against the commission of human rights violations by non-State actors, including business entities, within their jurisdiction.¹¹⁵ As a result, States such as Australia will be in violation of their ICCPR treaty obligations where they fail 'to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by... private persons or entities'.¹¹⁶ Thus, the effectiveness of business compliance with international human rights largely depends on the domestic legal systems of States.¹¹⁷
136. The following initiatives, among others, have endeavored to promote and clarify the relationship between business and human rights:
- (a) In 2000 the UN launched its Global Compact initiative which enshrines ten fundamental human rights principles. Business can choose to comply with the principles by signing the Compact;
 - (b) In 2003 the UN adopted the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*.¹¹⁸
137. In 2005 the UN Secretary-General appointed Professor John Ruggie as his Special Representative on Business and Human Rights (**the Special Representative**) to map out

¹¹⁴ Castan Centre for Human Rights Law, International Business Leaders Forum, Office of the United Nations High Commission for Human Rights and United Nations Global Compact Office, *Human Rights Translated: A Business Reference Guide* (2008), xi.

¹¹⁵ *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988); John Ruggie - United Nations Special Representative, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/4/35 (2007), 18.

¹¹⁶ *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), [8].

¹¹⁷ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003), pp 556-7.

- international standards of responsibility and accountability for business in relation to human rights. In April 2008 the Special Representative released his 'Protect, Respect and Remedy' framework, which is considered to be the authoritative model for addressing ways in which to impute human rights duties to business.¹¹⁹
138. The Special Representative's framework sets out three duties and responsibilities:
- (a) States are under a *duty to protect* human rights;
 - (b) States are under a duty to provide *access to a remedy* for breach of human right by third parties (such as corporations); and
 - (c) business is under a less onerous *responsibility to respect* human rights.¹²⁰
139. Under the Special Representative's framework, governments have the primary role in protecting human rights and providing access to remedies for breaches. Accordingly, the root cause of the 'business and human rights predicament' lies in deficiencies or gaps in governance. The focus ought to be on reducing those gaps.¹²¹
140. The Special Representative's framework provides an authoritative guide to determining obligations in the area of business and human rights, and should be adopted by the government as a basis for its corporate human rights policy and approach. The government should also support and engage with the work of the Special Representative's mandate.

Recommendation 24: Government should adopt the Special Representative's framework

The government should publicly and actively engage with the Special Representative's mandate and adopt the Special Representative's framework as a basis for its corporate human rights policy and approach.

¹¹⁸ Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003

¹¹⁹ John Ruggie - United Nations Special Representative, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 (7 April 2008) (**Ruggie Report**). In 2008 the Special Representative's mandate was extended to run until 2011.

¹²⁰ *Ibid* [9].

¹²¹ *Ibid* [3].

9.3 The State Duty to Protect Human Rights

141. Ordinarily, a State's general duty under international law to protect human rights is most effectively fulfilled by way of legislation which can be enforced in court if necessary. However, legislation is not the only means by which rights can be protected. The Special Representative has stated that the means of fulfilling the duty to protect against violations by business should be interpreted broadly and flexibly, taking into account the diverse range of policy options which government can leverage to encourage business to respect human rights.¹²²
142. To some extent the Australian Government already protects against corporate violations of human rights through existing criminal, labor, workplace health and safety, native title and environmental laws. Commonwealth, state and territory anti-discrimination legislation also impose human rights obligations.¹²³
143. However, the HRLRC believes that there is considerable scope to enhance the Australian Government's effective discharge of its obligation to protect against corporate human rights violations. A range of options – including those set out below – should be considered.

9.4 Options for promoting corporate human rights compliance

144. According to the Special Representative, one of the most effective means by which to promote rights compliance is to develop corporate cultures in which respecting rights is seen as being an integral part of doing business.¹²⁴ Government is uniquely placed to stimulate the development of these cultures.¹²⁵

¹²² Ruggie Report, above n 115, [84].

¹²³ There are four pieces of federal legislation currently in force prohibiting discrimination in Australia. These include the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). Each of these Acts prohibits discrimination by private entities, in addition to state agencies. These Acts are administered by the AHRC and its specialist commissioners pursuant to the *Human Rights and Equal Opportunity Act 1986* (Cth), principally by way of a complaints procedure which empowers AHRC to investigate and conciliate matters. It is important to note, however, that AHRC does not have power to investigate complaints on its own initiative, that is, its jurisdiction to investigate will only be triggered by the lodging of a complaint. The federal anti-discrimination legislation is reinforced by anti-discrimination legislation in force in all states and territories.

¹²⁴ Ruggie Report, above n 115, [29].

