



Australian  
Human Rights  
Commission

*everyone, everywhere, everyday*

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# National Human Rights Consultation

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Australian Human Rights Commission Submission  
June 2009

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## **1 Introduction**

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the National Human Rights Consultation (the Consultation).
2. The Commission is Australia's national human rights institution, with 23 years of experience promoting and protecting human rights in Australia.
3. The Consultation provides the first ever Australia-wide consultation about protecting and promoting human rights. This broad-based consultation process is a good example of participative democracy – people throughout Australia have been given an opportunity to tell the Australian Government how they want their human rights protected.
4. The Commission acknowledges that there is a significant divergence of views about the appropriate mechanisms for protecting human rights in Australia. The Consultation Committee has been asked to 'consult broadly', to 'seek out the wide range of views held by the community about the protection and promotion of human rights' and to 'provide an assessment of the level of community support for each option it identifies'.
5. Genuine and broad-based support for the better protection of human rights in Australia is the first step towards creating a vibrant human rights culture across the country. Consequently, the Commission sees this consultation process as critical in moving towards enhanced human rights protections for all people in Australia.
6. The Commission's long experience working on human rights issues places it in a unique position to offer recommendations about the most appropriate mechanisms for better protecting human rights in Australia.
7. The Commission has consulted directly with Australians about their human rights concerns for over two decades. This includes, for example, people from vulnerable communities including Aboriginal and Torres Strait Islander peoples, people with a disability and people who are homeless. It also includes 'ordinary' Australians from a broad cross-section of the community, including women from all walks of life and people who live in rural and remote Australia.
8. Overwhelmingly, the Commission hears that Australians care about their fundamental human rights and think that there should be better protection of these rights.
9. In light of all the Commission's experience and after careful consideration, the Commission has come to the view that a better developed culture of respect for human rights is essential to improved human rights protection in Australia. The Commission believes that a number of measures must be taken to achieve this cultural change – and that the centre-piece of these measures should be a Human Rights Act which requires each of the three branches of government to integrate consideration of human rights into its everyday work.

10. Australia played a significant role in drafting the *Universal Declaration of Human Rights* in the 1940s. Now, over 60 years later, it is time to make these human rights real for all people in Australia. It is time to bring human rights home.

## 2 Summary

11. Australia's strong traditions of liberal democracy, an independent judiciary and a robust media have been sufficient to protect the rights and freedoms of most people in Australia, most of the time. However, not all people in Australia can be confident of enjoying this protection in respect of all aspects of their lives all of the time.
12. Australia needs a system of government that makes sure that *all* people, no matter who they are, what they do, or where they live, have a safety net to protect their fundamental human rights.
13. All people in Australia should be able to name the human rights that the Australian Government has pledged to protect; and they should understand their responsibility to respect the rights of others.
14. A stronger human rights culture will build respect for the human dignity, freedom and equality of all people in Australia.
15. This submission addresses the following key questions.

### **Part A – Which human rights should be protected and promoted in Australia?**

16. The Commission believes that Australia should protect and promote all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.
17. Many of the human rights in international instruments the Australian Government has agreed to uphold have not yet been implemented in Australia. This should change. Australia should live up to its international commitments by ensuring that human rights standards are brought into domestic law.

### **Part B - Are human rights currently sufficiently protected and promoted in Australia?**

18. In the Commission's view, human rights are not sufficiently protected and promoted in Australia at present. Most of the international human rights instruments that Australia has promised to uphold are not recognised in Australian law. There is no single place in Australian law where people can find a clear statement of the rights which are recognised by that law. Furthermore:
  - the Australian Constitution does not fully protect human rights
  - Parliament can make laws that breach human rights without providing explicit justification
  - human rights can be overlooked in law and policy development processes
  - the common law does not adequately protect human rights

- administrative decisions may breach human rights
- Australia does not always provide effective remedies for human rights breaches
- the Australian Human Rights Commission's human rights protection functions are limited and its funding base is inadequate
- anti-discrimination laws do not protect all human rights or prohibit all types of discrimination
- resources for human rights education are seriously inadequate.

### **Part C - How could Australia better protect and promote human rights?**

19. A good system of human rights protection involves consideration of human rights at all levels, and by all branches of government, with the aim of preventing human rights violations. It also involves providing enforceable remedies for people whose human rights are breached.
20. The building blocks of such a system include:
  - a Parliament that considers the human rights implications of all new laws
  - Australian Government decision-makers who respect human rights when implementing laws, developing policy and delivering public services
  - Australian courts that consider human rights when making decisions
  - the right to challenge government decisions which breach the human rights of individuals
  - all people in Australia being aware of their human rights and their responsibility to respect the rights of others.
21. The Commission believes that the following key measures would help to create a better system of human rights protection in Australia:
  - a national Human Rights Act
  - strengthened and streamlined federal anti-discrimination laws which extend the grounds of prohibited discrimination and promote equality
  - constitutional reform to
    - recognise Indigenous peoples in the preamble to the Australian Constitution
    - remove racially discriminatory provisions from the Australian Constitution
    - replace discriminatory provisions with a guarantee of equality and non-discrimination
  - a significantly enhanced national program of human rights education
  - enhancing the role of the Australian Human Rights Commission to support the better promotion and protection of human rights, and ensuring adequate funding for the Commission to fulfil that role.

22. In making the key recommendation that a national Human Rights Act should be adopted, the Commission respectfully acknowledges the range of views about the best way to protect and promote human rights in Australia. Alternative arguments include, but are not limited to:
- the argument for a constitutionally entrenched bill of rights
  - the argument for a stronger form of statutory human rights protection
  - the argument that our current system of government provides adequate protection for human rights and that no specific human rights law is necessary or desirable.
23. The Commission has carefully considered these alternatives and has engaged in many discussions about the pros and cons of the various models. Ultimately, the Commission has come to the view that the best way to protect and promote human rights is through a national Human Rights Act, similar to the model used in the United Kingdom, New Zealand, Victoria and the Australian Capital Territory.
24. The Commission believes that such a Human Rights Act would ensure that relevant human rights are considered every time a government law, policy or other decision is made. In this way, a Human Rights Act would help promote the development of a culture of respect for human rights, thus helping to prevent human rights breaches before they occur, and introduce greater transparency and accountability into our system of government.

#### **A Human Rights Act would be an exercise of parliamentary supremacy**

25. A national Human Rights Act should make sure that Australian Government decision-making respects human rights, while ensuring that parliamentary supremacy is preserved.
26. Enacting a Human Rights Act would, in itself, be fundamentally democratic. It would be Parliament deciding how it believes human rights should be protected, promoted and respected in Australia. It would be Parliament deciding how its own processes and those of the executive and the courts should be altered to achieve that human rights protection.

#### **A Human Rights Act should bring human rights into parliamentary law-making processes**

27. A Human Rights Act should require the federal Parliament to consider human rights when it makes new laws:
- each bill introduced into Parliament should be accompanied by a human rights compatibility statement
  - a parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Human Rights Act
  - Parliament should be required to publicly explain a decision to adopt a law that is inconsistent with the Human Rights Act.



### **A Human Rights Act should bring human rights into government decision-making processes**

28. A Human Rights Act should require the Australian Government to respect human rights when developing policy, making decisions and delivering services:
- all Cabinet submissions should be accompanied by a Human Rights Impact Assessment
  - all federal public authorities should respect the human rights set out in the Human Rights Act by
    - considering and respecting human rights when they make decisions and set policies
    - preparing internal Human Rights Action Plans
    - reporting annually on compliance with the Human Rights Act
    - ensuring that public servants receive adequate human rights training.
29. It should be unlawful for a public authority to:
- act in a way that is incompatible with human rights
  - fail to give proper consideration to human rights in decision-making.

### **A Human Rights Act should bring human rights into the courts**

30. Federal courts and tribunals should be required to interpret legislation, as far as it is possible to do so consistent with the statutory purpose, in a manner that is consistent with the human rights in the Human Rights Act.
31. There should be a mechanism to alert Parliament when a court finds that a law cannot be interpreted consistently with human rights. It would then be up to Parliament to consider the future of that law. The courts would not have the power to invalidate legislation.

### **A Human Rights Act should provide remedies for breaches of human rights**

32. A Human Rights Act should provide ways for individuals whose human rights have been breached to seek remedies. These remedies should include:
- internal complaint handling mechanisms within federal public authorities
  - conciliation of complaints by the Australian Human Rights Commission
  - a cause of action in the courts
  - the right to seek reparations, including compensation where necessary and appropriate.

### **A Human Rights Act should be accompanied by a national Equality Act**

33. Australia has a thirty year history of anti-discrimination legislation. However, there remain key grounds of discrimination which are not prohibited in federal

anti-discrimination laws, for example discrimination on the basis of sexuality. Further, current anti-discrimination laws are inconsistent in their approach.

34. Australia's federal anti-discrimination laws should be modernised and harmonised. In principle the Commission supports the enactment of a single Equality Act. However, due to the complexity of this task, there should be an extensive inquiry about how best to provide statutory protection of equality in a manner that minimises concerns that a single Act will lose the focus on discrimination for particular groups within society. Special purpose Commissioners should be retained.

### **A Human Rights Act should be accompanied by constitutional protection of equality for all people in Australia**

35. Although this submission focuses on a Human Rights Act, such legislation alone will not be enough to fully protect and promote human rights in Australia.
36. The Australian Constitution continues to discriminate on the basis of race. This is unacceptable. The Australian Government should initiate a process of constitutional reform to ensure the constitutional protection of equality and non-discrimination, as soon as possible.

### **A Human Rights Act should be accompanied by a strong human rights education program**

37. For Australia to develop a robust human rights culture, all people in Australia need to better understand their human rights and their responsibility to respect the rights of others. This includes parliamentarians, court officials, public servants, private sector workers, students in both schools and universities and members of the general public.
38. Currently, human rights education efforts are ad hoc and inadequate. There is an urgent need for a properly resourced national human rights education program.

### **The role of the Australian Human Rights Commission should be enhanced**

39. The Australian Human Rights Commission has over two decades of expertise in the protection and promotion of human rights in Australia. If Australia adopts a Human Rights Act, the Commission is the appropriate body to assist with the Act's implementation and to monitor its effectiveness. In particular, the Commission should be charged with investigating and conciliating a broader range of human rights complaints.
40. However, regardless of whether Australia adopts a Human Rights Act, there is a range of ways in which, if properly resourced, the Commission's functions could be strengthened to ensure better protection and promotion of human rights. Strengthening the Commission would also lead to an enhanced ability to address systemic discrimination and build substantive equality.

41. The Commission at present is not adequately funded. It needs to be properly resourced to carry out its existing functions and any additional functions would need to be accompanied by adequate funding.

### **A Human Rights Act will not work in isolation of other measures**

42. None of these measures will work in isolation. For there to be a real and lasting improvement to human rights protection in Australia, all of these reforms should be implemented.
43. The cumulative impact of these reforms will be the development of a stronger human rights culture in Australia. This will lead to a fairer Australia, where the human dignity, freedom and equality of all people are better respected.

## **3 Recommendations**

44. The Australian Human Rights Commission makes the following key recommendations to the Consultation:
  1. The Australian Parliament should enact a national Human Rights Act.
  2. The Australian Government should refer to the Australian Law Reform Commission for inquiry and report the question of how best to strengthen, simplify and streamline federal anti-discrimination laws.
  3. The Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia.
  4. The Australian Government should resource a significantly enhanced nation-wide human rights education program.
  5. The Australian Government should enhance the powers, functions and funding of the Australian Human Rights Commission, particularly if a Human Rights Act is adopted. Any new functions should be accompanied by appropriate funding.
45. Further recommendations are made throughout this submission. A full list of recommendations is provided in Appendix 1.

## **PART A: Which human rights should be protected and promoted in Australia?**

### **4 Introduction**

46. The Consultation Committee has focused on three key questions. The first asks which human rights (including corresponding responsibilities) should be protected and promoted in Australia.
47. The Commission's answer to that question is that Australia should protect and promote all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.
48. Many of the human rights in international instruments the Australian Government has agreed to uphold have not yet been incorporated into Australian law. This should change. Australia should live up to its commitments by ensuring that the human rights standards to which it has agreed internationally are implemented domestically.
49. This section provides a fuller answer to the Consultation Committee's first question by providing brief background on: what human rights and responsibilities are; where human rights come from; and Australia's international human rights obligations.

### **5 What are human rights?**

#### **5.1 *Human rights are core human values***

50. Human rights are the basic standards of treatment that all people are entitled to, simply because they are human. They are based on the fundamental belief that all human beings have inherent dignity and worth.
51. Human rights are based on core values like freedom, equality, dignity and respect. They are about living a life free from fear, harassment and discrimination. They protect people's freedom to make choices about their own lives, and they promote equal opportunities for all people to develop to their full potential.
52. Equality is one of the most fundamental values underpinning human rights. Equality is a fundamental right in itself – all people have a right to be equal before the law and to be protected from discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>1</sup> In addition, all people are entitled to enjoy all of their other human rights without discrimination.<sup>2</sup>

## **5.2 Human rights are universal and inalienable**

53. Human rights are universal – they apply to everyone, everywhere, every day. All people are entitled to enjoy the same basic rights regardless of who they are, what they look like, where they come from or what they believe in.
54. The international community has long recognised that the enjoyment of human rights and fundamental freedoms is an essential element of a peaceful society. As acknowledged by the *Universal Declaration of Human Rights* (the Universal Declaration), the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.<sup>3</sup>

## **5.3 Human rights are indivisible and interdependent**

55. Human rights are often divided into two broad categories – civil and political rights, and economic, social and cultural rights. However, in practice this is an artificial distinction.
56. In reality, human rights are indivisible and interdependent. The realisation of all human rights is necessary for an individual to live with dignity and to enjoy equality. Many civil and political rights cannot be realised unless economic, social and cultural rights are also secured.
57. For example, if a person does not enjoy their economic right to adequate food, their civil right to life will be undermined. Or, if a person does not enjoy their economic right to adequate housing, they might have difficulty enjoying various civil and political rights including the right to privacy and the right to vote.
58. In the Commission’s experience, many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights. These include access to adequate health care, education and housing. And the restriction of these rights is often linked to civil and political rights like the right to non-discrimination.
59. The need for better protection to ensure the progressive realisation of economic, social and cultural rights in particular is discussed in more detail in section 20.5 of this submission.

## **5.4 Human rights come with responsibilities**

60. It is important to recognise that, just as all people are entitled to enjoy all human rights, all people also have responsibilities to respect the rights of others.
61. This is recognised in the Universal Declaration, which calls on every individual in society to promote respect for human rights and freedoms.<sup>4</sup> It is also recognised in key human rights treaties, which note that individuals have duties to other individuals and to their community, and have a responsibility to strive for the promotion and observance of human rights.<sup>5</sup>

62. These responsibilities are not binding legal obligations on individuals. Nonetheless, respecting the rights of others is a fundamental civic duty. It is important to promote the awareness and exercise of these responsibilities in Australia.

## **6 Where do Australia’s human rights obligations come from?**

63. Australia as a nation state has a broad range of international human rights obligations. These obligations exist because Australian Governments have, over the past sixty years, voluntarily agreed to become a party to various international human rights instruments, as outlined below.

### **6.1 Seven major human rights treaties**

64. Australia is a party to seven of the major international human rights treaties, as follows:<sup>6</sup>

<b>Major human rights treaties</b>	<b>Australia adopted</b>
<i>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</i> <sup>7</sup>	1975
<i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i> <sup>8</sup>	1976
<i>International Covenant on Civil and Political Rights (ICCPR)</i> <sup>9</sup>	1980
<i>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i> <sup>10</sup>	1983
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i> <sup>11</sup>	1989
<i>Convention on the Rights of the Child (CRC)</i> <sup>12</sup>	1991
<i>Convention on the Rights of Persons with Disabilities (Disability Convention)</i> <sup>13</sup>	2008

65. The two core treaties, adopted by the United Nations (UN) General Assembly in 1966, are the ICCPR and the ICESCR.
66. The ICCPR protects a broad range of civil and political rights. Many of these aim to ensure that all people are able to participate in public and political affairs – for example, the right to vote and to run for election, and freedom of speech, association and assembly. Other rights aim to protect people’s physical liberty and safety – for example, the right to life and to be free from torture, freedom of movement, freedom from arbitrary detention, and the right to a fair trial.
67. The ICESCR creates obligations on government to progressively realise a diverse range of economic, social and cultural rights. Many of these relate to the basic necessities people need in order to lead a healthy and dignified life – for example, the right to adequate shelter, food and clothing and the right to adequate health care. Others aim to ensure that all people can develop to their full potential and have access to economic opportunities – for example, the rights to a basic education, to work, and to fair and safe conditions at work.

## 6.2 Other human rights treaties

68. Australia is also a party to a number of other international treaties relating to human rights, including the following:

Other human rights treaties	Australia adopted
<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> <sup>14</sup>	1949
<i>Convention relating to the Status of Refugees</i> <sup>15</sup>	1954
<i>Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery</i> <sup>16</sup>	1958
<i>Protocol relating to the Status of Refugees</i> <sup>17</sup>	1973
<i>Convention relating to the Status of Stateless Persons</i> <sup>18</sup>	1973
<i>Convention on the Reduction of Statelessness</i> <sup>19</sup>	1973
<i>Convention concerning Discrimination in respect of Employment and Occupation (ILO No.111)</i> <sup>20</sup>	1973
<i>Optional Protocol to the International Covenant on Civil and Political Rights</i> <sup>21</sup>	1991
<i>Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty</i> <sup>22</sup>	1991
<i>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict</i> <sup>23</sup>	2006
<i>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography</i> <sup>24</sup>	2007
<i>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women</i> <sup>25</sup>	2008

69. Australia has signed but not yet ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>26</sup>

70. There are some international human rights agreements that Australia has not yet ratified, including the following:

- *Optional Protocol to the Convention on the Rights of Persons with Disabilities*<sup>27</sup>
- *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*<sup>28</sup>
- *International Labor Organisation Convention 169*.<sup>29</sup>

## 6.3 International human rights declarations

71. Australia has expressed support for a number of international declarations relating to human rights.

72. Unlike an international treaty, a declaration does not create binding legal obligations. However, declarations do carry significant political and moral weight because they are adopted through agreement by the international community. They therefore act as key standard-setting documents. Or, in some cases, they codify existing standards.

(a) *The Universal Declaration of Human Rights*

73. The most widely supported international human rights declaration is the Universal Declaration, which was adopted by the UN General Assembly in 1948.<sup>30</sup> Australia played a key role in drafting the declaration.

74. The Universal Declaration has had a profound influence on the development of international human rights law. It is globally accepted as a statement of fundamental rights which should be enjoyed by all human beings – including civil, political, economic, social and cultural rights. Some people argue that the Universal Declaration has become so accepted by the international community over the past sixty years that it has now become a part of international customary law, binding on all states.<sup>31</sup>

75. Under the Universal Declaration, every individual and organ of society is called on to promote respect for human rights through teaching and education, and through the adoption of national and international measures aimed at securing the recognition of the rights in the declaration.<sup>32</sup>

(b) *The United Nations Declaration on the Rights of Indigenous Peoples*

76. Another particularly important international declaration is the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples), which was adopted by the UN General Assembly on 13 September 2007.<sup>33</sup> Under the previous federal government, Australia voted against the adoption of the declaration. On 3 April 2009, the current federal government reversed this position and made a formal statement in support of the declaration.<sup>34</sup>

77. The declaration does not 'create' new rights. Rather, it elaborates existing human rights as they apply to Indigenous peoples. It affirms that:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.<sup>35</sup>

(c) *Other human rights declarations*

78. Australia also supports a range of other international declarations relating to human rights, including the following:

- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*<sup>36</sup>
- *Declaration on the Rights of Mentally Retarded Persons*<sup>37</sup>



- *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.*<sup>38</sup>

## **7 What are Australia's obligations under the major human rights treaties?**

79. The human rights set out in an international treaty do not automatically become part of Australian law because the Australian Government becomes a party to that treaty. However, by becoming a party, the Australian Government makes a commitment to the international community – and is thereafter bound by international law – to protect the treaty rights in Australian law and practice.
80. The major international human rights treaties require the Australian Government to take a range of steps to respect, protect, fulfil and promote human rights.<sup>39</sup> An overview of the key steps is set out below.

### **7.1 Adopt laws that protect and promote human rights**

81. All of the human rights treaties require Australia to take concrete measures, including changing or adopting laws, to implement the terms of the treaty domestically.<sup>40</sup>
82. For example, in the case of the ICCPR, Australia is obliged to 'adopt such laws or other measures as may be necessary to give effect to the rights' recognised in the Covenant.<sup>41</sup>
83. The UN Human Rights Committee has said this means that:
- ...unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.<sup>42</sup>
84. This obligation to implement domestic protection under the ICCPR is unqualified and took effect as soon as Australia became a party. The UN Human Rights Committee has said that '[a] failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State'.<sup>43</sup>
85. The obligation to ensure that human rights are respected and protected domestically is primarily the responsibility of the federal government. It is well established that in federal nations like Australia, this obligation includes ensuring protections also apply at the state and territory level. For example, Article 50 of the ICCPR states that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.<sup>44</sup>

## **7.2 Take administrative, financial, educational and other measures to protect and promote human rights**

86. In addition to adopting laws that protect and promote human rights, the Australian Government is obliged to implement all other appropriate measures required to give full effect to the rights recognised in the human rights treaties.<sup>45</sup>
87. For example, in the case of the ICESCR, Australia is obliged to implement the Covenant rights using ‘all appropriate means’ including legislative, administrative, financial, educational and social measures.<sup>46</sup>
88. The ICESCR is slightly different to the other human rights treaties, in that the obligation to implement the rights is expressed in terms of ‘progressive realisation’.<sup>47</sup> This allows for the full realisation of the rights over a period of time and allows for resource constraints to be taken into account. However, it still requires the taking of ‘deliberate, concrete and targeted’ steps towards realising the Covenant rights using all appropriate means.<sup>48</sup> The UN Committee on Economic, Social and Cultural Rights has also made clear that the ICESCR does impose minimum ‘core obligations’ in relation to the rights recognised in the Covenant. In relation to the right to health, for example, this requires access to health facilities, goods and services on a non-discriminatory basis; access to minimum essential food which is nutritionally adequate and safe; and access to basic shelter, housing and sanitation and an adequate supply of safe and potable water.<sup>49</sup>

## **7.3 Implement human rights without discrimination**

89. Australia must ensure that it implements all of the rights contained in the human rights treaties without discrimination.<sup>50</sup>
90. For example, the Australian Government must ensure that all children within Australia’s jurisdiction can enjoy the rights in the CRC:  

...without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>51</sup>

## **7.4 Provide effective remedies for breaches of human rights**

91. The human rights treaties either explicitly or implicitly require Australia to ensure that a person has access to effective remedies, including judicial remedies, if their rights are breached.<sup>52</sup>
92. According to the UN Human Rights Committee, an ‘effective remedy’ requires reparation to the person whose rights have been violated. Reparations can ‘involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices’.<sup>53</sup>
93. In the case of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has noted that although administrative remedies can sometimes

be enough, ‘whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary’.<sup>54</sup>

### **7.5 Report to international treaty committees on Australia’s progress**

94. Every two to five years (depending on the treaty), Australia must report to the UN committee charged with monitoring each major human rights treaty.<sup>55</sup>
95. In those reports, the Australian Government should explain what it has done to implement the relevant treaty and what progress has been made in the enjoyment of the rights under the treaty.<sup>56</sup> The reports should include an update on any recent developments in Australian law or practice.<sup>57</sup> Reports should also respond to issues raised by the relevant UN committee in its concluding observations on Australia’s previous report.<sup>58</sup>

**Recommendation 1:** Australia should promote and protect all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.

## **PART B: Are human rights currently sufficiently protected and promoted in Australia?**

### **8 Introduction**

96. The second key question asked by the Consultation Committee is whether human rights are currently sufficiently protected and promoted in Australia.
97. The Commission's experience has persuaded it that the answer to this question is no. While Australia's laws and democratic institutions provide an important level of respect for fundamental rights and freedoms, the protection of human rights in Australia is piecemeal, with systemic weaknesses and significant gaps.
98. Many Australians are lucky enough to enjoy most of their human rights without interference, most of the time. However, there are appreciable numbers of people in Australia whose rights are infringed on a daily basis. And there is always potential for people to move from 'lucky' to 'unlucky'.
99. For more than twenty years the Commission has heard from people all around Australia about situations where their human rights have not been properly protected, and the impacts these experiences have had on their lives and livelihoods.
100. This section of the submission provides a brief overview of some of those human rights problems. It then goes on to discuss the underlying causes of those problems – the gaps and systemic weaknesses in Australia's promotion and protection of human rights.
101. The gaps and weaknesses in human rights protection in Australia include the following:
  - international human rights treaties have not been adequately incorporated into Australian law
  - Australia's Constitution does not fully protect human rights
  - human rights can be overlooked in law and policy development processes
  - the common law does not properly protect human rights
  - administrative decisions may breach human rights
  - Australia does not always provide effective remedies for human rights breaches
  - the Australian Human Rights Commission's human rights protection functions are limited and its funding base is inadequate
  - anti-discrimination laws do not protect all human rights or prohibit all types of discrimination
  - resources for human rights education are seriously inadequate.

## 9 The Commission's experience: examples of insufficient human rights protection in Australia

102. For almost 23 years, the Commission has worked towards ensuring that the human rights of people in Australia are promoted and protected. This work has covered a vast array of issues, and has often been carried out in conjunction with stakeholders including government, NGOs, educational institutions, community groups, business and the Australian public. The Commission has examined numerous laws and policies for their compliance with Australia's human rights obligations, conducted nation-wide inquiries into issues of critical concern, listened to the stories of countless Australians, and investigated thousands of individual complaints about human rights breaches.
103. On a daily basis, the Commission hears from people in Australia who feel that their human rights have been breached. In many cases the Commission is not able to offer an effective solution, because its statutory powers are limited.
104. It is often the most vulnerable members of society who are most at risk of falling through the gaps in Australia's human rights protection. The following is a very brief snapshot of just some of the ways in which human rights are insufficiently promoted and protected in Australia.
- **Aboriginal and Torres Strait Islander peoples:** Aboriginal and Torres Strait Islander peoples (Indigenous peoples)<sup>59</sup> continue to face enormous challenges to enjoying their human rights. Compared to non-Indigenous Australians, they experience poorer educational outcomes, higher rates of unemployment, lower income levels and lower rates of home ownership; while at the same time experiencing higher levels of family violence and child abuse, and overrepresentation in prisons.<sup>60</sup>
  - **Homelessness:** Every night more than 100 000 people in Australia are homeless. One in every two people requesting accommodation from a homeless service is turned away.<sup>61</sup> More than 40% of people who are homeless in Australia are younger than 25.<sup>62</sup> Indigenous peoples are particularly vulnerable to homelessness because of their high levels of economic, social and cultural disadvantage.<sup>63</sup>
  - **Domestic violence:** As many as one in three Australian women are affected by domestic and family violence.<sup>64</sup> Nearly one in five Australian women has experienced sexual violence since the age of 15.<sup>65</sup> Domestic violence has been identified as the leading contributor to preventable death, disability and illness in women aged 15 to 44 in Victoria.<sup>66</sup> Further, domestic violence is the most common reason cited by individuals seeking assistance with Australian housing services.<sup>67</sup> A high proportion of women with a disability experience domestic violence.<sup>68</sup>
  - **Gender inequality:** Women experience lower levels of workforce participation, take on greater shares of caring responsibilities, and are generally paid less for the same work than men.<sup>69</sup> In the World Economic Forum's Global Gender Gap Index, Australia is ranked number one (with other countries) for educational attainment, but number 41 for labour force

participation.<sup>70</sup> Australian women who work fulltime earn, on average, 16% less than men.<sup>71</sup> Women are also more likely to be engaged in low paid, casual and part-time work.<sup>72</sup> These factors contribute to a significant gender gap in retirement savings.<sup>73</sup>

- **Children and young people:** Young people are often 'moved-on' from public places where they gather, under laws which give police broad powers to 'move-on' or detain people in public spaces.<sup>74</sup> These powers disproportionately impact on young people, especially Indigenous and homeless youth. Many children in Australia are subjected to child abuse and neglect or are exposed to domestic violence.<sup>75</sup> Others are not able to access adequate educational opportunities, particularly in rural and remote areas.<sup>76</sup>
- **People with disability:** People with disability continue to face higher barriers to participation and employment than many other groups in Australian society.<sup>77</sup> People with disability represent a significant proportion of Australia's working age population (16.6%), yet they participate in the workforce at lower rates, they are less likely to be employed when they do attempt to participate, and they will earn less if they do get a job.<sup>78</sup> Some people with disability face challenges to enjoying their right to vote, given the lack of electronic voting for people who are blind or visually impaired.<sup>79</sup>
- **People in prison or detention:** Some prisoners in Australia face difficult conditions due to overcrowding, as well as inadequate health and mental health care.<sup>80</sup> UN treaty bodies have raised concerns that children are sometimes detained in adult correctional facilities.<sup>81</sup> Australia's mandatory immigration detention law remains in place, and some immigration detainees face prolonged and uncertain periods in detention in violation of the right to be free from arbitrary detention. In addition, some children are still held in Australia's immigration detention facilities.<sup>82</sup>
- **People in rural and remote communities:** People living in some remote and rural areas in Australia face significant challenges to enjoying their human rights, particularly the rights to education and health care, due to lack of access to adequate services and facilities. Some communities have little access to essential support services such as mental health care, accommodation assistance for people who are homeless, and alcohol and drug rehabilitation facilities. Access to public buildings for people with a disability is also a significant challenge in some rural areas.<sup>83</sup>
- **People who are gay, lesbian, bisexual, transgender or intersex (GLBTI):** There is no federal law specifically prohibiting discrimination on the grounds of sexuality, sex identity or gender identity. Many GLBTI people in Australia still experience significant levels of violence, harassment, bullying and discrimination in the workplace and the broader community. Same-sex couples do not enjoy equality of rights regarding relationship recognition, including civil marriage rights. Some people who are sex and gender diverse face difficulties obtaining official documents that accurately reflect their sex or gender.<sup>84</sup>

- **People with mental illness:** One in five Australians will be affected by a mental illness during their lifetime. Many people in Australia with mental illness are not able to access prompt and adequate psychological or psychiatric care; some have difficulty getting necessary medication; and others face challenges accessing adequate accommodation support and welfare benefits. They and their families or carers often report being treated with a lack of respect and dignity when they seek assistance.<sup>85</sup>
- **People from culturally and linguistically diverse backgrounds:** Many people in Australia face experiences of discrimination, vilification or violence because of their ethnic, racial, cultural or linguistic background.<sup>86</sup> Over the past few years this has been an increasing issue for Arab and Muslim Australians in particular, some of whom have been subjected to discrimination, harassment or violence.<sup>87</sup> Discrimination against Jewish people also remains a problem in Australia.<sup>88</sup>

105. There are many more examples of systemic human rights problems in Australia than the ones discussed here. Some further examples are discussed as case studies in sections 11 to 18 below; others are addressed in further detail in Appendix 2. Undoubtedly, the Consultation Committee's public consultation sessions will have revealed many more stories of individual and systemic human rights concerns.

## 10 Human rights treaties have not been adequately incorporated into Australian law

106. While some human rights enjoy legal protection in Australia, many aspects of the major human rights treaties have not been incorporated into Australia's legal system. The major human rights treaties that Australia has agreed to uphold (as discussed in Part A) are not adequately protected in Australian law.
107. Some aspects of the right to equality and non-discrimination (as set out in the ICCPR, CERD, CEDAW, ILO No.111 and the Disability Convention) are implemented through the four federal anti-discrimination laws – the *Racial Discrimination Act 1975* (Cth) (Race Discrimination Act), the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act), the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) and the *Age Discrimination Act 2004* (Cth) (Age Discrimination Act).<sup>89</sup> However, as discussed in section 21 of this submission, those laws do not fully protect the right to equality.<sup>90</sup>
108. The rights contained in a range of treaties and declarations are recognised under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act), either as schedules to it<sup>91</sup> or as 'relevant international instruments' declared under section 47 of the HREOC Act.<sup>92</sup> However, this does not make those treaties part of Australian law.<sup>93</sup> It does mean that the Commission has jurisdiction to exercise its human rights functions with regard to those treaty rights, but the Commission cannot make binding recommendations and cannot enforce remedies for breaches of the rights. Two major treaties – the ICESCR and the CAT – are not scheduled to the HREOC Act or declared to be 'relevant international instruments'. Nor are they otherwise fully incorporated into Australian law.<sup>94</sup>

109. The UN treaty bodies charged with monitoring implementation of the ICCPR, ICESCR, CRC and CAT have each concluded that those treaties have not been adequately incorporated into Australia's legal system.<sup>95</sup> In many cases this means that a person in Australia who feels that the government has breached their rights under one of those treaties is left without an enforceable remedy.
110. In 2000, the UN Committee on Economic, Social and Cultural Rights expressed regret that 'because the Covenant has not been entrenched as law in the domestic legal order, its provisions cannot be invoked before a court of law', and strongly recommended that Australia 'incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts'.<sup>96</sup>
111. In 2009, the same Committee expressed regret that their 2000 recommendation had not been implemented, and called for 'comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions'.<sup>97</sup>
112. In 2000, the UN Human Rights Committee raised concerns that, in the absence of a constitutional bill of rights or a constitutional provision giving effect to the ICCPR, there are gaps in Australia's protection of the ICCPR rights and areas where people are not able to access an effective remedy for a rights violation.<sup>98</sup>
113. In 2009, the same Committee reiterated its concerns and recommended:

The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.<sup>99</sup>

## **11 Australia's Constitution does not fully protect human rights**

114. Contrary to the belief of many Australians,<sup>100</sup> the Australian Constitution does not include a bill of rights, and it offers only limited protection for a small number of discrete human rights. None of the international human rights treaties agreed to by the Australian Government have been incorporated into the Constitution.
115. When the Australian Constitution was written, the drafters were more concerned with the rights of the states than with the rights of individuals in Australia. One of the key arguments against the inclusion of individual rights in the Constitution at federation was that they would 'usurp the power of the States'.<sup>101</sup> Further, the drafters were also 'concerned to maintain the power of colonies, once they became the Australian states, to discriminate between people on the ground of their race'.<sup>102</sup>
116. At the Constitutional Conventions in the 1890s, there were no Indigenous people, women or working men as delegates. Those who drafted the Constitution were confident that 'the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society'.<sup>103</sup>



117. As a result, the Australian Constitution provides only limited safeguards for individual rights and freedoms. These include:
- the right to compensation on just terms in the event of a compulsory acquisition of property by the Commonwealth<sup>104</sup>
  - the right to trial by jury for a federal indictable offence<sup>105</sup>
  - the right to challenge the lawfulness of decisions of the Australian Government in the High Court<sup>106</sup>
  - a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion<sup>107</sup>
  - a prohibition on making federal laws that discriminate against a person because of the state in which they live.<sup>108</sup>
118. The High Court has found that some rights are implied in the text of the Constitution. This includes freedom of expression in relation to public and political affairs, commonly referred to as ‘freedom of political communication’.<sup>109</sup> This right is directed at ensuring that people are free to discover and debate matters which enable them to exercise a free and informed choice as voters.<sup>110</sup>
119. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution.<sup>111</sup> Even for those rights that are protected by the Constitution, either expressly or by implication, the Australian judiciary has generally interpreted them narrowly.<sup>112</sup> The High Court has not supported the proposition that, in cases of ambiguity, the Constitution should be interpreted consistently with human rights.<sup>113</sup>
120. Thus, there are many fundamental human rights that the Australian Constitution does not protect – the right to life, the right to equality and non-discrimination, the right to be free from arbitrary detention, freedom of assembly, and the right to be free from torture and cruel or inhuman treatment – to name just a few.<sup>114</sup>
121. In combination, these factors mean that the Australian Constitution offers very limited protection for human rights, and very limited constraints on the ability of the federal Parliament to pass laws that breach human rights.

### **11.1 Example: Australia’s Constitution does not protect racial equality – the Northern Territory Emergency Response**

122. The UN Committee on the Elimination of Racial Discrimination has expressed concern that there is no entrenched guarantee against racial discrimination in Australia.<sup>115</sup>
123. While the Race Discrimination Act provides some protection against racial discrimination, the Australian Constitution does not include protection for the right to racial equality. This means the federal Parliament can override the legislative protection offered by the Race Discrimination Act and adopt laws that discriminate on the basis of race.

124. The federal Parliament did this in 2007, when it suspended the operation of the Race Discrimination Act in order to pass the Northern Territory Emergency Response (NTER) legislation. The NTER legislation introduced measures to address child sexual abuse and family violence in 73 prescribed Indigenous communities in the Northern Territory.
125. The Commission does not dispute that the Australian Government has an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse.<sup>116</sup> The Commission has consistently supported those aspects of the NTER.<sup>117</sup> However, the Commission does not accept that to take the urgent action necessary to protect the rights of children and families, it is necessary to discriminate on the basis of race.
126. The NTER legislation measures that discriminate or allow discrimination on the basis of race include:
- suspending the application of the Race Discrimination Act and allowing officials to act in a racially discriminatory way
  - controlling how a person spends their money through income management measures, a significant interference with the right to privacy
  - applying parts of the social security legislation retrospectively
  - excluding some aspects of social security administrative decisions from review
  - acquiring property on a different basis to other property holders in the Northern Territory.
127. The UN Human Rights Committee criticised the Northern Territory Emergency Response as being inconsistent with Australia's obligations under the ICCPR, and expressed particular concern about the suspension of the Race Discrimination Act and the lack of consultation with Indigenous peoples in designing the NTER measures.<sup>118</sup>

### **11.2 Example: Australia's Constitution did not stop Parliament from making laws that authorised indefinite detention – the Al-Kateb case**

128. In the 2004 case of *Al-Kateb v Godwin*, the High Court of Australia was asked to decide whether the *Migration Act 1958* (Cth) (Migration Act) authorises the indefinite detention of an unlawful non-citizen when there is no real prospect of his removal from Australia.<sup>119</sup> The Court found that a law that resulted in a person being held in immigration detention indefinitely was constitutionally valid.
129. Mr Al-Kateb was twenty four when he arrived in Australia by fishing boat, without a valid visa. He was taken to Curtin Immigration Detention Centre in the Western Australian desert. Mr Al-Kateb's application for a protection visa to stay in Australia was rejected. The Department of Immigration tried to remove Mr Al-Kateb without success. Mr Al-Kateb was held in immigration detention for years, with no idea when he would be freed.

130. In the High Court, Mr Al-Kateb argued that the Migration Act should be interpreted consistently with Australia's obligations under the ICCPR, which protects the right to liberty and prohibits arbitrary detention.<sup>120</sup>
131. The majority of the High Court found that the words of the Migration Act clearly required Mr Al-Kateb to be detained until he could be removed from Australia, regardless of the fact that there was no reasonable prospect of this happening in the foreseeable future. Because the majority decided the words were unambiguous, they did not consider Mr Al-Kateb's human rights. Justice McHugh recognised that the situation was 'tragic' but said:
- It is not for courts ... to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.<sup>121</sup>
132. According to Justice McHugh, the case illustrated that a judge 'may be called upon to reach legal conclusions that are applied with "tragic" consequences'.<sup>122</sup> This observation could also be made about other cases – in the same year as the Al-Kateb case, the High Court also upheld the legality of the long-term detention of children and confirmed that immigration detention remains lawful even if the conditions are harsh or inhuman.<sup>123</sup>

## **12 Human rights can be overlooked in law and policy development processes**

133. As mentioned above, the best system of human rights protection is one that prevents breaches of human rights occurring in the first place. One of the key weaknesses in Australia's current system is that there are no formal mechanisms to ensure that federal ministers, parliamentarians and government departments assess the potential human rights implications of laws and policies before they are adopted.
134. Parliament can pass laws that breach Australia's international human rights obligations without even considering those obligations during the drafting process, and without public debate or explanation.
135. The Australian Government can also adopt and implement policy measures without considering whether those measures promote and protect the human rights Australia has agreed to uphold.
136. In recent years, these systemic weaknesses have allowed the adoption of laws and policies that breach numerous human rights. For example, Australia has adopted laws and measures that discriminate against Indigenous peoples in the Northern Territory; laws allowing the indefinite detention of people seeking asylum; laws discriminating against same-sex couples; and a raft of counter-terrorism laws that infringe on fundamental freedoms.
137. There are various stages of the law- and policy-making process where human rights may currently be overlooked, as discussed below.

### **12.1 Human rights may be overlooked at the early stages of legislative development**

138. The *Commonwealth Legislation Handbook* (the Legislation Handbook) describes the procedures for making federal laws.<sup>124</sup> It provides a 'guide for departmental officers and focuses on matters which require action by departmental officers'.<sup>125</sup>
139. The Legislation Handbook does not require ministers or their respective departments to consider human rights in the law- and policy-making process. This means that a new policy can be formulated and approved by a minister, and legislation can be drafted without consideration as to whether it complies with Australia's human rights obligations.
140. The Legislation Handbook does state that the Attorney-General's Department should be 'consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights'.<sup>126</sup> However, since ministers and departments are not required to consider human rights in the first place, it is unclear how human rights issues will be identified and it is likely that they will be overlooked in other than clear cases. Further, the Legislation Handbook does not explain what should happen in the event that the Attorney-General's Department does confirm an inconsistency with human rights.

### **12.2 Human rights may be overlooked by Cabinet**

141. The Legislation Handbook requires Cabinet approval for certain significant policy proposals involving legislation.<sup>127</sup> However, the Handbook 'does not single out policy proposals with a rights impact for Cabinet consideration'.<sup>128</sup> Nor does it require Cabinet submissions to consider how proposals for new legislation might impact on human rights.
142. The federal *Cabinet Handbook* provides further guidance for departmental officers involved with Cabinet submissions.<sup>129</sup> However, like the Legislation Handbook, this document does not contain any guidance on how human rights should be considered in the preparation of Cabinet submissions.

### **12.3 Human rights may be overlooked when making subordinate legislation**

143. The Legislation Handbook recommends that 'rules which have a significant impact on individual rights and liberties' and 'provisions conferring enforceable rights on citizens or organisations' should be implemented through primary legislation rather than delegated (or subordinate) legislation.<sup>130</sup>
144. The *Federal Executive Council Handbook*, which sets out procedures for making subordinate legislation, contains no specific guidance on how human rights should be considered in the drafting and approval of subordinate legislation.<sup>131</sup>

145. Further, the *Legislative Instruments Act 2003* (Cth) requires each legislative instrument to be accompanied by an explanatory statement.<sup>132</sup> However, the list of matters that must be addressed in this statement does not include the impact of the legislative instrument on human rights.

#### **12.4 Human rights may be overlooked by parliamentary committees**

146. Parliamentary committees scrutinise government activity including new bills, existing laws, and issues of public administration and policy.
147. There are a number of parliamentary committees with special areas of expertise. However, there is no specialist committee focused on examining the human rights implications of proposed laws. Further, there is no general requirement for other specialist committees to consider human rights during their inquiries, unless their specific terms of reference require them to do so. In practice, terms of reference rarely include human rights considerations.
148. The Standing Committee on Regulations and Ordinances and the Scrutiny of Bills Committee are governed by the Senate Standing Orders, which require the Committees to consider whether regulations, ordinances or bills may ‘trespass unduly on personal rights and liberties’.<sup>133</sup> However, these Committees are given no guidance on which rights and liberties they should consider, or how they should determine when those rights can be justifiably limited.