¹²⁵ *Ibid.*

145. 'Soft power' options are ideal tools for developing corporate cultures of compliance with rights. Soft power options are those which the government can adopt to 'better achieve some policy goals through leadership and attraction, rather than through use of force or regulation'.¹²⁶
146. By devising innovative mechanisms which harness the power of the market and leverage its regulatory and service-providing functions, government can simultaneously encourage business entities to respect human rights and enable them to pursue their business objectives.
147. The following sets out some soft power tools available to the government:
- (a) Incorporate human rights provisions in governmental contracts**
148. Government regularly imposes policy expectations, standards of conduct and relevant industry-specific codes on private entities by way of contract. The government's expectations of good corporate citizenship and compliance with human rights can similarly be imposed through the contracts it enters into with business.
- (b) Human Rights Impact Assessments**
149. 'Public-private partnerships' (PPPs) provide an ideal opportunity to use soft power options available to government to promote greater respect for human rights within business. Where government is partnering with a corporation in a large project, such as infrastructure projects, it can use its soft power to require the PPP to conduct a Human Rights Impact Assessment (HRIA) of the project in question. A HRIA is 'a process for systematically identifying, predicting and responding to the potential human rights impacts of a business operation or project'.¹²⁷ According to the Special Representative, in circumstances where a significant impact is expected, conducting HRIAs would yield more immediate results than any other measure in terms of human rights performance by business.¹²⁸
- (c) Market indexing and certification**
150. On the basis of a significant increase in consumer interest in responsible and sustainable investments, share market sustainability indices have been developed in both the UK and the US. For example, in the UK, the FTSE4 Good Index measures the performance of companies that meet globally recognised corporate responsibility standards. This provides easily-

¹²⁶ See generally Paul Hohnen, *Governmental 'Soft Power' Options: How Governments can use the 'soft power' art of encouragement and persuasion to advance corporate engagement on social and environmental issues* (July 2007), 2.

¹²⁷ Human Rights Translated, above n 110, xvii.

¹²⁸ Ruggie Report, above n 115, [77].

accessible information to potential investors as to the social-responsibility credentials of companies and thereby encourages investment in those companies.

151. Although these initiatives are primarily market-based and oriented, government can play an important role by resourcing and supporting socially-responsible market indices and certification programs. At a minimum government should, for example, take these indices and programs into account as part of its procurement policy and practice.

(d) AHRC's role

152. NHRI's play a significant role in promoting compliance with human rights.¹²⁹ The AHRC (Australia's NHRI) has the power to, among other things, promote discussion of human rights, conduct research and education for that purpose and advise government on any action which it needs to take to address human rights issues in Australia, including any measures necessary to ensure compliance with treaty obligations.¹³⁰ It is also empowered to 'inquire into any act or practice that may be inconsistent with or contrary to any human right', however, this is only in respect of Commonwealth laws, or actions of the Commonwealth or its Territories and so does not apply to business.¹³¹ Nevertheless, the AHRC's existing powers enable it to take an active role in relation to the human rights implications of business activity.
153. Commissioning the AHRC to undertake work in this area would have the advantage of reinforcing the role of an established specialist human rights body and avoid the potential duplication or overlap of functions which might arise if an ad-hoc institution was created to specifically address human rights in business. It is necessary to emphasise, however, that the functioning of the AHRC is heavily dependent on government funding. As it is, the AHRC is severely under-funded and so government will need to closely consider this issue if it is serious about promoting business respect for human rights.¹³² Given adequate funding, the AHRC should establish a unit dedicated to promoting human rights within business.

(e) OECD National Contact Points

154. The National Contact Point (**NCP**) 'complaints' system is established under the OECD Guidelines for Multinational Enterprises (**Guidelines**) to enhance corporate compliance with

¹²⁹ Ibid [97].

¹³⁰ HREOC Act, s 11(1).

¹³¹ HREOC Act, s. 11(1)(f).

¹³² HREOC, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry*, above n 9, [627] (speaking specifically on AHRC's work relating to addressing gender discrimination).

- human rights.¹³³ The Guidelines 'are recommendations addressed by governments to multinational enterprises... [which]... provide voluntary principles and standards for responsible business conduct consistent with applicable laws'.¹³⁴ The Guidelines oblige supporting States to establish NCPs who are tasked with promoting and providing a forum for discussing the Guidelines.¹³⁵
155. In Australia the NCP is the General Manager of the Foreign Investment and Trade Policy Division at the Treasury.¹³⁶ The NCP is able to receive formal complaints about a specific entity's behaviour and mediate an amicable, but non-binding, solution between the parties. Although this process lacks transparency, procedural clarity and effective sanctions, it does offer an example of the kind of institution which the government can engage with, support and strengthen in order to monitor corporate conduct.¹³⁷ Although the mechanism is non-binding, there is clearly reputational concern for any company subject to a complaint.
156. The NCP's role should be promoted, enhanced and, where necessary, resourced to ensure that it is well understood as a mechanism for complaints against corporations.

¹³³ Jennifer Zerk, *Corporate Abuse in 2007: A Discussion Paper on What Changes in the Law Need to Happen* (November 2007), available at <http://www.business-humanrights.org/Links/Repository/441927>.

¹³⁴ OECD, *OECD Guidelines for Multinational Enterprises*, 'Preface', [1], available at <http://www.oecd.org/daf/investment/guidelines>.

¹³⁵ *Ibid*, 'Concepts and Principles', [10].

¹³⁶ Available at <http://www.ausncp.gov.au>.

¹³⁷ Zerk, above n 129, 20.

Recommendation 25: Government should implement measures to protect against corporate human rights violations

The government should implement legislative and non-legislative measures to enhance the effective discharge of its obligation to protect against corporate human rights violations. Specifically, positive consideration should be given to the following initiatives:

- (a) incorporating human rights-based provisions in government contracts;
- (b) requiring human rights impact assessments on government and PPP projects;
- (c) resourcing and supporting human rights market indices and certification programs;
- (d) commissioning and resourcing the AHRC to take an active role in relation to the human rights implications of business activity; and
- (e) promoting, enhancing and, where necessary, resourcing the OECD National Contact Point to ensure that it is well understood as a mechanism for complaints against corporations.

10. Equality Act

10.1 Introduction

157. Non-discrimination constitutes a basic and general principle relating to the protection of all human rights.¹³⁸ Australia is obliged under several international human rights instruments to ensure full and effective legislative protection of the right to equality and freedom from discrimination.¹³⁹ In addition, recent studies have shown that equality not only increases social welfare, but is also associated with increased growth and prosperity.¹⁴⁰
158. A Human Rights Act including a right to equality before the law would be an important step towards better protection and promotion of equality and non-discrimination rights in Australia. However, specific and detailed equality laws are also required to create the machinery that will support and promote the right to equality.
159. The federal anti-discrimination legislative regime currently consists of a number of laws aimed at preventing discrimination on the basis of race, age, sex and disability; namely, the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth).
160. The HRLRC considers that this stand-alone anti-discrimination legislation should be replaced with:
- (a) an Equality Act which creates a comprehensive regime promoting equality and addressing all grounds of discrimination; and
 - (b) in the future, a referendum on a Constitutional amendment to include a guarantee of equality before the law.
161. This recommendation has also been made by the HRC in their recent review of Australia. In their Concluding Observations the HRC notes that it 'remains concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law' and recommends that Australia 'adopt Federal legislation, covering all grounds and areas of

¹³⁸ HRC, General Comment 18, Non-discrimination, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

¹³⁹ Including CERD; ICCPR; ICESCR; CEDAW; CRPD.

¹⁴⁰ Some of these are considered in the UK Equalities Review, see The Equality Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007), p 133-138.

discrimination to provide comprehensive protection to the rights to equality and non-discrimination.¹⁴¹

162. As a first step a national public inquiry should be held examining the merits of replacing existing Federal anti-discrimination laws with a single Equality Act. Such an inquiry would, as stated in a recent Report by the Senate Legal and Constitutional Affairs Committee, 'provide us with an opportunity to re-invigorate all of Australia's anti-discrimination laws and place them at the vanguard of legislative schemes that promote equality'.¹⁴²

10.2 Previous Consideration of Equality Legislation

163. Calls for greater legislative and constitutional protection for equality rights have been made for many years. Some of these include:

- (a) in 1988 the Constitutional Commission recommended a Constitutional amendment guaranteeing freedom from discrimination;¹⁴³
- (b) in 1994 the Australian Law Reform Commission proposed that a legal guarantee of equality be implemented through an Equality Act. Their report also recognised a Constitutional equality guarantee as the 'ultimate goal'.¹⁴⁴
- (c) in 2008 the Australian Human Rights Commission recommended an inquiry 'which would consider the merits of a comprehensive *Equality Act* for Australia';¹⁴⁵ and
- (d) also in 2008 the Senate Committee on Legal and Constitutional Affairs recommended that:¹⁴⁶

HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act. The inquiry should report by 2011 and should also consider:

- what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law;

¹⁴¹ Human Rights Committee, *Concluding Observations: Australia*, above n 52 [12].

¹⁴² Senate Legal and Constitutional Affairs Committee, *Report on the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (December 2008), p 165.

¹⁴³ Constitutional Commission, *Final Report of the Constitutional Commission* (1988), available at <http://www.ausconstitution.info/ConComm88/start.shtml#memb-com>.

¹⁴⁴ Australian Law Reform Commission, *Equality before the Law*, ALRC 69 (1994), [4.17].