#### **12.5 Human rights may be overlooked in parliamentary debate**

149. Some opponents of stronger legal protections for human rights suggest that robust parliamentary debate currently provides sufficient protection.<sup>134</sup> However, as Professor Hilary Charlesworth has observed, this claim:
- has little empirical basis in Australian history: indeed the current operation of the Commonwealth Parliament indicates the sharp diminution of the role of the legislature in policy development generally.<sup>135</sup>
150. Bills are often debated and adopted by Parliament with little reference to the potential impacts on people’s human rights. In some cases, parliamentarians and the general public may be unaware of the human rights obligations that could be undermined by the proposed legislation. In some cases, parliamentarians may be aware, but are not required to explain or justify publicly the limitations on rights. In other cases, bills are simply rushed through without adequate time to consider or address the potential human rights consequences.
151. Returning to the NTER legislation as an example, it is clear that Parliament did not hold an informed and rigorous debate about the serious potential human rights implications of the new legislation.
152. Alan Ramsey described the passage of the NTER legislation – which has since had significant impacts on human rights – as follows:

In the House, which met at 12.30pm, Malcolm Thomas Brough, 45, cabinet minister, introduced a package of five bills totalling some 700 pages, including explanatory memoranda. He began speaking at 12.30. He sat down at 1.51pm after reading five speeches end on end, like sausages. It had taken him 10 minutes short of two hours just to introduce his five bills. At 9.34 that night it was all over.

That is, the people's house passed Brough's five bills of 600 pages of legislative detail just nine hours after the Prime Minister's delegate introduced them. Debate had lasted four hours and 16 minutes. Fourteen politicians had spoken, including Brough a second time. Thus in a legislature of 150 MPs, only 13 were allowed only twice as long, collectively, to debate the bills as it had taken the minister to read his five speeches introducing them.<sup>136</sup>

153. Similarly, over the past decade, numerous counter-terrorism laws were rushed through Parliament without adequate consideration of, or debate about, their potential impacts on fundamental rights and freedoms.<sup>137</sup>
154. Both the UN Human Rights Committee and the UN Committee against Torture have since raised concerns about aspects of Australia's counter-terrorism laws.<sup>138</sup> The impacts of these laws are discussed further in the case study in section 13.3 below.

### **13 The common law does not properly protect human rights**

155. Some human rights are protected by established common law principles. Other human rights have limited protection through certain principles of statutory interpretation, as discussed below.
156. However, many of the human rights the Australian Government has agreed to uphold are not protected at all by the common law. And the protection that does exist is fragile. Parliament can adopt legislation that overrides the common law at any time, without giving due consideration to the human rights implications and without having to offer public justification.

#### **13.1 The common law offers some human rights protections**

(a) *Some human rights are recognised by the common law*

157. The common law recognises and protects some fundamental rights and freedoms. For example, the right against self incrimination; aspects of the right to a fair trial; prohibitions on trespass (which partially protect the right to privacy); the right to sue for false imprisonment; a presumption of innocence in criminal trials; and a presumption that the standard of proof in criminal cases is beyond reasonable doubt.

(b) *The development of the common law is influenced by international human rights*

158. It is possible for the common law to evolve over time to develop stronger rights protections, as international human rights law can influence the development of the common law. In *Mabo (No 2)*, Justice Gerard Brennan said that while the:

common law does not necessarily conform with international law ... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>139</sup>

159. However, this principle is subject to the somewhat ambiguous qualification that the High Court:

is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shapes and internal consistency.<sup>140</sup>

160. Further, the common law cannot offer protection where common law rights have been clearly restricted by legislation. Therefore, as the Hon Michael McHugh has observed:

the development of the common law by an independent judiciary by no means provides an adequate safeguard for human rights. It can not provide the same level of protection as a national Bill of Rights can do.<sup>141</sup>

(c) *Courts assume that Parliament does not intend to breach human rights*

161. In *Coco v The Queen*,<sup>142</sup> the majority of the High Court said that 'courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language'.<sup>143</sup>

162. This common law principle of statutory interpretation is intended to make sure that rights that are traditionally protected by the common law are not overridden by legislation unless Parliament has clearly intended to do so.<sup>144</sup>

(d) *Courts can interpret ambiguous legislation consistently with human rights*

163. A related common law principle of statutory interpretation is that where a law is unclear, courts can give the law a meaning that would comply with international law, so far as the language of the statute permits.<sup>145</sup> In particular, where there is ambiguity, the court should prefer a construction that is consistent with and advances Australia's international treaty obligations.<sup>146</sup>

164. In addition, where the specific legislation gives effect to an international treaty by adopting the words of the treaty, these provisions should be interpreted using the international jurisprudence relevant to the treaty, unless there is a clear contrary intention in the legislation.<sup>147</sup>

### **13.2 Common law protections can be overridden at any time, without explanation**

165. As discussed above, the common law offers a level of protection for some basic rights and freedoms. Although this protection is not comprehensive or systematic, the common law is often cited as one of the reasons why Australia's current system of human rights protection is sufficient.

166. This is simply not the case. Human rights protections offered by the common law are extremely vulnerable. Parliament can pass a law that overrides common law protections at any time, without having to consider the potential impacts on human rights and without public justification. Parliament is restricted only by the very limited protections offered by the Australian Constitution (as discussed in section 11 above).<sup>148</sup>

### 13.3 Example: Australia's counter-terrorism laws

167. Since the terrorist attacks in the United States on 11 September 2001, the Australian Government has introduced more than 40 new counter-terrorism laws, often without adequate consideration of, or debate about, their potential impacts on human rights. Some aspects of these new laws have eroded common law protections for fundamental rights and freedoms.<sup>149</sup>

168. For example, the right to personal liberty (freedom from arbitrary detention) has been described as 'the most elementary and important of all common law rights'.<sup>150</sup> However, this right has been eroded by recent counter-terrorism laws which have introduced novel ways for police and the Australian Security Intelligence Organisation (ASIO) to detain people without trial. For example:

- **Detention without charge:** The Australian Federal Police (AFP) has the power to detain a suspect without charge for 24 hours.<sup>151</sup> After 24 hours the AFP can seek an order from a court to detain the suspect for a further 24 hours. These 24 hour caps do not include 'dead time', which can include time when the suspect is contacting a lawyer, taking meal breaks and sleeping.<sup>152</sup> This means that, in practice, a person can be detained without charge for much longer periods. In 2007, Dr Mohammed Haneef was detained for 12 days under this power.
- **Restrictions on movement:** The *Anti-Terrorism Act (No. 2) 2005* (Cth) gave federal courts the power to issue control orders in response to a request from the AFP.<sup>153</sup> Control orders can force a person to stay in a certain place at certain times, prevent them from going to certain places or talking to certain people, or require them to wear a tracking device. Depending on the severity of the restrictions imposed, a control order could effectively amount to home detention.
- **Special powers of detention:** The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) gave ASIO special powers to question, or question and detain, a person suspected of having information related to an anti-terrorism investigation, even if that person is not suspected of a terrorist offence.<sup>154</sup> Under these powers, a person who is not suspected of a terrorism offence can be detained for up to seven days.<sup>155</sup> The grounds for detention can be kept secret.<sup>156</sup>

169. In 2009, the UN Human Rights Committee raised concerns that some provisions of Australia's counter-terrorism laws are incompatible with fundamental rights protected by the ICCPR.<sup>157</sup> The UN Committee against Torture has raised concerns about the new regime of preventative detention



orders and control orders.<sup>158</sup> Both committees have criticised the increased powers given to ASIO.<sup>159</sup>

## 14 Administrative decisions may breach human rights

170. Australian laws regularly authorise federal officials and ministers to make administrative decisions that can have significant impacts on people's human rights. It would be reasonable to assume that, when making administrative decisions, Australian officials will act in accordance with Australia's international human rights obligations.
171. However, while the High Court has held that the ratification of an international treaty creates a legitimate expectation that administrative decision-makers will act in conformity with the treaty, this expectation falls short of a legal right for the person who is the subject of the decision, and the decision-maker is not bound to comply with the treaty.<sup>160</sup>
172. Courts and tribunals can review administrative decisions to ensure the decision-maker is acting fairly, within their powers and in accordance with the law.<sup>161</sup> However, there is no general legal obligation upon a decision-maker to give proper consideration to human rights when making a decision.
173. At the federal level, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) sets out the grounds for judicial review of administrative decisions. Failing to give proper consideration to a relevant human right is not a ground of review under the ADJR Act.<sup>162</sup>

### 14.1 Example: Right to life – the 'Bali Nine' and the death penalty

174. In 2005, nine young Australians were arrested in Indonesia for their involvement in a plan to smuggle heroin from Indonesia to Australia. Before their arrest, the AFP provided information to the Indonesian authorities about the young men and women who are now known as the 'Bali Nine'. The information was provided in accordance with guidelines which permit the AFP to assist police in other countries, even in cases which may attract the death penalty.
175. Representatives of four members of the Bali Nine brought an action against the AFP. In *Rush v Commissioner of Police*, Justice Finn found there was no cause of action against the AFP for exposing the members of the Bali Nine to the death penalty.<sup>163</sup> The judgment confirmed that the AFP can lawfully provide 'police to police' assistance in circumstances which could result in a person being charged with an offence punishable by death. This is despite the fact that Australia has abolished the death penalty domestically; is a party to the ICCPR, which protects the right to life; and is a party to the Second Optional Protocol to the ICCPR, which aims at the abolition of the death penalty worldwide.<sup>164</sup>
176. Three members of the Bali Nine are currently awaiting execution in Indonesia.

## 15 Australia does not always provide effective remedies for human rights breaches

177. As discussed in section 10 above, many aspects of the international human rights treaties that Australia has agreed to uphold have not been adequately incorporated into Australia's legal system. In many cases this means that a person in Australia who feels that the government has breached their rights under one of those treaties is left without an effective remedy.
178. The Commission provides investigation and conciliation processes to resolve complaints about certain human rights issues. However, the UN Human Rights Committee has confirmed that these processes cannot be characterised as 'effective remedies' under the ICCPR because the Commission's recommendations are not binding.<sup>165</sup>
179. In the last decade, an increasing number of people have resorted to making human rights complaints to UN treaty bodies because they could not get an effective remedy within Australia. In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction.<sup>166</sup> These include the following:
- In *Brough v Australia*, the UN Human Rights Committee found that the conditions of detention of an Aboriginal boy with a mild intellectual disability violated the right of persons deprived of their liberty to be treated with humanity and respect for their dignity, the right of juvenile offenders to be segregated from adults, and the right of all children to special protection without discrimination. The boy was held in solitary confinement in an adult prison, his clothes and blankets were removed from him, and he was exposed to prolonged periods of artificial light. While being detained in these conditions, he attempted suicide.<sup>167</sup>
  - In *Young v Australia*, the UN Human Rights Committee found that an Australian law discriminated against same-sex couples, in breach of the right to equality before the law. Mr Young had been in a relationship with Mr C for 38 years. Mr C was a war veteran. When he passed away, Mr Young applied for a veteran's pension under the *Veterans' Entitlements Act 1986* (Cth). The Department of Veterans' Affairs denied his application on the basis that he did not fall within the definition of persons who could be a veteran's 'dependant', which covered members of de facto couples but not same-sex couples.<sup>168</sup>
  - In *A v Australia*, the UN Human Rights Committee found that the immigration detention of a Cambodian man at the Port Hedland detention centre for more than four years violated his right to be free from arbitrary detention. The Committee also found that Mr A's right to have the lawfulness of his detention reviewed by a court had been breached – although an Australian court had found his detention was lawful under the Migration Act, the court did not consider his rights under the ICCPR, including his right to be free from arbitrary detention.<sup>169</sup>
  - In *Coleman v Australia*, the UN Human Rights Committee found that Australia had violated the right to freedom of expression. Mr Coleman was

fined for breaching a Queensland by-law which prohibited giving a public address at a particular pedestrian mall without a permit. He failed to pay the fine and was imprisoned.<sup>170</sup>

180. In each of these cases, the person whose rights were breached could not access an effective remedy within Australia – if they had been able to do so, their complaint would not have been admissible to the UN treaty body.
181. However, even the views of the UN treaty bodies are not enforceable, and the Australian Government has often rejected their conclusions and recommendations.<sup>171</sup> This means that a person's efforts to seek a remedy for a human rights breach may be extremely time-consuming, expensive and ultimately fruitless.

## **16 The Australian Human Rights Commission's human rights protection functions are limited**

182. The Australian Human Rights Commission is Australia's national independent human rights institution. The Commission's 'human rights' functions are defined in section 11 and Division 3 of Part II of the HREOC Act.
183. Under section 11 of the HREOC Act, the Commission is given the following functions:
- examine laws and proposed laws to assess whether they are consistent with human rights, and report the results of the examination to the Attorney-General
  - inquire into acts and practices that may be inconsistent with or contrary to human rights
  - promote an understanding and acceptance, and the public discussion, of human rights
  - undertake research and educational programs to promote human rights, and co-ordinate other such programs undertaken on behalf of the Commonwealth
  - report to the Attorney-General as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights
  - report to the Attorney-General as to the action that needs to be taken by Australia in order to comply with the provisions of certain human rights instruments
  - publish guidelines for the avoidance of acts or practices done by or on behalf of the Commonwealth that would breach human rights
  - intervene, with the leave of the court, in proceedings that involve human rights issues
  - do anything incidental or conducive to the performance of any other functions.

184. The Commission is empowered to undertake a broad range of work regarding the promotion and protection of ‘human rights’, as defined in the HREOC Act. However, in practice the Commission’s ability to properly promote and protect human rights is limited for the reasons outlined below. (These issues are discussed further in sections 20.15 and 25 of this submission, which propose measures to enhance the role of the Commission.)

### **16.1 The Commission has limited powers of pre-legislative scrutiny**

185. The HREOC Act provides that the Commission has the power to examine proposed laws when requested to do so by the Minister.<sup>172</sup> However, in practice the Commission has never received such a request. The Commission’s role in scrutinising the human rights compatibility of proposed legislation is often confined to appearances before parliamentary committees.

### **16.2 The Commission’s functions are limited by a narrow definition of human rights**

186. The Commission’s human rights functions are limited by the definition of ‘human rights’ in the HREOC Act (which includes those rights set out in the instruments scheduled to the Act and other designated ‘relevant international instruments’).<sup>173</sup>

187. Under the HREOC Act ‘human rights’ means the rights and freedoms in:

- the ICCPR
- the CRC
- the *Declaration on the Rights of Mentally Retarded Persons*
- the *Declaration on the Rights of Disabled Persons*
- the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*
- the Disability Convention.<sup>174</sup>

188. This definition does not include the rights protected by other international treaties that Australia is a party to, including the ICESCR and the CAT.<sup>175</sup>

189. This means that the Commission cannot inquire into acts and practices that may breach the rights set out in those instruments, nor can it review legislation to assess its consistency with those rights, except to the extent that those rights are also incorporated in other treaties within the Commission’s statutory mandate.<sup>176</sup>

### **16.3 The Commission has limited jurisdiction to investigate human rights complaints**

190. The Commission's jurisdiction to investigate human rights complaints is limited to acts or practices of the Commonwealth and does not apply to the actions of the states or territories.<sup>177</sup> This restricts the Commission's capacity to investigate systemic human rights issues across Australia.

### **16.4 The Commission lacks adequate resources to fulfil its functions**

191. Insufficient funding undermines the Commission's capacity to fulfil its statutory functions, including handling complaints of unlawful discrimination and promoting public understanding and acceptance of human rights. As outlined in further detail in section 24.8, the Commission has faced significant budget cuts since 1996.

### **16.5 The Commission cannot enforce its recommendations about human rights complaints**

192. The HREOC Act provides a right to lodge a complaint with the Commission in relation to an act or practice by or on behalf of the Australian Government that is alleged to breach a person's human rights.<sup>178</sup>

193. If the Commission finds a breach of human rights, it can report to the Attorney-General. This report can include recommendations for preventing a repetition of the act or continuation of the practice, as well as the payment of compensation.<sup>179</sup> However, these are not enforceable remedies – they are non-binding recommendations which are not directly or indirectly enforceable by the courts.

194. This regime for addressing human rights complaints can be contrasted with the regime for resolving complaints of unlawful discrimination. If an unlawful discrimination complaint is terminated by the Commission, the complainant can commence proceedings in the Federal Court or the Federal Magistrate's Court.

### **16.6 Commission reports and recommendations can be ignored by government**

195. The Commission can bring human rights concerns or breaches to the attention of the Australian Government through tabling certain reports in Parliament, or through other means.

196. The Australian Government is not, however, required to respond to a Commission report which shows that a bill or a law is incompatible with human rights, or to recommendations by the Commission that the government should provide remedies to an individual victim of human rights violations. This undermines the Commission's ability to create a culture where the government is accountable for the impact of its laws, policies and actions on human rights.

## **16.7 Example: The Commission's ongoing efforts to end human rights violations in Australia's immigration detention system**

197. Some of the obstacles faced by the Commission in holding the Australian Government accountable in respect of its international human rights obligations are illustrated by the Commission's repeated efforts to address human rights violations caused by Australia's mandatory immigration detention system.
198. The Commission has investigated numerous complaints of human rights breaches in immigration detention over the past 13 years.<sup>180</sup> In cases where the Commission has found there was a breach, a report has been tabled in federal Parliament setting out recommendations for redress. While the Australian Government is required to table these reports, it is not required to respond. In many cases, the Commission's recommendations have been ignored.
199. More than a decade ago, the Commission conducted an inquiry into the mandatory detention system, which resulted in the 1998 report, *Those who've come across the seas: Detention of unauthorised arrivals*.<sup>181</sup> The Commission found that Australia's mandatory detention policy violated international human rights standards, including the right not to be subjected to arbitrary detention. The Commission made 94 recommendations about the use of, and conditions in, detention and put forward an alternative detention model and a range of community release options.
200. The Australian Government asserted that the mandatory detention policy did not breach Australia's human rights obligations, and did not consider implementing the community release options. The government rejected the Commission's recommendations that the lawfulness of immigration detention, as interpreted under international law, be subject to judicial review.
201. In 2004, the Commission released the report of its national inquiry into children in immigration detention, *A last resort?*<sup>182</sup> The inquiry found that Australia's mandatory detention laws and practices resulted in numerous and repeated breaches of the CRC. In 2005, the Migration Act was amended to affirm the principle that children should only be detained as a measure of last resort, and children were gradually released from immigration detention centres (IDCs). However, while children are no longer held in IDCs, some children are still held in other closed immigration detention facilities, both on the mainland and on Christmas Island.
202. While there have been some key improvements to Australia's immigration detention system over the past few years, many of the Commission's major concerns remain, despite more than a decade of efforts to reform the system. Throughout this decade many men, women and children have been detained for prolonged periods of time. Australia's mandatory detention law remains in place; the lawfulness of immigration detention is not subject to judicial review; there are no legislated standards for conditions in detention; and offshore processing of asylum seekers continues on Christmas Island.<sup>183</sup> The UN treaty bodies have made numerous criticisms about Australia's mandatory detention system and have urged its repeal.<sup>184</sup>

## **17 Anti-discrimination laws do not protect all human rights or prohibit all types of discrimination**

203. Australia has four federal anti-discrimination laws, which provide some important protections against discrimination on the basis of race, sex, disability and age.<sup>185</sup>
204. However, as discussed in further detail in section 21 of this submission, there are a number of significant limitations and deficiencies with these laws. They fail to offer comprehensive protection against discrimination on the grounds of race, sex, disability and age; they do not cover discrimination on a broad range of other grounds; and they contain various inconsistencies.
205. In practice, this means that people are often left without an effective remedy for a breach of their right to equality and non-discrimination.

### **17.1 Example: Discrimination on the grounds of criminal record**

206. Unlike equivalent legislation in the states and territories, federal anti-discrimination laws do not provide protection against discrimination on the ground of a person's criminal record.<sup>186</sup> While the Commission can accept a complaint on this ground under the HREOC Act, it cannot provide an enforceable remedy.
207. The Commission has received numerous complaints over the years from people who have been refused employment on the basis of a prior criminal record, which is not directly relevant to the job the person is applying for.
208. For example, in 1991, a man was convicted for receiving stolen goods. He completed 200 hours of community service at a police academy in South Australia (SA), after which he was employed by the SA Police as a grounds person at the academy.
209. Ten years after his conviction, his position was made redundant and he was moved to a security guard position with the Police Security Services Branch, where he worked for three months. However, prior to being formally employed in the role, the SA Police undertook a criminal record check, as part of its standard employment procedures. This check revealed his 1991 conviction and he was advised that he would not be offered the security guard position because of that criminal record.
210. The man lodged a complaint with the Commission. The Commission found that he had been discriminated against on the basis of his criminal record. There was enough evidence available to the SA Police to demonstrate that the man possessed the integrity and character required for the job, notwithstanding his criminal record. In particular, he had provided ten years of service to the SA Police, during which his employment and integrity had been highly praised.
211. The Commission made recommendations for remedies including compensation, but these recommendations were not enforceable under Australian law. To

date, the SA Police has not informed the Commission that it has complied with any of the recommendations.<sup>187</sup>

## **18 Resources for human rights education are seriously inadequate**

212. One of the major gaps in the current protection of human rights in Australia is that many people are not aware of what their human rights are, and what courses of action are available to them if their rights are breached.<sup>188</sup> There is a need for significantly enhanced human rights education in the community, in the public sector, and in schools and universities.
213. The need for enhanced human rights education was highlighted by young people in various parts of Australia during Commission workshops aimed at encouraging broad public participation in the National Human Rights Consultation process. (These workshops and the views expressed by young people are discussed further in Appendix 5 and Appendix 6.)
214. The Commission has statutory functions relating to human rights education in Australia. These include promoting understanding and public discussion of human rights, and undertaking research and educational programs for the purpose of promoting human rights.<sup>189</sup> Over the years the Commission has developed a wide range of education resources and programs.
215. However, the Commission cannot continue to produce an adequate range of materials or adequately distribute them under its current budget. This issue is discussed further in section 24.8 of this submission.



## **PART C: How could Australia better protect and promote human rights?**

### **19 Introduction: five major reforms to improve human rights protection in Australia**

216. There are a number of ways that human rights could be better promoted and protected in Australia. Over the past 23 years, the Commission has recommended numerous measures for improving human rights protections for specific, vulnerable groups. Some of the major ongoing human rights issues are set out in Appendix 2 to this submission.
217. It is clear from the Commission's years of experience that, to prevent human rights problems from arising, Australia needs to develop a culture of greater respect for human rights.
218. A stronger human rights culture in Australia is unlikely to be achieved through ad hoc, piecemeal reform. For all people in Australia to live in a community that is truly inclusive and respectful of their rights, no matter who they are or what their circumstances, there needs to be overarching, systemic changes to the way government, at all levels, considers the human rights of all people. There also needs to be greater awareness in the general community of the human rights to which we are all entitled and the responsibilities that come with them.
219. The Commission believes that a combination of the following five major reforms would help to build a stronger culture of respect for human rights in Australia:
- a national Human Rights Act
  - stronger statutory protection of equality and non-discrimination
  - a referendum to amend the Australian Constitution so that it recognises Aboriginal and Torres Strait Islander peoples; removes the existing racially discriminatory provisions; and protects equality for all people
  - a significantly enhanced national program of human rights education
  - expanded functions and better resourcing for the Commission, as Australia's national human rights institution.
220. Any one of these reforms would, in some measure, improve the protection and promotion of human rights in Australia. However, the Commission believes that each of these reforms would complement and strengthen each other. Together they would work to help Australia better live up to its international promises to protect human rights.
221. This part of the Commission's submission explains each one of these five major reforms in further detail, with specific emphasis on the Commission's recommendation for a Human Rights Act for Australia.

## **20 A Human Rights Act for Australia**

222. The Commission appreciates that the question of how Australia can best protect human rights, and whether Australia should have a Human Rights Act is the subject of much debate.
223. Some believe that only a constitutionally entrenched bill of rights can properly protect human rights in Australia. Others believe that our current democratic system already properly protects human rights and any interference with that system could undermine our democracy.
224. At the end of this section (in section 20.16) the Commission specifically responds to each of the primary arguments against a Human Rights Act.
225. In the main body of this section, the Commission explains why it believes that a Human Rights Act could make a real difference to human rights protection in Australia, and how it could be the catalyst for creating a stronger human rights culture in the Australian Government and in the Australian community.
226. In particular, the Commission explains how a Human Rights Act could improve the enjoyment, protection and promotion of human rights by simultaneously strengthening Australia's human rights culture and Australia's democratic system of government.

### **20.1 Australia should have a Human Rights Act**

227. The Commission believes that a Human Rights Act would help to build a culture that respects the human rights of all people in Australia, no matter who they are.
228. When Australia signed up to the major international human rights treaties, it made a commitment to ensure that Australia's government would always keep in mind the basic rights of every person – whether they were part of the majority or a minority in the community.
229. If the federal Parliament passed a Human Rights Act, it would be a major step towards fulfilling Australia's commitment to protecting human rights.
230. A Human Rights Act would be Parliament's clear statement of the fundamental rights and values to which Australia is committed. The Australian Government has already made that statement to the international community; it is now time to make it to the Australian community.
231. A Human Rights Act would set out the human rights that all people in Australia are entitled to have protected, and explain that we are all responsible for respecting the rights of others.
232. In this way, a Human Rights Act would be an extremely powerful tool for furthering the type of human rights dialogue and education that occurred during this Consultation process.

233. A Human Rights Act would also be Parliament's commitment to a democratic system that provides transparency and accountability in all decision-making which might impact on human rights.
234. Thus, a Human Rights Act could help to create a stronger human rights culture throughout government and the community by:
- requiring government officials to consider human rights at the early stages of the development of law and policy (which should help prevent human rights problems from arising)
  - requiring Parliament to consider whether new legislation protects human rights, and if not, publicly explain any decision to create or maintain such legislation (which should help improve transparency and accountability in policy and law-making processes)
  - requiring courts to interpret laws consistently with human rights and providing remedies where appropriate (while not giving courts the power to strike down legislation – Parliament would have the final say)
  - requiring public authorities to consider and respect the human rights of the individuals with whom they are dealing when making decisions (which should discourage 'one-size-fits all' policies and encourage solutions appropriate to the diversity of the Australian community)
  - providing solutions and remedies in the event that a public authority breaches human rights without legal authority (which might include an accessible alternative dispute resolution process, with the option to go to court if a complaint cannot be resolved)
  - clearly setting out human rights and the system for protecting them (which means that people in Australia would be better informed about government decisions that affect their human rights, improving their capacity to actively participate in the governmental processes that impact upon them, thus enhancing our democracy).

**Recommendation 2:** The Australian Parliament should enact a national Human Rights Act.

## ***20.2 A national Human Rights Act should be based on those in the UK, New Zealand, Victoria and the ACT***

235. The Commission believes that an adaptation of the model of human rights legislation operating in the UK, New Zealand, Victoria and the ACT is the most appropriate form of human rights protection for Australia at this time.

(a) *Why statutory human rights protection?*

236. The Commission recognises that some people argue that Australia should have a constitutionally entrenched bill of rights.

237. However, this option has been excluded from the Consultation Committee's terms of reference. In any event, the Commission is persuaded that a statutory

form of protection is the most appropriate for Australia at this time, for reasons outlined below.

238. The Commission also notes that the Hon Michael McHugh recently suggested a model of statutory protection based on the Canadian Bill of Rights.<sup>190</sup> This model would require federal laws to be read subject to the Human Rights Act and allow courts to hold that state and territory laws are invalid if they are inconsistent with it.<sup>191</sup> The model would, however, allow federal Parliament to expressly declare that a law could operate notwithstanding the Human Rights Act. Parliament could do this at the time the law was first introduced or in response to a court decision with which it disagreed.
239. However, the Commission recognises that there is some community concern about the potential role of the courts under a Human Rights Act or a constitutionally entrenched bill of rights. It may be that this concern will abate as Australia develops an improved human rights culture. Should it do so, the question of comprehensive constitutional protection of human rights could appropriately be revisited.
240. The Commission also recognises that many of the reforms to public decision-making processes that it proposes could be implemented independently of a Human Rights Act.
241. However, piecemeal reform risks replicating the current gaps in Australia's human rights protections. Further, a Human Rights Act would have the overarching benefit of being both a clear statement of human rights all people in Australia are entitled to, as well as a guide to the steps that should be taken to ensure the protection and promotion of these rights.
242. Therefore, the Commission believes that Australia should have a Human Rights Act based on the model described below, because:
- This model embeds human rights considerations into all stages – including very early stages – of public decision-making. This should help prevent human rights problems from occurring.
  - This model creates the type of accountability and transparency in decision-making which would strengthen Australia's democratic system of government and build upon our system of checks and balances.
  - This model preserves parliamentary supremacy. It would be a positive action taken by Parliament to express its view on how human rights should be protected, and to create the system it believes would achieve that purpose.
  - This model provides a clear statement to all people in Australia, and around the world, that Australia intends to live up to its international human rights commitments.
  - There is precedent for this model in New Zealand, the UK, Victoria and the ACT, and the Consultation Committees in WA and Tasmania have both supported this model.

(b) *The main features of the Human Rights Act proposed by the Commission*

243. The Human Rights Act model proposed by the Commission would:

- protect all people within Australia's territory and all people subject to Australia's jurisdiction
- protect rights recognised in international human rights treaties to which Australia is a party
- allow rights to be limited and balanced (with the exception of absolute rights) in accordance with strict criteria
- require the government to consider human rights at the early stages of the development of law and policy
- require parliamentary scrutiny of new legislation to ensure that it is compatible with human rights
- require legislation to be interpreted consistently with human rights
- require Parliament to be notified, and to publicly respond, if a law is found to be inconsistent with human rights
- require public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights in decision-making
- provide for an effective remedy when a public authority breaches human rights.

244. The following sections describe each of these features in more detail and explain why they are important for the creation of a strong human rights culture in the Australian Government and the Australian community.

**20.3 A Human Rights Act should protect everyone in Australia, without discrimination**

245. Since human rights apply to all people without discrimination, it is important to enact a Human Rights Act that protects all people in Australia's territory and all people subject to Australia's jurisdiction without discrimination.

246. A Human Rights Act would ideally create a uniform system of human rights protection across Australia. However, Australia's federal structure may constrain the achievement of this goal.

(a) *A Human Rights Act should protect every person in Australia's territory and jurisdiction*

247. The Commission is aware of the concern that a Human Rights Act could have the effect of granting extra rights to 'minorities' at the expense of the 'majority'.

248. This is why it is important to reinforce that a Human Rights Act should protect all people within Australia's territory and all people subject to Australia's jurisdiction without discrimination.<sup>192</sup>

249. Overwhelmingly, a Human Rights Act will benefit ordinary people, in their everyday interaction with government, by creating a more transparent and accountable decision-making system. While some individuals and groups may make more use of the legislation than others, this would be because those individuals and groups are in greater need of human rights protection than others – take, for example, Indigenous peoples who suffer more disadvantage than many other groups in Australia.
250. A Human Rights Act should protect individuals and groups, depending on the nature of the rights included.<sup>193</sup>
251. A Human Rights Act should also protect the rights of citizens and non-citizens. However it would need to recognise that some rights, such as the right to vote, apply only to citizens.<sup>194</sup>
252. A Human Rights Act should not confer human rights on corporations.
- (b) *Ideally, Australia should have uniform protection of human rights*
253. Under international human rights law, the federal government has ultimate responsibility for ensuring that human rights protections extend throughout the country.<sup>195</sup>
254. Ideally, human rights should be consistently protected by all federal, state and territory governments in Australia.
255. As illustrated by the different discrimination laws in Australia (see section 21), it is very difficult for people to understand what their rights are and how they are protected if they are protected in different ways by the federal, state and territory governments. Further, many of the human rights issues that touch people's everyday lives are affected by state and territory laws and policy.
256. However, there are practical and political difficulties to achieving uniform human rights protection across Australia.
257. It is constitutionally possible for a national Human Rights Act to bind the states to some extent.
258. Pursuant to the external affairs power,<sup>196</sup> federal Parliament could introduce a national system of human rights protection that binds federal, state and territory governments. It is also constitutionally possible that a national Human Rights Act may render inconsistent state laws inoperative.<sup>197</sup>
259. However, it might not be possible to extend all elements of a national Human Rights Act to the states, as the Australian Government does not have the power to make laws that would undermine the capacity of the states to function.<sup>198</sup>
260. Recognising this limitation, the federal government could introduce a Human Rights Act that binds the states to the extent constitutionally possible. The Australian Government could then encourage the states to enact their own legislation in relation to the outstanding elements (for example, those provisions about parliamentary processes).

261. An alternative approach would be to limit the operation of a national Human Rights Act to federal laws and public authorities and encourage the states and territories to enter into co-operative arrangements to implement Human Rights Acts throughout Australia.
262. There is some prospect of success with this approach. The ACT and Victoria have already introduced specific laws to protect human rights. Western Australia and Tasmania have conducted inquiries into human rights protections which recommended that these states introduce human rights acts.<sup>199</sup>
263. In the meantime, if a national Human Rights Act does in fact apply only to federal laws and public authorities, it should clearly express an intention to operate alongside state and territory human rights legislation. A similar approach is taken in federal discrimination laws to preserve the operation of state and territory anti-discrimination laws.<sup>200</sup>
264. As the Commission's expertise lies in the federal jurisdiction, this submission focuses on the potential beneficial impact of a national Human Rights Act upon federal laws and policies, and the actions of federal public authorities. However, the Commission recommends that the Consultation Committee explore all options for uniform human rights protection across Australia.

**Recommendation 3:** A Human Rights Act should protect the human rights of all people within Australia's territory and all people subject to Australia's jurisdiction.

**Recommendation 4:** The Australian Government should engage with the states and territories with the objective of creating a uniform system of human rights protection across Australia.

#### ***20.4 A Human Rights Act should have a principled and inclusive preamble***

265. While it may have limited legal significance, the preamble to a Human Rights Act could send a strong symbolic message to the Australian community about the importance of human rights.
266. A preamble to a Human Rights Act could articulate, in plain and simple language, the importance of human rights for an inclusive, cohesive and democratic society. It could set out the fundamental principles and values that underpin the Act. And it could affirm that all people in Australia are entitled to enjoy human rights, without discrimination.
267. A preamble should also specifically recognise the unique status of Indigenous peoples as first peoples and acknowledge their human rights.<sup>201</sup>
268. By recognising Indigenous peoples in the preamble to a Human Rights Act, the Australian Government would demonstrate a clear commitment to protecting their human rights. This is appropriate given the significant and sustained breaches of human rights that Indigenous peoples face.

269. A preamble should also highlight that it is the responsibility of government to protect, respect and promote human rights, and the responsibility of every person in Australia to respect the human rights of others.<sup>202</sup>

**Recommendation 5:** A Human Rights Act should include a preamble that:

- specifically recognises the human rights of Indigenous peoples
- highlights that it is the responsibility of government to protect, respect and promote human rights, and the responsibility of every person in Australia to respect the human rights of others.

### **20.5 A Human Rights Act should protect civil, political, economic, social and cultural rights**

270. Since human rights are universal, indivisible and interdependent, it is important for a Human Rights Act to protect all of the fundamental human rights in the human rights treaties which bind Australia.

271. In particular, and at a minimum, a Human Rights Act should explicitly recognise and protect the civil, political, economic, social and cultural rights in the ICCPR and ICESCR.

272. To take advantage of developments in international human rights law and ensure the protection of vulnerable groups, a Human Rights Act should include a mechanism to permit the use of more specific treaties and declarations to interpret and apply the basic civil, political, economic, social and cultural rights to those groups. This would include the treaties and declarations focussing on women, children, people with disability, different racial groups and Indigenous peoples.

273. Further, vulnerable groups (including Indigenous peoples) should be explicitly consulted in the drafting of a Human Rights Act.

274. Irrespective of which rights are explicitly mentioned in a Human Rights Act, it should be made very clear that those rights are not exhaustive.

275. Further, the legislation should require periodic review of a Human Rights Act, including review of whether the rights set out in the Act should be expanded. This would make sure that the document stays current and relevant to the community's needs (see section 20.14).

(a) *A Human Rights Act should include economic, social and cultural rights*

276. The Commission believes that a national Human Rights Act should explicitly include economic, social and cultural rights, despite the fact that human rights legislation in many other jurisdictions predominately protects civil and political rights.

277. There are several reasons for this view.



278. First, human rights are universal, interdependent and indivisible. This means that the full enjoyment of civil and political rights may be hampered if economic, social and cultural rights are not also protected (see section 5.3).
279. Secondly, some of the most pressing human rights concerns facing people in Australia involve economic, social and cultural rights. If economic, social and cultural rights were included in a Human Rights Act, those concerns could be better addressed.
280. Thirdly, the omission of economic, social and cultural rights from a Human Rights Act would reinforce a commonly-held misconception that these rights are somehow less important than civil and political rights. Including those rights in a Human Rights Act would help guide and educate decision-makers on the significance of these rights to the lives of people in Australia.
281. Finally, the independent human rights consultation committees in the ACT, Tasmania and Western Australia all recommended that at least some economic, social and cultural rights be included in state level human rights acts.<sup>203</sup> The UK Human Rights Act includes the right to education, and the UK Joint Committee on Human Rights has suggested that further economic, social and cultural rights should also be protected.<sup>204</sup>
- (i) Economic, social and cultural rights should be explicitly set out in a Human Rights Act
282. Some people argue that it is possible to protect economic, social and cultural rights without explicitly listing them in a Human Rights Act. This is because they can be protected indirectly through the interpretation of civil and political rights.
283. For example, civil and political rights such as the right to equality and the right to life, liberty and security of the person have been used in Canada to protect key economic, social and cultural rights. This includes the right to the highest attainable standard of physical and mental health,<sup>205</sup> and the right to adequate housing.<sup>206</sup>
284. However, the Commission believes that economic, social and cultural rights should be explicitly set out in a national Human Rights Act. The Commission shares the concern of the Western Australian Human Rights Act Consultation Committee that an indirect approach to protecting economic, social and cultural rights 'would, at best, result in ad hoc and limited protection for some of these rights'.<sup>207</sup>
285. The WA Committee further stated that it is 'undesirable that the protection of ESC rights should depend upon the occurrence of a breach of a civil and political right in a context which also involves the enjoyment of an ESC right'.<sup>208</sup>

(ii) Courts would not obtain power to make decisions about policy or resource allocation

286. Some people are concerned that explicit protection of economic, social and cultural rights in a Human Rights Act might transfer power over resource allocation and policy-making from Parliament to the courts.

287. The Commission believes that a Human Rights Act can be drafted to ensure that courts take the principle of 'progressive realisation' into account when making decisions in relation to economic, social and cultural rights.

288. For example, the South African Constitution explicitly protects economic, social and cultural rights. In South Africa, the government is obliged to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights to health care services, sufficient food and water, social security and adequate housing.<sup>209</sup>

289. In considering these rights, South African courts do not make policy. Instead, the role of the courts is limited to assessing whether the measures taken by the government are reasonable. The courts:

will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.<sup>210</sup>

290. A Human Rights Act could be similarly drafted to avoid requiring courts to make judgments that should properly be left to government. In particular, the principle of 'progressive realisation' should be a relevant factor when assessing the reasonableness of limitations upon economic, social and cultural rights. (For further discussion on a 'reasonable limits' provision in a Human Rights Act, see section 20.6 below.)

291. Further, it may be that different enforcement mechanisms are appropriate for civil and political rights on the one hand, and economic, social and cultural rights on the other. (See section 20.12 below.) However, this does not mean that economic, social and cultural rights are incapable of enforcement or that they should be excluded from a Human Rights Act.

292. In any event, under the Human Rights Act model proposed by the Commission, federal Parliament would always have the final say with respect to resource allocation (regardless of the nature of the right at stake).

(iii) A Human Rights Act could initially set out core economic, social and cultural rights

293. In the event that the Consultation Committee is unsure about whether to recommend inclusion of all economic, social and cultural rights in a Human Rights Act, the Commission recommends against an 'all or nothing approach'. In those circumstances, the Commission encourages the Consultation

Committee to consider a minimum core of economic, social and cultural rights for inclusion in a Human Rights Act.

294. For example, the UK Joint Committee on Human Rights recommended that a UK Bill of Rights should contain rights to health, education, housing and an adequate standard of living. Inclusion of these core rights was recommended because they ‘touch the substance of people’s everyday lives’.<sup>211</sup> The Joint Committee further considered that this list should be reviewed after a period to determine if further economic, social and cultural rights should be added.
295. In terms of which rights to include in a Human Rights Act, the Commission is confident that people in Australia will tell the Consultation Committee about the rights that ‘touch the substance’ of their everyday lives. In the Commission’s experience, this includes fundamental economic, social and cultural rights such as the right to an adequate standard of living, education, housing and health. At the very least, such core economic, social and cultural rights should be included in a Human Rights Act.
296. If only a limited number of economic, social and cultural rights are protected initially, a Human Rights Act should be reviewed periodically to assess of whether further rights should be included (see section 20.14).
- (b) *A Human Rights Act should include mechanisms to incorporate the rights of specific groups in Australia*
297. As a statement of rights that all people in Australia are entitled to enjoy, a Human Rights Act might initially include human rights sourced in the ICCPR and ICESCR. These rights are typically expressed in general language, applying to everyone.<sup>212</sup>
298. Australia has also committed to international treaties and declarations which protect the rights of women, children, people with disability, people of different races and Indigenous peoples.<sup>213</sup>
299. These specific instruments often articulate the way in which general human rights apply to people whose human rights are most at risk. They build upon the general rights set out in the ICCPR and the ICESCR. For example, the CEDAW builds upon the right to equality and non-discrimination as it applies to women and the circumstances they face.
300. The Commission understands the concern that specific issues affecting certain groups could be overlooked if a Human Rights Act does not include rights as expressed in these instruments.
301. One way of addressing this is to expressly permit courts and decision-makers to consider international law, including human rights materials that elaborate the rights of specific groups of people, when interpreting the general civil, political, economic, social and cultural rights set out in the Human Rights Act.<sup>214</sup>
302. A Human Rights Act need not attempt to exhaustively list which materials the courts and decision-makers can consider. It could, however, draw attention to

human rights instruments that are of particular importance to people in Australia.

303. This should include:

- international human rights treaties to which Australia is a party
- international human rights declarations that Australia supports, such as the Declaration on the Rights of Indigenous Peoples
- general comments and views of the UN treaty bodies
- judgments of domestic, foreign and international courts and tribunals
- customary international law.<sup>215</sup>

304. This would help ensure that the development of Australian law reflects international human rights law. It would also encourage courts and decision-makers to interpret and apply the general human rights set out in a Human Rights Act in a way that responds to the circumstances of certain vulnerable groups.

305. For example, Indigenous peoples would particularly benefit from a Human Rights Act that includes general rights of equality before the law, non-discrimination, economic, social and cultural rights and the right to self-determination. In applying general human rights to Indigenous peoples, courts and decision-makers should be guided by the 'minimum standards' affirmed by the Declaration on the Rights of Indigenous Peoples and the protections against racial discrimination contained in the CERD.

(i) Marginalised groups should be consulted in drafting a Human Rights Act

306. The Commission recommends that special effort should be made to ensure that Indigenous peoples, and members of other marginalised groups, are full and effective participants in the development of a Human Rights Act. This would provide an opportunity for people from vulnerable groups to articulate whether specific protections should be included in a Human Rights Act, or whether they are satisfied that general protections are sufficient to protect their rights.<sup>216</sup>

307. If a Human Rights Act initially only includes rights expressed in general terms, a periodic review should include consideration of whether further, specific protections for certain groups are necessary (see section 20.14).

(c) *The human rights set out in a Human Rights Act should not be exhaustive*

308. The Commission understands the concern that setting out rights in a Human Rights Act could cause rights to be limited. However, a Human Rights Act could be amended by federal Parliament if necessary. For instance, if Australia committed to the protection of new rights, these could readily be incorporated into a Human Rights Act.

309. Further, a Human Rights Act should not be exhaustive of the rights that people may have under domestic or international law. For example, the Victorian Charter provides:

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.<sup>217</sup>

310. A similar provision should be included in a national Human Rights Act.

**Recommendation 6:** A Human Rights Act should protect civil, political, economic, social and cultural rights.

**Recommendation 7:** A Human Rights Act should contain an interpretive provision that expressly permits courts and other decision-makers to consider international and comparative legal materials when applying the Human Rights Act.

**Recommendation 8:** Marginalised groups, including Indigenous peoples, should be specifically consulted in the development of a Human Rights Act.

**Recommendation 9:** The human rights set out in a Human Rights Act should not be exhaustive.

## **20.6 A Human Rights Act should allow justifiable limitations on rights**

311. Most human rights are not absolute and circumstances may require that different rights be balanced. For example, it may be necessary to balance the right to freedom of expression with the right to privacy. In extraordinary circumstances, it may also be permissible to suspend or restrict certain rights.

312. A Human Rights Act should therefore provide clear guidance as to what rights can be limited, when and how.

(a) *A Human Rights Act should include strict criteria and processes for limiting rights*

313. A Human Rights Act should set out strict criteria for the limitation of human rights, taking into account factors such as the nature of the right and considerations of reasonableness and proportionality.

314. A Human Rights Act should also require Parliament to publicly explain how any limitations it intends to impose upon human rights can be justified in a free and democratic society. (See section 20.8.)

315. The Victorian and ACT models provide a useful starting point for developing a 'reasonable limits' provision in a national Human Rights Act.

316. Section 7(2) of the Victorian Charter provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

317. Section 28 of the ACT Human Rights Act contains a similar reasonable limits provision.<sup>218</sup> Both the ACT and Victorian Acts also subject certain rights to specific internal limitations.<sup>219</sup>

318. According to the recent Victorian decision in *Kracke*, the requirement that any limitation upon a human right be both ‘reasonable’ and ‘demonstrably justified’ imposes a ‘stringent standard of justification’ on the government.<sup>220</sup>

(b) *A Human Rights Act should distinguish between rights that can and cannot be limited*

319. A Human Rights Act should distinguish between rights that can be limited and rights that are absolute under international law.

320. International human rights treaties include certain rights with internal limitations. For example, article 19 of the ICCPR protects the right to freedom of expression. However, this right:

carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>221</sup>

321. Other human rights are so fundamental that they should never be suspended or ‘derogated’ from, even in times of public emergency which threaten the life of the nation. For example, the ICCPR provides that the following rights are ‘non-derogable’:<sup>222</sup>

- the right to life
- freedom of thought, conscience and religion
- freedom from torture or cruel, inhuman or degrading treatment or punishment
- right to recognition everywhere as a person before the law

- the prohibition on the retrospective operation of criminal laws
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation
- the right not to be held in slavery or servitude.

322. Some of those ‘non-derogable’ rights have internal limitations.<sup>223</sup> For example, article 18(3) of the ICCPR provides:

[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

323. However, there are other rights which can never be limited, qualified or derogated from. This includes the prohibition on torture, which is regarded as an ‘absolute’ right.

324. A Human Rights Act could specifically exempt absolute rights from the operation of a reasonable limits provision. This would clearly signal to decision-makers that some rights are so fundamental that they should never be limited.

325. Alternatively, a Human Rights Act could rely upon judicial interpretation of the reasonable limits provision, with the expectation that the provision would not apply to rights that are absolute under international law.<sup>224</sup> However, this second approach would not explicitly recognise the special nature of absolute rights. It would also suggest that absolute rights may be limited, rather than recognising that certain rights are non-negotiable.<sup>225</sup>

(c) *Applying a reasonable limits clause*

326. Applying a ‘reasonable limits’ clause would not be a novel role for Australian courts, which already assess the limitations placed on rights in specific contexts.<sup>226</sup> This is also a role undertaken by courts in other jurisdictions.<sup>227</sup>

327. Further, Australian courts already apply a proportionality analysis in relation to the constitutionally implied ‘freedom of political communication’ and the guarantee that inter-state trade and commerce shall be absolutely free.<sup>228</sup>

328. Finally, it is important to remember that courts would be required to interpret legislation in a way that is consistent with the purpose of the legislation, and that courts would not be able to invalidate laws under a Human Rights Act.

**Recommendation 10:** A Human Rights Act should include a ‘reasonable limits’ provision. Human rights protected by a Human Rights Act should only be subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society. Absolute rights should be exempt from the operation of this provision.

## **20.7 A Human Rights Act should ensure human rights are considered when law and policy is developed**

329. The Commission believes that many human rights problems could be avoided if human rights were actively considered in the earliest stages of law- and policy-making. In other words, human rights breaches may not occur if policy and law makers were required to consider the potential human rights impact of policies and laws before they finalised them.
330. The Commission therefore recommends that a Human Rights Act should require that any policy submission put to federal Cabinet (including proposals for new laws, amendments and policies) should be accompanied by a human rights impact statement.
331. A human rights impact statement should include an assessment of whether a proposed law or policy is consistent with the human rights set out in the Human Rights Act. It should also draw Cabinet's attention to any proposed limitations on rights and justify those limitations in accordance with any reasonable limits provision in the Human Rights Act.
332. Through these human rights impact statements, Cabinet would be alerted to the potential human rights impact of proposed laws and policies and would be in a better position to consider human rights in its deliberations.
333. The Australian Government should also set out these procedures in the Cabinet Handbook to provide clear direction to ministers and departments.
334. Further, the Commonwealth Legislation Handbook should explicitly require ministers and their departments to consider the human rights set out in the Human Rights Act when developing new laws.<sup>229</sup>
335. **Example:** How could a Human Rights Act make a difference?

If human rights were taken into account during the development of the Northern Territory Emergency Response, the government may have implemented measures to protect women and children that did not discriminate on the basis of race. The government may have respected the right of Indigenous peoples to participate in decision-making in matters that affect their rights. This could have led to a partnership approach to policy development.

**Recommendation 11:** Any policy submission put to federal Cabinet (including proposals for new laws, amendments and policies) should be accompanied by a human rights impact statement.

## **20.8 A Human Rights Act should ensure human rights are considered before new laws are passed**

336. Sometimes, especially in times of perceived emergency or when acting under significant time pressure, Parliament disregards or fails to fully consider the human rights implications of new laws. This can result in the passing of laws that have serious human rights implications – for example counter-terrorism laws.



337. A Human Rights Act could help prevent human rights breaches by ensuring that the human rights implications of new laws are openly and transparently assessed and debated, in an informed manner, before the laws are enacted.
338. Pre-legislative human rights scrutiny should require Members of Parliament to consider how legislation may affect human rights before the proposed legislation is put to a vote. The human rights implications of any proposed measure should be clearly identified. They could then be debated openly in Parliament. And in the event that the executive or Parliament was intending to limit the enjoyment of any human rights, this should be explicitly identified and publicly justified and debated.
339. Pre-legislative scrutiny would also ensure that courts are better informed of legislative intent.
340. Thus, pre-legislative scrutiny processes could increase accountability and transparency – the public would be put on notice when their elected representatives were considering measures that would limit human rights.
341. Pre-legislative scrutiny would also mean that all Members of Parliament, including ministers, would have to become familiar with the potential impact of new laws and policies on human rights. It would help create an awareness of, and a culture of respect for, human rights within Parliament and across government departments.
342. In the Commission's view, a Human Rights Act should include the following pre-legislative processes:
- every bill introduced into Parliament should be accompanied by a statement of human rights compatibility
  - every bill should be scrutinised by a specialist parliamentary Human Rights Committee
  - in the event that a bill bypasses those processes, the law should be automatically reviewed after a fixed period of time.
343. **Example:** How could a Human Rights Act make a difference?

If a Human Rights Act had been in place in the past, with stronger pre-legislative scrutiny processes, Parliament would have openly debated whether:

- a law requiring the mandatory detention of all 'unlawful non-citizens' could be justified
- a law permitting the indefinite detention of children and young people in immigration detention could be justified
- changes to workplace relations, taxation or social security laws adequately took into account the particular needs of women
- counter-terrorism laws allowing detention without charge impacted inappropriately on the right to liberty and freedom from arbitrary detention.

A Human Rights Act would have required Parliament to justify any limitations to human rights imposed by such legislation, and publicly explain why such limitations were reasonable. This would have stirred active debate in Parliament and the media.

(a) *A statement of human rights compatibility should accompany bills and regulations*

344. A Human Rights Act could require the relevant minister or Member of Parliament (in the case of a private member's bill) to prepare a human rights compatibility statement for each new bill. This statement would accompany the bill when it was introduced into Parliament.

345. The *Legislative Instruments Act 2003* (Cth) could also require that a human rights compatibility statement accompany any new or amended regulation tabled in Parliament.

346. The Member of Parliament who introduced the bill or regulation into Parliament should be required to explain whether or not it is compatible with human rights. The human rights compatibility statement should address, amongst other things, any limitations on human rights that the proposed legislation or regulation would impose. And if there were such limitations, they should be justified in accordance with the reasonable limits provision in the Human Rights Act.

347. **Example:** How could a Human Rights Act make a difference?

The requirement to table a statement of compatibility in Parliament could ensure that human rights considerations are an integral part of the law-making process. For example, the Victorian Privacy Commissioner has stated that:

The [Victorian] Charter's presence and the requirement for a statement of compatibility places a spotlight on privacy and encourages the public sector, when developing and amending legislation, to turn its mind to broader privacy rights as well as information privacy protected by the IPA [the *Information Privacy Act 2000*]. This in turn encourages the sector to consult with [the Office of the Victorian Privacy Commissioner] on privacy impacts at an earlier phase in the legislative process.<sup>230</sup>

(b) *A parliamentary Human Rights Committee should examine the human rights implications of all bills*

348. Currently, the parliamentary committee system is one of the most important mechanisms for the scrutiny of legislation in Australia. As discussed above in section 20.8, there is no parliamentary committee that is specifically charged with considering the human rights implications of new laws.

349. A Human Rights Act could require a parliamentary committee to examine new legislation, and provide advice to Parliament on any human rights implications. This would reduce the likelihood of the introduction of laws that breach human rights standards.

350. The Committee should be permanent and dedicated to conducting human rights scrutiny. This would produce a better result than simply expanding the role of existing legislative scrutiny committees, because it would enable the Committee to build special expertise in analysing human rights issues.
351. The pre-legislative scrutiny conducted by the Committee should be a public process, further increasing the transparency of public decision-making. The Committee's scrutiny process could also involve engagement with the public and civil society, improving the ability of people in Australia to become involved in democratic processes.
352. Experience in the UK and Victoria has shown that human rights committees have had an important impact on parliamentary debate. In the UK, it has been suggested that parliamentary debate on human rights issues is more informed and sophisticated as a result of the work of the Joint Committee on Human Rights.<sup>231</sup> In Victoria, the pre-legislative scrutiny process has resulted in meaningful exchanges between ministers and the Scrutiny of Acts and Regulations Committee.<sup>232</sup>
- (i) A parliamentary Human Rights Committee should have broad functions
353. The parliamentary Human Rights Committee should consider each bill introduced into Parliament and inquire into whether the bill is consistent with the Human Rights Act.
354. A Human Rights Act would guide the parliamentary committee on the rights that it should consider when conducting these functions. It would also provide guidance on how to assess whether a limitation upon a right could be justified.
355. The Committee should report its findings to Parliament before Parliament is due to vote on the bill in question.
356. The parliamentary Human Rights Committee could also inquire into any questions referred to it by Parliament.
357. A parliamentary Human Rights Committee could adopt broad terms of reference similar to those used in the UK, which enable the UK Committee to consider 'matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)'.<sup>233</sup> The UK Committee undertakes a wide range of other functions including:
- examining existing laws on an ad hoc basis
  - examining pre-legislative documents (for example, Green Papers)
  - monitoring implementation of the human rights legislation
  - monitoring the work of human rights commissions
  - monitoring the government's human rights policy.<sup>234</sup>

(ii) A parliamentary Human Rights Committee should be adequately resourced

358. The Committee should be provided with adequate resources and time to be able to properly assess the human rights implications of proposed legislation. The Commission acknowledges that the demands and complexities of legislative programs can be difficult to manage. However, it is important that every effort be made to ensure that all aspects of pre-legislative scrutiny are conducted appropriately.

(iii) Other elements of a Human Rights Act would complement the work of a parliamentary Human Rights Committee

359. The Commission acknowledges the view that human rights protections in Australia could be improved by strengthening parliamentary committees, without a Human Rights Act.<sup>235</sup>

360. However, the Commission believes that parliamentary committees alone cannot ensure comprehensive human rights protection.<sup>236</sup>

361. A Human Rights Act would provide guidance to the parliamentary committee as to what rights it should consider, and a framework for assessing proposed limitations upon rights.

362. Further, improving the way human rights are considered in the legislative process is only one of many reforms required to develop a culture of respect for human rights in government. All levels of government, including government agencies and other public authorities, need to consider human rights in decision-making. A Human Rights Act is a comprehensive way of ensuring that this occurs.

(c) *Parliament should review legislation within a specified time if the pre-legislative scrutiny process is bypassed*

363. There may be instances where a bill must be expedited through Parliament, giving insufficient time for full pre-legislative scrutiny. This should not affect the validity, operation or enforcement of the legislation.

364. However, if Parliament enacts legislation without following the pre-legislative scrutiny process, a Human Rights Act should require Parliament to review that legislation after a fixed period of operation (for example, two years). This would encourage public debate on the impacts of that legislation upon human rights.

**Recommendation 12:** Each bill and regulation introduced into the federal Parliament should be accompanied by a human rights compatibility statement.

**Recommendation 13:** A parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Human Rights Act.

**Recommendation 14:** Parliament should be required to review legislation within a specified time if the pre-legislative scrutiny process is bypassed.

## **20.9 A Human Rights Act should ensure that courts and public authorities consider human rights when interpreting and applying laws**

365. In the Commission's view, it is important that public authorities consider how their actions and decisions might impact on a person's human rights. It is also appropriate that courts interpret laws consistently with human rights, provided the purpose of Parliament in enacting legislation is respected.
- (a) *Public authorities and courts should interpret laws consistently with human rights*
366. A Human Rights Act could require courts and public authorities to interpret federal legislation consistently with the rights protected by the Human Rights Act.<sup>237</sup>
367. The purpose of a provision of this kind would be to make sure that human rights are considered in decision-making at all levels of government so that human rights breaches are avoided to the maximum extent possible.
368. A Human Rights Act which included such an interpretive provision would 'bring human rights immediately to the mind of everybody involved in statutory interpretation, whether they be a judicial officer, government official or legal practitioner'.<sup>238</sup>
369. A human rights interpretive provision would clarify and strengthen the established common law presumption that Parliament does not intend to abrogate fundamental rights and freedoms in the absence of a clear intention to the contrary.<sup>239</sup>
370. This principle of interpretation means that Parliament:
- must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>240</sup>
371. A Human Rights Act would strengthen the presumption by supplementing common law fundamental freedoms with a specific list of rights that reflects Australia's international human rights obligations.<sup>241</sup>
372. Possible models for a human rights interpretive provision can be found in the ACT Human Rights Act, Victorian Charter, NZ Bill of Rights Act and the UK Human Rights Act.<sup>242</sup> There is growing body of jurisprudence about how these principles should be applied.<sup>243</sup>
373. As is the case in other jurisdictions, the interpretive provision should apply to both legislation and regulations,<sup>244</sup> regardless of whether they were introduced before or after the introduction of the Human Rights Act.<sup>245</sup>

(b) *The purpose of Parliament must be respected*

374. A human rights interpretive provision would build upon what Australian courts already do – interpret and apply laws enacted by Parliament. As Chief Justice Spigelman has observed, significant areas of the law are now governed entirely by statute. As such, ‘the law of statutory interpretation has become the most important single aspect of legal practice’.<sup>246</sup>
375. However, the Commission acknowledges the concern that a Human Rights Act may give judges a licence to rewrite legislation and therefore trespass on parliamentary supremacy.<sup>247</sup>
376. To address this concern, a Human Rights Act should provide that legislation may only be interpreted consistently with human rights, if that meaning is also consistent with the purpose of the legislation.<sup>248</sup> The pre-legislative scrutiny processes proposed by the Commission would result in courts being better informed about the actual legislative intent.
377. An interpretive provision would ensure that courts do not cross the line between legitimate judicial interpretation and improper judicial law-making.<sup>249</sup> It would preserve the separation of powers and ensure that courts do not tread onto the territory of legislators.
378. Eminent constitutional and human rights lawyers have confirmed that there is no constitutional impediment to introducing such a provision in a national Human Rights Act.<sup>250</sup>
379. This type of provision would not limit Parliament’s power to make laws, including laws that breach human rights. However, it would require Parliament to be explicit about its intention to pass a law that is inconsistent with human rights.
380. Similarly, if Parliament objected to the way legislation had been interpreted by a court, Parliament could introduce amendments clarifying the operation of the law.
381. In either case, the introduction of a new law or amendments which deliberately limit the enjoyment of human rights would engage the pre-legislative scrutiny process described in section 20.8. Parliament would be required to justify a decision to enact legislative amendments which were inconsistent with human rights. However, parliamentary supremacy would be preserved.
382. Combined with the pre-legislative scrutiny process, the requirement that Parliament clearly identify its legislative purpose would ensure that the public is better informed about the actions of its elected representatives.
383. **Example:** How could a Human Rights Act make a difference?
- The interpretive provision in a Human Rights Act may have made a difference to Mr Al-Kateb’s case (see section 11.2). A Human Rights Act would have required the High Court to explore if there was a possibility that the Migration Act could be interpreted consistently with the purpose of the mandatory detention provisions and

the human rights of Mr Al-Kateb. The decision of the minority in *Al-Kateb* indicates that it was possible to do so.<sup>251</sup>

**Recommendation 15:** All federal legislation should be interpreted in a way that is consistent with the rights identified in the Human Rights Act, so far as it is possible to do so consistently with the purpose of that legislation.

**Recommendation 16:** The obligation to interpret laws consistently with human rights should apply to everybody interpreting and applying federal legislation, including courts and public authorities.

### ***20.10 A Human Rights Act should ensure that Parliament is notified when laws are inconsistent with human rights***

384. Under the Human Rights Act model supported by the Commission, courts would not have the power to invalidate laws that are inconsistent with human rights.

385. However, this does raise the question of what should happen if a court finds it impossible to interpret a law consistently with human rights.

386. Where a statutory provision is inconsistent with a Human Rights Act, it should continue to operate. This would ensure that parliamentary supremacy is respected.

387. However, in the Commission's view there should be some kind of process to notify Parliament about the existence of a law that cannot be interpreted in a way that is consistent with human rights.

388. The Commission believes that a notification process would encourage the government to take responsibility for laws that breach human rights, and to look for ways to achieve its policy objectives without breaching human rights.

389. If a Human Rights Act included a notification process, it would give Parliament an opportunity to reconsider the legislation in question and to amend it to ensure that it is consistent with human rights. Or, alternatively, Parliament could choose to leave the legislation as it is.

390. Most importantly, no matter what Parliament decided to do about the law, there would be greater transparency and accountability. Parliament would be required to publicly explain its decision. Parliament would ultimately be accountable to the Australian public for maintaining legislation that is inconsistent with human rights.

#### ***(a) The UK, Victoria and the ACT use 'declarations of compatibility'***

391. In the UK, Victoria and the ACT, courts can issue a 'declaration of incompatibility' if they are unable to interpret legislation in a way that is compatible with human rights.<sup>252</sup> This declaration is brought to the attention of Parliament.

392. A declaration of incompatibility does not affect the ‘validity, operation or enforcement’ of the provision that is the subject of the declaration.<sup>253</sup> However, in Victoria the minister responsible, and in the ACT the Attorney-General, is required to respond to a declaration of incompatibility within six months.<sup>254</sup> A failure to comply with this timetable does not affect the validity of the legislation.
393. So far, no declarations of incompatibility have been made in Victoria or the ACT.
394. Seventeen declarations of incompatibility have been made in the UK.<sup>255</sup> In all 17 cases, Parliament has taken legislative action to ensure the laws in question comply with human rights.<sup>256</sup>
- (b) *A Human Rights Act could use an alternative notification process*
395. Some people have raised doubts about the constitutional validity of a ‘declaration of incompatibility’ in the federal context. In particular, former High Court Justice the Hon Michael McHugh has raised the following questions:
- Does the question of whether a law is consistent with the Human Rights Act raise a ‘matter’ within the meaning of Ch III of the Constitution?
  - Is issuing a declaration of incompatibility an exercise of federal judicial power?<sup>257</sup>
396. These questions warrant careful consideration in the design of a Human Rights Act. However, such constitutional concerns could be addressed if courts were taken out of the notification process.
397. A roundtable of Australia’s leading constitutional and human rights lawyers, including the Hon Michael McHugh and the former Chief Justice of the High Court, Sir Anthony Mason, suggested that one option could be to give an independent body such as the Australian Human Rights Commission a role in the notification process.
398. For example, if a court is unable to interpret legislation consistently with the rights set out in a Human Rights Act, the Commission could notify the Attorney-General of this finding.
399. If the Commission were to be given this role, it would not be empowered to reopen or re-examine the case. Nor would it be empowered to affect the validity or ongoing operation of the legislation in question in any way. The Commission could simply draw the Attorney-General’s attention to the fact that a court had not been able to interpret legislation consistently with human rights.
400. The Commission could be empowered to do this of its own motion or at the request of a party to the proceeding.
401. The Attorney-General could be required to table the notification in federal Parliament and the government could be required to respond to the notification within a defined period (for example, six months).



(c) *Subordinate legislation could be invalidated by courts*

402. Subordinate legislation is made by the executive, not Parliament, and does not attract the same level of parliamentary scrutiny as primary legislation. For this reason, '[t]here is no threat to parliamentary sovereignty in the judiciary invalidating delegated legislation that the primary legislator has not authorised'.<sup>258</sup>

403. Therefore, the Commission recommends that federal courts be empowered to invalidate subordinate legislation which is inconsistent with the rights protected by a Human Rights Act, unless the primary Act expressly authorises the making of subordinate legislation that is inconsistent with human rights.

**Recommendation 17:** If a federal court found that it could not interpret a federal law in a way that was consistent with the rights identified in the Human Rights Act, a statutory process should apply to bring this finding to the attention of federal Parliament and require a government response.

**Recommendation 18:** A Human Rights Act should give courts the power to invalidate subordinate legislation.

***20.11 A Human Rights Act should require public authorities to respect human rights***

404. Public authorities such as Centrelink and Medicare make many of the day-to-day government decisions which impact on the lives of people in Australia. A Human Rights Act could help ensure that public authorities respect human rights when making those decisions.

405. The Commission believes that imposing obligations on public authorities to consider and respect human rights would have a strong and positive impact. Public authorities would become more conscious of the impact their decisions have on the rights of individuals and the need to respect those rights. This greater awareness and understanding could prevent many human rights breaches from occurring.

406. Experience in the UK has shown that '[h]uman rights principles can help decision-makers and others see seemingly intractable problems in a new light'.<sup>259</sup> This is because a Human Rights Act would define human rights and provide a framework to analyse, understand and ultimately resolve issues that may have at first seemed to be unresolvable.<sup>260</sup>

407. This framework should improve public service delivery by leading to more individualised solutions. This should reduce the level of complaints received and increase the effectiveness of the service.

408. In this way, a Human Rights Act would positively impact on the lives of people in Australia in their regular, day-to-day contact with government departments and public services. It would strengthen Australia's human rights culture both in government and the general community.

409. The following sections explain the Commission's view on who should be included in the definition of a 'public authority'; the obligations a Human Rights Act might impose on public authorities; and the steps a public authority could take to ensure they are adequately fulfilling their responsibilities.

(a) *A Human Rights Act should clearly define 'public authority'*

410. Generally speaking, a Human Rights Act should require that ministers, departments, government agencies and any other organisations acting on behalf of the government respect human rights when making decisions that impact on individuals.

411. The definition of 'public authority' should be flexible enough to accommodate changes to governance arrangements and clear enough to provide certainty as to who must comply with a Human Rights Act.<sup>261</sup>

412. It is particularly important that the definition of 'public authority' include private organisations when they are performing public functions on behalf of government. This is because, increasingly, services previously performed by government are being outsourced to corporations and community organisations.<sup>262</sup> Outsourcing should not deprive the users of that government service from the right to be treated with respect and in accordance with human rights.

413. Furthermore, Australian public authorities (for example, the Australian Federal Police or AusAid) should be required to comply with a Human Rights Act when conducting operations internationally.<sup>263</sup>

414. However, the Parliament and federal courts should generally be excluded from the definition of public authority, other than when acting in an administrative capacity. This exclusion would preserve parliamentary supremacy and protect against any interference with judicial power.

415. The definition of public authority should also exclude individuals or organisations that are not performing public functions.

(b) *A Human Rights Act should require public authorities to consider and respect human rights*

416. A Human Rights Act should ensure that public authorities respect human rights in their actions and properly consider human rights when making decisions.

417. To achieve this result, a Human Rights Act could make it unlawful for a public authority to:

- act in a way that is incompatible with human rights (where an 'act' includes a failure, refusal or a proposal to act)<sup>264</sup>
- fail to give proper consideration to human rights in decision-making.

418. For example, a Human Rights Act could make it unlawful for the Department of Immigration and Citizenship to treat a person in immigration detention in a way that breaches the right to be free from cruel, inhuman and degrading treatment.
419. When making decisions, a public authority would need to interpret and apply laws and regulations in a way that is compatible with human rights. However, this obligation would be subject to Parliament's clear intention to the contrary. In other words, a public authority's actions or decisions would not be unlawful if the legislation expressly required the authority to act in a way that was inconsistent with human rights.<sup>265</sup>
420. The Commission acknowledges that these obligations may require some changes to the policies and procedures of public authorities. To address this operational concern, the obligations on public authorities under a Human Rights Act could commence after a 'lead-in' period of one to two years.
- (c) *Human rights should be incorporated into public sector practice and procedures*
421. If a Human Rights Act imposes obligations on public authorities, the public sector could need to take steps to ensure that respect for human rights is embedded into public sector practice and procedure.
422. Those steps could include:
- better education of the public sector about human rights and the obligations under a Human Rights Act
  - requiring federal government departments and agencies to develop human rights action plans
  - requiring federal government departments and agencies to conduct annual human rights audits and prepare annual reports on compliance with the Human Rights Act
  - integrating respect for human rights into public sector values and codes of conduct
423. These initiatives are described more fully below.
424. It may not be appropriate for all of these mechanisms to be explicitly set out in a Human Rights Act. Rather, these features could be integrated into the practice and procedure of the public sector.
425. The Commission understands that some people are concerned that this could lead to undue bureaucracy and expense for public authorities. However, most of these measures should complement, or be incorporated into, the current practice and procedure of the public service.
426. For example, the Australian Public Service has had the 'Charter of Public Service in a Culturally Diverse Society' since 1998.<sup>266</sup> This Charter recognises that service delivery should be tailored to the different needs of different groups

of people and that this is ‘the foundation upon which to improve effectiveness and efficiency’.<sup>267</sup>

427. A national Human Rights Act would similarly be about ensuring that government properly considers the needs of all members of Australia’s increasingly diverse population. In human rights terms, this means that no person should apply blanket policies without proper regard to the particular circumstances of an individual user of public services. Greater personalisation of the public sector means better public service, leading to better policy outcomes.

428. **Example:** How could a Human Rights Act make a difference?

A Human Rights Act would lead to improvements in the practice and procedures of public authorities.

Example one: In Victoria, a local service provider for people with disability implemented a new system in which its routine assessment of client needs included explicit consideration of their human rights through the use of a mandatory Human Rights Checklist. Any issues identified by staff were then referred to an internal Human Rights Committee for review, with the Committee making recommendations to the person’s case manager. Through the implementation of these new processes, the service provider became aware of a number of people with intellectual disabilities whose ability to exercise their right to vote had been restricted. The service took immediate steps to support them to make individual decisions about how they would vote.<sup>268</sup>

Example two: A nursing home in the UK had a practice of routinely placing residents in special ‘tilt-back’ wheelchairs, regardless of whether they could walk or not. As a consequence, residents who were able to walk unaided were stopped from doing so. This had a severe impact on their ability to make choices about everyday activities, as well as their capacity to feed themselves and use the bathroom. A consultant pointed out to staff that their failure to consider the different circumstances of individual residents was contrary to human rights principles. She drew particular attention to the right to respect for private life, which emphasises the importance of dignity and autonomy, and the right not to be treated in a degrading way. This ‘one-size-fits-all’ practice was stopped. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.<sup>269</sup>

(i) Better education about human rights and the obligations under a Human Rights Act

429. Public servants, parliamentarians and their staff, courts and tribunals, the legal profession, and any private bodies which perform public functions on behalf of the government should receive specialised human rights education and training about a Human Rights Act. In the early years of the Act’s operation, education and training should be a whole-of-government initiative, supported by specific departmental projects. Further, there should be support for training in private organisations acting as ‘public authorities’.

430. In Victoria, for example, the newly-established Human Rights Unit of the Department of Justice developed and delivered a whole-of-government human rights education strategy during 2007, including:

- Legal and Legislative Policy Officer Training delivered to over 500 participants
  - the Human Rights Implementation Program, a train-the-trainer course delivered to over 300 service delivery staff across government.<sup>270</sup>
431. These whole-of-government initiatives were complemented by initiatives at the departmental level, including:
- training courses for staff
  - changes to the induction and performance management programs
  - online learning modules and other internal communication strategies such as newsletters, displays and a Human Rights Week.<sup>271</sup>
432. These complementary initiatives continued into 2008. As the different departments became more familiar with the Victorian Charter, they generally provided a greater level of support to private bodies acting as public authorities.<sup>272</sup>
- (ii) Human rights action plans for federal departments and agencies
433. Federal government departments and agencies should be required to prepare internal human rights action plans specifying how they intend to fulfil their obligations under the Human Rights Act. These action plans would assist departments and agencies to embed the consideration of human rights into their policies, procedure and practice.
434. The human rights action plans should become the assessment and reporting framework for audits and annual reports on compliance with human rights.
- (iii) A Human Rights Act could require annual reports and human rights audits
435. A Human Rights Act could require federal government departments and agencies to conduct an annual human rights audit and to report on their compliance with the Act.
436. The annual reports could include:
- details about the measures undertaken to comply with the Human Rights Act, including an assessment of the department or agency's performance against its human rights action plan
  - human rights education or training that the department or agency has undertaken and the impact of that training on staff
  - details about complaints under the Human Rights Act involving the department or agency, including information on the status of those complaints or how those complaints were resolved.
437. Government departments and agencies could also be subject to an external audit to determine the extent to which their practices and procedures are compatible with human rights.

(iv) Human rights could be incorporated into public service values and codes of conduct

438. The responsibility of public servants to respect and promote human rights in the performance of their duties should be articulated in the Australian Public Service Values and Code of Conduct.

439. For example, the *Public Administration Act 2004* (Vic) includes the following public sector value:

human rights—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—

- (i) making decisions and providing advice consistent with human rights; and
- (ii) actively implementing, promoting and supporting human rights.<sup>273</sup>

440. The Act also provides that public sector body heads (including heads of departments) must establish employment processes that will ensure that ‘human rights as set out in the Charter of Human Rights and Responsibilities are upheld’.<sup>274</sup>

441. Setting out similar requirements in the Australian Public Service Values and Code of Conduct could help to integrate respect for human rights into the culture of the Australian public service.<sup>275</sup>

**Recommendation 19:** The definition of ‘public authority’ in a Human Rights Act should include private organisations when they are performing public functions on behalf of government.

**Recommendation 20:** Parliament and courts should be excluded from the definition of ‘public authority’ except when acting in an administrative capacity.

**Recommendation 21:** A Human Rights Act should make it unlawful for a public authority to:

- act in a way that is incompatible with human rights
- fail to give proper consideration to human rights in decision-making.

**Recommendation 22:** All federal government agencies should take steps to ensure they respect the human rights set out in the Human Rights Act by:

- engaging in human rights training and education programs
- preparing internal human rights action plans
- reporting annually on compliance with the Human Rights Act.

**Recommendation 23:** The Australian Public Service Values and Code of Conduct should articulate the responsibility of the public sector to respect human rights.

**20.12 A Human Rights Act should provide a cause of action and enforceable remedies if public authorities breach human rights**

442. As discussed above, the integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches.
443. However, sometimes better processes and education will not be enough, and breaches of human rights may occur.
444. In those circumstances a Human Rights Act should provide a cause of action and the possibility of enforceable remedies. This should, in itself, help to build a stronger human rights culture both in the community and in government.
445. This would convey to the community that the Australian Government takes its human rights obligations seriously. It would empower individuals to assert their rights. It would also be a signal to public authorities that there will be consequences for breaches of human rights.
- (a) *A Human Rights Act should provide an independent cause of action*
446. A Human Rights Act should provide an independent cause of action for victims of a breach of human rights committed by a public authority.
447. The Commission understands the concern that a Human Rights Act may lead to increased litigation.
448. However, an accessible alternative dispute resolution (ADR) process would reduce the impact of a Human Rights Act on the judicial system.
449. Litigation need not be the only – or indeed, the first – port of call for people who want to make a complaint alleging a breach of human rights.
450. The current anti-discrimination jurisdiction recognises the potential of ADR to resolve disputes between complainants and public authorities in a quick, cost-efficient and effective manner.<sup>276</sup>
451. Following this model, a Human Rights Act could require a person to attempt to resolve a human rights complaint through the investigation and conciliation processes provided by the Commission.
452. Any ADR process under a Human Rights Act should be properly funded, accessible and affordable.
453. Where a complaint cannot be resolved through conciliation, complainants should be entitled to pursue their claim in the Federal Court of Australia or the Federal Magistrates Court.

(b) *A Human Rights Act should allow an independent cause of action for all rights in the Act*

454. The Commission believes that economic, social and cultural rights should be given the same status and protection as civil and political rights under Australian law. This is consistent with Australia's international obligations.

455. In the Commission's view, an independent cause of action should be available for a person to seek a remedy for a breach of human rights, irrespective of the type of right breached. That is, independent causes of action should not be limited to breaches of civil and political rights. This approach recognises that human rights are indivisible and must be treated equally, on the same footing, and with the same emphasis.

456. It also recognises that economic, social and cultural rights can be legally enforced.<sup>277</sup> Indeed, '[e]vidence shows that ... the adjudication of ESC rights across the world has, in fact, been widespread'.<sup>278</sup> In particular, significant jurisprudence has been developed in South Africa regarding the economic, social and cultural rights protected by the South African Bill of Rights.<sup>279</sup>

(i) Court access could be limited to breaches of civil and political rights

457. As discussed in section 20.5, the Commission believes that the protection of economic, social and cultural rights in a Human Rights Act would not permit courts to interfere in resource allocation. However, the Commission acknowledges that there are strong views that economic, social and cultural rights should not be the subject of litigation.

458. There are options for ensuring that public authorities respect economic, social and cultural rights without creating an independent cause of action before the courts.

459. For example, a Human Rights Act could:

- restrict independent causes of action to matters involving civil and political rights
- provide access to ADR at the Commission in matters solely involving economic, social and cultural rights, but not allow for complaints to be heard by a court if they cannot be resolved.

460. Under the second of these options, if the Commission formed the view that a public authority had solely breached an economic, social or cultural right, the Commission could report to the Attorney-General recommending what action should be taken, including changes to policy and procedure.

461. The Commission might also report to the Attorney-General if it had received a series of complaints indicating the need for further consideration of certain policy areas. The Commission has significant expertise in reporting to the government about economic, social and cultural rights, as set out in more detail in section 24.3.



462. The Attorney-General could be required to respond to such reports in Parliament.
- (ii) Even if there was no cause of action for economic, social and cultural rights, other aspects of the Human Rights Act should still apply
463. Even if a Human Rights Act did not create an independent cause of action for breaches of economic, social and cultural rights, those rights should still be considered in pre-legislative scrutiny processes.
464. Further, courts should still interpret legislation consistently with the economic, social and cultural rights protected by the Human Rights Act.
465. Finally, a public authority should still be required to give proper consideration to economic, social and cultural rights in decision-making, and individuals should still be able to access existing administrative review processes if a public authority breaches this obligation (see section 20.12 below).
466. While these options would not provide full protection of economic, social and cultural rights, they would still promote greater scrutiny of the impact of public authorities on the enjoyment of those rights than is currently in place.
- (c) *A Human Rights Act should provide a range of enforceable remedies against public authorities*
467. A public authority should be held accountable if it breaches the human rights of an individual.
468. A Human Rights Act could provide that accountability by giving a person access to enforceable remedies when a public authority breaches his or her human rights under the Act.
469. A Human Rights Act should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and damages.
- (i) Orders requiring action
470. A Human Rights Act should give courts the power to make an order requiring a respondent to act to redress any loss or damage suffered by a person whose human rights have been breached.
471. Courts should also have the power to direct a respondent not continue or repeat conduct that has been found to breach human rights.
472. Such powers would be consistent with the powers of courts hearing federal discrimination claims. Section 46PO(4) of the HREOC Act sets out a non-exhaustive list of remedies that are available for a successful claim under the Race Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act or the Age Discrimination Act. These include orders 'directing the respondent not to repeat or continue... unlawful discrimination' and

‘requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant’.

473. This may be an especially important remedy for the violation of economic, social and cultural rights, particularly in the event that access to damages may be limited with respect to those rights (as considered below).

(ii) Injunctions

474. A Human Rights Act should specifically permit courts to make an order for an injunction in cases where a public authority is proposing to act inconsistently with human rights.

475. For example, section 46PP of the HREOC Act empowers the Federal Court to grant interim injunctions in respect of a complaint of unlawful discrimination lodged with the Commission, upon an application from the Commission, a complainant, a respondent or an affected person. The purpose of such an injunction is to maintain the status quo.

(iii) Damages

476. The right to claim monetary damages for a breach of human rights would send an important message to public authorities, people in Australia and the international community: Australia takes breaches of human rights by, or on behalf of its government, seriously.

477. Thus, a Human Rights Act should empower a court to make an order for damages where appropriate. If this was not included in the Human Rights Act, there is some risk that the Act would itself violate Australia’s obligations under article 2(3) of the ICCPR (see section 7.4). Further, it would suggest that the Australian Government takes human rights claims less seriously than other legal claims for which compensation is available.

478. While not the preferable course, a Human Rights Act could exclude or limit damages awards in relation to claims for breaches of economic, social and cultural rights in order to address concerns about judicial adjudication of those rights.

479. Damages are currently available for breaches of rights protected by federal discrimination laws.<sup>280</sup>

480. Damages are available for a violation of the UK Human Rights Act but only if this award is necessary to afford just satisfaction to the complainant.<sup>281</sup>

481. While the *New Zealand Bill of Rights Act 1990* (NZ) does not make specific provision for remedies, the NZ Court of Appeal has held that compensation is available for breach of the human rights protected under that Act.<sup>282</sup>

482. Damages are not available under the ACT Human Rights Act or the Victorian Charter.<sup>283</sup>

(d) *A Human Rights Act may have an impact on administrative law claims*

483. Australia already has administrative law mechanisms to review the actions and decisions of public authorities. A Human Rights Act could impact on those mechanisms by supplementing existing bases for challenging government decisions.

(i) A Human Rights Act may be relevant in merits review

484. The Administrative Appeals Tribunal and other federal administrative bodies such as the Social Security Appeals Tribunal and the Refugee Review Tribunal can review the merits of certain decisions made by public officials.

485. In contrast to judicial review where courts do not remake decisions, merits review asks the reviewer to 'stand in the shoes' of the original decision-maker. This allows tribunals to reconsider discretionary matters and the merits of the original decision.

486. Thus, tribunals should be required to take human rights into account in the same way as a primary decision-maker.

(ii) A Human Rights Act may be relevant in judicial review

487. A person who believes that a statutory decision-maker did not give proper consideration to a relevant human right, as required by a Human Rights Act, could seek judicial review of the decision. Under existing grounds for review, a person could argue that the decision-maker made a decision that was contrary to law or was an improper exercise of power because of a failure to take into account a relevant consideration.<sup>284</sup>

488. Remedies for successful judicial review include the power to set aside the decision or refer the decision back to the decision-maker for further consideration, but not damages<sup>285</sup>

(e) *A Human Rights Act should give standing to appropriate representative organisations*

489. Litigation is often expensive, time consuming, and, particularly for unrepresented litigants, a confusing process.

490. One way to improve access to justice for victims of human rights violations is to ensure that the standing rules in a Human Rights Act are broad.

491. Broad standing rules could enable an organisation or entity to bring an action on behalf of an alleged victim of human rights violations in circumstances where the victim does not have the capacity or resources to bring such an action themselves.

492. The Australian Law Reform Commission has considered the issue of standing rules and has recommended permitting appropriate organisations with a legitimate interest in a particular subject matter to commence human rights

proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons.<sup>286</sup>

493. The HREOC Act currently allows a person to bring a discrimination complaint to the Commission on behalf of an aggrieved person. However, only the aggrieved person can pursue the complaint in the courts, and the ability of representative bodies to bring claims on behalf of members is very limited.<sup>287</sup> This presents an unnecessary obstacle to justice and one which should not be replicated in a Human Rights Act.

**Recommendation 24:** A Human Rights Act should provide an independent cause of action against public authorities for a breach of their obligations under the Human Rights Act.

**Recommendation 25:** A Human Rights Act should provide remedies for breaches of civil and political rights and breaches of economic, social and cultural rights.

**Recommendation 26:** A Human Rights Act should provide access to the complaint handling section of the Commission for individuals alleging a breach of the human rights set out in the Human Rights Act.

**Recommendation 27:** A Human Rights Act should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and damages where necessary.

**Recommendation 28:** A Human Rights Act should include broad standing provisions that enable claims to be brought on behalf of a person who is an alleged victim of a breach of human rights.

### ***20.13 A Human Rights Act should improve community understanding of human rights***

494. A Human Rights Act could be a fundamental tool for better community education on human rights.

495. A Human Rights Act could provide a clear focus for a human rights education and community awareness program across Australia. It should be a clear statement of Australian rights and values, and of how Parliament intends to protect those rights and values.