¹⁴⁵ HREOC, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry*, above n 9.

¹⁴⁶ Senate Legal and Constitutional Affairs Committee, above n. 137, p xvii.

- whether the model for enforcement of anti-discrimination laws should be changed; and
- what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.

164. This section draws on the above reports and recommendations and makes some broad conclusions about the need for a new Australian Equality Act. However, a complete analysis and set of recommendations on the form and content of an Equality Act is beyond the scope of this submission.

10.3 The Need for an Australian Equality Act

165. Our current legislative regime does not provide adequate protection and promotion of the right to equality. Existing anti-discrimination legislation is deficient in that it:

- (a) is effective only in those areas where individuals choose to challenge specific instances of discrimination that fall within limited and defined spheres of activity;
- (b) fails to actively promote equality or address systemic discrimination;
- (c) does not cover all grounds of discrimination (for example, there is no federal legislative protection against discrimination based on carer responsibilities, sexuality, gender identity, homelessness or criminal record);
- (d) does not adequately address multiple or compounded discrimination;¹⁴⁷ and
- (e) is ineffective in areas that have been granted permanent exemptions (such as, under the SDA, sporting clubs, religious bodies and charities).

166. The HRLRC considers that the best way to address these deficiencies is through the enactment of a single, comprehensive and cross-jurisdictional Equality Act which should:

- (a) provide a legal right to substantive equality;
- (b) provide comprehensive coverage through a non-exhaustive list of prohibited grounds or protected attributes;
- (c) have the capacity to retain distinct features regarding specific grounds of discrimination;
- (d) take account of the historical and contextual framework of disadvantage;

¹⁴⁷ Multiple (or compounded) discrimination occurs when a person or group is discriminated against on more than one grounds. For example, where an Indigenous woman is discriminated against on the basis of her sex and her

- (e) directly challenge and seek to eliminate systemic discrimination;
 - (f) recognise and address compounded or intersectional discrimination;
 - (g) allow for both representative and individual complaints;
 - (h) allow for temporary special measures and general conditions to promote equal opportunity; and
 - (i) cover public and private life, without any permanent exemptions or exceptions.
167. A number of groups have expressed concern that abolishing grounds-specific and individually titled anti-discrimination legislation would disadvantage those groups that benefit from the educative force and symbolic power of distinct Acts. While we recognise this concern, we consider that it can be addressed through public education and broad, cross-sectorial participation in the enactment and implementation of an Equality Act.

Recommendation 26: Hold a public inquiry into the merits of an Equality Act

The Government should hold a national, public inquiry into the merits of a single, comprehensive Equality Act.

10.4 Constitutional Equality Guarantee

168. The strongest legal mechanism available to promote the right to equality in Australia is a Constitutional guarantee of equality. Constitutional entrenchment would not only have significant symbolic power; it would ensure that the Government cannot easily amend or overturn the right to equality simply by passing legislation.
169. Equality and non-discrimination is a fundamental right of particular importance. Equality is not only a stand alone right, but it ensures the proper enjoyment of all other human rights. That is, all human rights should be required to be respected and protected without discrimination.¹⁴⁸ Under international law, even in times of national emergency, it is not lawful for States to take measures to discriminate on the basis of race, colour, sex, religion, language and social

race, her experience of discrimination is different than if she had been discriminated against on one of those grounds alone.

¹⁴⁸ ICCPR, article 2, states that the rights in the ICCPR must be respected and ensured without distinction of any kind.

origin.¹⁴⁹ To this extent, non-discrimination is a non-derogable right (see further discussion of non-derogable rights in the HRLRC's first submission).

170. Constitutional entrenchment and protection of equality is particularly necessary in Australia given that the Commonwealth has the power to pass racially discriminatory laws. Using the race power in section 51(xxvi) of the Constitution, the Commonwealth has the power to pass laws that are detrimental to, or discriminatory against, the people of any race by reference to their race.¹⁵⁰ A guarantee of equality in the Constitution should be framed to remove the ability of the Commonwealth to pass discriminatory laws.
171. In recognition of the considerable difficulty involved in amending the Constitution, and also of the need to consider carefully how an equality provision might work in the Constitution, we recommend that a referendum on a Constitutional equality guarantee be considered after the introduction and implementation of an Equality Act and preferably with bipartisan support. To ensure that such a review takes place, provision for it should be made in legislation.

Recommendation 27: An Equality Act to include a provision for a constitutional amendment inquiry

A Federal Equality Act should include a provision mandating that after three years of operation an inquiry be held into a constitutional amendment aimed at enshrining the right to equality.

¹⁴⁹ See ICCPR, article 4.

¹⁵⁰ *Kartinyeri v Commonwealth ('the Hindmarsh Island Case')* 1997, 152 ALR 140, 571-573.