496. A Human Rights Act could help people in Australia to identify their rights and their responsibilities to respect the rights of others. It could also explain what to do if these rights are not respected by public authorities.

497. To be an effective education tool, a Human Rights Act should be accessible to all people in Australia. In particular, it should be:

- drafted using plain English
- made available in a range of formats and languages to ensure accessibility for people with disabilities, people whose first language is not English, and people of different age groups.

498. Further, the Australian Government should commit to building awareness of the Act through:

- community engagement including public education campaigns, media and community training workshops
- incorporating human rights education into the core curricula taught in schools.

499. Information, education and awareness-raising campaigns about a Human Rights Act should be delivered in a way that is culturally relevant to Indigenous peoples and people from culturally and linguistically diverse backgrounds.

500. Particular attention should also be paid to human rights education in rural and remote communities in Australia.

501. **Example:** How could a Human Rights Act make a difference?

A Human Rights Act could raise awareness of human rights and be used as an advocacy tool to ensure that public authorities respect human rights.

Example one: In Victoria, a pregnant single mother of two children living in community housing was given an eviction notice. The notice didn't provide any reasons for the eviction or allow her to address the landlord's concerns. The Victorian Charter was used to negotiate with the landlord to prevent an eviction into homelessness. An alternative agreement was reached.<sup>288</sup>

Example two: Following the death of her mother, a woman found that she and her children were not entitled to remain in her mother's public housing property, because the lease had been in her mother's name. The children had always lived in that house and had close contacts with the local community, especially their school and nearby friends. There was a risk the woman would lose custody of her children if they were required to leave the property and she could not provide a home for them. A community legal centre helped the woman by raising the right to protection of family life in submissions to the public housing authority. The woman was given a lease over the property.<sup>289</sup>

**Recommendation 29:** A Human Rights Act should be clear, accessible and accompanied by a broad community education program.

### ***20.14 A Human Rights Act should be periodically reviewed***

502. A Human Rights Act should be subject to periodic independent reviews to assess its impact and effectiveness.

503. Periodic review could ensure the continued relevance of a Human Rights Act for an evolving Australia. It could draw the government's attention to necessary amendments and help prevent a Human Rights Act from becoming 'frozen in time'.

504. Reviews could include consideration of whether further rights should be set out in a Human Rights Act – especially in the event that it does not initially protect

economic, social and cultural rights, or specifically articulate the rights of members of particularly vulnerable groups.

505. Reviews could also consider whether the causes of action and remedies under a Human Rights Act provide effective redress for breaches of human rights.
506. Reviews might also consider whether further human rights education initiatives are required to better implement the Human Rights Act.
507. These periodic reviews should involve widespread public consultation. In particular, the consultation process should ensure that Indigenous peoples can participate effectively.

**Recommendation 30:** The operation and implementation of a Human Rights Act should be subject to periodic independent review.

### ***20.15 A stronger role for the Australian Human Rights Commission would help implement a Human Rights Act***

508. As Australia's national human rights institution, the Commission has over two decades of experience in analysing, applying and promoting international human rights standards in the Australian context. This makes the Commission ideally placed to play a significant role in the implementation of a Human Rights Act in Australia.

(a) *The Commission could promote public awareness and understanding of a Human Rights Act*

509. The Commission's current statutory functions include promoting understanding, acceptance and public discussion of human rights in Australia.<sup>290</sup> The Commission has substantial expertise and experience in this area and is ready to play a leading role in engaging the Australian community on the content and effect of a Human Rights Act.

510. The Commission's role in this regard might include:

- undertaking research
- developing public education programs
- running community based workshops
- holding public forums
- developing materials for use in schools
- using innovative information and communications technology to promote awareness of a Human Rights Act.

(b) *The Commission could scrutinise bills and laws for human rights compatibility*

511. Greater pre-legislative scrutiny is a critical tool for preventing breaches of human rights. The Commission's expertise means that it can play a valuable role in scrutinising bills and laws for human rights compatibility.
512. However, as discussed in section 16.1, the Commission currently has limited powers in relation to scrutiny of proposed laws. It also has limited powers to progress recommendations about existing laws that are incompatible with human rights.
513. Under a Human Rights Act, the Commission could be given an independent power to examine whether laws and bills are compatible with the human rights protected by the Act.
514. Such a power should be discretionary, not mandatory. It should be a self-initiated power of the Commission (in other words it should not require the invitation of the Attorney-General or any other party).
515. When the Commission undertook such an examination and provided a report to the Attorney-General, the Attorney should be required to table the report in Parliament within a fixed time period.
516. Importantly, the Attorney-General should also be required to table a response setting out how the government intended to respond to the Commission's recommendations. This response should be tabled within a fixed period, for example within six months of the initial report being tabled.

(c) *The Commission could investigate and conciliate complaints under a Human Rights Act*

517. The Consultation Committee's Background Paper invites people to consider whether the Commission's jurisdiction should be expanded to enable it to inquire into and conciliate a broader range of human rights complaints.<sup>291</sup>
518. The Commission currently handles complaints of human rights breaches, as well as complaints of workplace discrimination and unlawful discrimination contrary the four federal anti-discrimination laws.<sup>292</sup> The Commission's complaints procedure provides an accessible, cost-effective and efficient system of alternative dispute resolution. During the 2007-2008 financial year, the Commission's Complaint Information Service handled 18 765 enquiries, and finalised 1883 complaints in an average time of six months.<sup>293</sup>
519. If a Human Rights Act permitted complaints of alleged human rights breaches to be made against public authorities, the Commission could be given jurisdiction to investigate and conciliate those complaints.
520. The process for resolving complaints of alleged human rights violations under a Human Rights Act could mirror the Commission's current complaints procedure in the unlawful discrimination jurisdiction.

521. Following this model, a Human Rights Act could require a person to lodge their human rights complaint with the Commission. The Commission would investigate the complaint and seek to resolve it through conciliation, thereby avoiding unnecessary litigation. Where the Commission could not resolve a complaint, the complainant could pursue their claim in the Federal Court or the Federal Magistrates Court.

(d) *The Commission could assist courts in cases involving a Human Rights Act*

522. The Commission can currently intervene, with the leave of the court, in proceedings involving 'human rights', as defined in the HREOC Act.<sup>294</sup> The Commission and its Commissioners can also intervene or act as *amicus curiae* in cases involving discrimination issues.<sup>295</sup>

523. The special expertise the Commission has developed through performing its current statutory intervention and *amicus* functions – in over 70 cases – places the Commission in a unique position to assist courts and tribunals on the meaning, scope and application of human rights, including the interpretation of international human rights jurisprudence.

524. Thus, under a Human Rights Act, the Commission could have the power to intervene in court or tribunal proceedings involving the interpretation or application of the Act.

525. This should be an automatic right of intervention – the Commission should not be required to seek the leave of the court. This would be consistent with the Victorian Charter, which grants the Victorian Equal Opportunity and Human Rights Commission a right of intervention.<sup>296</sup>

526. Further, to allow the Commission a reasonable opportunity to consider whether or not to intervene in relevant proceedings, a Human Rights Act should require that the Commission receive formal notice of any court or tribunal proceedings involving the interpretation or application of the Act.

(e) *The Commission could notify the Attorney-General about laws which are inconsistent with a Human Rights Act*

527. Under a Human Rights Act, the Commission could be empowered to notify the Attorney-General if a court finds that it cannot interpret a law consistently with the Human Rights Act.

528. This should be a discretionary power of the Commission, rather than a mandatory function.

529. This notification process is discussed in further detail in section 20.10.

(f) *The Commission could review policies and practices of public authorities under a Human Rights Act*

530. Under a Human Rights Act, the Commission could be empowered to review the policies and practices of public authorities to assess their compatibility with the



Human Rights Act. This power should be exercisable on the Commission's own initiative, without an invitation from the relevant public authority. The Commission should have the right to access any documents, witnesses or other information necessary to conduct a proper review.

531. The Commission should also be empowered to make recommendations to the public authority in question after conducting such a review. For instance, the Commission might recommend changes to the policies or practices of a public authority to make them compatible with the Human Rights Act.

532. Public authorities should be required to respond to the Commission's recommendations.

(g) *The Commission could prepare an annual report on the operation of a Human Rights Act*

533. The Commission could conduct a general assessment of the overall impacts of a Human Rights Act by preparing an annual report on the operation of the Act. These reports could be fed into the periodic reviews of the Act (as discussed in section 20.14).

534. The Commission's reports might consider issues relating to the implementation of the Act, compliance and non-compliance with the provisions of the Act, and relevant court proceedings.

535. A Human Rights Act should not mandate the specific content of these annual reports. There should be sufficient flexibility to allow the Commission to focus on the most relevant aspects of the Act's operation in any given year.

536. The Attorney-General should be required to table the annual report in federal Parliament within a fixed period after receiving it from the Commission.

(h) *The Commission would need adequate funding to fulfil any new responsibilities*

537. The Commission could play an important role in promoting and implementing a Human Rights Act. However, if the Commission was tasked with additional functions under a Human Rights Act, the government would need to provide sufficient resources to enable the Commission to properly fulfil those functions.

**Recommendation 31:** The Commission should have the following functions and powers under a Human Rights Act:

- a function of promoting public awareness and understanding of the Human Rights Act
- a discretionary, self-initiated power to examine whether laws and bills are compatible with the human rights protected by the Human Rights Act
- a function of investigating and conciliating complaints of alleged breaches of human rights by public authorities under the Human Rights Act

- power to intervene, without seeking leave, in court or tribunal proceedings involving the interpretation or application of the Human Rights Act
- power to notify the Attorney-General, either of its own motion or at the request of a party to the relevant proceedings, if a court finds that it cannot interpret a law consistently with the Human Rights Act
- a discretionary, self-initiated power to review the policies and practices of public authorities to assess their compliance with the Human Rights Act
- a function of preparing an annual report on the operation of the Human Rights Act.

**Recommendation 32:** If the Commission is granted new functions under a Human Rights Act, the Australian Government must ensure that sufficient additional resources are provided to the Commission to enable it to carry out those functions.

### ***20.16 The Commission's response to arguments against a Human Rights Act***

538. The Commission acknowledges that there are many strongly-held views against a Human Rights Act. It has spent considerable time considering those views.

539. The following sections respond to some of the more common arguments against a Human Rights Act, and explain why the Commission believes that a Human Rights Act would lead to better promotion and protection of human rights in Australia.

*(a) There is no historical basis for a Human Rights Act in Australia*

540. It is frequently argued that there is no foundation in Australia's history for a Human Rights Act. The drafters of the Australian Constitution did not see the need for a bill of rights for Australia. Nor have Australian voters supported past attempts to insert guarantees of basic rights into the Constitution and to extend existing constitutional rights to bind the states.

541. However, it is important to recognise what have been described as 'the real motivations of the drafters' in rejecting a bill of rights. The drafters 'were driven by a desire to maintain race-based distinctions'.<sup>297</sup> In particular, the drafters were intent on preserving the ability of the states to discriminate on the grounds of race.

542. Racial discrimination is clearly unacceptable in Australia today, yet Australia's Constitution still contains racist provisions. Australia should not bind itself to the outcome of this historical reasoning. Instead, Australia should be guided by the international human rights standards that the Australian Government has promised to promote and protect.

543. More recent history suggests that Australians do support statutory human rights protection. Since 2003, independent inquiries in the ACT, Victoria, Western Australia and Tasmania have consulted widely and reported broad public support for human rights legislation.

544. For example, in the most recent inquiry, an independent opinion poll found that 89% of Western Australians thought that their state should have a law that aims to protect human rights.<sup>298</sup>
545. Further, in February 2009, an independent Neilson poll commissioned by Amnesty International Australia found that 81% of people surveyed would support the introduction of a law to protect human rights in Australia.<sup>299</sup>
- (b) *There are already sufficient human rights protections in Australia – ‘if it ain’t broke, don’t fix it’*
546. Many people in Australia enjoy a relatively high standard of living. Australia is a great country to live in, for most of us, most of the time.
547. However, as detailed in section 9 and Appendix 2, the Commission’s experience over the past 23 years confirms that human rights are not always adequately protected and promoted in Australia. This applies to many groups in the community, including Indigenous peoples, people seeking asylum, refugees, women, people with disability, and people who are homeless, to name a few.
548. In addition, any one of us could move from a situation where our rights are currently well protected to one where they are vulnerable. For example, any person could suffer a car accident and end up in a wheelchair; we are all going to get older; we may have a family member who suffers from a mental illness; and with the global financial crisis, we are all more vulnerable to unemployment and associated concerns about housing, education, transport and food.
549. For many people in Australia, the system is ‘broke’. It is time to fix it.
- (c) *Human rights can be best protected by relying on our democratic institutions*
550. Australia is a robust democracy. However, as discussed in Part B, there are numerous examples of laws and policies that have, despite this democratic system, shown insufficient regard or respect for fundamental human rights.
551. These examples, and the human rights concerns discussed in Appendix 2, suggest that politicians cannot always be counted on to pay sufficient regard to the protection of the human rights of all people in Australia.
552. While the capacity to vote politicians out of power is a fundamental aspect of Australia’s democracy, the majority view is not always aware of, or sympathetic to international human rights standards.
553. Opponents of a Human Rights Act point to the achievements of Parliament in addressing some human rights problems as evidence that Australia’s democratic system currently protects human rights. There are certainly examples of wrongs that Parliament has set right. Yet, change is often too slow.
554. For example, public pressure eventually led to the removal of many asylum-seeking children from immigration detention centres – but only after hundreds of children were held in detention centres for long periods of time, during which the

mental health of many children was severely damaged. Even now, some children are still held in immigration detention facilities.

555. Similarly, last year the Australian Government amended more than 80 laws which discriminated against people in same-sex relationships – but only after thousands of people had suffered ongoing financial hardship just because of the sex of the person they loved.
556. On the other hand, parliamentary processes can sometimes work swiftly and without proper consideration of human rights. This was the case, for example, with the Northern Territory Emergency Response legislation and the counter-terrorism laws discussed in sections 11.1 and 13.3.
557. A Human Rights Act would lead to the routine and careful consideration of human rights in the early stages of the law- and policy-making process. This would help prevent human rights problems. It would also result in courts being better informed about the legislative intent behind particular laws.
558. Further, in considering whether a law could be interpreted consistently with human rights, courts could help reveal human rights impacts that were not at first apparent or that only emerged in the application of the law to an individual. This would give Parliament the opportunity to reconsider laws in a fresh light. A Human Rights Act could therefore enhance the ability of Australia's democratic institutions to respond to human rights problems when they do occur.

(d) *A Human Rights Act would be undemocratic*

559. A common argument against a Human Rights Act is that it will shift power from Parliament to unelected judges.
560. However, the Human Rights Act model suggested by the Commission would maintain the supremacy of Parliament. It would be an ordinary Act passed by Australia's elected representatives, meaning that it would be a fundamentally democratic document. Any power given to a court, or any other body, would be voluntarily given by the Parliament itself. And Parliament would be able to repeal, amend or override a Human Rights Act using its ordinary legislative mechanisms.
561. A Human Rights Act would not upset the separation of powers, or politicise the judiciary by permitting courts to 'make' policy.
562. Under a Human Rights Act, Australian courts would be doing the kind of work they always do – interpreting laws, balancing competing issues and social concerns, and making difficult decisions in complex matters.
563. The Human Rights Act model preferred by the Commission would not permit courts to interpret legislation in a way that is inconsistent with the purpose of Parliament (see section 20.9). And it would not permit courts to invalidate laws made by Parliament.

564. If a court was unable to interpret legislation consistently with the rights set out in the Human Rights Act, Parliament could be notified of this inconsistency and be required to respond publicly.
565. The final decision on how to deal with that law would remain with the elected Parliament. If Parliament chose to amend the law, this would not be the result of ‘undemocratic’ interference or pressure from courts. This would be democracy in action. For if Parliament decided not to amend a law that was found to be inconsistent with human rights, it would have to justify that decision to the public. The Australian people would have the ultimate say – at the ballot box.
566. A Human Rights Act may also allow Parliament to limit rights in certain situations. However, if that happened, Parliament would have to publicly justify those limitations according to criteria that it decided upon in enacting the Human Rights Act.
567. Rather than being undemocratic, a Human Rights Act would mean that the public would be better informed about parliamentary decisions that affect their human rights. This would promote greater accountability among politicians, and strengthen Australia’s democratic system of government.

(e) *Human rights are vague and incapable of application by courts*

568. It has been suggested that a Human Rights Act would consist of vague guarantees or values.
569. The Commission believes that a Human Rights Act should contain fundamental, universal rights sourced in treaties to which Australia is already a party. Those human rights have decades of history behind them, and the Australian Government has voluntarily agreed to uphold those standards.
570. Because they are universal, these rights are frequently cast in general terms. However, this does not mean that courts will be ‘taking leaps into the dark ... they will be walking along judicially well-worn paths’.<sup>300</sup> Courts will be able to draw upon the considerable body of international and comparative jurisprudence that has given content to human rights.

(f) *The rights set out in a Human Rights Act would become ‘frozen in time’*

571. Another common argument against a Human Rights Act is that it would limit rights to those included in the Act, and that it would become outdated and inflexible.
572. However, a Human Rights Act could be amended by federal Parliament if necessary. For instance, if Australia committed to the protection of new rights, these could readily be incorporated into a Human Rights Act.
573. Further, a Human Rights Act could state that the rights in the Act are not exhaustive. Rights recognised elsewhere in Australian or international law would not be limited just because they are not included, or are not fully

included, in the Act. Rights may also be implemented through other legislation or policy.

574. Finally, periodic independent reviews of a Human Rights Act would guard against rights becoming frozen in time.

*(g) A Human Rights Act would be a 'lawyer's picnic'*

575. It has been argued that a Human Rights Act would lead to a 'flood' of litigation.

576. By embedding human rights considerations into government decision-making, a Human Rights Act could actually prevent human rights problems from arising in the first place, reducing the need to go to court.

577. A Human Rights Act is not about lawyers, judges or courts – 'human rights can be about the way your government treats you, every day'.<sup>301</sup> The biggest impact of a Human Rights Act would be felt outside the courtroom, often by people who cannot afford lawyers.

578. In fact, numerous case studies from the UK, the ACT and Victoria show that ordinary people can benefit from Human Rights Act without having to go to court.<sup>302</sup>

*(h) A Human Rights Act would distance people from democratic processes*

579. A related argument is that a Human Rights Act would diminish the ability of people to participate in democratic processes, because it would lead to an increased focus on litigation.

580. While virtually all new legislation has the potential to generate litigation, it seems unlikely that a Human Rights Act would lead to significantly increased litigation.

581. A Human Rights Act would actually enhance democratic processes – the public would be informed of decisions by Parliament to limit human rights and of the justifications behind those decisions. Armed with this information, the public would be better prepared to participate in democratic processes.

582. A Human Rights Act would not prevent people from participating in political campaigns. To the contrary, as a statement of the fundamental rights that Parliament has agreed to protect and promote, a Human Rights Act could provide a focus for advocacy and a standard to which government should be held accountable.

583. Further, by creating greater transparency in law- and policy-making processes (see section 20.8), a Human Rights Act would provide ordinary citizens with greater information about the decisions being made by the Parliament and executive.

584. Finally, a Human Rights Act would help to ensure that the needs of individuals are considered by government. For example, the UK Human Rights Act has improved:

the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect. In particular, ... the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.<sup>303</sup>

585. The Commission expects that a Human Rights Act would similarly improve the relationship between people in Australia and the Australian Government, rather than creating distance between them.

*(i) A Human Rights Act would only benefit vocal minorities*

586. It is sometimes argued that a Human Rights Act is an attempt by minority groups to impose their views on the majority.

587. On the contrary, a Human Rights Act would guarantee the rights of all people in Australia.

588. It may be that, in practice, members of the 'majority' will have limited need to access the causes of action available in a Human Rights Act. However, the systems set up by the Act would ensure that the rights of all people in Australia are respected. For example, a Human Rights Act would require public authorities to respect the rights of individuals, no matter who they are. And it would require the executive to consider the impact of new policy on individuals, no matter who they are.

589. A Human Rights Act would also set up a safety net in case a member of the 'majority' should slip into a more vulnerable group – due to unemployment, accident, age, family circumstances or any other reason.

590. A further argument is that Human Rights Acts in other jurisdictions have only benefitted 'villains', 'terrorists' or 'criminals'.<sup>304</sup> However, even 'villains', 'terrorists' and 'criminals' have human rights.

591. In any event, the 2006 review of the implementation of the UK Human Rights Act found that the Act 'has not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration'.<sup>305</sup>

592. Overwhelmingly, a Human Rights Act would benefit ordinary people, in their everyday interaction with government.

*(j) A Human Rights Act would frustrate the business of government*

593. Another argument is that a Human Rights Act could impede the ability of Parliament to deal with pressing problems.

594. However, a Human Rights Act would not prevent Parliament from passing laws. Nor would it allow courts to strike down laws. It would require Parliament to consider human rights when making decisions and to publicly justify decisions to limit rights. The Commission believes that this would be a good thing, even if it came at the expense of speed.
595. It is sometimes argued that a Human Rights Act could place undue bureaucratic burdens upon public authorities.
596. It is true that, initially, a Human Rights Act may create additional work for public authorities. However, a Human Rights Act should work alongside existing processes and structures so as to reduce administrative burdens. There could also be a 'lead-in' period to allow time for public authorities to adjust to a Human Rights Act.
597. Some public authorities may need to review and change their practices to comply with the Human Rights Act. Yet, as Byrnes, Charlesworth and McKinnon have observed, where the operations of public authorities do not conform to human rights standards 'there may be good reasons for insisting on the change'.<sup>306</sup>
598. By requiring public authorities to consider human rights in decision-making, a Human Rights Act could actually lead to greater efficiency, more targeted service delivery, and less time spent responding to complaints.

*(k) A Human Rights Act would stifle debate about contentious issues*

599. It has been argued that a Human Rights Act would stifle debate about important, and often contentious, matters. The Commission believes a Human Rights Act would have the opposite effect.
600. In the Commission's view, a Human Rights Act would encourage further debate about contentious issues by requiring Parliament to openly consider the human rights impacts of legislation. Under a Human Rights Act, Parliament would still have the same power to make or change laws that it has now.
- (l) A Bill of Rights didn't work in the USSR, Pakistan or Zimbabwe, why would a Human Rights Act work here?*
601. Opponents of a Human Rights Act have emphasised the failure of domestic rights guarantees to prevent human rights abuses in certain countries, such as the USSR, Nazi Germany, Pakistan or Zimbabwe.
602. No law operates independently of its social context. The failure to protect rights in certain countries cannot be attributed to a human rights law or a bill of rights – but rather to complex social and political factors, including civil unrest and a lack of respect for the rule of law.
603. It has also been claimed that the US Bill of Rights did not stop Guantanamo Bay. However, it is arguable that the US Government chose this detention site



precisely because it was attempting to avoid the reach of its constitutional safeguards.<sup>307</sup>

604. A Human Rights Act alone is not the solution to all human rights problems. Where democratic institutions break down, human rights protections may be of limited value. A Human Rights Act works best when it is embedded within governance systems that respect the rule of law.
605. Australia has a healthy respect for the rule of law, but Australia's system of checks and balances has not always protected the human rights of all people in Australia.
606. A Human Rights Act could build upon Australia's existing protections. It could enhance our democratic system of government by requiring greater transparency in, and accountability for, decision-making by elected representatives and public authorities.

## 21 An Equality Act for Australia

### 21.1 Introduction

607. Discrimination has historically been a significant barrier to the exercise and enjoyment of human rights in Australia. This Consultation provides a timely opportunity to consider how to strengthen Australia's anti-discrimination laws in order to more effectively protect and promote the right to equality.

608. The Consultation Committee's Background Paper asks:

- Are there inconsistencies between existing anti-discrimination laws that should be addressed?
- Would it be simpler to make a complaint if there was one, streamlined Commonwealth anti-discrimination law to cover the four existing areas of unlawful discrimination, as well as any new areas of unlawful discrimination?<sup>308</sup>

609. The Commission believes, in principle, that Australia's current federal anti-discrimination laws should be replaced by a single Equality Act, which broadens the grounds on which discrimination is prohibited.

610. As a first step, the Australian Government should initiate a comprehensive and independent national inquiry into the merits of a single Equality Act.

611. While the Commission believes that a national Human Rights Act is the key to better protecting and promoting human rights in Australia, stronger anti-discrimination legislation is necessary even if a Human Rights Act is enacted. A Human Rights Act will perform a different and complementary role to anti-discrimination laws.

### 21.2 Australia's anti-discrimination laws need to be overhauled

612. Australia's anti-discrimination laws provide an important pillar of legislative human rights protection. Nevertheless, a significant number of limitations and deficiencies persist.

613. Australia's anti-discrimination regime has developed in a piecemeal fashion over several decades to cover particular attributes in particular circumstances, often in response to new international treaty obligations.<sup>309</sup> This has resulted in inconsistencies and has left gaps, as discussed below.

#### (a) *Federal laws do not cover some important areas of discrimination*

614. The only types of discrimination proscribed under federal law are discrimination on the grounds of race, sex, disability and age and related characteristics.<sup>310</sup>

615. Unlike equivalent legislation in the states and territories, as well as overseas, federal anti-discrimination laws do not provide protection against discrimination on the basis of attributes such as:

- religion<sup>311</sup>
- political beliefs<sup>312</sup>
- sexual orientation/preference<sup>313</sup>
- sexuality/transgender<sup>314</sup>
- trade union activities<sup>315</sup>
- nationality<sup>316</sup>
- occupation<sup>317</sup>
- medical record<sup>318</sup>
- criminal record.<sup>319</sup>

616. This failure to proscribe discrimination on these grounds sends a poor message to the Australian community that discrimination on such grounds is acceptable. It also falls well short of implementing Australia's international obligations.<sup>320</sup>

617. In 2009, the UN Human Rights Committee stated that it was 'concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law' and recommended that Australia 'adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection for the rights to equality and discrimination'.<sup>321</sup>

618. Similar concerns have been raised by the UN Committee on Economic, Social and Cultural Rights, which recommended in 2009 that Australia 'enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds'.<sup>322</sup>

*(b) The protections provided by federal laws are inadequate*

619. There are many gaps in the protections provided by federal anti-discrimination laws.<sup>323</sup>

620. For example, whilst purporting to prohibit discrimination on the basis of sex, marital status, pregnancy, potential pregnancy and family responsibilities, the Sex Discrimination Act has been recognised by the Senate Legal and Constitutional Affairs Committee and the Australian Law Reform Commission as falling well short of achieving comprehensive protection on these grounds.<sup>324</sup> The protection provided to men and women varies.<sup>325</sup> The protection against discrimination on the grounds of family responsibilities (being limited to direct discrimination that results in dismissal from employment) is minimal when compared to other areas of discrimination.<sup>326</sup> Students do not have a remedy for sexual harassment if their harasser is a student or teacher from a different school, and students under 16 do not have a remedy if their harasser is a fellow student.<sup>327</sup> Likewise, the protection afforded to contract workers and volunteers remains unclear.<sup>328</sup>

621. Similarly, the Race Discrimination Act does not provide protection against discrimination and other unlawful conduct on the ground of religion.

622. Aside from gaps in protection, a number of practical obstacles further limit the effectiveness of current federal anti-discrimination laws. For example, the various tests for direct discrimination incorporate a requirement that an applicant establish less favourable treatment compared with a hypothetical ‘comparator’. The practical application of the comparator, however, has proved problematic due to difficulties in constructing the same or similar circumstances for carrying out the comparison.<sup>329</sup> In particular, to what extent should circumstances or characteristics related to the protected attribute be included or excluded from the comparison, and to what extent can a comparison be sensibly made where the relevant experience is unique to one group only?<sup>330</sup>
623. Practical difficulties also arise in relation to proving indirect discrimination. Under the Disability Discrimination Act, for example, applicants must establish that they have been required to comply with an unreasonable requirement or condition with which they cannot comply, but with which a substantially higher proportion of persons without their disability can comply. This has raised difficulties and uncertainties where, for example, an applicant can technically comply with the relevant requirement, but with additional hardships not experienced by other persons without their disability.<sup>331</sup>
624. In addition, despite widely recognised difficulties in proving discrimination,<sup>332</sup> current federal laws generally require the applicant to carry the onus of proof in relation to all elements of discrimination.<sup>333</sup> This is despite the reality that information relating to causation (such as the respondent’s basis for treating the applicant in a particular way) is typically within the control of the respondent, not the applicant.
625. Further, each of the laws establishes a proscriptive, negative-based standard. Discriminatory conduct is *prohibited*, rather than non-discriminatory or other positive conduct being *required*.<sup>334</sup> Unlike recent developments in the United Kingdom (discussed below), federal anti-discrimination laws lack positive obligations to promote equality.
626. These gaps and limitations undermine Australia’s compliance with its international obligations.

(c) *There are inconsistencies between current anti-discrimination laws*

627. In addition to gaps within the laws themselves, there are various idiosyncratic differences and inconsistencies between the four federal anti-discrimination laws.
628. These inconsistencies make it hard for people to understand what their rights are. They also complicate the process for legal advisers, judges, advocates and those on whom the laws impose obligations.<sup>335</sup>
629. For example, each anti-discrimination Act adopts a different definition of discrimination and includes different exceptions and defences. The areas of public life sought to be regulated vary between the Acts, as does:
- the onus of proof in indirect discrimination

- the extent to which the Acts bind the Crown in right of the state
- the coverage provided to associates of persons with protected attributes
- the provisions relating to victimisation and vicarious and ancillary liability.

630. Even relatively simple aspects of the laws are inconsistent, such as the meaning of ‘services’, or whether incitement to engage in discrimination is a criminal offence.

631. Further, there are inconsistencies between the protections provided by federal anti-discrimination laws and state and territory anti-discrimination laws.

### **21.3 The United Kingdom’s improvements to its equality laws**

632. The recent experience of the UK provides valuable lessons for Australia.

633. Like Australia, anti-discrimination laws in the UK developed in a piecemeal fashion over several decades. Also like Australia, each anti-discrimination law borrowed heavily from its predecessors, but with differing peculiarities and statutory language built up along the way.

#### *(a) The United Kingdom’s review of equality legislation*

634. In 2005 the UK government made an election commitment to ‘modernise and simplify equality legislation’.<sup>336</sup> This commitment set in motion ‘the most extensive review of equality in Britain for over 30 years’.<sup>337</sup> The government commissioned an independent Equalities Review, aimed at identifying the key social inequalities and barriers still facing UK society. It also launched the Discrimination Law Review (DLR), tasked with ‘creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience discrimination ... while reflecting better regulation principles’.<sup>338</sup>

635. The DLR identified a pressing need to simplify and streamline UK anti-discrimination laws, noting:

Because the law has developed over more than 40 years, different approaches have been taken at different times, and the law is set out in many different places, in Acts of Parliament, regulations and orders. There is widespread agreement that everyone who needs to understand discrimination law will benefit from having it in a Single Equality Act which simplifies the law as far as this can be done.<sup>339</sup>

636. The government further stated that its streamlining and simplification reform proposals would be based on the following principles:

- existing protections should not be eroded
- common approaches should be adopted wherever practicable
- definitions, tests and exceptions should be practical and reflect the realities of people’s experience of discrimination and the way business operates

- British discrimination law should comply with the requirements of European law.<sup>340</sup>

637. As a product of this ongoing process of reform, each of the separate equality commissions have now been unified into a single Commission for Equality and Human Rights, several new grounds of discrimination have been given legislative protection and a range of positive duties aimed at combating systemic discrimination have been imposed on public authorities.<sup>341</sup>

638. In addition, the government has committed itself to introducing a bill into Parliament this year which will unify all UK anti-discrimination laws in a single Equality Bill.<sup>342</sup> The bill is intended to strengthen existing legislative protections, simplify the language of discrimination law and achieve uniform protection and provisions as far as possible for all protected grounds.<sup>343</sup>

(b) *Lessons from the United Kingdom's experience*

639. A number of important lessons can be learned from the reform path followed in the UK.

640. **Take a measured approach to reforming equality laws:** Effective legislative reform of anti-discrimination laws is complex. As the findings of the UK Equalities Review demonstrate, equality is a complex social aim confounded by a myriad of complex barriers.<sup>344</sup> The DLR process has already spanned over four years, yet a draft bill is still not completed. The sheer volume of issues, possibilities, gaps and inconsistencies identified by the DLR as warranting consideration and reform highlight the need for a measured approach rather than a hasty legislative response.

641. **Public consultation helps to reach the right balance:** The DLR process highlights the importance of adequate public consultation. Anti-discrimination laws protect and impact on a wide variety of social groups. The opportunity for input from all such groups is vital for ensuring the achievement of an appropriate and workable legislative balance that takes into account all competing needs and interests.

642. **It is vital to have strong commitment from government:** Any review of anti-discrimination laws must be undertaken with a firm government commitment to strengthening and improving those laws. As noted above, the UK Government publicly committed that the review would not erode existing protections.<sup>345</sup> This commitment was an essential reassurance to groups most vulnerable to discrimination that hard-fought gains in legislative protection would not be wound back under the guise of reform.

643. **Any review must be comprehensive:** As the DLR has illustrated in the UK, each of the separate anti-discrimination laws interacts with and informs the others. The same is true in Australia. The Senate Standing Committee on Legal and Constitutional Affairs (Senate Standing Committee) has recently conducted reviews of the Sex Discrimination Act as well as a review of proposed changes to the Disability Discrimination Act and the Age Discrimination Act.<sup>346</sup> In 2004 the Productivity Commission also released its report of its review of the

Disability Discrimination Act.<sup>347</sup> The Commission welcomes these initiatives. However, these reviews have highlighted the high level of interactivity between our existing anti-discrimination laws. It is only through reviewing all federal anti-discrimination laws together that the most effective opportunities for harmonising provisions become truly apparent, as well as the areas in which specifically tailored provisions are required.

#### **21.4 Australia should have a national inquiry into equality protection**

644. The Commission is mindful that the Consultation Committee might feel reluctant about recommending a further consultation process. However, the Commission believes that a comprehensive inquiry into federal anti-discrimination laws is an appropriate recommendation in light of the gaps and flaws identified above and the importance of protecting the right to equality.

645. Moreover, it is clearly beyond the scope of the present Consultation to undertake the work required to effectively review Australia's existing anti-discrimination laws and offer an appropriate range of reform options. The recent reviews of the Sex Discrimination Act and the Disability Discrimination Act have already given a national inquiry an invaluable head-start. However, a dedicated and comprehensive inquiry into all federal anti-discrimination laws is required to properly finish the job.

646. The Commission recommends that a national inquiry on the protection of equality in Australia should:

- identify and redress significant gaps within the existing federal anti-discrimination laws
- streamline statutory language and concepts
- initiate public discussion on whether additional grounds of discrimination warrant legislative protection
- lead the process of national harmonisation of federal, state and territory anti-discrimination laws
- consider other potential options for protecting and promoting the right to equality in Australia.

(a) *The Australian Law Reform Commission should conduct a national inquiry*

647. In its recent review of the Sex Discrimination Act, the Senate Standing Committee recommended that the Australian Human Rights Commission should undertake a national inquiry to review Australia's existing federal anti-discrimination laws and consider the merits of a single Equality Act.<sup>348</sup>

648. While the Commission agrees with the Senate Standing Committee's recommendation that such a national inquiry needs to be undertaken, it does not agree that the Commission is the most appropriate body to undertake that inquiry.

649. First, the inquiry would inevitably need to examine the powers, functions and institutional arrangements of the Commission itself.
650. Secondly, as the federal body responsible for receiving, investigating and conciliating discrimination complaints, the Commission is an integral component of the anti-discrimination regulatory system.
651. An independent body such as the Australian Law Reform Commission (ALRC) would be a more appropriate choice as it would not be as vulnerable to criticisms of having a vested interest in the outcome of the inquiry.
652. However, the Commission could assist such an inquiry by acting in an advisory capacity. For example, the Commission could participate in an advisory board to the ALRC, as it has done in other ALRC inquiries.

*(b) A national inquiry should consider harmonisation of federal and state anti-discrimination laws*

653. The Commission notes that the Standing Committee of Attorneys-General has already commenced a process for harmonising the federal and state anti-discrimination jurisdictions generally. The Commission has previously commented that there are obvious advantages to such harmonisation, provided that it complies with certain guiding principles and does not erode existing protections by adopting a 'lowest common denominator' approach.<sup>349</sup>
654. A national review of Australia's federal anti-discrimination laws would provide an appropriate first step towards national harmonisation, by formulating a 'best practice' model at the federal level to lead the harmonisation process.

## **21.5 Australia should have a single Equality Act**

655. A key question for a national inquiry would inevitably be whether to unify discrimination laws into a single Equality Act.
656. In its submission to the Senate Standing Committee's review of the Sex Discrimination Act, the Commission observed that there were potential concerns with pursuing a single Equality Act. Those concerns include the consequences of losing dedicated laws that have 'represented important national statements of the right to non-discrimination for particular groups within society'.<sup>350</sup>
657. The Senate Standing Committee similarly noted that certain submissions had expressed concerns about a single Equality Act due to the 'iconic status' of anti-discrimination laws for particular groups in the community.<sup>351</sup>
658. A national inquiry would provide an appropriate forum for these concerns to be debated.<sup>352</sup>
659. However, having had an opportunity to consider the issues further, the Commission is increasingly of the view that a single Equality Act is the most appropriate way to promote equality.<sup>353</sup>



(a) *A single Equality Act would simplify anti-discrimination law*

660. A single Equality Act would consolidate the disparate anti-discrimination laws into a single Act, with consistent drafting of definitions and key concepts. It would also help to clarify that all forms of discrimination on all relevant grounds have equal status.

661. Discrimination is a complex social phenomenon that cannot always be categorised neatly into separate Acts. The current laws enable individuals to identify more than one ground and/or Act in their discrimination complaint. However, consolidating each of the grounds within one Act may assist victims of intersectional discrimination to more easily conceptualise and articulate their complaint by asserting each aspect of their discrimination with consistent statutory language under the one Act.

662. While opinions differed in the UK as to the detail of the various DLR reform proposals, the UK government reported that nearly all of the 4,226 submissions to the DLR agreed with the overarching objective of streamlining the existing anti-discrimination laws into a single Equality Act.<sup>354</sup> In addition to the proposed amendments in the UK, a single Act omnibus model also already operates in Canada and New Zealand, as well as in each of the Australian states and territories.<sup>355</sup> It therefore offers a well tried and tested model for federal reform.

(b) *Special purpose Commissioners should be retained*

663. To the extent that a single Equality Act might dilute the group-specific focus of the current anti-discrimination laws, the Commission considers that this underscores the importance of retaining the current statutory role of special-purpose Commissioners within the Commission: the positions of Race, Sex, Disability, and Aboriginal and Torres Strait Islander Social Justice Commissioners.<sup>356</sup> This would help to ensure that the specific needs and interests of particular groups most vulnerable to discrimination continue to be represented.

**Recommendation 33:** The Australian Government should refer to the Australian Law Reform Commission for inquiry and report the question of how best to strengthen, simplify and streamline federal anti-discrimination laws.

## **22 Australia's Constitution should be amended to protect and promote human rights**

### **22.1 Introduction**

664. The Commission believes that a statutory Human Rights Act, rather than a constitutionally-entrenched bill of rights, is currently the best option for human rights protection in Australia. However, certain reforms to the Australian Constitution are long overdue.

665. Australia's Constitution:

- does not recognise Indigenous peoples.
- permits laws to be made that discriminate on the basis of race.

666. The rights to equality and to be free from discrimination are so fundamental to a fair society that the Australian Government should take steps towards entrenching these rights in the Constitution.

667. In particular:

- Indigenous peoples should be recognised in the preamble to the Constitution
- section 25 should be removed from the Constitution
- the Constitution should be amended to guarantee racial equality and to proscribe discrimination on the ground of race
- there should be further dialogue about the need to amend the Constitution to guarantee a general right to equality and freedom from discrimination.

### **22.2 Recognise Indigenous peoples in the preamble**

668. The Constitution does not acknowledge Indigenous peoples as first peoples and traditional owners of the land now known as Australia.

669. In fact, the Constitution makes no reference to Aboriginal and Torres Strait Islander peoples at all.

670. There is enormous symbolic importance in recognising the rights and unique status of Indigenous peoples in the preamble to the Constitution. It would go some way towards redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.

671. A new preamble would not have direct legal effect or give rise to substantive rights or obligations. For this reason, it is of the utmost importance that recognition of Indigenous peoples in the preamble to the Constitution be in addition to, rather than instead of, other constitutional reforms aimed at prohibiting discrimination.

672. A proposal for a new preamble to the Constitution was put to a referendum in November 1999. The proposal included limited recognition of Indigenous peoples. No state or territory recorded a majority vote in favour of the proposal, with only 39.34% of the total Australian population voting in favour.
673. Part of the reason for the failure of this proposal was poor drafting and a poor consultation process. Many Australians who support recognition of Indigenous peoples in the preamble voted against the proposal because of dissatisfaction with the language used.
674. A lesson from this failed attempt at constitutional change is that there must be extensive, genuine engagement with Indigenous peoples and the broader Australian community to determine the wording of any proposed preamble. A failure to do so could undermine community support for constitutional change.

### **22.3 Remove section 25 from the Constitution**

675. Section 25 of the Constitution reflects a time when there were racist restrictions on the right to vote. It provides that, for the purposes of determining the composition of the House of Representatives:
- ... if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.
676. The section clearly recognises that states may exclude voters on racial lines. As the Council for Aboriginal Reconciliation has stated, '[s]uch a provision is inappropriate for any democratic nation, particularly one whose people come from many different backgrounds'.<sup>357</sup> Similarly, the 1988 Constitutional Commission described section 25 as 'odious' and recommended that it be repealed.<sup>358</sup>
677. A constitutional provision that contemplates denial of the right to vote on the basis of race has no place in an inclusive, multicultural Australia.
678. The Commission therefore believes that section 25 should be removed from the Australian Constitution.

### **22.4 Protect racial equality in the Constitution**

679. The removal of section 25 should be accompanied by the insertion of a clause to guarantee racial equality and to prohibit racial discrimination.
680. Neither a statutory Human Rights Act, nor an Equality Act (discussed in sections 20 and 21 above) would prevent Parliament from introducing laws that discriminate on the basis of race.
681. For example, the federal Parliament exercised its power to override the operation of the Racial Discrimination Act when it passed the Northern Territory Emergency Response legislation (see the case study in section 11.1 above).

682. Constitutional protection of racial equality would prevent legislative protections against racial discrimination from being overridden or suspended by Parliament. It would complement and strengthen the protections contained in a Human Rights Act and federal anti-discrimination laws.

683. Constitutional reform to prohibit racial discrimination has been a constant and prominent feature of debates about protecting the rights of Indigenous peoples. For example, the Council for Aboriginal Reconciliation recommended in its final report that '[t]he Commonwealth Parliament prepare legislation for a referendum which seeks to ... introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race'.<sup>359</sup>

684. The Commission recommends constitutional reform to prevent discrimination against Indigenous peoples, as discussed below.

(a) *Section 51(xxvi) could be amended*

685. Section 51(xxvi) of the Constitution authorises the Parliament to pass legislation with respect to the 'people of any race for whom it is deemed necessary to make special laws'.

686. The question of whether section 51 (xxvi) empowers the Parliament to enact laws that are detrimental to Indigenous peoples is not considered fully settled.<sup>360</sup> However, Chief Justice French has commented that the 'weight of High Court authority supports the view that s 51(xxvi) authorises both beneficial and adverse laws'.<sup>361</sup>

687. One option for protecting racial equality could be to amend section 51(xxvi) to ensure that the Parliament could only make racially-specific laws 'for the benefit' of the people of a particular race.

688. However, the question of what constituted a 'benefit' could be subjective and controversial.

689. Further, Parliament could rely upon other powers to enact legislation that discriminated on the basis of race, such as the 'Territories power' contained in section 122 of the Constitution.<sup>362</sup>

(b) *It would be better to add a new racial equality and non-discrimination clause*

690. An alternative, and preferable, option is for the Constitution to be amended to include a clause prohibiting discrimination on the basis of race. This would mean that Parliament would not have the power to introduce laws that discriminate on racial grounds.

691. A clause protecting racial equality and prohibiting discrimination on the basis of race would be consistent with Australia's international human rights obligations. In 2005, the UN Committee on the Elimination of Racial Discrimination expressed concern 'about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth' and

recommended that Australia ‘work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law’.<sup>363</sup>

## **22.5 Initiate dialogue about general equality protection in the Constitution**

692. The Commission believes that there should be a national dialogue about whether to reform the Australian Constitution to include a general guarantee of the right to equality (that is, to protect the right to equality for all people in Australia, not just members of different racial groups).

693. There will need to be extensive community consultation and engagement in order to build the understanding and awareness necessary for a proposal to amend the Constitution to succeed at a referendum.

694. As the Australian Law Reform Commission has observed, there are ‘formidable obstacles to amending Australia’s Constitution. ... Australia’s record of changing its Constitution through this process is poor. Without support from both major political parties a referendum is likely to fail’.<sup>364</sup>

695. The Commission recognises that complex questions will need to be examined before a proposal for constitutional protection of equality can be put to the Australian people.

696. The Commission recommends that there be a national inquiry about the need for constitutional protection of equality, to properly consider key questions such as:

- the exact wording of a constitutional clause to protect the right to equality
- the extent to which specific grounds of protection should be listed
- whether the clause should include any possible limitations on the right to equality.

**Recommendation 34:** Indigenous peoples should be recognised in the preamble to Australia’s Constitution.

**Recommendation 35:** The Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia:

- section 25 should be removed from the Constitution
- the Constitution should be amended to guarantee racial equality and proscribe discrimination on the basis of race
- there should be a comprehensive national inquiry considering:
  - the exact wording of a constitutional clause to protect the right to equality
  - the extent to which specific grounds of protection should be included
  - whether the clause should include any possible limitation.

## **23 Enhance human rights education in Australia**

### **23.1 Introduction**

697. Human rights education is fundamental to building a human rights culture where the rights of all people in Australia are understood and respected.

698. As discussed above in section 20.13, a Human Rights Act should be accompanied by a broad human rights education program aimed at the general community, the public sector and educational institutions.

699. However, other forms of human rights education are also needed, including programs aimed at:

- the broad community
- federal public servants and administrative decision makers
- schools and universities.

### **23.2 Australia has an international obligation to provide human rights education**

(a) *Australia's general obligation to provide human rights education*

700. Australia's duty to provide human rights education is set out in several international human rights agreements.<sup>365</sup>

701. The Universal Declaration states that '[e]ducation shall be directed to ... the strengthening of respect for human rights and fundamental freedoms'.<sup>366</sup>

702. Further, article 29 of the CRC requires Australia to direct children's education to:

- the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations
- the development of respect for the child's parents, his or her own 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 civilizations different from his or her own
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

703. In addition, the UN Human Rights Committee has said that Australia should:

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.<sup>367</sup>

(b) *The World Program of Human Rights Education*

704. Australia has also made commitments under the World Program for Human Rights Education (WPHRE).
705. The WPHRE was initiated in January 2005 as a follow up to the United Nations Decade for Human Rights Education (1995-2005). The Australian Government has expressed broad support for this program.
706. The first phase of the WPHRE was extended to 2009 so that UN Member States could have a four year period to report on progress in developing national programs for human rights education. Reports for this period are due in September 2009. A second phase of the World Programme begins on 1 January 2010.

### **23.3 Human rights education in the community**

707. As outlined in section 20.13, if Australia adopts a Human Rights Act, there should be broad and accessible community education about human rights and the operation of the Act.
708. However, community education about human rights is important regardless of whether Australia adopts a Human Rights Act.
709. Broad education about human rights, and the relevance of human rights to people's lives, should lead to a culture of increased tolerance and respect. Education should focus on ensuring that all people in Australia understand their own rights and their responsibility to respect the rights of others.
710. It is also important to develop specific human rights education initiatives to address the needs of communities facing particular human rights issues. For example, the Commission was funded in June 2007 by the Attorney-General's Department to develop and deliver training aimed at preventing family violence in Indigenous communities. This initiative was to achieve one of the aims of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and the COAG Communiqué of July 2006:
- COAG has... agreed to invest in community legal education to ensure Indigenous Australians are informed about their legal rights, know how to access assistance and are encouraged to report incidents of violence and abuse.<sup>368</sup>
711. In March, August and December 2008 the Commission delivered training to Community Legal Educators across Australia. To date, approximately half of the existing Family Violence Prevention Legal Services of Australia have had access to this training.
712. The training program provides 40 hours of face to face training and resource materials relevant to family violence and tailored to the legislation and guidelines of each state and territory. The course examines the legislation

relevant to family violence including child abuse and child neglect, sexual assault, physical assault and threatening and other violent behaviours. It covers protocols and explanations from each state and territory on the Child Protection Process, Family Violence Orders and duty of care and reporting guidelines. The course also covers content about Australia's justice system and courts; Indigenous customary laws and practice; human rights provisions relevant to violence prevention and community development theory and practice.

713. The training program has been mapped against the Certificate III, Certificate IV and the Diploma courses in National Indigenous Legal Advocacy. The Commission is the copyright holder of these nationally accredited courses. Upon successful completion of all training assessment tasks, participants are issued with a certificate of completion which supports applications for recognition of prior learning.
714. The two evaluations of the training program contain evidence of a high degree of satisfaction with the quality of the training, the relevance of the materials and the delivery of the course content.
715. Unfortunately the government funding was for a limited period and there are no additional funds for the future. This means that the remaining Family Violence Prevention Legal Services of Australia will not have access to the training. In addition, there is evidence of a high degree of interest in the training outside of this sector. The Commission has had requests for the training from Indigenous Justice Groups, state government violence prevention workers, paralegal employees, non-government organisations, training institutions and government departments.
716. If the Commission received funding aimed at human rights education in future, the Commission could deliver programs similar to that described above.

#### ***23.4 Human rights education for federal public servants and administrative decision-makers***

717. Education and training about human rights is also important for federal public servants and administrative decision-makers regardless of whether or not Australia adopts a Human Rights Act.
718. As outlined in section 20.11, experience in other jurisdictions demonstrates that understanding about human rights leads to better public service delivery. Importantly, this contributes to preventing breaches of human rights before they occur.

#### ***23.5 Human rights education in Australian schools***

719. 'Human rights' does not exist as a discrete subject in any state or territory curricula. However, an understanding of rights and responsibilities – and their relevance to young people as active citizens – is an identified learning outcome in a range of secondary school subjects.



720. In schools, human rights is embedded in the ‘Civics and Citizenship’ National Statements for Learning, which all states have either added on to or used to underpin their Society and Environment curriculum area. However, future funding for ‘Civics and Citizenship’ from the Department of Education, Employment and Workplace Relations is unclear after 2009.
721. On 5 December 2008, the Melbourne Declaration of Educational Goals for Young Australians was issued by all Australian Ministers for Education.<sup>369</sup> It includes a commitment to supporting all young Australians to become active and informed citizens, and it sets the direction for Australian schooling over the next ten years.
722. The current transition towards a national curriculum includes key learning areas of English, Maths, Science and History. Human rights content overlaps with each of these areas, particularly History. Developed by the interim National Curriculum Board, a framing paper on national curriculum in History notes the links between History and Civics and Citizenship education, including the role played by human rights principles and institutions.
723. Human rights also has a strong presence in all subjects within the key learning areas of Society and Environment (for example, Geography and Legal Studies), as well as in Career Education and Personal Development, Health and Physical Education.
724. However, currently there is no coherent approach to the topic of ‘human rights’ throughout other curriculum in the states and territories. Educators of all curriculum areas require professional support to adequately teach the human rights content.
725. There are several human rights education centres at the university level. However, none of these has a formally recognised national role other than the National Centre for Human Rights Education (NCHRE). The NCHRE was established at RMIT University in Melbourne and launched in December 2007.
726. There is currently no recognised ‘clearing house’ for human rights education material in Australia. While there are numerous published resources, there are no official distribution channels, and no support for the professional development of educators.

(a) *The Commission’s education materials for Australian schools*

727. The Commission has specific functions relating to human rights education:
- to promote an understanding and acceptance, and the public discussion, of human rights in Australia
  - to undertake research and educational programs for the purpose of promoting human rights.
728. The Commission has a strong track record of working with Australia’s state and territory education departments, schools and community organisations to promote an understanding of, and commitment to, human rights education.

729. The Commission has developed practical human rights education resources and programs through its Human Rights Education Program. The program is guided by a clear set of education principles and learning outcomes, and the approach supports the goals and direction of the WPHRE.
730. The Human Rights Education Program includes a range of interactive, resource-rich, web-based learning modules for use in the classroom with students ranging in age from years 10 to 17. The Commission has linked these core human rights education modules with curriculum frameworks from Education Departments across each Australian state and territory. Links have been established in a range of key learning areas: Studies of Society and Environment (especially Aboriginal Studies and Australian Studies), English, Civics and Citizenship/Discovering Democracy, Geography, History, and Drama.
731. The Commission's human rights education resources are available online at: [www.humanrights.gov.au/education](http://www.humanrights.gov.au/education).
732. Unfortunately, the Commission's current budget is insufficient to allow production of a full range of human rights education materials, or adequate distribution and promotion of these materials.

*(b) Ways to improve human rights education in Australian schools*

733. In order to fulfil the requirements of the WPHRE, the Commission recommends that there be an audit (situational analysis) of all of the human rights education initiatives (and curriculum links) that currently exist in Australian education systems.
734. This situational analysis should be the precursor to developing a national plan for human rights education.
735. Some of the areas that could be covered in a national plan for human rights education include:
- consideration on how best to incorporate human rights education across the curriculum
  - mechanisms to achieve pre-service and in-service human rights training and professional support for all teachers in Australian schools
  - increased production, distribution and promotion of human rights education curriculum materials.

**Recommendation 36:** The Australian Government should resource a significantly enhanced nation-wide human rights education program.

## 24 Enhance the role of the Australian Human Rights Commission

736. The Consultation Committee's Background Paper acknowledges the role played by the Commission in protecting and promoting human rights in Australia. It invites people to consider the following questions:

- Should the jurisdiction of the Commission be expanded to enable it to inquire into and conciliate a broader range of human rights complaints?

**The Commission's answer:** Yes.

- Should the Commission have a greater role in scrutinising legislation for human rights compatibility?

**The Commission's answer:** Yes.

- How should the Australian Government respond to the Commission's recommendations, such as those contained in Commission reports that are tabled in Parliament?<sup>370</sup>

**The Commission's answer:** Formally and promptly.

737. The Commission has various statutory functions, set out in the HREOC Act, and outlined in section 16 of this submission. They are wide ranging, and enable the Commission to undertake a broad range of activities aimed at the promotion and protection of human rights. However, the Commission's ability to promote and protect human rights is limited for the reasons discussed in section 16 of this submission.

738. As Australia's national human rights institution, the Commission could play a significant role in implementing and promoting a Human Rights Act, if one was enacted. Section 20.15 of this submission discusses in detail the Commission's potential roles under a Human Rights Act, including:

- promoting public awareness and understanding of a Human Rights Act
- scrutinising bills and laws for compatibility with a Human Rights Act
- investigating and conciliating complaints under a Human Rights Act
- intervening in cases involving a Human Rights Act
- notifying the Attorney-General if a court finds that it cannot interpret a law consistently with the Human Rights Act
- reviewing policies and practices of public authorities under a Human Rights Act
- preparing an annual report on the operation of a Human Rights Act.

739. Regardless of whether Australia adopts a Human Rights Act, there is a strong case for enhancing the functions and powers of the Australian Human Rights Commission, as outlined below.

### **24.1 Empower the Commission to scrutinise bills and laws for human rights compatibility**

740. Section 16 of this submission outlines the limitations of the Commission's current roles in scrutinising bills and laws for human rights compatibility.
741. Currently the Commission can examine existing laws for their compatibility with human rights (as defined in the HREOC Act).<sup>371</sup> However, the Australian Government is not required to respond to a Commission report which shows that a law is incompatible with human rights. Further, the Commission can only examine bills at the Minister's request. It has never been requested to do so.
742. As suggested in section 20.15, if Australia adopts a Human Rights Act, the Commission should be given the power to examine whether bills and laws are compatible with the human rights set out in the Human Rights Act.
743. The examination of laws before they are passed is a powerful tool for preventing human rights breaches from occurring. The Commission should therefore be given the power to examine bills for their compatibility with human rights regardless of whether Australia has a Human Rights Act. This power should be discretionary and self-initiated.
744. When the Commission examines a bill or a law and reports to Parliament, the Attorney-General should be required to table both the Commission's report, as well as a government response, within a specified time period.

### **24.2 Empower the Commission to intervene in cases that raise human rights issues**

745. Section 20.15 of this submission outlines the Commission's current intervention and *amicus* roles, and suggests that the Commission should have the power to intervene in court or tribunal proceedings involving the interpretation or application of a Human Rights Act.
746. Regardless of whether Australia adopts a Human Rights Act, the Commission should have the power to intervene, as of right, in all cases that raise significant human rights issues.
747. This power would allow the Commission to bring its human rights expertise to cases involving significant human rights issues. It would provide the Commission with an important opportunity to inform and assist lawyers, judges and complainants about the relevance of human rights to legal issues.

### **24.3 Empower the Commission to consider a broader range of human rights**

748. As discussed in section 16.2, the Commission's human rights functions are currently limited by the definition of 'human rights' in section 3 of the HREOC Act, which includes those rights set out in the instruments scheduled to the HREOC Act and other designated 'relevant international instruments'.

749. If Australia adopts a Human Rights Act, the Commission should have the power to conduct its functions with respect to all of the rights set out in that Act.
750. However, regardless of whether Australia adopts a Human Rights Act, the Commission believes that its jurisdiction should be expanded to cover the human rights in the:
- ICESCR<sup>372</sup>
  - CAT
  - Declaration on the Rights of Indigenous Peoples.
751. Australia is already a party to these treaties, and has expressed its support for this declaration.
752. Section 47 of the HREOC Act enables the Attorney-General to declare an instrument which has been ratified by Australia (or a declaration that has been adopted by Australia) to be an international instrument relating to human rights for the purposes of the HREOC Act.
753. The legal effect of declaring an instrument under section 47 is that the rights contained within that instrument will then fall within the definition of 'human rights' in sections 3 and 46A of the HREOC Act, and the Commission's statutory 'human rights' functions can then be exercised in relation to the rights contained in the declared instruments.
754. Declaring these additional instruments under the HREOC Act would mean that the Commission could properly promote public awareness and understanding of the rights contained in these instruments as well as inquire into, and help resolve, a broader range of human rights complaints.
755. The Commission could play a significant role promoting economic, social and cultural rights. This would be particularly important if these human rights were excluded from court action under a Human Rights Act.
756. The Commission currently has the power to investigate and conciliate some complaints of economic, social and cultural rights. The Commission can receive complaints about breaches of the rights set out in the CRC, if the complaint is against the Commonwealth or one of its agencies. The CRC includes a wide range of economic, social and cultural rights.
757. Further, the Commission has extensive expertise in analysing and reporting to Parliament about the protection and promotion of economic, social and cultural rights. For example:
- The Aboriginal and Torres Strait Islander Social Justice Commissioner has powers to consider economic, social and cultural rights in the annual Social Justice Reports. These reports provide comprehensive analyses of the protection and promotion of the human rights of Indigenous peoples.

- *A last resort?*, the report of the National Inquiry into Children in Immigration Detention included consideration of all of the economic, social and cultural rights contained in the CRC.<sup>373</sup>
- The National Inquiry into Rural and Remote Education included detailed analysis of the protection of the right to education for children in rural and remote Australia.<sup>374</sup>

758. Finally, the Commission has conducted comprehensive policy work on economic, social and cultural rights such as the right to health in the Close the Gap campaign. The Commission's involvement in this campaign is described in Appendix 2 to this submission.

#### **24.4 Empower the Commission to investigate human rights breaches wherever they occur**

759. Under the HREOC Act, the Commission has the power to inquire into acts and practices that may be inconsistent with or contrary to human rights.<sup>375</sup>

760. On an initial reading, this appears to be quite a broad function, allowing the Commission to conduct inquiries into a wide range of human rights issues in Australia. However, because of the restrictive way this power is defined in the HREOC Act, the Commission's human rights inquiry function is effectively limited to actions done by or on behalf of the federal government.<sup>376</sup>

761. This limits the Commission's ability to conduct formal inquiries into systemic and widespread human rights issues concerning state or territory laws or bodies other than the federal government. For example, the Commission's jurisdiction does not extend to private employers, state laws and practices, or other bodies that may be acting in breach of human rights.

762. This can be compared to the Commission's power to inquire into workplace discrimination matters, which extends to conducting inquiries into systemic practices that may constitute discrimination, including the acts and practices of state governments and private companies.<sup>377</sup>

763. The Commission believes that its formal inquiry function under the HREOC Act should empower it to inquire into human rights issues or concerns, regardless of where in Australia they occur and regardless of whether they occur under a state, territory or federal law. This would allow the Commission to address a broader range of systemic human rights issues across Australia.

764. Under this broader inquiry function, the Commission should retain its current inquiry-related powers. These include the power to require the giving of information, the production of documents and the examination of witnesses.<sup>378</sup>

#### **24.5 Provide enforceable remedies for complaints made under the HREOC Act**

765. As outlined in section 16.5, currently there are no enforceable remedies for complaints of human rights breaches made under the HREOC Act.

766. This means that a person who makes a complaint of unlawful discrimination (for example discrimination on the basis of disability) against a federal government agency can commence court proceedings and has access to an enforceable remedy. However, a person who makes a complaint against the same government agency, of a breach of a human right not covered by the anti-discrimination laws (for example, the right to be free from cruel, inhuman and degrading treatment or punishment), does not have access to an enforceable remedy.
767. The protection of human rights would be significantly enhanced if there were enforceable remedies for complaints made under the HREOC Act.
768. If a complaint under the HREOC Act cannot be conciliated, the complainant should be able to commence proceedings in the Federal Court or the Federal Magistrate's Court.

#### **24.6 Require the government to respond to Commission recommendations**

769. Currently, there is no obligation on the government to respond to Commission reports that are tabled in Parliament, including those regarding:
- individual complaints
  - inquiries into systemic human rights issues (for example *A last resort?*, the report of the National Inquiry into Children in Immigration Detention)
  - the annual Social Justice Report and Native Title Report.
770. Commission reports about individual complaints can include recommendations for preventing repetition of an act or continuation of a practice, as well as the payment of compensation or other remedies.<sup>379</sup> However, as described above the Commission cannot enforce its recommendations, and the Australian Government is not required to respond to them.
771. Similarly, the Australian Government is not required to respond to the Commission's other human rights recommendations.
772. The Commission believes that, at a minimum, the Australian Government should be required to provide a response to the Commission's individual complaint reports indicating how the government intends to address the Commission's recommendations. This could be achieved by amending the HREOC Act to require that the Attorney-General table a response to the Commission's reports in Parliament within a set period, for example six months after the report is tabled.
773. In the case of other reports prepared by the Commission under one of its statutory functions and subsequently tabled in federal Parliament, the Attorney-General should be required to table a response in Parliament within a set period of time, again possibly six months after the report is tabled.<sup>380</sup> For example, this would include:

- the annual Social Justice Report and Native Title Report, prepared by the Aboriginal & Torres Strait Islander Social Justice Commissioner
- reports following National Inquiry processes
- reports prepared by the Commission and tabled in Parliament under any new statutory functions granted to the Commission under a Human Rights Act.

774. The government response should indicate how the government intends to address the recommendations made by the Commission in its report.

775. The Senate Legal and Constitutional Committee has made recommendations to this effect in previous inquiries. For example, in its 2000 inquiry into progress towards reconciliation the Committee recommended that ‘the Government should be required by statute to respond to the reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner’.<sup>381</sup>

#### **24.7 Better resource the Commission’s education work**

776. As outlined in section 23, one of the major gaps in the protection of human rights in Australia is that many people are currently unaware of what human rights are and how they are (or are not) protected in Australia. There is a need to build greater awareness through human rights education in schools, universities and the broader community.

777. Regardless of whether Australia adopts a Human Rights Act, human rights education in Australia should be significantly enhanced. The Australian Government should invest adequate resources in ensuring that the Commission can fully and effectively carry out its statutory human rights education functions.

#### **24.8 Financially support the Commission to properly carry out its functions**

(a) *The Commission does not have adequate resources to fulfil its existing functions*

778. The Commission currently has a broad range of statutory functions related to promoting and protecting human rights in Australia, which it fulfils to the best of its ability. In practice, however, the Commission’s capacity to fulfil its statutory functions is often constrained by insufficient funding.

779. The Commission has been consistently underfunded over the past decade or more. In 1996, the Commission’s funding was reduced by 40% (applied over a four year period). The Commission had to close state and territory offices, and the number of Commissioners was reduced from six to three. This has left Commissioners doubling up on portfolios.

780. The Commission faced another significant budget cut in the 2008-2009 financial year. The Commission’s budget appropriation for the year was \$13.55 million, representing a 12.5% cut compared to the previous year.<sup>382</sup> To accommodate



this decrease, each of the units across the Commission was forced to reduce its operating budget by 14.5%.<sup>383</sup> In the 2009-2010 financial year the Commission's operating budget will be discounted by 19% (from the base level of 2007-2008).

*(b) If new functions are added, new funding must be provided*

781. Under current funding levels, the Commission is struggling to carry out its existing functions. It does not have the capacity to undertake new functions in addition to its existing ones. Therefore, if the Commission is granted new functions (under a Human Rights Act or otherwise) the Australian Government will need to ensure that sufficient additional resources are provided to the Commission to enable it to carry out those functions.

**Recommendation 37:** The Australian Government should enhance the powers, functions and funding of the Australian Human Rights Commission, particularly if a Human Rights Act is adopted. Any new functions should be accompanied by appropriate funding.

**Recommendation 38:** The Commission's existing functions and powers should be enhanced as follows:

- The Commission's power to examine bills for their compatibility with human rights should be a discretionary, self-initiated power. When the Commission examines a bill or law and reports to Parliament, the Attorney-General should be required to table the Commission's report as well as a government response within a specified time period.
- The Commission should have the power to intervene, as of right, in cases that raise significant human rights issues.
- The Attorney-General should give consideration to declaring the following instruments under section 47(1) of the HREOC Act:
  - ICESCR
  - CAT
  - Declaration on the Rights of Indigenous Peoples.
- The Commission's inquiry function under the HREOC Act should be broadened to empower the Commission to inquire into human rights issues or concerns regardless of where in Australia they occur, or whether they occur under a state, territory or federal law.
- For reports prepared by the Commission under one of its statutory functions and subsequently tabled in federal Parliament, the Attorney-General should be required to table a response in Parliament within a fixed period indicating how the government intends to address the Commission's recommendations. This would include:
  - reports prepared by the Commission after conducting an inquiry under section 11(1)(f) of the HREOC Act
  - the annual Social Justice Report and Native Title Report, prepared by the Aboriginal & Torres Strait Islander Social Justice Commissioner

- reports prepared by the Commission and tabled in Parliament under any new statutory functions granted to the Commission under a Human Rights Act.

**Recommendation 39:** If a complaint under the HREOC Act cannot be conciliated, the complainant should be able to commence proceedings in the Federal Court or the Federal Magistrate's Court.

**Recommendation 40:** The Australian Government should invest adequate resources in ensuring that the Commission can fully and effectively carry out its statutory education functions.

**Recommendation 41:** The Australian Government should provide adequate resources in order to ensure that the Commission can fully and effectively carry out its current statutory functions.

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- <sup>1</sup> *International Covenant on Civil and Political Rights* (ICCPR), 1966, art 26. At [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (viewed 22 May 2009).
- <sup>2</sup> ICCPR, above, art 2(1); *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, art 2(2). At [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (viewed 22 May 2009).
- <sup>3</sup> *Universal Declaration of Human Rights* (Universal Declaration), GA Resolution 217A(III), UN Doc A/810 (1948), preamble. At <http://www.un.org/en/documents/udhr/> (viewed 22 May 2009).
- <sup>4</sup> Universal Declaration, above, preamble.
- <sup>5</sup> ICCPR, note 1, preamble; ICESCR, note 2, preamble.
- <sup>6</sup> Australia is currently not a party to another major international human rights treaty, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990. At [http://www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm) (viewed 29 May 2009).
- <sup>7</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), 1965. At [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm) (viewed 29 May 2009).
- <sup>8</sup> ICESCR, note 2.
- <sup>9</sup> ICCPR, note 1.
- <sup>10</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1979. At <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm> (viewed 29 May 2009).
- <sup>11</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), 1984. At <http://www2.ohchr.org/english/law/cat.htm> (viewed 29 May 2009).
- <sup>12</sup> *Convention on the Rights of the Child* (CRC), 1989. At <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (viewed 29 May 2009).
- <sup>13</sup> *Convention on the Rights of Persons with Disabilities* (Disability Convention), 2006. At <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (viewed 29 May 2009).
- <sup>14</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948. At [http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm) (viewed 29 May 2009).
- <sup>15</sup> *Convention relating to the Status of Refugees* (Refugee Convention), 1951. At [http://www.unhchr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) (viewed 29 May 2009).
- <sup>16</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 1956. At <http://www2.ohchr.org/English/law/slavetrade.htm> (viewed 29 May 2009).
- <sup>17</sup> *Protocol relating to the Status of Refugees*, 1967. At [http://www.unhchr.ch/html/menu3/b/o\\_p\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_p_ref.htm) (viewed 29 May 2009).
- <sup>18</sup> *Convention relating to the Status of Stateless Persons*, 1954. At [http://www.unhchr.ch/html/menu3/b/o\\_c\\_sp.htm](http://www.unhchr.ch/html/menu3/b/o_c_sp.htm) (viewed 29 May 2009).
- <sup>19</sup> *Convention on the Reduction of Statelessness*, 1961. At [http://www.unhchr.ch/html/menu3/b/o\\_reduce.htm](http://www.unhchr.ch/html/menu3/b/o_reduce.htm) (viewed 29 May 2009).
- <sup>20</sup> *Convention concerning Discrimination in respect of Employment and Occupation* (ILO No. 111), 1958. At [http://www.unhchr.ch/html/menu3/b/d\\_ilo111.htm](http://www.unhchr.ch/html/menu3/b/d_ilo111.htm) (viewed 29 May 2009).
- <sup>21</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 1966. At [http://www.unhchr.ch/html/menu3/b/a\\_opt.htm](http://www.unhchr.ch/html/menu3/b/a_opt.htm) (viewed 29 May 2009).
- <sup>22</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* (Second Optional Protocol to the ICCPR), 1989. At [http://www.unhchr.ch/html/menu3/b/a\\_opt2.htm](http://www.unhchr.ch/html/menu3/b/a_opt2.htm) (viewed 29 May 2009).
- <sup>23</sup> *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 2000. At <http://www.unhchr.ch/html/menu2/6/protocolchild.htm> (viewed 29 May 2009).
- <sup>24</sup> *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 2000. At <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> (viewed 29 May 2009).
- <sup>25</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 1999. At [http://www.unhchr.ch/html/menu3/b/opt\\_cedaw.htm](http://www.unhchr.ch/html/menu3/b/opt_cedaw.htm) (viewed 29 May 2009).
- <sup>26</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), 2002. At <http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm> (viewed 29 May 2009). The Australian Government signed OPCAT on 19 May 2009, but has not yet acceded to it.

- <sup>27</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2006. At <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (viewed 29 May 2009).
- <sup>28</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (OPICESCR), UN Doc A/RES/63/117 (2008). At <http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf> (viewed 29 May 2009). The OPICESCR was adopted by the UN General Assembly on 10 December 2008, and is currently scheduled to open for signature on 24 September 2009.
- <sup>29</sup> *International Labor Organisation Convention 169*, 1989. At <http://www.ilo.org/ilolex/english/convdisp1.htm> (viewed 5 June).
- <sup>30</sup> Universal Declaration, note 3.
- <sup>31</sup> See, for example, L Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 *American University Law Review* 1, p 16.
- <sup>32</sup> Universal Declaration, note 3, preamble.
- <sup>33</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples), GA Resolution 61/295, UN Doc A/61/L.67 (2007). At [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (viewed 29 May 2009).
- <sup>34</sup> Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon J Macklin MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm) (viewed 29 May 2009).
- <sup>35</sup> Declaration on the Rights of Indigenous Peoples, note 33, art 1.
- <sup>36</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Resolution 36/55, UN Doc A/RES/36/55 (1981). At [http://www.unhchr.ch/html/menu3/b/d\\_intole.htm](http://www.unhchr.ch/html/menu3/b/d_intole.htm) (viewed 29 May 2009).
- <sup>37</sup> *Declaration on the Rights of Mentally Retarded Persons*, GA Resolution 2856 (XXVI), UN Doc A/RES/26/2856 (1971). At [http://www.unhchr.ch/html/menu3/b/m\\_mental.htm](http://www.unhchr.ch/html/menu3/b/m_mental.htm) (viewed 29 May 2009).
- <sup>38</sup> *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Resolution 47/135, UN Doc A/RES/47/135 (1992). At [http://www.unhchr.ch/html/menu3/b/d\\_minori.htm](http://www.unhchr.ch/html/menu3/b/d_minori.htm) (viewed 29 May 2009).
- <sup>39</sup> For the purposes of this submission, the phrase 'the major international human rights treaties' refers to the ICCPR, ICESCR, CERD, CEDAW, CAT, CRC and the Disability Convention.
- <sup>40</sup> ICCPR, note 1, art 2; ICESCR, note 2, art 2; CERD, note 7, art 2; CEDAW, note 10, arts 2, 3; CAT, note 11, art 2; CRC, note 12, art 4; Disability Convention, note 13, art 4.
- <sup>41</sup> ICCPR, above, art 2(2).
- <sup>42</sup> UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 13. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/0/58f5d4646e861359c1256ff600533f5f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/0/58f5d4646e861359c1256ff600533f5f?Opendocument) (viewed 28 May 2009).
- <sup>43</sup> UN Human Rights Committee, above, para 14.
- <sup>44</sup> See also ICESCR, note 2, art 2(1)(a).
- <sup>45</sup> ICCPR, note 1, art 2; ICESCR, note 2, art 2; CERD, note 7, art 2; CEDAW, note 10, art 2, 3; CAT, note 11, art 2; CRC, note 12, art 4; Disability Convention, note 13, art 4.
- <sup>46</sup> ICESCR, note 2, art 2(1); UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), paras 3, 4, 7. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (viewed 29 May 2009).
- <sup>47</sup> ICESCR, note 2, art 2(1); UN Committee on Economic, Social and Cultural Rights, above, para 9.
- <sup>48</sup> UN Committee on Economic, Social and Cultural Rights, above, paras 2, 3, 7.
- <sup>49</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 14*, UN Doc E/C.12/200/4 (2000), paras 43, 44.
- <sup>50</sup> ICCPR, note 1, art 2(1); ICESCR, note 2, art 2(2); CRC, note 12, art 2(1).
- <sup>51</sup> CRC, above, art 2(1).
- <sup>52</sup> CERD, note 7, art 6; CAT, note 11, art 14; CEDAW, note 10, art 2(c); ICCPR, note 1, art 2(3); ICESCR, note 2, art 2(1); CRC, note 12, art 4; Disability Convention, note 13, art 4; See also Committee on Economic, Social and Cultural Rights, *General Comment 3*, note 46, para 5.
- <sup>53</sup> UN Human Rights Committee, *General Comment No 31*, note 42, para 16.

<sup>54</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, UN Doc E/C.12/1998/24, CESCR (1998), para 9. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument) (viewed 29 May 2009). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3*, note 46, para 5.

<sup>55</sup> State party reports are required once every five years under the ICCPR, ICESCR and the CRC; once every four years under CAT, CEDAW and the Disability Convention; and once every two years under CERD.

<sup>56</sup> See ICCPR, note 1, art 40; ICESCR, note 2, art 16; CERD, note 7, art 9; CEDAW, note 10, art 18; CAT, note 11, art 19; CRC, note 12, art 44; Disability Convention, note 13, art 35.

<sup>57</sup> Inter-Committee Technical Working Group, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents*, UN Doc HRI/MC/2006/3 (2006), para 29. At [http://www.dfat.gov.au/hr/reports/icescr-iccpr/harmonised\\_guidelines.pdf](http://www.dfat.gov.au/hr/reports/icescr-iccpr/harmonised_guidelines.pdf) (viewed 29 May 2009).

<sup>58</sup> Inter-Committee Technical Working Group, above.

<sup>59</sup> The Commission recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples are primarily referred to as 'Indigenous peoples' in this document. This is because the term carries a meaning in international law. In particular, the use of 'peoples' with an 's' (and *not* people singular) reflects the human rights instruments that refer to the collective right of self-determination as one enjoyed by 'peoples'. For a more detailed explanation on the use of terms see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009). At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport08/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 3 June 2009).

<sup>60</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Reports* (1993-2008) at [http://www.humanrights.gov.au/social\\_justice/sj\\_report/index.html](http://www.humanrights.gov.au/social_justice/sj_report/index.html) (viewed 28 May 2009); Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (2005) at [www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf](http://www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf) (viewed 28 May 2009); Australian Institute of Health and Welfare, *Australia's Health No. 11* (2008) at <http://www.aihw.gov.au/publications/aus/ah08/ah08-c03.pdf> (viewed 28 May 2009).

<sup>61</sup> Australian Institute of Health and Welfare, *Demand for SAAP accommodation by homeless people 2007-2008 Australia* (2009). At <http://www.aihw.gov.au/publications/index.cfm/title/10772> (viewed 28 May 2009).

<sup>62</sup> Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), p ix. At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/\\$File/20500-2008Reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/$File/20500-2008Reissue.pdf) (viewed 29 May 2009). See also Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children* (1989).

<sup>63</sup> For further discussion about homelessness as a human rights issue, see Human Rights and Equal Opportunity Commission, *Submission to the Green Paper on Homelessness - Which Way Home?* (4 July 2008) at [http://humanrights.gov.au/legal/submissions/2008/20080704\\_homelessness.html](http://humanrights.gov.au/legal/submissions/2008/20080704_homelessness.html) (viewed 28 May 2009); Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) at [http://humanrights.gov.au/human\\_rights/housing/homelessness\\_2008.html](http://humanrights.gov.au/human_rights/housing/homelessness_2008.html) (viewed 28 May 2009).

<sup>64</sup> J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004), p 3. At <http://www.aic.gov.au/publications/rpp/56/RPP56.pdf> (viewed 29 May 2009).

<sup>65</sup> Australian Bureau of Statistics, *Personal Safety Survey (Reissue)* (2005), p 11. At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060\\_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf) (viewed 29 May 2009).

<sup>66</sup> VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004), p 11. At <http://www.vichealth.vic.gov.au/~media/ProgramsandProjects/MentalHealthandWellBeing/Discriminati onandViolence/IntimatePartnerViolence/ipv.ashx> (viewed 29 May 2009).

<sup>67</sup> Australian Institute of Health and Welfare, *Homeless people in SAAP: SAAP National Data Collection annual report 2006-07 Australia* (2008), p 32. At <http://www.aihw.gov.au/publications/index.cfm/title/10523> (viewed 6 April 2009).

<sup>68</sup> Women With Disabilities Australia, *Forgotten Sisters: A Global Review of Violence against Women with Disabilities* (2007).



<sup>69</sup> For further details, see Human Rights and Equal Opportunity Commission, *Gender equality: What matters to Australian women and men – The Listening Tour Community Report* (2008). At [http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/index.html](http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html) (viewed 28 May 2009).

<sup>70</sup> World Economic Forum, *The Global Gender Gap Report 2007* (2007), p 38. At <http://www.weforum.org/en/initiatives/gcp/Gender%20Gap/index.htm> (viewed 16 March 2009).

<sup>71</sup> Australian Bureau of Statistics, *Average Weekly Earnings, Australia, February 2008* (2008). At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0Feb%202008?OpenDocument> (viewed 1 June 2009).

<sup>72</sup> Australian Bureau of Statistics, above.

<sup>73</sup> See S Kelly, *Entering Retirement: the Financial Aspects* (Paper for the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes Conference, Perth, 12 - 13 December 2006).

<sup>74</sup> See, for example, *Crime Prevention Powers Act 1998* (ACT); *Summary Offences Act 1953* (SA); *Summary Offences Act 2005* (Qld); *Police Powers and Responsibilities Act 2000* (Qld).

<sup>75</sup> See, for example UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), pp 8 - 9. At

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/\\$FILE/G0544374.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/$FILE/G0544374.pdf) (viewed 1 June 2009).

<sup>76</sup> See Human Rights and Equal Opportunity Commission, *National Inquiry into Rural and Remote Education* (2000). At [http://www.humanrights.gov.au/Human\\_RightS/rural\\_education/index.html](http://www.humanrights.gov.au/Human_RightS/rural_education/index.html) (viewed 1 June 2009).

<sup>77</sup> Human Rights and Equal Opportunity Commission, *WORKability 2: SOLUTIONS Final report of the National Inquiry into Employment and Disability* (2006), Executive Summary. At [http://www.humanrights.gov.au/disability\\_rights/employment\\_inquiry/final/exec.htm](http://www.humanrights.gov.au/disability_rights/employment_inquiry/final/exec.htm) (viewed 28 May 2009).

<sup>78</sup> Human Rights and Equal Opportunity Commission, above. See also Human Rights and Equal Opportunity Commission, *National Inquiry into Employment and Disability Issues Paper 1: Employment and Disability – The Statistics* (2005). At [http://www.humanrights.gov.au/disability\\_rights/employment\\_inquiry/papers/issues1.htm](http://www.humanrights.gov.au/disability_rights/employment_inquiry/papers/issues1.htm) (viewed 29 May 2009).

<sup>79</sup> Joint Committee on Electoral Matters, *Report on the 2007 federal election electronic voting trials*, 2009. At <http://www.aph.gov.au/house/committee/em/elect07/report.htm> (viewed 5 June 2009).

<sup>80</sup> See, for example, UN Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), para 23, at <http://www2.ohchr.org/english/bodies/cat/cats40.htm> (viewed 4 June 2009); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (Advance Unedited Version) (2009), paras 29-30, at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 29 May 2009).

<sup>81</sup> See, for example, UN Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), note 75, paras 73 - 74.

<sup>82</sup> For further discussion of these issues, see Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2009) at [http://humanrights.gov.au/human\\_rights/immigration/idc2008.html](http://humanrights.gov.au/human_rights/immigration/idc2008.html) (viewed 4 June 2009); Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (4 August 2008) at [http://www.humanrights.gov.au/legal/submissions/2008/20080829\\_immigration\\_detention.html](http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html) (viewed 4 June 2009).

<sup>83</sup> See, for example, Human Rights and Equal Opportunity Commission, *Bush Talks* (1999). At [http://www.humanrights.gov.au/pdf/human\\_rights/bush\\_talks.pdf](http://www.humanrights.gov.au/pdf/human_rights/bush_talks.pdf) (viewed 29 May 2009).

<sup>84</sup> For further discussion of these issues, see Human Rights and Equal Opportunity Commission, *Stories of discrimination experienced by the gay, lesbian, bisexual, transgender and intersex community* (2007), at [http://humanrights.gov.au/human\\_rights/gay\\_lesbian/stories.html](http://humanrights.gov.au/human_rights/gay_lesbian/stories.html) (viewed 1 June 2009); Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, Concluding Paper of the sex and gender diversity project (2009), at [http://humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://humanrights.gov.au/genderdiversity/sex_files2009.html) (viewed 1 June 2009).

<sup>85</sup> See, for example, Human Rights and Equal Opportunity Commission, *Not for service: Experiences of injustice and despair in mental health care in Australia* (2005). At

[http://www.humanrights.gov.au/disability\\_rights/notforservice/report/index.html](http://www.humanrights.gov.au/disability_rights/notforservice/report/index.html) (viewed 29 May 2009).

<sup>86</sup> See, for example, Human Rights and Equal Opportunity Commission, *Voices of Australia: 30 years of the Racial Discrimination Act: 1975-2005* (2005). At

[http://www.humanrights.gov.au/racial\\_discrimination/voices/index.html](http://www.humanrights.gov.au/racial_discrimination/voices/index.html) (viewed 29 May 2009).

<sup>87</sup> See Human Rights and Equal Opportunity Commission, *Ismae – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), at

[http://www.humanrights.gov.au/racial\\_discrimination/ismae/index.html](http://www.humanrights.gov.au/racial_discrimination/ismae/index.html) (viewed 29 May 2009); Human

Rights and Equal Opportunity Commission, *Living Spirit: A dialogue on human rights and responsibilities*, Report on Muslim Women's Project 2006 (2008) at

[http://www.humanrights.gov.au/racial\\_discrimination/livingspirit/1.html#5\\_3](http://www.humanrights.gov.au/racial_discrimination/livingspirit/1.html#5_3) (viewed 1 June 2009).

<sup>88</sup> J Jones, *2008 Report on antisemitism in Australia* (2008). At

<http://www.antisemitism.org.il/eng/2008%20Report%20on%20antisemitism%20in%20Australia%20-%20By%20Jeremy%20Jones> (viewed 9 June 2009).

<sup>89</sup> *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>90</sup> See also UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – Australia* (Advanced Unedited Version), UN Doc CCPR/C/AUS/CO/5 (2 April 2009), para 12, at

<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc> (viewed 9 June 2009); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia*

(2009), note 80, para 14.

<sup>91</sup> The schedules to the HREOC Act are ILO No. 111, the ICCPR, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

<sup>92</sup> Declarations have been made in relation to the Disability Convention, the Convention on the Rights of the Child and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief.

<sup>93</sup> See *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523, 528 (Flick J) and the authorities cited therein.

<sup>94</sup> However, the Aboriginal and Torres Strait Islander Social Justice Commissioner must 'have regard to' other human rights instruments including the ICESCR: *Human Rights and Equal Opportunity Act 1986* (Cth), s 46C(4)(a). With regard to the CAT, the Australian Government has recently announced that it will consider introducing a new federal offence of torture. This will strengthen the limited protection provided by the *Crimes (Torture) Act 1988* (Cth).

<sup>95</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 8; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 11; UN Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000), paras 14, 24, at

<http://www.unhchr.ch/tbs/doc.nsf/0/693c56f3d2694130c12569580039a1a2?OpenDocument> (viewed 23 April 2009); UN Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), note 75, paras 9 - 10; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, para 9.

<sup>96</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2000), above, paras 14, 24.

<sup>97</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 11.

<sup>98</sup> UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000), paras 498 - 528. At

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40,paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument) (viewed 2 June 2009).

<sup>99</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 8.

<sup>100</sup> See Roy Morgan Research, *Anti-Terrorism Legislation Community Survey prepared for Amnesty International Australia* (2006), p 12. At <http://acthra.anu.edu.au/articles/Anti-terror%20community%20survey%20report.pdf> (viewed 2 June 2009).

<sup>101</sup> RCL Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 85, p 86.

<sup>102</sup> G Williams, *Human Rights under the Australian Constitution* (2002), p 41.

<sup>103</sup> H Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, p 210.

<sup>104</sup> Australian Constitution, s 51(xxxi).

<sup>105</sup> Australian Constitution, s 80.

<sup>106</sup> Australian Constitution, s 75(v).

<sup>107</sup> Australian Constitution, s 116.

<sup>108</sup> Australian Constitution, s 117.

<sup>109</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.

<sup>110</sup> *Australian Capital Television Pty Ltd*, above, 187.

<sup>111</sup> A substantive doctrine of equality under the Constitution was proposed by Deane and Toohey JJ in their dissenting judgment in *Leeth v Commonwealth* (1992) 174 CLR 455, 486 - 492 (Deane and Toohey JJ), but was rejected in the joint judgment of Mason CJ, Dawson and McHugh JJ. It was also rejected by a majority of the Court in *Kruger v Commonwealth* (1997) 190 CLR 1. The more limited procedural doctrine of equality proposed by Gaudron J in *Leeth* may still be open for argument.

<sup>112</sup> Charlesworth, 'The Australian Reluctance about Rights', note 103, p 198; J Doyle and B Wells, 'How Far Can the Common Law go Towards Protecting Human Rights?' in P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 17, p 61.

<sup>113</sup> See, for example, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 - 225 (Heydon J) and the authorities cited therein. A contrary view has been expressed by Kirby J: see, for example, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657 - 658 (Kirby J).

<sup>114</sup> See sections 21 and 22 of this submission for further discussion of the weaknesses of the Australian Constitution in protecting racial equality and the right to equality more generally.

<sup>115</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 9. At

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fff3368f665eaf93c125701400444342/\\$FILE/G0541073.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fff3368f665eaf93c125701400444342/$FILE/G0541073.pdf) (viewed 23 April 2009).

<sup>116</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*

(2008), ch 3. At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/](http://humanrights.gov.au/social_justice/sj_report/sjreport07/) (viewed 2 June 2009).

<sup>117</sup> Human Rights and Equal Opportunity Commission, *Submission to Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007). At [http://www.humanrights.gov.au/legal/submissions/2007/NTNER\\_Measures20070810.html](http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html) (viewed 9 June 2009).

<sup>118</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 14.

<sup>119</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>120</sup> ICCPR, note 1, art 9.

<sup>121</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).

<sup>122</sup> The Hon M McHugh AC, *The need for agitators: the risk of stagnation* (Paper presented to the Sydney University Public Law Forum, Sydney, 12 October 2005), p 7. At

[http://www.hcourt.gov.au/speeches/mchughj/mchughj\\_12oct05.pdf](http://www.hcourt.gov.au/speeches/mchughj/mchughj_12oct05.pdf) (viewed 29 May 2009).

<sup>123</sup> *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

<sup>124</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook* (1999, updated as of May 2000). At [http://www.dpmc.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf) (viewed 26 May 2009).

<sup>125</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 1.1.

<sup>126</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 6.34.

<sup>127</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 4.5.

<sup>128</sup> S Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665, p 674.



<sup>129</sup> Department of the Prime Minister and Cabinet, *Cabinet Handbook*, (5<sup>th</sup> ed, 1983, amended as of March 2004). At [http://www.dpmc.gov.au/guidelines/docs/cabinet\\_handbook.rtf](http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.rtf) (viewed 26 May 2009).

<sup>130</sup> Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, note 124, para 1.12.

<sup>131</sup> Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook* (2005). At [http://www.dpmc.gov.au/guidelines/docs/executive\\_handbook.doc](http://www.dpmc.gov.au/guidelines/docs/executive_handbook.doc) (viewed 26 May 2009).

<sup>132</sup> *Legislative Instruments Act 2003* (Cth), s 26.

<sup>133</sup> Senate Table Office, *Standing Orders and other Orders of the Senate* (2006), Standing Orders 23 and 24, pp 20 - 21. At [http://www.aph.gov.au/senate/pubs/standing\\_orders/standingorders.pdf](http://www.aph.gov.au/senate/pubs/standing_orders/standingorders.pdf) (viewed 2 June 2009).

<sup>134</sup> For further discussion, see section 20.16 of this submission.

<sup>135</sup> H Charlesworth, 'Who wins under a Bill of Rights?' (2006) 25 *The University of Queensland Law Journal* 1, p 44.

<sup>136</sup> A Ramsey, 'No opposition, no debate, no contest', *The Sydney Morning Herald*, 11 August 2007. At <http://www.smh.com.au/news/opinion/no-opposition-no-debate-no-contest/2007/08/10/1186530620958.html> (viewed 2 June 2009).

<sup>137</sup> See further Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At [http://humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html) (viewed 10 June 2009).

<sup>138</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.

<sup>139</sup> *Mabo v Queensland (No 2)* (1991) 175 CLR 1, 42 (Brennan J) (*Mabo (No 2)*).

<sup>140</sup> *Mabo (No 2)*, above, 29 (Brennan J).

<sup>141</sup> The Hon M McHugh AC QC, *Does Australia Need a Bill of Rights?* (Speech delivered at Law Week Oration, University of Melbourne, 15 May 2007). At <http://acthra.anu.edu.au/resources/DoesAustraliaNeedABillofrights.pdf> (viewed 2 June 2009).

<sup>142</sup> (1994) 179 CLR 427.

<sup>143</sup> *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>144</sup> See generally *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4, para 47 (French J), and the authorities cited therein.

<sup>145</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ).

<sup>146</sup> *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>147</sup> See D Pearce and R Geddes, *Statutory Interpretation in Australia* (6<sup>th</sup> ed, 2006), pp 38 - 39.

<sup>148</sup> See further Doyle and Wells, note 112, p 74.

<sup>149</sup> See Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws*, note 137.

<sup>150</sup> *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagher J).

<sup>151</sup> *Crimes Act 1914* (Cth), pt 1C, div 2.

<sup>152</sup> *Crimes Act 1914* (Cth), pt 1C, div 2. The provision for 'dead time' is found in ss 23CA(8)(m) and 23CB.

<sup>153</sup> *Criminal Code Act 1995* (Cth), schedule, div 104.

<sup>154</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), pt III, div 3.

<sup>155</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4).

<sup>156</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS.

<sup>157</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006). At <http://daccessdds.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement> (viewed 2 June 2009).

<sup>158</sup> UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.

<sup>159</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.

<sup>160</sup> *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273. The concept of 'legitimate expectation' has been questioned in subsequent cases, but has not been reversed. See, for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

<sup>161</sup> Section 75(v) of the Australian Constitution guarantees the High Court's jurisdiction to judicially review the actions of a Commonwealth officer (including the actions of a Minister). Section 39B of the *Judiciary Act 1903* (Cth) gives the Federal Court jurisdiction to review the lawfulness of federal executive action.

<sup>162</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5.

<sup>163</sup> *Rush v Commissioner of Police* [2006] FCA 12.

<sup>164</sup> Second Optional Protocol to the ICCPR, note 22.

<sup>165</sup> UN Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para 7.3. At

<http://www.unhcr.ch/tbs/doc.nsf/0/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument> (viewed 2 June 2009).

<sup>166</sup> The UN Human Rights Committee has found that Australia has breached the human rights of those within its jurisdiction 17 times. The UN Committee on Elimination of Racial Discrimination and the Committee against Torture have each made one finding against Australia.

<sup>167</sup> UN Human Rights Committee, *Brough v Australia*, Communication No. 1184/2003, UN Doc CCPR/C/86/D/1184/2003 (2006). At

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/8aeb1fcbc458419ac125716200520f4b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/8aeb1fcbc458419ac125716200520f4b?Opendocument) (viewed 1 June 2009).

<sup>168</sup> UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). At

<http://www.unhcr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034?Opendocument> (viewed 1 June 2009).

<sup>169</sup> UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997). At

<http://www.unhcr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument> (viewed 1 June 2009).

<sup>170</sup> UN Human Rights Committee, *Coleman v Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (2006). At

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/bb31fe728f09bc5dc12571cd0048757c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/bb31fe728f09bc5dc12571cd0048757c?Opendocument) (viewed 1 June 2009).

<sup>171</sup> For example, in the case of *A v Australia*, the Australian Government rejected the Committee's findings that Mr A's detention was in contravention of the ICCPR and that the review of the lawfulness of the detention by Australian courts was inadequate. The Government also rejected the Committee's view that compensation should be paid to Mr A. See H Charlesworth, *Human rights: Australia versus the UN*, Democratic Audit of Australia, Discussion Paper 22/06 (2006). At [http://democratic.audit.anu.edu.au/papers/20060809\\_charlesworth\\_aust\\_un.pdf](http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf) (viewed 1 June 2009).

<sup>172</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).

<sup>173</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 3.

<sup>174</sup> The definition of 'human rights' in s 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) makes reference to rights 'recognised or declared by any relevant international instrument'. While this appears to give the definition a broad scope, the term 'relevant international instrument' is defined later in s 3 to be 'an international instrument in respect of which a declaration under s 47 is in force'. To date only the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, the CRC, and the Disability Convention have been the subject of a declaration under s 47.

<sup>175</sup> There is one exception to this. The Aboriginal and Torres Strait Islander Social Justice Commission 'must, as appropriate, have regard to' the ICESCR and 'such other instruments relating to human rights as the Commissioner considers relevant': *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 46C(4)(a), 46C(4)(b).

<sup>176</sup> The Commission has certain limited powers in relation to the examination of legislation or proposed legislation that may be contrary to CEDAW by virtue of s 48 of the Sex Discrimination Act.

<sup>177</sup> However, the Commission may conduct inquiries into discrimination in employment, including systemic discrimination. This function is not limited to employment by the Commonwealth. It also applies to private workplaces and employment by States and Territories. *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(b).

<sup>178</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f). ‘Human rights’ are defined in s 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

<sup>179</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 29(2)(b), 29(2)(c).

<sup>180</sup> Reports of complaints are available at

[http://www.humanrights.gov.au/legal/HREOCA\\_reports/index.html](http://www.humanrights.gov.au/legal/HREOCA_reports/index.html).

<sup>181</sup> Human Rights and Equal Opportunity Commission, *Those who’ve come across the seas – Detention of unauthorised arrivals* (1998). At

[http://www.humanrights.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf) (viewed 2 June 2009).

<sup>182</sup> Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At

[http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/report/PDF/alr\\_complete.pdf](http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf) (viewed 2 June 2009).

<sup>183</sup> See further Australian Human Rights Commission, *2008 Immigration detention report*, note 82; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 82.

<sup>184</sup> See, for example, UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 7-8; Committee against Torture, *Concluding Observations: Australia* (2008), note 80, pp 4, 8; Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), note 75, p 13.

<sup>185</sup> *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>186</sup> See *Discrimination Act 1991* (ACT), s 7(1)(o); *Anti-Discrimination Act 1998* (Tas), s 16(r); *Anti-Discrimination Act* (NT), s 19(1)(q).

<sup>187</sup> Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr Frank Ottaviano of discrimination in employment on the basis of criminal record against South Australia Police*, Report No. 38 (2007). At

[http://www.humanrights.gov.au/legal/HREOCA\\_reports/hrc\\_report\\_38.html](http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_38.html) (viewed 2 June 2009).

<sup>188</sup> For example, Amnesty International Australia commissioned a nationwide poll of 1001 voters in 2006. Sixty one per cent of respondents said they thought Australia had a bill or charter of rights. Thirteen percent said that Australia did not have a bill or charter of rights. Twenty six percent could not say. See Roy Morgan Research, note 100.

<sup>189</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 11(1)(g), 11(1)(h).

<sup>190</sup> The Hon M McHugh AC QC, *A Human Rights Act, the courts and the Constitution* (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009). At

[http://humanrights.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://humanrights.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc) (viewed 4 June 2009). The *Canadian Bill of Rights 1960* (Can), s 2 states:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...

<sup>191</sup> For example, in *R v Drybones* [1970] SCR 282, the Supreme Court of Canada held that a law that could not be sensibly construed so as not to abrogate the rights and freedoms recognised in the *Canadian Bill of Rights* was inoperative to the extent of the inconsistency, unless there was an express declaration that the law operated notwithstanding the *Canadian Bill of Rights*. Pamela Tate SC has raised concerns about the constitutional implications of introducing a ‘notwithstanding’ clause of this type in the Australian federal context. See P Tate, *Victoria’s Charter of Human Rights and Responsibilities: A contribution to the Debate on a National Charter* (Paper presented the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009).

<sup>192</sup> See ICCPR, note 1, art 2(1).

<sup>193</sup> In particular, the right to self-determination is a collective right, held by ‘peoples’: ICCPR, note 1, art 1; ICESCR, note 2, art 1.

<sup>194</sup> ICCPR, note 1, art 25(b). See also UN Human Rights Committee, *General comment No 15: The position of aliens under the Covenant* (1986), reprinted in UN Doc HRI/GEN/1/Rev.9 (Vol I) (2008), p 189. At

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument) (viewed 7 June 2009).

<sup>195</sup> ICCPR, note 1, art 50; ICESCR, note 2, art 28.

<sup>196</sup> The Commonwealth can introduce laws that protect human rights pursuant to s 51(xxix) of the Australian Constitution (the external affairs power), which gives Parliament the power to introduce

laws that implement the terms of those international agreements to which Australia is a party:

*Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>197</sup> Australian Constitution, s 109.

<sup>198</sup> Although the precise formulation of this rule is not entirely clear, it is doubtful that the Commonwealth would be able to control the procedures by which a state Parliament makes laws. See *Austin v Commonwealth* (2003) 215 CLR 185, pp 257 - 258 (Gaudron, Gummow and Hayne JJ); *Re Australian Education Union: ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); A Simpson, 'State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design' (2004) 32 *University of Western Australia Law Review* 45, p 50.

<sup>199</sup> Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), at

[http://www.department.dotag.wa.gov.au/H/human\\_rights\\_report\\_2007.aspx?uid=0053-1186-4534-3685](http://www.department.dotag.wa.gov.au/H/human_rights_report_2007.aspx?uid=0053-1186-4534-3685) (viewed 7 June 2009); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), at

[http://www.law.utas.edu.au/reform/docs/Human\\_Rights\\_A4\\_Final\\_10\\_Oct\\_2007\\_revised.pdf](http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf) (viewed 7 June 2009).

<sup>200</sup> See *Racial Discrimination Act 1975* (Cth), s 6A(1); *Sex Discrimination Act 1984* (Cth), ss 10(3), 11(3); *Disability Discrimination Act 1992* (Cth), s 13(3); *Age Discrimination Act 2004* (Cth), s 12(3).

<sup>201</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.

<sup>202</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.

<sup>203</sup> Consultation Committee for a Proposed WA Human Rights Act, note 199, pp 76 - 77; Tasmania Law Reform Institute, note 199, pp 169 - 170; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), p 100, at <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 7 June 2009).

<sup>204</sup> *Human Rights Act 1998* (UK), sch 1, pt II; Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007-08* (2008), p 56, at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm> (viewed 7 June 2009).

<sup>205</sup> In *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, the Supreme Court of Canada held that the State's failure to provide interpreters to people with a hearing impairment when they accessed health services violated the right to equality contained in s 15(1) of the *Charter of Rights and Freedoms*.

<sup>206</sup> In *Victoria (City) v Adams*, 2008 BCSC 1363, the Supreme Court of British Columbia found that a bylaw that prohibited the erection of temporary shelter on public property deprived people who are homeless of the right to life, liberty and security of the person guaranteed by s 7 of the *Charter of Rights and Freedoms*.

<sup>207</sup> Consultation Committee for a Proposed WA Human Rights Act, note 199, p 86. See further, P Macklem, *Indigenous Difference and the Constitution of Canada* (2002), p 243: Canadian 'courts have generally been reluctant to invest civil and political rights with much social [or] economic ... content'. See also A Byrnes, H Charlesworth and G McKinnon, quoted in ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006), p 48: 'Even in ... Canada where a Charter of Rights had long been established, the record of the courts in protecting social, economic and cultural rights through other rights ... has been mixed at best'.

<sup>208</sup> Consultation Committee for a Proposed WA Human Rights Act, note 199, p 87.

<sup>209</sup> *Constitution of the Republic of South Africa, 1996*, ss 26 - 27.

<sup>210</sup> *South Africa v Grootboom* [2001] 1 SA 46, para 41.

<sup>211</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?*, note 204, p 56.

<sup>212</sup> Although certain rights are tailored, for example, to the circumstances of lawful aliens, children, citizens, ethnic, religious or linguistic minorities and mothers: ICCPR, note 1, arts 13, 24, 25, 27; ICESCR, note 2, art 10.

<sup>213</sup> CEDAW, note 10; CRC, note 12; Disability Convention, note 13; CERD, note 7; Declaration on the Rights of Indigenous Peoples, note 33.



<sup>214</sup> Australian courts already have recourse to international human rights jurisprudence in interpreting laws which give effect to Australia's international obligations. They may also have reference to it in the context of applying the common law principle of statutory interpretation that, in the case of ambiguity, courts should prefer an interpretation that is consistent with Australia's international obligations: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264 - 265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 303 (McHugh J), 332 - 333 (Kirby J). It has been held that approach is not confined in its application to ambiguous statutory provisions: *X v Commonwealth* (1999) 200 CLR 177, 222 - 223 (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 - 333 and footnotes 168 - 169 (Kirby J).

<sup>215</sup> See, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2); *Human Rights Act 2004* (ACT), s 31(1). See further *Human Rights Act 2004* (ACT), dictionary; Explanatory Statement to the Human Rights Bill 2003 (ACT), pp 5 - 6; Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic), pp 23 - 24. See also other sources of international law as outlined in the *Statute of the International Court of Justice*, art 38.

<sup>216</sup> For further on a Human Rights Act and the rights of Aboriginal and Torres Strait Islander peoples, see Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2008*, note 59, ch 2.

<sup>217</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.

<sup>218</sup> *Human Rights Act 2004* (ACT), s 28.

<sup>219</sup> For an analysis of internal limitations in the ACT Human Rights Act and Victorian Charter, see C Evans and S Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008), paras 5.20 - 5.22.

<sup>220</sup> *Kracke v Mental Health Review Board* [2009] VCAT 646, para 108, citing *R v Oakes* [1986] 1 SCR 103, para 67.

<sup>221</sup> ICCPR, note 1, art 19(3).

<sup>222</sup> ICCPR, above, art 4(2). The UN Human Rights Committee considers that there are elements of other rights that may not lawfully be subject to derogation: UN Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add. 11 (2001), para 13. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument) (viewed 2 June 2009).

<sup>223</sup> UN Human Rights Committee, above, para 7.

<sup>224</sup> J Debeljak, 'Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, p 434.

<sup>225</sup> See further, Debeljak, above, p 435.

<sup>226</sup> *Bropho v Western Australia* [2008] FCAFC 100, para 83.

<sup>227</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2); *Human Rights Act 2004* (ACT), s 28; *New Zealand Bill of Rights Act 1990* (NZ), s 5; *Constitution of the Republic of South Africa, 1996*, s 36. See also *R v Oakes* [1986] 1 SCR 103.

<sup>228</sup> P Tate, 'Protecting Human Rights in a Federation' (2008) 33 *Monash University Law Review* 212, p 232. See also Evans and Evans, note 219, para 5.49.

<sup>229</sup> Department of Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, note 124.

<sup>230</sup> Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (2009), p 30. At <http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp> (viewed 7 June 2009).

<sup>231</sup> M Hunt, *The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia* (Speech delivered at the Australian Human Rights Commission, Sydney, 17 February 2009). At [http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt\\_2009.html](http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html) (viewed 7 June 2009).

<sup>232</sup> Victorian Equal Opportunities and Human Rights Commission, *Emerging Change*, note 230, p 71.

<sup>233</sup> See, for example, Joint Committee on Human Rights. At [http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights/jchrabout.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrabout.cfm) (viewed 2 June 2009).

<sup>234</sup> UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), p 21; Hunt, note 231.

<sup>235</sup> See J Uhr, 'Leap into lead on rights path', *The Canberra Times*, 13 May 2009. At <http://www.canberratimes.com.au/news/opinion/editorial/general/leap-into-lead-on-rights-path/1511515.aspx> (viewed 7 June 2009).

<sup>236</sup> In the UK, Parliament has passed laws that are incompatible with human rights against the advice of the Joint Parliamentary Committee. The ability of courts under the UK Human Rights Act to issue a declaration of incompatibility has provided further opportunity for Parliament to publicly consider the human rights impacts of laws. See Hunt, note 231.

<sup>237</sup> See *Kracke v Mental Health Review Board* [2009] VCAT 646, para 206 where Justice Bell said '[t]he subject of s 32(1) is everybody. It applies to the courts, tribunals, government officials and public authorities'.

<sup>238</sup> The Hon Kevin Bell, *Enhancing Australian Democracy with a Bill of Rights* (Paper presented to the Australian Institute of Administrative Law (Victorian Chapter), 20 November 2008), p 3.

<sup>239</sup> For discussion of this presumption, see section 13.1 of this submission.

<sup>240</sup> *R v Secretary of State for the Home Department Ex Parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) (*Ex Parte Simms*). This presumption 'has been described in the United Kingdom as an aspect of a "principle of legality" governing the relationship between parliament, the executive and the courts': *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4, para 47 (French CJ).

<sup>241</sup> See *Ex Parte Simms*, above, 131 (Lord Hoffman). Common law rights have never been comprehensively defined. However, they are narrower than those protected by the ICCPR and ICESCR. For further discussion of how the interpretive provision extends beyond the existing common law statutory interpretation principles, see Evans and Evans, note 219, paras 3.16 - 3.17.

<sup>242</sup> *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK), s 3.

<sup>243</sup> For a discussion of the application of the interpretive provision in the Victorian context, see *Kracke v Mental Health Review Board* [2009] VCAT 646; in the United Kingdom, see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and in New Zealand, see *R v Hansen* [2007] 3 NZLR 1.

<sup>244</sup> The interpretation of federal legislative instruments is dealt with by common law principles and the *Legislative Instruments Act 2003* (Cth), s 13. This Act could be amended to make it clear that all legislative instruments should be interpreted consistent with the interpretive provision in a Human Rights Act.

<sup>245</sup> However, the interpretive provision should not impose obligations on public authorities to interpret legislation consistently with human rights where the act of interpreting the legislation occurs before the Human Rights Act comes into force. For a discussion of the retrospective application of the Victorian Charter, see *Kracke v Mental Health Review Board* [2009] VCAT 646, paras 334 - 365.

<sup>246</sup> The Hon Chief Justice J Spigelman AC, *The Application of Quasi-Constitutional Laws* (Speech delivered at the 2008 McPherson Lecture Series, Brisbane, 11 March 2008), p 9. At [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/vwFiles/spigelman110308.pdf/\\$file/spigelman110308.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$file/spigelman110308.pdf) (viewed 4 June 2009).

<sup>247</sup> For an example of such criticisms in relation to the UK interpretive provision, see McHugh, *A Human Rights Act, the courts and the Constitution*, note 190, pp 20 - 23, 26 - 27.

<sup>248</sup> Such a provision is contained in *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2004* (ACT), s 30. The Commission envisages that this interpretive provision would operate consistently with s 15AA of the *Acts Interpretation Act 1901* (Cth), which states: '[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'.

<sup>249</sup> Chief Justice Spigelman argues that the words 'consistently with their purpose' in the Victorian Charter and the ACT Human Rights Act are words of limitation which do not permit the courts in Victoria and the ACT to apply the interpretive obligation as expansively as had occurred in the UK. See Spigelman, note 246, p 32; McHugh, *A Human Rights Act, the courts and the Constitution*, note 190, p 26.

<sup>250</sup> Statement of Constitutional Validity of an Australian Human Rights Act (22 April 2009) (Reproduced as Appendix 3 of this submission). At <http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html> (viewed 4 June 2009). In *K-Generation* [2009] HCA 4, para 46, French CJ observed that statutory interpretation is 'to be informed by the principle that the parliament, whether of the State or the Commonwealth, did not intend the statute to exceed constitutional limits. It should be interpreted, so far as its words allow, to keep it within constitutional limits'. Any interpretive provision included in a national Human Rights Act would therefore be interpreted, as far as its words allowed, to keep it within constitutional limits and not to infringe the separation of powers.

<sup>251</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 - 578 (Gleeson CJ), 607 - 609 (Gummow J), 615 - 616 (Kirby J).

<sup>252</sup> *Human Rights Act 1998* (UK), ss 4, 36; *Human Rights Act 2004* (ACT), s 32. In Victoria, this is known as a 'declaration of inconsistent interpretation': *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36.

<sup>253</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5); *Human Rights Act 2004* (ACT), s 32(3).

<sup>254</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37; *Human Rights Act 2004* (ACT), s 33(3).

<sup>255</sup> Twenty-six declarations of incompatibility have been issued in the UK, but nine were overturned on appeal. Statistic cited by Hunt, note 231.

<sup>256</sup> Statistic cited by Hunt, above.

<sup>257</sup> McHugh, *A Human Rights Act, the courts and the Constitution*, note 190.

<sup>258</sup> J Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169, p 175. See also D Meagher, 'Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework' (2005) 10 *Deakin Law Review* 686.

<sup>259</sup> The British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2008), p 5. At <http://www.bih.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf> (viewed 7 June 2009).

<sup>260</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forward* (2008), p 6. At <http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp> (viewed 4 June 2009).

<sup>261</sup> For definitions of 'public authority' in other jurisdictions, see *Human Rights Act 2004* (ACT), s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4; *Human Rights Act 1998* (UK), s 6.

<sup>262</sup> These services include those in the areas of welfare services, health care, and management of prisons and other detention facilities.

<sup>263</sup> Regarding the ICCPR, the UN Human Rights Committee has stated 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory': UN Human Rights Committee, *Delia Saldías de Lopez v Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/OP/1 (1984), 88 at para 12.3. At [http://www1.umn.edu/humanrts/undocs/html/52\\_1979.htm](http://www1.umn.edu/humanrts/undocs/html/52_1979.htm) (viewed 4 June 2009).

<sup>264</sup> A similar provision is included in *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 3(1).

<sup>265</sup> A similar provision is included in *Human Rights Act 2004* (ACT), s 40B(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2).

<sup>266</sup> Department of Immigration and Multicultural Affairs, *Charter of Public Service in a Culturally Diverse Society* (1998). At [http://www.immi.gov.au/media/publications/multicultural/nmac/append\\_g.htm](http://www.immi.gov.au/media/publications/multicultural/nmac/append_g.htm) (viewed 9 June 2009).

<sup>267</sup> M Kalantis and B Cope, 'The charter of public service in a culturally diverse society, Australian Government', *New Learning*. At <http://newlearningonline.com/new-learning/chapter-4-learning-civics/the-charter-of-public-service-in-a-culturally-diverse-society-australian-government/> (viewed 7 June 2009).

<sup>268</sup> Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, section 1.12. At <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/> (viewed 26 May 2009).

<sup>269</sup> The British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2<sup>nd</sup> ed, 2008), p 15. At [http://www.bih.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL\\_0.pdf](http://www.bih.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL_0.pdf) (viewed 7 June 2009).

<sup>270</sup> Victorian Equal Opportunity and Human Rights Commission, *First steps forward*, note 260, p 12.

<sup>271</sup> Victorian Equal Opportunity and Human Rights Commission, above, p 12.

<sup>272</sup> Victorian Equal Opportunity and Human Rights Commission, *Emerging change*, note 230, p 21.

<sup>273</sup> *Public Administration Act 2004* (Vic), s 7(1)(g).

<sup>274</sup> *Public Administration Act 2004* (Vic), s 8(ca).

<sup>275</sup> *Public Service Act 1999* (Cth), ss 10, 13.

<sup>276</sup> For information on the complaints process, see Australian Human Rights Commission, *Federal Discrimination Law Online*, ch 6. At <http://www.humanrights.gov.au/legal/FDL/index.html> (viewed 4 June 2009).

<sup>277</sup> UN Committee on Economic, Social and Cultural Rights, *General comment No 9*, note 54, para 10.

<sup>278</sup> International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (2008), p 99. At [http://www.humanrights.ch/home/upload/pdf/080819\\_justiziabilit esc.pdf](http://www.humanrights.ch/home/upload/pdf/080819_justiziabilit esc.pdf) (viewed 4 June 2009).

<sup>279</sup> For a review of how courts around the world have adjudicated matters relating to economic, social and cultural rights, see International Commission of Jurists, above, ch 3.

<sup>280</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46P(4)(d). See also Australian Human Rights Commission, *Federal Discrimination Law Online*, note 276, ch 7.

<sup>281</sup> *Human Rights Act 1998* (UK), s 8(3).

<sup>282</sup> *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

<sup>283</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3); *Human Rights Act 2004* (ACT), s 40C(4).

<sup>284</sup> See *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5, 6. It would be possible, but not necessary, to include a specific ground of review relating to a failure to take into account the human rights specified in a national Human Rights Act.

<sup>285</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 15, 15A, 16. *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 104, 114 (Sweeney J), 126 (Morling J), 134 (Foster J).

<sup>286</sup> See Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, ALRC 87 (1996), at

<http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html> (viewed 5 June 2009);

Australian Law Reform Commission, *Standing in Public Interest Litigation*, ALRC 27 (1985), at

<http://www.austlii.edu.au/au/other/alrc/publications/reports/27/> (viewed 5 June 2009).

<sup>287</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 46P(2), 46PO(1). See also *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.

<sup>288</sup> Human Rights Law Resource Centre, *Case Studies*, note 268, section 1.4.

<sup>289</sup> Human Rights Law Resource Centre, above, section 2.2.

<sup>290</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(g).

<sup>291</sup> *National Human Rights Consultation Background Paper* (2008), p 13. At

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About\\_Human\\_Rights\\_in\\_Australia](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_Human_Rights_in_Australia) (viewed 9 June 2009).

<sup>292</sup> See section 11(1)(f) and Part II, Divisions 3 and 4 of the HREOC Act regarding the Commission's human rights and discrimination in employment complaint functions. See Part IIB of the HREOC Act regarding the Commission's unlawful discrimination complaint functions.

<sup>293</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2007-2008*, ch 4. At [http://www.humanrights.gov.au/about/publications/annual\\_reports/2007\\_2008/chap4.html#4\\_1](http://www.humanrights.gov.au/about/publications/annual_reports/2007_2008/chap4.html#4_1) (viewed 9 June 2009).

<sup>294</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(o), s 3(1).

<sup>295</sup> *Racial Discrimination Act 1975* (Cth), s 20(1)(e); *Sex Discrimination Act 1984* (Cth), s 48(1)(gb); *Disability Discrimination Act 1992* (Cth), s 67(1)(l); *Age Discrimination Act 2004* (Cth), s 53(1)(g).

Special purpose commissioners also have the specific function of assisting the Federal Court and Federal Magistrates Court as *amicus curiae* with leave of the court: *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46PV.

<sup>296</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 40(1).

<sup>297</sup> Williams, note 102, p 25.

<sup>298</sup> Consultation Committee for a Proposed WA Human Rights Act, note 199, Appendix E.

<sup>299</sup> Amnesty International Australia, 'Majority support the introduction of a law to protect human rights in Australia', (Media Release, 12 March 2009). At <http://www.amnesty.org.au/news/comments/20460/> (viewed 6 May 2009).

<sup>300</sup> S Zifcak & A King, *Wrongs, Rights & Remedies: An Australian Charter?* (2009), p 54. At [http://www.australiancollaboration.com.au/booksreports/Wrongs\\_Rights\\_Remedies.pdf](http://www.australiancollaboration.com.au/booksreports/Wrongs_Rights_Remedies.pdf) (viewed 7 June 2009).

<sup>301</sup> S Harris Rimmer, 'Some lawyers take cheap shots, some even work pro bono', *The Canberra Times*, 27 January 2009. At <http://www.canberratimes.com.au/news/opinion/editorial/general/some->



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[lawyers-take-cheap-shots-some-even-work-pro-bono/1416770.aspx?storypage=0](http://www.humanrightsact.com.au/lawyers-take-cheap-shots-some-even-work-pro-bono/1416770.aspx?storypage=0) (viewed 12 May 2009).

<sup>302</sup> See, for example, British Institute of Human Rights, *Changing Lives*, note 259; British Institute of Human Rights, *Changing Lives* (2<sup>nd</sup> ed), note 269; Human Rights Law Resource Centre, *Case Studies*, note 268.

<sup>303</sup> UK Department for Constitutional Affairs, note 234, p 4.

<sup>304</sup> Jack Straw (UK Lord Chancellor and Secretary of State for Justice) has acknowledged that the *Human Rights Act 1998* (UK) is 'unfortunately perceived by sections of the public and the media as a "villains charter"'. However, he remains 'firmly supportive' of the Human Rights Act: Letter from the Rt Hon Jack Straw MP, Secretary of State for Justice to the Chairman, Joint Committee on Human Rights, 11 January 2009, reproduced in Joint Committee on Human Rights, *A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08* (2009), p 32.

<sup>305</sup> UK Department for Constitutional Affairs, note 234, p 4.

<sup>306</sup> A Byrnes, H Charlesworth & G McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009), p 65.

<sup>307</sup> J Burnside, *Who's afraid of Human Rights?* (28<sup>th</sup> Sir Richard Kirby Lecture, Wollongong University, 25 September 2008). At <http://www.humanrightsact.com.au/2008/2008/11/27/whos-afraid-of-human-rights/> (viewed 13 May 2009).

<sup>308</sup> National Human Rights Consultation, *Background Paper* (2008), p 12. At [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About\\_Human\\_Rights\\_in\\_Australia](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_Human_Rights_in_Australia) (viewed 9 June 2009).

<sup>309</sup> *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992*; *Age Discrimination Act 2004*. The Race Discrimination Act and Sex Discrimination Act were intended to give effect to Australia's obligations under the CERD and CEDAW, respectively.

<sup>310</sup> The particular grounds of unlawful discrimination under federal anti-discrimination law can be summarised as follows: race, colour, descent or national or ethnic origin; sex; marital status; pregnancy or potential pregnancy; family responsibilities; disability; people with disabilities in possession of palliative or therapeutic devices or auxiliary aids; people with disabilities accompanied by an interpreter, reader, assistant or carer; a person with a disability accompanied by a guide dog or an 'assistance animal'; and age. Also falling within the definition of 'unlawful discrimination' is: offensive behaviour based on racial hatred; sexual harassment; harassment of people with disabilities; and victimisation and several criminal offences relating to discrimination.

<sup>311</sup> *Equal Opportunity Act 1995* (Vic), s 6(j) (religious belief or activity); *Discrimination Act 1991* (ACT), s 7(1)(i) (religious conviction); *Anti-Discrimination Act 1991* (Qld), s 7(1)(i) (religious belief or religious activity); *Anti-Discrimination Act 1998* (Tas), ss 16(o) (religious belief or affiliation), 16(p) (religious activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(m) (religious belief or activity); *Equal Opportunity Act 1984* (WA), s 53 (religious conviction); *Anti-Discrimination Act 1977* (NSW), s 7 (race, including ethno-religious origin); *Canadian Human Rights Act 1985* (Can), s 3(1) (religion); *Equality Act 2006* (UK), pt 2 (religion and belief); *Human Rights Act 1993* (NZ), s 21(1)(c) (religious belief).

<sup>312</sup> *Equal Opportunity Act 1995* (Vic), s 6(g) (political belief or activity); *Discrimination Act 1991* (ACT), s 7(1)(i) (political conviction); *Anti-Discrimination Act 1991* (Qld), s 7(1)(j) (political belief or activity); *Anti-Discrimination Act 1998* (Tas), ss 16(m) (political belief or affiliation), 16(n) (political activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(n) (political opinion, affiliation or activity); *Equal Opportunity Act 1984* (WA), s 53 (political conviction); *Equality Act 2006* (UK), pt 2 (belief); *Human Rights Act 1993* (NZ), s 21(1)(j) (political opinion).

<sup>313</sup> *Equal Opportunity Act 1995* (Vic), ss 6(d) (lawful sexual activity), 6(l) (sexual orientation); *Anti-Discrimination Act 1977* (NSW), s 49ZG (homosexuality); *Equal Opportunity Act 1995* (Vic), ss 6(d) (lawful sexual activity), 6(l) (sexual orientation); *Anti-Discrimination Act 1991* (Qld), ss 7(1)(l) (lawful sexual activity), 7(1)(n) (sexuality); *Anti-Discrimination Act 1998* (Tas), ss 16(c) (sexual orientation, including heterosexuality, homosexuality & bisexuality), 16(d) (lawful sexual activity); *Equal Opportunity Act 1984* (WA), s 35O (sexual orientation); *Equal Opportunity Act 1984* (SA), s 29(1)(b) (sexuality, including heterosexuality, homosexuality & bisexuality); *Anti-Discrimination Act 1992* (NT), s 19(1)(c) (sexuality, including heterosexuality, homosexuality & bisexuality); *Canadian Human Rights Act 1985* (Can), s 3(1) (sexual orientation); *Equality Act 2006* (UK), Pt 3 (sexual orientation); *Human Rights Act 1993* (NZ), s 21(1)(m) (sexual orientation, including a heterosexual, homosexual, lesbian or bisexual orientation).

<sup>314</sup> *Anti-Discrimination Act 1977* (NSW), s 38B (transgender); *Equal Opportunity Act 1995* (Vic), s 6(ac) (gender identity); *Discrimination Act 1991* (ACT), ss 7(1)(b) (sexuality), 7(1)(c) (transsexuality); *Equal*

*Opportunity Act 1984* (SA), s 29(1)(b) (sexuality, including transsexuality); *Anti-Discrimination Act 1998* (Tas), s 16(c) (sexual orientation, including transsexuality); *Anti-Discrimination Act 1992* (NT), s 19(1)(c) (sexuality, including transsexuality).

<sup>315</sup> *Equal Opportunity Act 1995* (Vic), s 6(c) (industrial activity); *Discrimination Act 1991* (ACT), s 7(k) (membership or non-membership of an association or organisation of employers or employees); *Anti-Discrimination Act 1991* (Qld), s 7(1)(k) (trade union activity); *Anti-Discrimination Act 1998* (Tas), s 16(l) (industrial activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(k) (trade union or employer association activity).

<sup>316</sup> *Anti-Discrimination Act 1977* (NSW), s 7 (race, including nationality); *Anti-Discrimination Act 1998* (Tas), s 16(a) (race, including nationality); *Equal Opportunity Act 1995* (Vic), s 6(i) (race, including nationality); *Discrimination Act 1991* (ACT), s 7(1)(h) (race, including nationality); *Anti-Discrimination Act 1991* (Qld), s 7(1)(g) (race, including nationality); *Equal Opportunity Act 1984* (WA), s 51 (race, including nationality); *Anti-Discrimination Act 1992* (NT), s 19(1)(a); *Equal Opportunity Act 1984* (WA), s 36 (race, including nationality); *Human Rights Act 1993* (NZ), s 21(1)(g) (ethnic or national origins including nationality and citizenship). Whilst the Race Discrimination Act prohibits discrimination on the basis of 'national origin', this is separate from 'nationality' and 'citizenship' which are not protected under the Race Discrimination Act. See, for example, *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75 (Sackville J); *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 210 - 212 (Carr, Sundberg and North JJ).

<sup>317</sup> *Discrimination Act 1991* (ACT), s 7(1)(m) (profession, trade, occupation or calling).

<sup>318</sup> *Anti-Discrimination Act 1998* (Tas), s 16(r) (irrelevant medical record); *Anti-Discrimination Act 1992* (NT), s 19(1)(p) (irrelevant medical record).

<sup>319</sup> *Discrimination Act 1991* (ACT), s 7(1)(o) (spent conviction within the meaning of the *Spent Convictions Act 2000* (ACT)); *Anti-Discrimination Act 1998* (Tas), s 16(q) (irrelevant criminal record); *Anti-Discrimination Act 1992* (NT), s 19(1)(q) (irrelevant criminal record).

<sup>320</sup> ICCPR, note 1, art 26.

<sup>321</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 12.

<sup>322</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 14.

<sup>323</sup> See, generally, Human Rights and Equal Opportunity Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (1 September 2008), pts 11 and 12. At

[http://www.humanrights.gov.au/legal/submissions/2008/20080901\\_SDA.html](http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html) (viewed 7 June 2009).

<sup>324</sup> The Senate Standing Committee on Legal and Constitutional Affairs concluded that it was 'concerned by evidence it received of specific gaps in coverage under the Act': Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008), para 11.20. At [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/sex\\_discrim/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/index.htm) (viewed 7 June 2009). Likewise, the Australian Law Reform Commission has observed that the SDA 'remains only a partial response to women's legal inequality': *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), para 4.5. At

<http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/> (viewed 7 June 2009).

<sup>325</sup> Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act*, note 323, paras 312 - 317.

<sup>326</sup> Human Rights and Equal Opportunity Commission, above, pt 10. See also Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family* (2007). At [http://www.humanrights.gov.au/sex\\_discrimination/its\\_about\\_time/](http://www.humanrights.gov.au/sex_discrimination/its_about_time/) (viewed 7 June 2009).

<sup>327</sup> Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act*, note 323, paras 388 - 393.

<sup>328</sup> Human Rights and Equal Opportunity Commission, above, paras 318 - 327.

<sup>329</sup> See, for example, K Lindsay, N Rees and S Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), p 83.

<sup>330</sup> See, for example, M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) pp 2 - 3.

<sup>331</sup> See, for example, *Hinchcliffe v University of Sydney* (2004) 186 FLR 376, 476 at paras 115 - 116. The Commission acknowledges, however, that the current definition of indirect discrimination under

the Disability Discrimination Act may soon be amended under the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*.

<sup>332</sup> See, for example, *IW v City of Perth* (1997) 191 CLR 1, 63 (Kirby J); *Australian Iron & Steel Pty Ltd v Banovic* (1989) 169 CLR 165, 176 (Deane and Gaudron JJ); *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958, cited with approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, para 40 (Heerey, Mansfield and Hely JJ); *Shamoon v Chief Constable of the RUC* [2003] 2 All ER 26, 71 (Ld Rodger).

<sup>333</sup> The notable exception is the Sex Discrimination Act, where the onus of proving reasonableness in respect of indirect discrimination rests with the respondent (s 7C). However, the onus in respect of the remaining elements of direct and indirect discrimination remains with the applicant under the Sex Discrimination Act.

<sup>334</sup> See further Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act*, note 323, paras 190 – 199.

<sup>335</sup> The Senate Standing Committee on Legal and Constitutional Affairs noted that ‘the existing patchwork approach to coverage under the [Sex Discrimination Act] appears both unnecessarily complex and undesirable’: Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act*, note 324, para 11.22.

<sup>336</sup> The Labour Party, *Manifesto 2005: Britain forward not back* (2005), p 112. At [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13\\_04\\_05\\_labour\\_manifesto.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13_04_05_labour_manifesto.pdf) (viewed 7 June 2005).

<sup>337</sup> United Kingdom, Department for Communities and Local Government, *Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A consultation paper*, (June 2007), p 11. At

<http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation> (viewed 7 June 2005).

<sup>338</sup> UK Department for Communities and Local Government, above, p 11.

<sup>339</sup> UK Department for Communities and Local Government, above, p 12.

<sup>340</sup> UK Department for Communities and Local Government, above, p 13.

<sup>341</sup> *Equality Act 2006* (UK), pts 1 - 4. Protection now applies to discrimination on the basis of religion or belief and sexual orientation. For more detail on the nature of the positive duties aimed at combating systemic discrimination, see the UK Commission for Equality and Human Rights, *Public Sector Duties*. At

<http://www.equalityhumanrights.com/en/forbusinessesandorganisation/psd/Pages/variationSiteDefault.aspx> (viewed 28 May 2009).

<sup>342</sup> United Kingdom, Government Equalities Office, ‘Harman: Equality Bill confirmed in Legislative Programme’ (Press Release, 3 December 2008). At

[http://www.equalities.gov.uk/media/press\\_releases/equality\\_bill\\_confirmed.aspx](http://www.equalities.gov.uk/media/press_releases/equality_bill_confirmed.aspx) (viewed 28 May 2009).

<sup>343</sup> See, generally, United Kingdom, *The Equality Bill – Government response to the Consultation* (2008). At <http://www.official-documents.gov.uk/document/cm74/7454/7454.asp> (viewed 7 June 2009).

<sup>344</sup> See, generally, The Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007). At <http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html> (viewed 7 June 2009).

<sup>345</sup> See, for example, UK Department for Communities and Local Government, note 337, p 13.

<sup>346</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984*, note 324; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Disability Discrimination and Human Rights Legislation Amendment Bill 2008* (2009), at

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/disability\\_discrimination/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/disability_discrimination/report/index.htm) (7 June 2009).

<sup>347</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report no. 30 (2004). At <http://www.pc.gov.au/projects/inquiry/dda/docs/finalreport> (7 June 2009).

<sup>348</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act*, note 324, Recommendation 43.

<sup>349</sup> It is imperative to ensure that any such harmonisation process: (1) ensures that laws comply with international human rights standards; (2) promotes ‘best practice’ models rather than the ‘lowest common denominator’ from each jurisdiction; (3) provides greater clarity about the practical application of equality rights and responsibilities in specific contexts; (4) reduces the transactional costs for both applicants and respondents; and (5) promotes access to justice, with particular focus on improving access for people who are mostly intensely affected by inequality and other violations of human rights



in Australia. See Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act*, note 323, para 776.

<sup>350</sup> Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act*, note 323, para 781.

<sup>351</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act*, note 324, para 11.107.

<sup>352</sup> Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act 1984*, note 323, paras 781 - 783.

<sup>353</sup> A similar view was expressed in several other submissions to the Senate review of the SDA: Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act*, note 324, paras 4.57 - 4.65.

<sup>354</sup> United Kingdom, *The Equality Bill*, note 343, para 1.11.

<sup>355</sup> See *Canadian Human Rights Act 1985* (Can); *Human Rights Act 1993* (NZ); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Discrimination Act 1991* (ACT).

<sup>356</sup> The Sex Discrimination Commissioner also has responsibility for matters relating to discrimination on the basis of age.

<sup>357</sup> Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights: Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/pg7.htm> (viewed 1 May 2009).

<sup>358</sup> Constitutional Commission, *Final Report of the Constitutional Commission* (1988), p 16. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming our Constitution: A roundtable discussion* (2008), p 49. At <http://www.aph.gov.au/house/committee/laca/constitutionalreform/report/fullreport.pdf> (viewed 1 May 2009).

<sup>359</sup> Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000), p 105. At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm> (viewed 28 May 2009). Constitutional reform was also identified as an essential component of the proposed 'Social Justice Package' to be developed in response to the *Mabo* decision: see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1995* (1995), ch 4. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport95.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport95.html) (viewed 28 May 2009). See also Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: a Report to Government on Native Title Social Justice Measures* (1995).

<sup>360</sup> In *Kartinyeri v Commonwealth*, Gaudron, Gummow and Hayne JJ left open the possibility that a 'manifest abuse' of the federal legislature's use of s 51(xxvi) may generate a justiciable constitutional question for the High Court: (1998) 195 CLR 337, 369, 380.

<sup>361</sup> R S French, *Dolores Umbridge and the Concept of Policy as Legal Magic* (Speech delivered at the Australian Law Teachers' Association National Conference, Perth, 24 September 2007), para 19.

<sup>362</sup> See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, note 59, pp 71 - 74.

<sup>363</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 9.

<sup>364</sup> Australian Law Reform Commission, *Equality before the Law: Women's Equality*, note 324, para 4.16.

<sup>365</sup> ICESCR, note 2, art 13; CRC, note 12, art 28; CERD, note 7, arts 5, 7; CEDAW, note 10, art 10.

<sup>366</sup> Universal Declaration, note 3, art 26(2).

<sup>367</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 8 - 9.

<sup>368</sup> Council of Australian Governments (COAG), *Communiqué: Indigenous Issues* (COAG Meeting, Canberra, 14 July 2006). At <http://www.austlii.edu.au/au/journals/AILR/2006/58.html> (viewed 28 May 2009).

<sup>369</sup> Ministerial Council on Education, Employment, Training and Youth Affairs, *Melbourne Declaration on Educational Goals for Young Australians* (5 December 2008). At [http://www.curriculum.edu.au/mceetya/melbourne\\_declaration\\_25979.html](http://www.curriculum.edu.au/mceetya/melbourne_declaration_25979.html) (viewed 5 June 2009).

<sup>370</sup> National Human Rights Consultation, note 308, p 13.

<sup>371</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).

<sup>372</sup> In May 2009, the UN Committee on Economic, Social and Cultural Rights noted with concern that the Commission has limited competency with regard to the ICESCR. The Committee recommended that Australia strengthen the mandate of the Commission in order to cover all rights in the ICESCR. See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 13.

<sup>373</sup> Human Rights and Equal Opportunity Commission, *A last resort?*, note 182.

<sup>374</sup> Human Rights and Equal Opportunity Commission, *National Inquiry into Rural and Remote Education*, note 76.

<sup>375</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f).

<sup>376</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 11(1)(f), 3(1).

<sup>377</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 30(1), 31(b).

<sup>378</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 21 - 23.

<sup>379</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 29(2)(b), 29(2)(c).

<sup>380</sup> Note that, under section 45 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the Commission is required to prepare an annual report on its operations during the prior year. It is not suggested that the Australian Government be required to table a formal response to the Commission's annual report.

<sup>381</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Reconciliation: Off track* (2003), para 6.35, recommendation 9. At

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/reconciliation/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/reconciliation/index.htm) (viewed 5 June 2009).

<sup>382</sup> Human Rights and Equal Opportunity Commission, *Submission to the Joint Committee of Public Accounts and Audit Inquiry on the Effects of the Ongoing Efficiency Dividend on Smaller Public Sector Agencies* (29 July 2008), para 6. At

[http://www.humanrights.gov.au/legal/submissions/2008/20080729\\_efficiency\\_dividend.html](http://www.humanrights.gov.au/legal/submissions/2008/20080729_efficiency_dividend.html) (viewed 7 June 2009). Budget appropriation for 2007-08 was \$15.5m. This was reduced to \$14.9m at additional estimates with the withdrawal of funding for workplace relations reform and the application of the additional 2% efficiency dividend.

<sup>383</sup> For further background to this funding reduction, see Human Rights and Equal Opportunity Commission, *Submission to the Joint Committee of Public Accounts and Audit Inquiry*, above.

## **Appendix 1 – Recommendations**

**Recommendation 1:** Australia should promote and protect all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.

**Recommendation 2:** The Australian Parliament should enact a national Human Rights Act.

**Recommendation 3:** A Human Rights Act should protect the human rights of all people within Australia's territory and all people subject to Australia's jurisdiction.

**Recommendation 4:** The Australian Government should engage with the states and territories with the objective of creating a uniform system of human rights protection across Australia.

**Recommendation 5:** A Human Rights Act should include a preamble that:

- specifically recognises the human rights of Indigenous peoples
- highlights that it is the responsibility of government to protect, respect and promote human rights and the responsibility of every person in Australia to respect the human rights of others.

**Recommendation 6:** A Human Rights Act should protect civil, political, economic, social and cultural rights.

**Recommendation 7:** A Human Rights Act should contain an interpretive provision that expressly permits courts and other decision-makers to consider international and comparative legal materials when applying the Human Rights Act.

**Recommendation 8:** Marginalised groups of people, including Indigenous peoples, should be specifically consulted in the development of a Human Rights Act.

**Recommendation 9:** The human rights set out in a Human Rights Act should not be exhaustive.

**Recommendation 10:** A Human Rights Act should include a 'reasonable limits' provision. Human rights protected by a Human Rights Act should only be subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society. Absolute rights should be exempt from the operation of this provision.

**Recommendation 11:** Any policy submission put to federal Cabinet (including proposals for new laws, amendments and policies) should be accompanied by a human rights impact statement.

**Recommendation 12:** Each bill and regulation introduced into the federal Parliament should be accompanied by a human rights compatibility statement.

**Recommendation 13:** A parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Human Rights Act.

**Recommendation 14:** Parliament should be required to review legislation within a specified time if the pre-legislative scrutiny process is bypassed.

**Recommendation 15:** All federal legislation should be interpreted in a way that is consistent with the rights identified in the Human Rights Act, so far as it is possible to do so consistently with the purpose of that legislation.

**Recommendation 16:** The obligation to interpret laws consistently with human rights should apply to everybody interpreting and applying federal legislation, including courts and public authorities.

**Recommendation 17:** If a federal court found that it could not interpret a federal law in a way that was consistent with the rights identified in the Human Rights Act, a statutory process should apply to bring this finding to the attention of federal Parliament and require a government response.

**Recommendation 18:** A Human Rights Act should give courts the power to invalidate subordinate legislation.

**Recommendation 19:** The definition of ‘public authority’ in a Human Rights Act should include private organisations when they are performing public functions on behalf of government.

**Recommendation 20:** Parliament and courts should be excluded from the definition of ‘public authority’ except when acting in an administrative capacity.

**Recommendation 21:** A Human Rights Act should make it unlawful for a public authority to:

- act in a way that is incompatible with human rights
- fail to give proper consideration to human rights in decision-making.

**Recommendation 22:** All federal government agencies should take steps to ensure that they respect the human rights set out in the Human Rights Act by:

- engaging in human rights training and education programs
- preparing internal human rights action plans
- reporting annually on compliance with the Human Rights Act.

**Recommendation 23:** The Australian Public Service Values and Code of Conduct should articulate the responsibility of the public sector to respect human rights.

**Recommendation 24:** A Human Rights Act should provide an independent cause of action against public authorities for a breach of their obligations under the Human Rights Act.

**Recommendation 25:** A Human Rights Act should provide remedies for breaches of civil and political rights and breaches of economic, social and cultural rights.

**Recommendation 26:** A Human Rights Act should provide access to the complaint handling section of the Commission for individuals alleging a breach of the human rights set out in the Human Rights Act.

**Recommendation 27:** A Human Rights Act should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and damages where necessary.

**Recommendation 28:** A Human Rights Act should include broad standing provisions that enable claims to be brought on behalf of a person who is an alleged victim of a breach of human rights.

**Recommendation 29:** A Human Rights Act should be clear, accessible and accompanied by a broad community education program.

**Recommendation 30:** The operation and implementation of a Human Rights Act should be subject to periodic independent review.

**Recommendation 31:** The Commission should have the following functions and powers under a Human Rights Act:

- a function of promoting public awareness and understanding of the Human Rights Act
- a discretionary, self-initiated power to examine whether laws and bills are compatible with the human rights protected by the Human Rights Act
- a function of investigating and conciliating complaints of alleged breaches of human rights by public authorities under the Human Rights Act
- power to intervene, without seeking leave, in court or tribunal proceedings involving the interpretation or application of the Human Rights Act
- power to notify the Attorney-General, either of its own motion or at the request of a party to the relevant proceedings, if a court finds that it cannot interpret a law consistently with the Human Rights Act
- a discretionary, self-initiated power to review the policies and practices of public authorities to assess their compliance with the Human Rights Act
- a function of preparing an annual report on the operation of the Human Rights Act.

**Recommendation 32:** If the Commission is granted new functions under a Human Rights Act, the Australian Government must ensure that sufficient additional resources are provided to the Commission to enable it to carry out those functions.

**Recommendation 33:** The Australian Government should refer to the Australian Law Reform Commission for inquiry and report the question of how best to strengthen, simplify and streamline federal anti-discrimination laws.



**Recommendation 34:** Indigenous peoples should be recognised in the preamble to Australia's Constitution.

**Recommendation 35:** The Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia:

- section 25 should be removed from the Constitution
- the Constitution should be amended to guarantee racial equality and proscribe discrimination on the basis of race
- there should be a comprehensive national inquiry considering:
  - the exact wording of a constitutional clause to protect the right to equality
  - the extent to which specific grounds of protection should be included
  - whether the clause should include any possible limitation.

**Recommendation 36:** The Australian Government should resource a significantly enhanced nation-wide human rights education program.

**Recommendation 37:** The Australian Government should enhance the powers, functions and funding of the Australian Human Rights Commission, particularly if a Human Rights Act is adopted. Any new functions should be accompanied by appropriate funding.

**Recommendation 38:** The Commission's existing functions and powers should be enhanced as follows:

- The Commission's power to examine bills for their compatibility with human rights should be a discretionary, self-initiated power. When the Commission examines a bill or law and reports to Parliament, the Attorney-General should be required to table the Commission's report as well as a government response within a specified time period.
- The Commission should have the power to intervene, as of right, in cases that raise significant human rights issues.
- The Attorney-General should give consideration to declaring the following instruments under section 47(1) of the HREOC Act:
  - ICESCR
  - CAT
  - Declaration on the Rights of Indigenous Peoples.
- The Commission's inquiry function under the HREOC Act should be broadened to empower the Commission to inquire into human rights issues or concerns regardless of where in Australia they occur or whether they occur under a state, territory or federal law.
- For reports prepared by the Commission under one of its statutory functions and subsequently tabled in federal Parliament, the Attorney-General should be required to table a response in Parliament within a fixed period indicating how

the government intends to address the Commission's recommendations. This would include:

- reports prepared by the Commission after conducting an inquiry under section 11(1)(f) of the HREOC Act
- the annual Social Justice Report and Native Title Report, prepared by the Aboriginal & Torres Strait Islander Social Justice Commissioner
- reports prepared by the Commission and tabled in Parliament under any new statutory functions granted to the Commission under a Human Rights Act.

**Recommendation 39:** If a complaint under the HREOC Act cannot be conciliated, the complainant should be able to commence proceedings in the Federal Court or the Federal Magistrate's Court.

**Recommendation 40:** The Australian Government should invest adequate resources in ensuring that the Commission can fully and effectively carry out its statutory education functions.

**Recommendation 41:** The Australian Government should provide adequate resources in order to ensure that the Commission can fully and effectively carry out its current statutory functions.

## **Appendix 2 – Further specific measures that would better protect human rights in Australia**

1. Throughout the main body of this submission, the Commission recommends five major reforms to Australia's system for the protection and promotion of human rights, namely:
  - a Human Rights Act for Australia
  - streamlined and strengthened anti-discrimination legislation
  - constitutional reforms to remove racially discriminatory provisions and protect the fundamental principle of equality in Australia
  - better human rights education in Australia
  - a stronger role for the Australian Human Rights Commission
2. In the Commission's view, the implementation of any one of these reforms will help to better protect and promote human rights, and a combination of these reforms will achieve even greater results.
3. However, neither one nor all of those reforms will solve all of Australia's human rights problems. In some cases, there will need to be additional and specific measures to address long-standing human rights issues.
4. The Commission has over two decades of experience working on the major human rights issues in Australia. Drawing on this experience, Part B of this submission includes a very brief list of some examples of the ways in which human rights are insufficiently promoted and protected in Australia.
5. This Appendix discusses, in more detail, some of the examples mentioned in Part B of the main submission and other examples of systemic human rights problems in Australia.
6. Where possible, this Appendix hypothesises about how these human rights problems might be, or might have been, more effectively addressed if the Commission's suggested reforms were a reality. It also notes where additional measures would need to be introduced.
7. The human rights issues covered in this Appendix include those relating to:
  - Aboriginal and Torres Strait Islander peoples
  - asylum seekers, refugees and migrants
  - people trafficking
  - counter-terrorism legislation
  - gender equality
  - protection against discrimination on the basis of sexual orientation, sex identity and gender identity

- the National Strategy for implementation of the Convention on the Rights of Persons with Disabilities (Disability Convention)
  - the right to vote.
8. The material in this Appendix is largely a compilation of the Commission's recent comments to the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights. It is not a comprehensive discussion of all human rights problems in Australia. Rather, it provides a summary of some key areas of concern to the Commission and of how those concerns might be addressed.

## **1 Aboriginal and Torres Strait Islander peoples**

9. The Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions to report annually on the impact of laws and policies on the human rights of Aboriginal and Torres Strait Islander peoples (Indigenous peoples). Since 1993, the annual *Social Justice Report* and *Native Title Report* (which began in 1994) have assessed the human rights impact on Indigenous peoples across a vast array of areas. These include, inter alia, education, health, housing, employment, land rights, heritage protection, climate change, criminal justice and violence.
10. It is envisaged that a national Human Rights Act would provide improved protection in order to remedy the breaches of human rights that have been identified by the Social Justice Commissioner over time.

### **1.1 Equality between Indigenous and non-Indigenous people in Australia**

11. Indigenous peoples continue to experience significant inequalities in the realisation of their human rights. Inequality in the right to life is of particular concern. Between 1996 and 2001, there was an estimated difference of 17 years between Indigenous and non-Indigenous life expectancy in Australia.<sup>1</sup>
12. Underlying this inequality in the right to life is a range of social and economic inequalities including lower incomes, higher rates of unemployment, poorer educational outcomes and lower rates of home ownership. For example, in 2001 the unemployment rate for Indigenous peoples was 20% – three times higher than the rate for non-Indigenous Australians.<sup>2</sup>
13. Many of these existing inequalities can be attributed to the impact of previous laws and policies that have discriminated against Indigenous peoples and which have not provided them with equal life chances. This has resulted in systemic barriers to full participation in Australian society.
14. The Commission notes that a national Human Rights Act would have a critical role to play in identifying the systemic impact of new laws and policies on Indigenous peoples. As outlined in the body of this submission, the Commission also believes that a Human Rights Act should be accompanied by amendments

to Australia's Constitution to guarantee racial equality and prohibit discrimination into the future.

15. The Commission notes that at the Indigenous Health Equality Summit in 2008, the Australian Government made accountable and measureable commitments to achieving equality in health status and life expectancy between Indigenous and non-Indigenous Australians by 2030. The Council of Australian Governments has similarly committed to closing the life expectancy gap within a generation, halving the mortality gap for children under five within a decade and halving the gap in reading, writing and numeracy within a decade.
16. Having committed itself to applying this human rights based framework to address Indigenous health, the Australian Government should take steps to equally apply a human rights based framework to all aspects of Indigenous affairs policy, programs and service delivery. This should include the Northern Territory Emergency Response.
17. The Commission believes that a vital step in setting up a human rights framework is to introduce an Australian Human Rights Act that requires public authorities delivering public services and programs to act compatibly with human rights. This will significantly impact on policy-making in relation to Indigenous peoples and has the potential to achieve better outcomes from service delivery to Indigenous peoples.

## **1.2 *United Nations Declaration on the Rights of Indigenous Peoples and self-determination***

18. The Commission welcomes the Australian Government's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples).<sup>3</sup> The statement notes that:

The Declaration recognises the legitimate entitlement of Indigenous people to all human rights – based on principles of equality, partnership, good faith and mutual benefit...

Australia's existing obligations under international human rights treaties are mirrored in the Declaration's fundamental principles.

The Declaration needs to be considered in its totality - each provision as part of the whole.
19. The Declaration on the Rights of Indigenous Peoples provides a framework for the protection of the rights of Indigenous peoples to be applied consistently with Australia's existing human rights obligations. It does not create new rights – it merely describes how existing rights are relevant and apply to Indigenous peoples in accordance with their cultures, identity and way of life.
20. One of the most important human rights for Indigenous Australians is the right to self-determination. With the adoption of the Declaration on the Rights of Indigenous Peoples, there is now international recognition that the right to self-determination applies to Indigenous peoples.

21. Consistent with this, it is notable that the UN Committee on Economic, Social and Cultural Rights has also recognised that Indigenous peoples' rights to culture and identity are protected under article 1 (the right to self-determination) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>4</sup>
22. In its statement of support for the Declaration on the Rights of Indigenous Peoples, the Australian Government also stated that:

Through the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.

Article 46 makes it clear that the Declaration cannot be used to impair Australia's territorial integrity or political unity.

We want Indigenous peoples to participate fully in Australia's democracy.

Australia's Indigenous peoples must be able to realise their full potential in Australian and international affairs.

We support Indigenous peoples' aspiration to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity.

Australia is a longstanding party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and supports their aims and principles.
23. The Declaration provides a firm basis for advancing greater recognition and protection of Indigenous peoples' rights to self-determination in Australia. The Commission looks forward to working with the government on mechanisms for implementing the Declaration within Australia. Strengthening the powers of the Commission so that it can take the Declaration into account in exercising its human rights functions, as well as providing greater resourcing and capacity to the Commission, would contribute to the future operation of the Declaration in Australia.
24. The establishment of a new national Indigenous representative body is another government initiative that is critical to both the implementation of the Declaration and the advancement of self-determination of Indigenous peoples in Australia. By July 2009, the Steering Committee convened by Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, will present a preferred model for a new national Indigenous representative body to the Australian Government, with recommendations to establish an interim body from August 2009.

### **1.3 *The Racial Discrimination Act and the Northern Territory Emergency Response***

25. The Commission is concerned that the application of the *Racial Discrimination Act 1975* (Cth) (RDA) continues to be suspended in relation to the Northern Territory Emergency Response (NTER).<sup>5</sup>

26. The legislation enacted for the NTER declares itself, and any acts done pursuant to it, to be a special measure for the purposes of the RDA and exempt from the operation of Part II of the Act. It also declares that, where relevant, it is exempt from Northern Territory and Queensland anti-discrimination legislation.<sup>6</sup>
27. The *Social Justice Report 2007* assessed the NTER's compliance with Australia's human rights obligations and found that:
  - the government did have an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse
  - the NTER legislation is inappropriately classified as a 'special measure' under the RDA because of the negative impacts of some of the measures on Indigenous people and the absence of adequate consultation or consent by Indigenous peoples to the measures
  - the NTER legislation contains a number of provisions that are racially discriminatory
  - some provisions raised concerns for the compliance with human rights obligations (for example, the lack of access to review of social security matters and the compulsory acquisition of land without just compensation).<sup>7</sup>
28. In accordance with the International Covenant on Civil and Political Rights (ICCPR), the promotion and protection of one right, namely freedom from violence and abuse, cannot be undertaken in a discriminatory manner, nor can it be at the expense of other rights, including the right to procedural fairness and an effective remedy, equality before the law and the right to participation.<sup>8</sup>
29. The *Social Justice Report 2007* also found that, despite being entitled a 'national emergency', the NTER does not meet the requirements of a 'public emergency' as articulated in article 4 of the ICCPR. Further, the extent of the derogation allowed for in article 4 is limited. The NTER is not a situation that justifies introducing measures that place restrictions on the rights of Indigenous people, such as overriding the principles of non-discrimination or safeguards for procedural fairness.
30. The UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee and the UN Committee on Economic Social and Cultural Rights have all expressed concerns about the NTER.<sup>9</sup>
31. A formal, independent review of the NTER legislation and its operation has been conducted by a Review Board. The Review Board's report, released in October 2008, found that the NT Intervention had made some positive changes in the Northern Territory, for instance in terms of increased police presence in communities, measures to reduce alcohol-related violence, improving quality and availability of housing, the health and wellbeing of communities and education. The Review Board noted that local communities saw the significant government investment under the NT Intervention as 'an historic opportunity wasted because of its failure to galvanise the partnership potential of the Aboriginal community'.<sup>10</sup> The inclusion of racially discriminatory measures in the

NTER was also seen as a significant failure that contributed to a lack of faith and trust from Indigenous peoples in the Australian Government's approach.

32. In May 2009, the government announced its final response to the review of the NTER.<sup>11</sup> This included a budget commitment of \$807.4 million funding over three years, with specific measures in the areas of: welfare reform and employment, law and order, education, families, child and family health, housing and land reform and coordination. Importantly the government confirmed its commitment to introduce legislation in 2009 to make the RDA and the Northern Territory anti-discrimination legislation applicable to the NTER legislation.
33. The government also released its 'Future Directions for the Northern Territory Emergency Response Discussion Paper' on 21 May 2009,<sup>12</sup> which it intends to use as the basis for consultations with 73 prescribed communities on NTER measures. These consultations are necessary steps to make sure the NTER does not continue to discriminate against Aboriginal people on the basis of their race, and to improve any continuing measures, through the participation of Indigenous peoples.
34. While the government's response addresses several of the recommendations outlined in the *Social Justice Report 2007* and the NTER Review Board's report, aspects of some of these recommendations have not been adopted or are not fully addressed, for instance in areas such as income management, CDEP, funding arrangements, governance, and resetting the relationship between the government and Aboriginal people.
35. A Human Rights Act that preserved parliamentary supremacy would not have prevented the introduction of the NTER. However, it would have required the Australian Government to publicly justify why it believed the only way to achieve the legitimate objectives of the NTER was to suspend the RDA. By making the government more accountable for deciding to breach human rights, a Human Rights Act could help build a culture of respect for human rights.
36. The only way to guarantee that future Australian Governments will not suspend legal protection from racial discrimination to enact discriminatory legislation is to amend the Australian Constitution to guarantee racial equality and prohibit discrimination. Such a clause would prevent legislative protections against racial discrimination from being overridden or suspended by the federal Parliament.
37. Any constitutional change can only occur with the support of the Australian people. As detailed in the body of the submission, the Commission supports a comprehensive national inquiry into protecting the right to equality in the Constitution.

#### **1.4 Indigenous family support and protection of children and young people**

38. As highlighted by reports such as the *Little Children are Sacred Report* (NT) and the *Breaking the Silence Report* (NSW), child abuse, child sexual abuse and family violence are critical issues for Indigenous communities.<sup>13</sup> An



Indigenous child is six times more likely to be involved with the statutory child protection system than a non-Indigenous child, but four times less likely to have access to child care or preschool service that can offer family support to reduce the risk of child abuse.<sup>14</sup>

39. In recognition of Indigenous children's rights to maintain a connection to their family, community and culture, all Australian jurisdictions recognise the Aboriginal Child Placement Principle (ACPP). The ACPP states that Indigenous children should be placed with Indigenous carers. Children should first be placed with the child's extended family; if that is not available they should be placed within the child's community; failing that they should be placed with other Indigenous people. However, the overriding priority is still the best interests of the child.
40. The rate of Indigenous children placed in accordance with the ACPP varies across states and territories. It is as high as 84% in NSW but drops to 48% in the Northern Territory and only 36% in Tasmania.<sup>15</sup> Continued capacity building and Indigenous engagement is needed to ensure that the ACPP remains a guiding principle in Indigenous child protection.
41. A new *National Framework for Protecting Australia's Children 2009-2020* was endorsed by the Australian Government and all state and territory governments in April 2009. The framework provides for an integrated response to child protection across all governments. The framework identifies several measures for ensuring Indigenous children are supported and safe in their families and communities.<sup>16</sup>
42. As part of the development of this framework, the government has looked to introduce income management schemes, where welfare incomes are quarantined or deducted subject to the enrolment and participation of children in schools. These measures raise a number of human rights concerns, including the right to social security.
43. The Commission has recommended against the introduction of such schemes as part of the national child protection framework. The Commission has called for the government to adopt a human rights-based approach to the framework that would uphold the best interests of the child, non-discrimination, and the child's right to life and right to participation.
44. The Commission's report, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities* highlights the need for support for Indigenous community initiatives and networks, human rights education, government action, and robust accountability and monitoring.<sup>17</sup>
45. Arguably, some forms of income management could be undertaken consistent with the right to social security. For example, it is likely that the model proposed by the Cape York Institute in its report *From hand out to hand up* contains the appropriate procedural guarantees and participatory requirements to enable those proposed measures to potentially be characterised as a special measure and as consistent with the right to social security.<sup>18</sup>

46. The provisions on income management in the NTER legislation could be amended to ensure they are compatible with obligations arising from the right to social security.
47. As noted above, in May 2009, the Australian Government announced consultations to review income management arrangements under the NTER to ensure that they are consistent with human rights. The outcomes of this process will need to ensure the right of individuals and groups to participate in decision-making processes that affect their exercise of the right to social security.
48. In the *National Framework for Protecting Australia's Children 2009-2020* the government indicates that it will evaluate income management trials in WA, NT and Cape York over 2009-2010.<sup>19</sup>

### **1.5 Indigenous health inequality**

49. The Close the Gap Campaign and the closing the gap commitments of all Australian governments have the potential to be a turning point in Indigenous affairs in Australia.<sup>20</sup> The Australian Government has already made substantial investments, backed up by emerging health system reforms. The Australian Government has elevated the urgency of dealing with the Indigenous health crisis to a national priority.
50. The groundwork has now been laid to make inroads into this longstanding issue. It is, however, a task that will take a generation. And there remains significant work to be done. This includes:
  - the creation of a new partnership between Indigenous Australians and their representatives and Australian governments to underpin the national effort to achieve Indigenous health equality
  - the development of an appropriately funded, long-term national plan of action to achieve Indigenous health equality, in part to coordinate the many different streams of activity underway that have the potential to contribute to that end
  - the establishment of adequate mechanisms to coordinate and monitor the multiple service delivery roles of governments that impact on Indigenous health, and to monitor progress towards the achievement of Indigenous health equality.
51. The adoption of targeted approaches to Indigenous health equality was substantially progressed by the establishment of the Close the Gap Campaign for Indigenous Health Equality. This is an historic event, being the first time that such authoritative and influential peak bodies and key organisations from Australian civil society have worked together in partnership in such a sustained manner towards a single goal – Indigenous health equality.
52. It should be noted that recent revisions of the Indigenous life expectancy gap from 17 years to around 10 years underscore the importance of improved data collection.<sup>21</sup> A firm data foundation is essential to plan and implement for Indigenous health equality by 2030.

53. A key element of the Close the Gap Campaign has been the development of National Indigenous Health Equality Targets over a period of six months by three working groups. A notable Indigenous person with extensive health experience led each working group.
54. The targets represent the ‘industry perspective’ on what needs to be done and the time frame for doing so in relation to achieving Indigenous health. This unprecedented body of work is intended to be the basis of negotiations with Australian governments as to the main elements and time frames of a national plan to achieve Indigenous health equality by 2030.
55. The integration of the Close the Gap targets into policy settings remains an ongoing concern of the Campaign partners. The targets in the Statement of Intent, for example, are still not reflected in the government’s *Overcoming Indigenous Disadvantage Framework*.
56. The Campaign partners have a further concern in relation to partnership and the achievement of Indigenous health equality. While the Campaign partners have been encouraged by the commitment to partnerships including by the Prime Minister in the apology to Australia’s Indigenous peoples<sup>22</sup> there are few signs that the Australian Government is otherwise embracing a partnership approach. In part, this could be because the Australian Government is waiting for the establishment of the national Indigenous representative body as a vehicle for partnership.
57. Particularly in relation to a national primary health care strategy, Aboriginal representative bodies must be active participants in development and implementation. Aboriginal community controlled health services must be involved in health planning at the local and regional level with the National Aboriginal Community Controlled Health Organisation, and State/Territory NACCHO Affiliates at national and jurisdictional levels respectively. Where relevant, additional partners would include the Indigenous health professional bodies and a national Indigenous representative body when it is established.
58. The recent progress made in Indigenous health policy is an excellent example of the way in which policy can be developed within a human rights framework. This kind of approach would be more likely if Australia had a Human Rights Act.

## **1.6 Indigenous housing and homelessness**

59. Indigenous people are likely to experience homelessness because of their high levels of social and economic disadvantage. According to the 2006 census, there were 4116 Indigenous people who were homeless on census night.<sup>23</sup> In every state and territory, Indigenous clients of Supported Accommodation Assistance Program services were substantially over-represented relative to the proportion of Indigenous people in those jurisdictions.<sup>24</sup>
60. In 2006, the UN Special Rapporteur on Adequate Housing identified an Indigenous housing crisis in Australia. He argued that the following factors have led to a ‘severe housing crisis’ which is likely to worsen in coming years as a result of the rapid rate of population growth in Indigenous communities:

- lack of affordable and culturally appropriate housing
  - lack of appropriate support services
  - significant levels of poverty
  - underlying discrimination.<sup>25</sup>
61. Further factors that contribute to Indigenous homelessness include:
- many Indigenous people enter poverty and homelessness as a result of poor educational and employment opportunities
  - Indigenous people are vulnerable to homelessness when they are forced to move in order to access employment and income support
  - the removal or temporary suspension of welfare benefits which can increase the chances of an Indigenous person becoming homeless
  - inadequate housing which can severely impact on the health of residents
  - a lack of culturally appropriate housing.<sup>26</sup>
62. The UN Committee on Economic Social and Cultural Rights has noted its concern that the incidence of homelessness has increased in Australia over the last decade, mainly affecting Indigenous peoples, and has recommended the government implement the recommendations of the UN Special Rapporteur on the Right to Adequate Housing contained in the report of his mission to Australia.<sup>27</sup>
63. In addition to wider housing reforms to address homelessness and housing affordability, including for Indigenous peoples in urban and regional areas,<sup>28</sup> the Council of Australian Governments' *National Partnership Agreement on Remote Indigenous Housing* took effect on 1 January 2009. The Agreement provides for \$1.94 billion over 10 years to improve the living standards of Indigenous peoples in remote areas by reducing overcrowding, homelessness, poor housing conditions and severe housing shortages. Under this Agreement the Australian Government will provide funding for remote Indigenous housing. The state and Northern Territory governments will be responsible for delivering the reform package, including the provision of housing and associated tenancy management reforms.<sup>29</sup>
64. This is complemented by the Indigenous Remote Service Delivery National Partnership which will provide \$291.2 million over six years to improve access to services by Indigenous peoples in 26 identified remote Indigenous locations.<sup>30</sup>
65. However, the government has deemed provision of housing and other services under the *National Partnership Agreement on Remote Indigenous Housing* to be conditional upon Indigenous land owners providing 40 year leases over their lands to the government, despite communities' reluctance to provide such leases; and transferring tenancy agreements from Indigenous community housing providers to public housing providers.

66. Indigenous community housing providers such as Tangentyere Council have argued for a community housing system accredited against the National Community Housing Standards in preference to public housing management for the Alice town camps.<sup>31</sup> In the absence of an agreement being reached, the government has indicated it will use the NTER legislation to compulsorily acquire the lands against the communities' wishes.
67. Such conditions on access to the right to adequate housing undermine the rights to land and culture and the right of Indigenous peoples to participate in decisions about their land and development as recognised in the Declaration on the Rights of Indigenous Peoples.<sup>32</sup>
68. There are also concerns that insufficient government funds and resources may be allocated for meeting the need for housing and services in remote Indigenous communities other than the 26 identified communities. This concern arises both under the federal policy and the Northern Territory Government's *Homelands / Outstations policy – Working Future – Fresh ideas / real results*.
69. Under its Homelands / Outstations policy the NT Government has indicated it will focus on the establishment of 20 towns across the Territory, with government services to outstations/homelands in most cases involving a form of remote delivery, based from the closest or most accessible hub town. The NT Government has indicated it will not provide funding to construct housing on outstations in the NT.
70. The Laynhapuy Homelands Association has expressed concerns that 'the decision not to fund new housing for our homelands condemns Yolngu to further overcrowding, declining living conditions and ultimately the extinguishment of our traditional culture'.<sup>33</sup> The concern is that people will be forced to move from their traditional lands into the 20 hub towns in order to access basic rights to housing, health and education.<sup>34</sup>

## **1.7 Indigenous language, culture and arts**

71. The *National Indigenous Languages Survey Report* shows that of the original estimated 250 Indigenous languages, only about 145 exist today and the majority of these are critically endangered.<sup>35</sup>
72. A major finding of the report is that Australia's Aboriginal and Torres Strait Islander languages are critically endangered and urgent action is required to preserve them for the future. The vast majority of the 145 Indigenous languages that are still spoken or partially spoken are severely endangered. Less than 20 languages are strong and not currently on the endangered list.<sup>36</sup> This situation was noted with concern by the UN Committee on Economic, Social and Cultural Rights.<sup>37</sup>
73. Indigenous languages and cultures are closely intertwined. Safeguarding languages preserves Indigenous culture and identity.
74. Currently, the promotion and protection of Indigenous languages and cultures is not sufficiently prioritised by the Australian Government. If languages are to

survive, genuine commitment and policies are required for language maintenance and language revitalisation programs at all levels of Australia's educational institutions. This means making schools culturally familiar and appropriate for Indigenous children and embedding Indigenous perspectives across the curriculum.

75. Additionally, the Commission is concerned that the protection of Indigenous cultural and intellectual property by the mainstream legal system is inadequate. Instruments such as the *Copyright Act 1986* (Cth) that provide legal protections for the life of the artist plus fifty years are not equipped to protect knowledge systems and artistic designs that are thousands of years old. Nor are they capable of recognising and protecting collective ownership of artistic content and products, which is common in Indigenous cultures.<sup>38</sup>
76. A Human Rights Act could provide protection for the cultural rights recognised in article 27 of the ICCPR and article 15 of ICESCR. This would mean that the government would need to consider the cultural rights of Indigenous peoples when developing new laws and policy. This would help redress the historical and continuing failure to recognise and protect Indigenous cultural rights.

## **1.8 Indigenous education**

77. While some small improvements have been made in the education outcomes of Indigenous students in Australian schools, the disparity of outcomes for remote students compared with their urban counterparts remains unacceptable. The provision of quality education services in remote Australia continues to be of concern.
78. The vast majority of the Australian continent is defined as remote or very remote. In 2006 there were 1,187 discrete Indigenous communities in Australia with 1,008 of these communities in very remote areas. Of the very remote communities, 767 had population sizes of less than 50 persons. In 2006 there were 69,253 Indigenous people living in very remote Australia.<sup>39</sup>
79. Remoteness has obvious implications for school education, including limiting access to early childhood services, primary and secondary schools as well as other resources such as libraries and information technology. In remote areas, road access may be limited during times of the year and prevent access during the wet season for months on end. If internet access is available in remote Australia, it is usually via satellite, offering a dial-up service with slow internet speeds.
80. Indigenous children in remote areas have, on average, much lower rates of school attendance, achievement and retention than Indigenous children in urban areas and other Australian children.<sup>40</sup> In remote areas of the NT, only 3 to 4% of Indigenous students achieved the national reading benchmark in 1999.<sup>41</sup>
81. In May 2009, the UN Committee on Economic, Social and Cultural Rights expressed concerns about the delivery of education to Indigenous peoples. It stated:

The Committee notes with concern the persistence in the State party of disparities in access to the educational system for indigenous peoples, including those living in remote areas, compared with the rest of the population, as well as the deficient quality of education provided to persons living in remote areas, in particular indigenous peoples. It regrets that access to pre-school education is not equally guaranteed throughout the State party. (art. 2.2 and 13)<sup>42</sup>

82. The Commission is of the view that a Human Rights Act would provide a benchmark against which the right to education could be regularly assessed and would ensure more consistent and improved accountability mechanisms for governments. It would provide a more systemic approach to protecting the economic, social and cultural rights of the most vulnerable sectors of the community.
83. The Commission is also concerned about the threat to bilingual education for Aboriginal students. Of the 9,581 schools that exist in Australia today, nine schools are bilingual schools, instructing students in their first Indigenous language.
84. In 2009 the NT Government implemented a policy-making it mandatory for schools to begin each school day with four hours of English literacy. The impact of this policy will be felt most markedly by the bilingual schools. In fact, the four hours of English is likely to destroy the bilingual education model. Dismantling bilingual education potentially endangers some of the remaining Indigenous languages.
85. Bilingual education is an example of Indigenous controlled education. Students are instructed in their first language, learning educational concepts in their own language and learning their first literacies in their mother-tongue. English language and literacies are gradually introduced in the primary years.
86. Bilingual education is considered to be one way to keep Indigenous language and culture alive. Bilingual programs are supported by local Indigenous community members with the aim of protecting and promoting Indigenous languages and culture through school education.
87. Evidence from an Australian study demonstrates marginally better English literacy outcomes for students from bilingual schools at the end of primary school compared with students from non-bilingual schools with similar languages, demography and contact histories.<sup>43</sup>
88. The Commission supports the protection and promotion of bilingual education. A human rights approach to policy development could require consideration of whether education promoted and protected the cultural rights of Indigenous children.

### **1.9 *Indigenous people and the criminal justice system***

89. The Commission is concerned about the continued high levels of incarceration of Indigenous people, particularly women and children, and the over-representation of Indigenous people in prisons and juvenile justice facilities. For example:

- Indigenous prisoners represented 24% of the total national prisoner population at 30 June 2008<sup>44</sup>
  - Indigenous adults are 13 times more likely to be imprisoned than non-Indigenous adults<sup>45</sup>
  - Indigenous young people are 23 times more likely to be in juvenile detention than non-Indigenous young people, and make up roughly half of the national juvenile detention population.<sup>46</sup>
90. The UN Committee against Torture recently recommended that the Australian Government reduce overcrowding in prisons, implement alternatives to detention, abolish mandatory sentencing and prevent and investigate deaths in custody.<sup>47</sup>
91. In light of the continued over-representation of Indigenous people, particularly women, in the criminal justice system, there is a pressing need for the continued implementation of the 339 recommendations contained in the Report of the Royal Commission into Aboriginal Deaths in Custody, including any outstanding recommendations.
92. The Commission is also concerned about developments under federal law which undermine the role of Aboriginal customary law. These developments prevent a court from taking into account 'any form of customary law or cultural practice' as a mitigating factor in sentencing, or in the context of granting bail.<sup>48</sup>
93. The Commission opposes this for a number of reasons, including the importance of recognising the right of minorities to enjoy their own culture, which applies to Indigenous peoples and imposes a positive obligation on governments to protect their cultures.<sup>49</sup>
94. People who are convicted of criminal offences should be appropriately punished. This is best achieved by ensuring that courts can consider the full range of factors relevant to the commission of the offence, including a person's culture. The right to enjoy culture cannot be enjoyed at the expense of the rights of others and must be consistent with other human rights in the ICCPR and the rights of women and children as protected by the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)<sup>50</sup> and the *Convention on the Rights of the Child* (CRC)<sup>51</sup>.
95. The Commission notes that although the NT Parliament made changes to the mandatory sentencing laws for property offences effective from 2001, the *Sentencing Act 1995* (NT) still contains forms of mandatory sentencing in cases involving offences of violence.<sup>52</sup>

### **1.10 Stolen Generations**

96. The Commission is concerned at the number of outstanding recommendations of the *Bringing them home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which documents the experiences of the Stolen Generations, who were forcibly removed from their families under the guise of welfare.<sup>53</sup>



97. This report recommended that reparation be made in recognition of the history of gross violations of human rights, and that the *van Boven principles* guide the reparation measures, which should consist of:
- acknowledgment and apology
  - guarantees against repetition
  - measures of restitution
  - measures of rehabilitation
  - monetary compensation.
98. The Commission welcomed the Australian Government's apology to the Stolen Generations in February 2008 for:
- laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians ... especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.<sup>54</sup>
99. However, the other recommendations for reparation remain outstanding, including the provision of healing programs for the Stolen Generations and their families, and monetary compensation.
100. The only compensation scheme established specifically for the Stolen Generations to date has been in Tasmania. Redress schemes have been established in Queensland and WA for children who have experienced abuse in state care, but they are not Stolen Generations specific.

### **1.11 Indigenous stolen wages**

101. The issue of 'stolen wages' has contributed to the entrenched and inter-generational disadvantage experienced by Indigenous people in Australia, and the consequent discrimination and inequality that contravenes the non-discrimination and equality provisions in articles 2 (1) and 26 of the ICCPR.
102. The stolen wages compensation schemes are a critical means for Indigenous people to access their right to remedy for the human rights violations they experienced, as required under article 2 of the ICCPR, and as the UN Human Rights Committee recommended in 2000.<sup>55</sup>
103. Stolen wages compensation schemes have been established in Queensland and NSW to compensate Indigenous people for the withholding, non-payment and underpayment of wages in the control of government. Investigations and consultations on the nature and extent of stolen wages issues in WA are also underway.
104. The right to an effective remedy remains unfulfilled in areas where compensation schemes have not been established. The Commission notes the need for stolen wages compensation schemes to be established in other states and territories as appropriate.

105. The Commission also has significant concerns about the adequacy and fairness of the regimes established, particularly by the Queensland Government, to address injustices inflicted on Indigenous peoples through the underpayment of wages.<sup>56</sup>
106. In December 2006 the Senate Standing Committee on Legal and Constitutional Affairs published *Unfinished business: Indigenous stolen wages*, which recommended the following to strengthen the existing compensation schemes:
- governments provide unhindered access to archives for the purposes of researching the stolen wages issue as a matter of urgency
  - funding be made available for education and awareness in Indigenous communities about, and preliminary legal research, into stolen wages issues.<sup>57</sup>
107. These recommendations have not been adopted.

### **1.12 Native Title system reform**

108. The *Native Title Act 1993* (Cth) (Native Title Act) is the primary mechanism through which Indigenous peoples access their cultural rights to land. The Act was intended to advance and protect Indigenous people by recognising their traditional rights and interests in the land.<sup>58</sup>
109. However, in practice, there are a number of limitations of the native title system, including the following:
- The courts have construed the Native Title Act as requiring that Indigenous people claiming native title prove traditional laws and customs at sovereignty and their continued observance generation by generation until today.<sup>59</sup> One of the cruel consequences is that the greater the impact of colonisation on Indigenous peoples (for example, if they were forcibly removed from their land), the less likely that they will be able to prove native title under Australian law.
  - Indigenous peoples bear the burden of proof and strict rules of evidence generally apply. The result is that Indigenous peoples whose culture is based on the oral transmission of knowledge must prove every aspect, including the content of the law, and custom and genealogy, back to the date of sovereignty (up to almost 200 years) in a legal system based on written evidence.
  - Only the traditional laws and customs that existed at the time of sovereignty and which are still observed and practiced today will be recognised. There is little room for revival of cultural traditions or adaptation of the traditions to today.<sup>60</sup> Similarly, the rights recognised are severely limited in terms of how Indigenous peoples can utilise any resources associated with that land for economic or social benefit.
110. Recent reforms to the native title system do not reach far enough to overcome the limitations of the system or enable the full realisation of rights to land and culture.<sup>61</sup>

111. Further, the native title system is in a state of gridlock.<sup>62</sup> Between 1 January 1994 (when the Native Title Act came into effect) and 31 December 2008, 117 determinations of native title were made, while over 500 claims are still waiting to be determined. Litigated determinations take an average of nearly seven years. On current estimates it will take another 30 years to finalise the remaining claims.<sup>63</sup>
112. The system is in a state of gridlock for a number of reasons. It is in part due to the technical and aggressive attitude of government parties in an adversarial setting. Another relevant factor is the inadequate funding by government for Indigenous peoples pursuing their rights.<sup>64</sup> Although some amendments to the system were made in 2007, and some are currently being considered by government, these measures do not adequately improve the process.
113. The Commission is concerned that while the system continues to progress so slowly, Indigenous peoples' rights are being denied and Indigenous elders are dying.

### **1.13 Land rights under the Northern Territory Emergency Response**

114. The NTER legislation has allowed the Australian Government to acquire a wide range of interests in land, including:
- compulsory acquisition of five-year leases over certain lands
  - control of leases for town camps in Darwin, Katherine, Tennant Creek and Alice Springs including the power to forfeit the lease and resume the land
  - power to acquire all rights, titles and interests in the land subject to a town camp lease
  - rights in construction areas, and buildings and infrastructure constructed on Aboriginal land.
115. The NTER legislation significantly reduces the protection of Aboriginal peoples' rights and interests in their traditional lands as provided by both the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT) and the Native Title Act. However, this legislation also impacts on the ability of those Aboriginal people affected to leverage economic, social and cultural development through the future acts regime.
116. Any native title rights and interests, to the extent that they may occur over the area covered by a five year lease, are not expressly preserved by the legislation. While the legislation states that the non-extinguishment principle applies to the granting of a five year lease and other specified acts as determined by the NTER legislation, the legislation does ensure the suspension of the future acts regime.<sup>65</sup>
117. Under a Human Rights Act, proposed legislation that impacts on the land rights of Indigenous peoples would need to be accompanied by a statement which explains what impact the legislation will have on human rights. This process of

justification would mean that the implications for human rights would be firmly before the Parliament when making decisions about amendments such as those described above.

### **1.14 Indigenous participation in environmental management**

118. Indigenous peoples have had limited influence and participation in policies which affect their rights to land and waters, such as policies on environmental management, cultural heritage and climate change. For example, while the Australian Government has been developing a policy for climate change, and water use and access, there has been minimal consultation or discussion with Indigenous peoples.
119. A Human Rights Act that recognised Indigenous cultural rights and the right to self-determination, as well as economic, social and cultural rights, would mean that those rights would be considered when law and policy is developed. The Commission believes that this increased focus on human rights would lead to improved consultation with Indigenous peoples about issues of environmental management and policy.

## **2 Asylum seekers, refugees and migrants**

### **2.1 Immigration detention**

120. Over the last decade, Australia's treatment of asylum seekers and other people in immigration detention has repeatedly breached Australia's international human rights obligations. This has damaged Australia's international reputation and, more importantly, the lives of many individuals and families.
121. The Commission has done extensive work on immigration detention over the past decade, including investigating complaints from individuals in detention;<sup>66</sup> conducting annual inspections of detention facilities;<sup>67</sup> making submissions to parliamentary inquiries;<sup>68</sup> and conducting two national inquiries.<sup>69</sup>
122. Most recently, the Commission released its 2008 report about conditions in Australia's immigration detention facilities.<sup>70</sup> The key recommendations of the report included the following:
- Australia's mandatory detention law should be repealed.
  - The *Migration Act 1958* (Cth) (Migration Act) should be amended so that people are only detained when it is necessary. Detention must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law.<sup>71</sup>
  - The Migration Act should be amended so that the decision to detain a person is subject to prompt review by a court; periodic independent reviews of the ongoing need to detain an individual are undertaken; and a maximum time limit for immigration detention is specified.

- Minimum standards for conditions and treatment of persons in immigration detention should be set out in law and should reflect international human rights standards.
- People should not be held in immigration detention on Christmas Island. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination process on the Australian mainland.
- The Australian Government should implement all of the recommendations of the National Inquiry into Children in Immigration Detention.<sup>72</sup>

123. If Australia had a Human Rights Act, many of the breaches of human rights identified by the Commission may have been prevented. A Human Rights Act would mean that any future changes to Australia's immigration laws would need to be assessed against the human rights protected by the Human Rights Act.

(a) *Mandatory detention laws can result in arbitrary detention*

124. Australia's system of mandatory detention has led to the prolonged and indefinite detention of many people. The Commission has repeatedly urged the Australian Government to repeal the provisions of the Migration Act that have led to indefinite and arbitrary detention in breach of the ICCPR.<sup>73</sup> Mandatory detention has also led to other human rights breaches including the breach of a child's right to be detained only as a matter of last resort and for the shortest appropriate period of time.<sup>74</sup>

125. While detention may be acceptable for a short period in order to conduct security, identity and health checks, currently the mandatory detention provisions of the Migration Act empower immigration officials to detain people for unlimited periods of time. There is no way for the Australian courts to review whether a person's detention is arbitrary in breach of international law.

126. The Commission's 2008 report highlighted that, despite improvements in the physical conditions of immigration detention facilities over the past few years, the most critical issue remains: some people are still detained for prolonged and indefinite periods, without knowing when they will be released or whether they will be allowed to stay in Australia when that happens. It is well established that detaining people in these circumstances leads to negative impacts on their mental health.<sup>75</sup>

127. The Commission is also concerned that children continue to be held in some immigration detention facilities, both on the mainland and on Christmas Island. For children and their families, the psychological effects of being detained can be devastating, and these facilities are inappropriate for anything but the briefest of periods.

128. On 29 July 2008, the Minister for Immigration and Citizenship, Chris Evans, announced new directions for Australia's immigration detention system.<sup>76</sup> The new directions provide for a shift in policy, away from the requirement that all unlawful non-citizens be detained, towards a presumption that detention will occur as a last resort and for the shortest practicable period.

129. While the Commission has welcomed this development, it remains to be seen how the new directions will be implemented in practice, and in particular how the changes will be enforced or guaranteed.

*(b) Detention should be subject to judicial review*

130. The Commission has raised repeated concerns that the Australian courts cannot review the legality of a person's immigration detention on the grounds that it breaches the prohibition on arbitrary detention.<sup>77</sup>

131. The Australian courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or to refuse to release a person) contrary to the ICCPR.

132. The UN Human Rights Committee has said that the right to challenge the 'lawfulness' of one's detention under article 9(4) of the ICCPR must include the opportunity to challenge detention which is arbitrary.<sup>78</sup>

133. The Commission believes that any decision to detain a person should be subject to prompt review by a court; there should be periodic independent reviews of the ongoing need to detain an individual; and there should be a specified legal limit on the period of time for which immigration detention is permitted.

134. These safeguards should be entrenched in legislation. If Australia had a Human Rights Act they would also need to be interpreted and applied consistently with the rights protected by a Human Rights Act.

*(c) People should not be detained in excised offshore places like Christmas Island*

135. Australia's excision legislation creates a dual processing system for asylum seekers that, in the Commission's view, is unjustified. People who arrive in excised offshore places are unable to make a valid visa application under the Migration Act unless the Minister exercises his non-compellable discretion to permit them to do so.<sup>79</sup> Further, people who arrive at excised places are not able to have their cases reviewed in the Refugee Review Tribunal or the Australian courts.<sup>80</sup>

136. Until recently, detainees on Christmas Island were not entitled to legal or migration assistance. In July 2008, the Minister indicated that asylum seekers on the island would be given access to publicly funded assistance, as well as access to independent review of negative refugee status assessment decisions.

137. The Commission welcomed these developments. However, it has ongoing concerns given the lack of lawyers and migration agents on the island; the lack of transparency surrounding the non-statutory refugee status assessment process applied on the island; and the lack of clarity regarding the system for conducting independent merits reviews.

138. The Commission remains concerned that the practice of processing asylum seekers offshore undermines Australia's international obligations under the *Convention Relating to the Status of Refugees*<sup>81</sup> (Refugee Convention), the ICCPR and the CRC. The lack of legal safeguards increases the risk of a person genuinely in need of Australia's protection being returned to a place of persecution, and can also lead to breaches of children's rights.<sup>82</sup>
- (d) *There are no legal guarantees that detainees will be treated humanely in detention*
139. The Commission has long been concerned about the absence of adequate mechanisms to ensure that immigration detainees are treated in accordance with Australia's international human rights obligations. In particular, the Commission remains concerned that, despite its repeated recommendations, Australian law does not set out minimum standards for conditions and treatment of immigration detainees.<sup>83</sup>
140. Since 1998, immigration detention services have been provided by private sector providers under contract to the Australian Government. Detention service providers are required to meet service requirements, including conditions for immigration detainees, as part of their contractual obligations. However, the Commission considers that these have provided insufficient guidance on what service providers must do to ensure that conditions comply with human rights standards. Further, these service requirements do not provide people in immigration detention with a cause of action or other effective remedy for breaches of their human rights.
141. Currently, if a person in immigration detention makes a complaint to the Commission alleging that the way they have been treated in detention breaches their human rights (for example, their right not to be subjected to cruel, inhuman or degrading treatment), the Commission can investigate the complaint. If the Commission finds that a breach of human rights has occurred, the Commission can table a report in federal Parliament. However, the Commission's recommendations are not legally binding and may be ignored by the government.
142. A Human Rights Act could impose a legal obligation on the Australian Government, and private companies that run detention services on behalf of the Australian Government, not to act inconsistently with the human rights of people in immigration detention. Under a Human Rights Act, a person could seek a legally enforceable remedy for a breach of their human rights while in immigration detention.

## **2.2 Non-refoulement obligations**

143. The Commission has repeatedly recommended that a system of complementary protection should be introduced to protect people who do not fall within the definition of refugee under the Refugee Convention, but who nonetheless must be protected from refoulement under the ICCPR, the CAT or the CRC.<sup>84</sup>

144. Australia does not have an effective system of protection for these asylum seekers, who may risk death, torture or cruel, inhuman or degrading treatment or punishment if returned. Instead, their claims can only be considered after they have been rejected at each stage of the refugee determination process and then seek a personal intervention by the Minister. Although the Minister may consider Australia's obligations under other human rights treaties, the Minister's decisions in these cases are non-compellable and non-reviewable.
145. In May 2009, the Australian Government committed to provide \$4.8 million over four years to implement a system of complementary protection for people to whom Australia has non-refoulement obligations. This announcement is welcome and the Commission looks forward to seeing this system implemented as soon as possible.

### **2.3 Formal citizenship test**

146. In 2007, the Australian Government introduced a formal citizenship test as part of the requirements for applying for Australian citizenship. The test aims to verify that applicants have demonstrated English competence and understanding of Australian values.
147. The Commission recognises the right of the Australian Government to introduce a formal citizenship test that is pursuant to a legitimate aim, proportionate to achieving this aim, and based on reasonable and objective criteria.
148. However, the Commission is concerned that the particular test introduced may disadvantage certain categories of people, particularly refugees and humanitarian applicants, and deprive them the right to equal treatment under articles 2 and 26 of the ICCPR.
149. The Commission believes that the formal citizenship test for migrants and refugees who wish to become Australian citizens should be assessed against human rights standards, in order to ensure that it does not have a discriminatory impact.
150. The Commission believes that humanitarian applicants should not have to demonstrate English language competency or an understanding of Australian values in order to find permanent refuge and settlement in Australia. It would also be inappropriate to require family reunion applicants, such as applicants for aged parent or spouse visas, to pass language or values tests.<sup>85</sup>

## **3 People trafficking**

151. While slavery, sexual servitude and the trafficking of people for exploitation are crimes under Australian law, these practices still occur in Australia. The Commission believes that the Australian Government Anti-Trafficking Strategy needs a greater focus on the human rights of people who are trafficked to Australia.<sup>86</sup>



152. The government funded Victim Support Program is only available to victims of people trafficking who are assessed by the Australian Federal Police as eligible for a visa under the People Trafficking Visa Framework. The Commission is concerned that this framework fails to protect the rights of trafficked people who are not of interest or assistance to police. The Commission expressed these concerns to a Department of Immigration and Citizenship review of the visa framework in 2008.
153. People who have been trafficked to Australia are non-citizens and, in many cases, are in Australia without a valid visa. Access to victim support, culturally appropriate assistance and legal advice is vital to help trafficked people recover from their experience and understand their legal rights.
154. The Commission hopes that the outcome of the 2008 review of the visa framework will mean that people who have been trafficked to Australia will receive support and protection on the basis of need. This is consistent with the recent recommendation by the United Nations Human Rights Committee that Australia should 'provide equal assistance and protection to all victims identified regardless of their participation or otherwise in criminal proceedings against perpetrators'.<sup>87</sup>
155. Australia's response to trafficking shows that insufficient attention to human rights in the law- and policy-making process can result in inadequate protection of human rights. For example, a recent report found that government departments had not considered the policy implications of cases where alleged victims of trafficking were not mentally fit to decide whether to assist police, 'nor developed a way forward on managing mentally impaired victims, to ensure that their rights and interests are adequately protected'.<sup>88</sup>
156. Similarly, insufficient efforts have been made to ensure that people who have been trafficked to Australia have access to effective remedies outside the criminal justice system. To date, the Commission is only aware of one award of compensation to a person who was trafficked to Australia.<sup>89</sup> The Commission urges the Australian Government to explore legal options to improve the ability of people who have been trafficked to seek compensation.<sup>90</sup>
157. These weaknesses in Australia's response to trafficking could have been avoided if there had been a greater focus on the human rights of trafficked people at the time anti-trafficking laws and polices were first introduced. This might have occurred if Australia had a Human Rights Act at the time.
158. As Australia begins to respond to emerging issues such as labour trafficking outside the sex industry and trafficking for forced marriage, new laws and policies should be formulated within a human rights framework. A Human Rights Act could make sure that human rights are placed at the centre of efforts to address and prevent trafficking.
159. Australia also needs to develop 'best practice models for identifying and responding to possible victims of labour trafficking, including investigating the effectiveness of responses based on education about rights, rather than victims'.<sup>91</sup>

## 4 Counter-terrorism legislation

160. Since the terrorist attacks in the United States on 11 September 2001, the Australian Government has introduced over 40 new counter-terrorism laws. The Commission has repeatedly raised concerns that a number of the new laws may breach, or allow for the breach of, Australia's human rights obligations.
161. The Commission believes the best way to ensure that future efforts to protect Australia's national security comply with Australia's human rights obligations is to introduce a Human Rights Act.

### 4.1 *Inadequate safeguards against human rights violations*

162. The Commission is concerned that a number of Australia's counter-terrorism laws fail to minimise the risk of human rights violations occurring. Two examples are outlined here, relating to the right to liberty and security of the person,<sup>92</sup> and the right of a detainee to be brought before a judicial officer to seek a ruling on the lawfulness of their detention.<sup>93</sup>
163. The *Anti-Terrorism Act 2004* (Cth) introduced special powers for the Australian Federal Police (AFP) to arrest a person suspected of committing a terrorism offence, and detain that person for the purpose of investigating whether that person had committed any terrorism offence.<sup>94</sup> Pursuant to these special powers, the AFP can hold a person for questioning for four hours,<sup>95</sup> and a magistrate can authorise an extension of up to 20 hours.<sup>96</sup> This means a person can be held without charge for 24 hours for the purpose of questioning.
164. However, 'dead time' can be excluded from the total questioning time.<sup>97</sup> 'Dead time' includes a range of periods of time, such as allowing the detainee to rest, or conveying a person to a place of detention. But 'dead time' also includes allowing the investigating officer to request further time for investigating a terrorism offence.<sup>98</sup> The investigating officer can specify how much 'dead time' is required for this purpose. The effect of these 'dead time' provisions is that a person could be held for much longer than 24 hours.
165. For example, Dr Mohammed Haneef was held in pre-charge detention for 12 days pursuant to the operation of one of the 'dead time' provisions.<sup>99</sup> Dr Haneef's case demonstrates that there are inadequate safeguards in the operation of the 'dead time' provisions to prevent a person being held for an extended period of time (far beyond 24 hours), without proper review of the lawfulness of that detention. If a Human Rights Act had been in place at the time the 'dead time provisions' were being drafted, the provisions may have been accompanied by stronger and more effective safeguards.
166. Similarly, the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) gave ASIO special powers to question, or question and detain, a person suspected of having information related to an anti-terrorism investigation, even if that person is not suspected of a terrorist offence.<sup>100</sup> Under these powers, a person who is not suspected of a terrorism offence can be detained for up to seven days.<sup>101</sup> The grounds for detention can be kept secret.<sup>102</sup>

167. The Commission considers that this power of ASIO to detain an individual who is not suspected of any crime creates a serious risk of violating a person's right to liberty and security of the person, and a detained person's right to be brought before a judicial officer to rule on the lawfulness of their detention.
168. These laws are subject to a sunset clause which means their operation must be reviewed in 2016. The Commission believes that when Parliament decides whether to extend the sunset clause, the laws should be assessed within a human rights framework. This could be achieved by introducing a Human Rights Act which provides guidance on when human rights can be legitimately limited.

#### **4.2 *Inadequate assessment of the human rights compatibility of Australia's counter-terrorism laws***

169. Counter-terrorism laws have often been enacted in haste and without adequate assessment of their impact on fundamental rights and freedoms.
170. Introducing a Human Rights Act could ensure that in the future, proposed counter-terrorism measures are assessed in a human rights framework before they are adopted. It would mean that:
- human rights are identified and protected
  - legitimate restrictions on human rights are justified
  - government agencies consider the human rights impact of counter-terrorism measures
  - courts act as a safeguard against executive overreach in individual counter-terrorism cases.

#### **4.3 *Australia's counter-terrorism laws should be independently reviewed***

171. With over 40 counter-terrorism laws enacted since 2001, there is a need to ensure that the operation of these laws, both individually and collectively, is subject to independent review. Current mechanisms for the review of counter-terrorism laws are ad hoc, and pay insufficient attention to compliance with human rights standards.
172. The Commission has consistently called for the establishment of an Independent Reviewer of counter-terrorism laws to examine how Australia's counter-terrorism laws are working in practice, and whether any significant human rights concerns have arisen as a result of the operation of these laws.<sup>103</sup>
173. Reports by bi-partisan parliamentary committees and independent reviews of Australia's counter-terrorism laws have all said that Australia needs to establish an independent body to provide a comprehensive and holistic review of the operation of counter-terrorism laws.<sup>104</sup>

174. On 23 December 2008, the Australian Government announced that it would amend certain counter-terrorism offences and establish a National Security Legislation Monitor to review the practical operation of counter-terrorism legislation on an annual basis. The National Security Legislation Monitor will be a new statutory office in the Prime Minister's Portfolio and will report to Parliament.<sup>105</sup>
175. While it would appear that the Australian Government has stopped short of establishing a mechanism of regular independent review of Australia's counter-terrorism laws, the Commission welcomes the government's decision to implement many of the recommendations made by the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef, the Review of Sedition Laws in Australia, and the reports of the Parliamentary Joint Committee on Intelligence and Security.<sup>106</sup> The Commission understands a discussion paper and exposure draft of legislation to implement these changes will be released in 2009.
176. The Commission believes it is vital that all new counter-terrorism laws comply with Australia's human rights obligations. A Human Rights Act could make sure that, in future, all proposed counter-terrorism laws are accompanied by a human rights compatibility statement.

#### **4.4 Counter discrimination and promote social inclusion**

177. Many Arab and Muslim Australians are concerned that counter-terrorism legislation is being implemented in a way that has a disproportionate impact on their communities.<sup>107</sup> Uncertainties around the definition of terrorism and terrorist organisations have fuelled confusion and fear.<sup>108</sup>
178. In 2004, the Commission published its report *Ismaḡ –Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*.<sup>109</sup>
179. The report found that members of Muslim and Arab communities had experienced increasing levels of discrimination since the terrorist attacks on 11 September 2001.
180. The Ismaḡ report identified three main trends within Muslim and Arab communities:
- an increase in fear and insecurity
  - the alienation of some members of the community
  - a growing distrust of authority.
181. In June 2006 the Security Legislation Review Committee expressed 'serious concern' about the way in which counter-terrorism legislation is perceived by some members of Muslim and Arab communities in Australia.<sup>110</sup>
182. The 2006 report of the Parliamentary Joint Committee on Intelligence and Security found that 'one of the most damaging consequences of the terrorist bombings in the US, the UK, Europe and Indonesia has been a rise in

prejudicial feelings towards Arab and Muslim Australia'.<sup>111</sup> It also expressed concern about 'reports of increased alienation attributed to new anti-terrorist measures, which are seen as targeting Muslims and contributing to a climate of suspicion'.<sup>112</sup>

183. Both the Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence and Security supported remedying these problems through measures which promote social inclusiveness and which counter discrimination.<sup>113</sup> The ongoing work of the Commission with Muslim and Arab communities is vital in this context.<sup>114</sup>

## **5 Gender equality**

184. While the Commission acknowledges the progress made towards achieving equality between women and men, the Commission remains concerned about the ongoing and persistent gender inequality entrenched in Australian life.
185. Introducing a Human Rights Act could help ensure that law and policy makers actively look for ways in which new laws and policies could promote gender equality.
186. The Sex Discrimination Commissioner has identified a number of areas of gender inequality requiring action by the Australian Government.<sup>115</sup> In July 2008, the Sex Discrimination Commissioner released her Plan of Action towards Gender Equality, setting out five priority areas for her term of office.<sup>116</sup> The Commission has since made a number of submissions to Australian Government inquiries to progress these reforms at the national level.

### **5.1 Strengthening laws to prevent sex discrimination and promote gender equality**

187. The Commission is concerned about the limited ability of the *Sex Discrimination Act 1984* (Cth) (SDA) to achieve substantive gender equality in a number of areas of public and private life.<sup>117</sup> The SDA does not fully implement Australia's international human rights obligations, particularly under CEDAW.
188. The Senate and Legal Constitutional Affairs Committee recently completed an inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality. The Commission made 54 recommendations for immediate reform of the SDA and also proposed a more extensive second stage of inquiry to consider 11 more extensive reform proposals.<sup>118</sup> The majority of the Commission's recommendations were adopted by the Senate Committee Inquiry.<sup>119</sup> The Australian Government is yet to respond to the Senate Committee's report.
189. The Commission's previous proposals for strengthening laws to prevent sex discrimination should inform the implementation of the Commission's recommendation to strengthen and streamline Australian federal discrimination law.

## **5.2 Paid parental leave**

190. The Commission has congratulated the Australian Government on its recent historic announcement that it will fund a national legislated scheme of paid parental leave (the Scheme), with a commencement date of 1 January 2011. The Commission has been a long-standing advocate of the need to establish such a scheme.
191. It is important to now ensure that the Scheme is appropriately implemented, including an effective awareness-raising and education campaign for both employees and employers. Further, there is a need for a continuous program of monitoring and evaluation so the effectiveness of the Scheme is maximised.
192. The Commission believes the Scheme is an important first step towards securing a world class paid parental leave system in Australia. There are a number of improvements to the Scheme that remain outstanding, including achieving:
- superannuation on the leave entitlement
  - full coverage for all workers, not only primary carers in receipt of \$150 000 or less
  - income replacement, rather than payment at the rate of the Federal Minimum Wage
  - availability of at least two weeks supporting parent leave (commonly known as paternity leave)
  - availability of additional supporting parent leave (ideally four weeks, to be taken on a 'use it or lose it' basis)
  - a total of one year of paid parental leave for new parents.
193. The Commission has welcomed the Australian Government's commitment to undertake a review of the Scheme two years after implementation, during which the above measures can be considered.
194. The Commission recommends that the Australian Government remove its reservation to article 11(2)(b) of CEDAW.
195. The Commission also recommends that the Australian Government take steps towards ratification of the *Maternity Protection Convention 2000* (No 183) and ensure compliance with other provisions of that Convention.<sup>120</sup>
196. For further detail about the Commission's recommendations regarding achieving a world class system of paid parental leave for Australia, see the Commission's two submissions to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave (2008).<sup>121</sup>

## **5.3 Balancing work and caring responsibilities**

197. The Commission believes that there needs to be greater structural support for men and women to balance paid work and caring responsibilities.<sup>122</sup> This is

essential for eliminating discrimination against women in employment as required by article 11 of CEDAW.

198. The Commission is concerned that the new *National Employment Standards*, established as part of the Australian Government's new workplace relations framework, provide inadequate protection for workers with caring responsibilities. The new right to request flexible working arrangements under the *National Employment Standards* is limited to workers with children under school age or children with disability under the age of 18 and does not apply to workers unless they have completed 12 months of continuous service. These limitations will have a disproportionate impact on women and men with wide-ranging care dependent relationships that can develop at any point over the work-life cycle.<sup>123</sup>
199. The Commission is also concerned that the family responsibilities provisions of the SDA provide extremely limited coverage for employees experiencing this form of discrimination. Currently, protection against discrimination on the grounds of family responsibilities is limited to situations of direct discrimination and dismissal from employment.<sup>124</sup> These problems should be addressed by strengthening federal discrimination laws.
200. For the Commission's recommendations about improving the SDA to protect workers from discrimination on the grounds of family and carer responsibilities, see the Commission's submission to the Inquiry into the Effectiveness of the Sex Discrimination Act.<sup>125</sup>

#### **5.4 Women's economic security in retirement**

201. The Commission is concerned about the significant disparity between the retirement savings and income of men and women. Current figures show that women's superannuation balances are less than half of those of men.<sup>126</sup> This stark figure is a clear marker of gender inequality in Australia.
202. Linking superannuation exclusively to engagement in paid work disadvantages women and other groups with marginal labour force attachment and lower earnings. Superannuation is a type of social insurance under article 9 of the ICESCR. Due to superannuation being linked to paid work, women do not currently equally enjoy the right to social security in Australia.
203. Women are more likely to have broken paid work patterns due to caring responsibilities and have lower life-time earnings due to pay inequity. This means that, not only do women generally have lower levels of superannuation coverage over their lifetime, but when they do engage in paid work, they accumulate lower amounts of superannuation. Forms of age discrimination can create further barriers to participation in the paid workforce.
204. With women generally retiring earlier and living longer than men, many women face prospects of financial insecurity and poverty in retirement, often solely relying on the Age Pension. Of all household types in Australia, elderly single women are at the greatest risk of poverty.<sup>127</sup> Around 73% of those on the single rate of the Age Pension are women.<sup>128</sup>

205. The Australian Government is currently reviewing the retirement income system as part of a broader review of the national tax system. The Commission has expressed concern that that current system does not enable women to equally enjoy their right to social security and subsequently, equally enjoy their right to an adequate standard of living.<sup>129</sup> If a Human Rights Act was introduced, the Australian Government would be required to formally assess the human rights implications of any legislative changes to the tax system.
206. The Commission has recommended actions in the following areas to increase women's economic security in retirement:
- removing barriers to women's labour market participation (see above)
  - increasing life-time earnings for women by reducing the gender pay gap (see below)
  - extending initiatives to increase superannuation contributions for low income earners and those on welfare payments, including investigation of a system to recognise the value of unpaid caring work
  - ensuring that the Age Pension protects individuals from poverty and fulfils Australia's international human rights obligations for women and men to equally enjoy a right to an adequate standard of living, and to social security
  - regular monitoring and reporting of the gender impact of federal budgets and reforms (see below)
  - independent monitoring and reporting of Australia's progress towards achieving substantive gender equality.
207. The Commission welcomes the recent commitment by the Australian Government to increase the rate of the Age Pension. However, this measure alone will not be sufficient to address the gender gap between women and men in their retirement income and savings over the lifecycle.

## **5.5 Gender pay gap**

208. There is a gender pay gap in Australia, with female workers earning 16.7% less than male workers.
209. The gender pay gap in Australia is measured using data on average weekly earnings collected by the Australian Bureau of Statistics. In August 2008, women working full-time were earning 83.3% in the male dollar – this equates to a 16.7% pay gap. When part-time and casual work is included, women were earning around two thirds of what men earn. Although the pay gap for full-time earnings has hovered between 15-19 percentage points in the last three decades, in recent years the gender pay gap has widened slightly.
210. In a submission to the House of Representatives Inquiry into Pay Equity and associated issues related to increasing female participation in the workforce, the Commission recommended that the Australian Government:



- Amend the SDA in accordance with the recommendations of the Senate Inquiry report into the effectiveness of the SDA,<sup>130</sup> particularly to: provide for full protection from discrimination in employment on the grounds of family and carer responsibilities; impose a positive duty on employers to reasonably accommodate the needs of workers in relation to pregnancy or family and carer responsibilities; and expand the powers of the Commission and the Sex Discrimination Commissioner to undertake inquiries, and to initiate complaints.
- Amend the federal industrial relations laws (formally the *Workplace Relations Act 1996* (Cth), which the federal Government is replacing with the *Fair Work Act 2009* (Cth) (Fair Work Act)), in relation to equal remuneration provisions.
- Improve national institutional arrangements, and data collection and monitoring mechanisms, including providing for the Commission to independently monitor and regularly report on progress in achieving gender equality at the national level.
- Increase funding to the Commission to enable it to exercise its existing and proposed new powers and functions in this area.<sup>131</sup>

211. The Commission welcomes the new equal remuneration provisions in the Fair Work Act which have substantially adopted one of the Commission's proposals for legislative reform in this area.

## **5.6 Sexual harassment**

212. Despite nearly 25 years of legislative protection under the SDA, the Commission is concerned that sexual harassment remains a problem in Australian workplaces.
213. Elimination of sexual harassment is critical to achieving gender equality in the workplace and implementing Australia's obligations under CEDAW. The widespread incidence of sexual harassment in the workplace also impacts on the capacity of women to equally enjoy their right to safe and healthy working conditions, as set out in articles 3 and 7(b) of ICESCR.
214. Addressing sexual harassment is one of the five priority areas for the term of the current Sex Discrimination Commissioner, set out in her Plan of Action Towards Gender Equality.
215. In 2008, the Commission conducted its second national telephone survey about the nature and extent of sexual harassment in Australian workplaces. The national telephone survey was first conducted in 2003. The survey found that 22% of females and 5% of males had experienced sexual harassment in the workplace at some time, compared to 28% of females and 7% of males in 2003.
216. Arising out of the findings of the 2008 national telephone survey, the Commission made a number of recommendations for action. The recommendations include that the Australia Government should provide sufficient funding to:

- enable the Commission to work with relevant Australian Government agencies and small business representatives to develop and promote the use of specific sexual harassment training guidelines for small business
- expand the capacity of the Commission to provide information to ensure people understand their rights and responsibilities under the law, and ensure the ongoing provision of an efficient and effective complaint service
- enable the Equal Opportunity for Women in the Workplace Agency or the Commission to develop an audit kit to assist employers to monitor the incidence of sexual harassment
- enable the Commission to repeat its national telephone survey every five years in order to independently monitor trends in the nature and extent of sexual harassment in Australian workplaces.<sup>132</sup>

217. In the 2008 Senate Inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality, sexual harassment was a specific terms of reference for the Inquiry. The Commission made a number of recommendations to the Inquiry to improve the capacity of the SDA to redress sexual harassment.

218. The Commission highlighted the need for expanded legal protection and comprehensive education efforts to eliminate sexual harassment. The Commission also recommended that the Australian Government increase funding to the Commission to perform its policy development, education, research, submissions, public awareness and inquiry functions to eliminate discrimination and promote gender equality.<sup>133</sup>

219. A number of the Commission's recommendations were adopted by the Inquiry. As noted above, the Australian Government is yet to respond to the Senate Committee's report. These issues should be addressed as part of efforts to strengthen and streamline federal discrimination law.

## **5.7 Gender-based violence**

220. Gender-based violence is still a serious problem in Australia. Experiences of violence severely limit the capacity of women to equally enjoy their human rights.

221. As many as one in three Australian women are affected by domestic and family violence.<sup>134</sup> Nearly one in five Australian women has experienced sexual violence since the age of 15.<sup>135</sup> Domestic violence has been identified as the leading contributor to preventable death, disability and illness in women aged 15 to 44 in the state of Victoria.<sup>136</sup> Further, domestic violence is the most common reason cited by individuals seeking assistance with Australian housing services.<sup>137</sup> A high proportion of women with a disability experience domestic violence.<sup>138</sup>

222. Since November 2007, the Australian Government has introduced some key initiatives to address gender-based violence. In May 2008, the Australian Government formed a National Council to Reduce Violence Against Women

and Children (the National Council). The National Council was directed to develop a 12 year *National Plan to Reduce Violence Against Women and Children* (the National Plan).

223. In April 2009, the Australian Government released *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* along with the Australian Government's response. The development, implementation and evaluation of the National Plan has been referred to the Council of Australian Governments (COAG). The Australian Government has also committed to implementing a selection of the urgent recommendations of the report.
224. The Commission has welcomed these developments, while urging the Australian Government to ensure that:
- The development, implementation and evaluation of the National Plan is supported with sustained commitment and proper resourcing.
  - The National Plan receives priority attention within COAG and is implemented by early 2010 in line with the Australian Government's commitment.
  - The National Plan includes funding to adequately resource participatory decision making processes and to facilitate stakeholder and community input into implementation and evaluation.
  - The National Plan is regularly monitored by an independent body to measure progress. This includes developing strong data collection and evaluation mechanisms, as well as the setting of appropriate targets and benchmarks.

## **5.8 National gender equality machinery**

225. The Commission notes the importance of Australia having in place robust national gender machinery, including gender budgeting analysis, accountability systems, independent monitoring and benchmarking, and a strong, well-supported civil society, in order to prevent sex discrimination and promote gender equality.<sup>139</sup>
226. The Commission encourages the Australian Government to review the effectiveness of existing national gender machineries in Australia, particularly in the lead up to the 54th session of the UN Commission on the Status of Women in March 2010, as part of the review and appraisal of the implementation of the Beijing Declaration and Platform of Action and the outcome of the 23rd Special Session of the General Assembly on 'Women 2000: gender equality, development and peace for the twenty-first century' in June 2000.

### **(a) Gender budgeting**

227. The Commission notes the particular importance of national gender machineries enabling appropriate gender budgeting to occur. The Commission has recommended that a Gender Analysis Unit should be established within

Treasury to conduct gender disaggregated public expenditure analysis, gender disaggregated tax incidence analysis, and yearly gender budget statements.<sup>140</sup>

*(b) Monitoring and reporting gender equality indicators*

228. In Australia, there is no institutional arrangement in place for an agency independent of government to regularly report to Parliament and the Australian public, providing a considered evidence-based assessment of progress against an integrated set of national gender equality indicators and to benchmark progress against those indicators over time.
229. The Commission has existing functions, such as its education and research function, which would enable ongoing monitoring and reporting on gender equality benchmarks and indicators at a national level. However, the Sex Discrimination Commissioner and the Commission have assessed that the Commission is not in a position to assume this important national role under existing funding arrangements.
230. The Senate Standing Committee on Legal and Constitutional Affairs recommended that ‘the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years’.<sup>141</sup>
231. The Committee further recommended that the Commission be provided with additional resources to enable it to perform this role.<sup>142</sup> This recommendation should be implemented as part of action taken to strengthen and streamline Australia’s federal discrimination laws.

## **6 Gay, lesbian, bisexual, transgender and intersex people**

### **6.1 Protection against discrimination on the basis of sexual orientation, sex identity and gender identity**

232. There remains insufficient protection against discrimination experienced by gay, lesbian, bisexual, transgender and intersex people in Australia. The best way to address these issues is through the implementation of the Commission’s recommendations to strengthen and streamline federal discrimination laws, and to begin a process of constitutional reform to protect the principle of equality for people in Australia.
233. There is no federal law specifically prohibiting discrimination on the grounds of sexuality, sex identity or gender identity. While the Commission may investigate a complaint of discrimination in employment on the grounds of sexual orientation, and complaints of human rights breaches based on sex or gender identity, these protections are limited and any recommendations made by the Commission are not enforceable.
234. Introducing a national Equality Act which provided a legal remedy for discrimination on the grounds of sexuality, and sex and gender identity, would send a strong message to the community that gay, lesbian, bisexual,

transgender and intersex people are entitled to the same rights as any other person.

235. In addition, same-sex couples in Australia do not enjoy equality of rights regarding relationship recognition, including civil marriage rights.

## **6.2 Official documents and records for people who are sex and gender diverse**

236. Having documents that contain accurate information about sex and gender is crucial for the full participation in society of people who are sex and gender diverse. It is also an important aspect of freedom of expression and, in relation to travel documents, can affect a person's freedom of movement and travel.<sup>143</sup>

237. Some transgender, transsexual and intersex people have official documents that state an inappropriate sex. Although Australia has some systems that enable the sex marker on official documents to be changed, not all transgender, transsexual and intersex people can access those systems. In particular, current systems for changing the sex marker on some official documents can only be accessed by people who have undergone sex affirmation surgery. Further, the current systems do not allow for people who are married to change some or all of their documents.

238. The absence of nationally consistent procedures to assist people who are sex and gender diverse to change their official documents and government records means that the process may be time consuming, frustrating and inconsistent.<sup>144</sup>

239. In March 2009, the Commission launched the concluding paper from its sex and gender diversity project, *Sex Files: the legal recognition of sex in documents and government records* (Sex Files).<sup>145</sup> In Sex Files, the Commission recommended that:

- Access to the system for having sex legally recognised to accord with sex identity should be broadened.
- The process for amending documents and records to legally recognise sex identity should be streamlined and user-friendly.

240. In Sex Files, the Commission further recommended that the federal government should take a leadership role in ensuring that there is a nationally consistent approach to the legal recognition of sex, in accordance with the concluding paper's recommendations.

## **7 National strategy for implementation of the Convention on the Rights of Persons with Disabilities**

241. The Commission has welcomed the government's decision to pursue a National Disability Strategy based on the *Convention on the Rights of Persons with Disabilities* (Disability Convention).

242. The Disability Convention makes even clearer than previous human rights instruments that legal measures alone are not a sufficient response to Australia's treaty obligations on human rights, or sufficient to ensure that human rights are fully and equally enjoyed in practice by all people in Australia.
243. The Disability Convention, while intended to reflect rights already recognised in the human rights treaties, provides substantially more detail than previously available on the meaning of those rights in relation to people with disability and guidance on measures which should be adopted or considered in turning rights into realities.
244. The obligations of parties to the Disability Convention (under article 4) include the general obligation:
- to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.
245. Article 4(1)(c) of the Convention requires parties to 'take into account the protection and promotion of the human rights of persons with disabilities in *all* policies and programmes' (emphasis added), rather than only in those areas specifically targeted at disability issues.
246. The Commission considers it clear that a comprehensive national strategy involving all areas and levels of government is necessary to implement this obligation.
247. A National Disability Strategy should include:
- development and implementation of more detailed disability strategies for all areas and levels of government, both on relevant aspects of each department and agency's specific responsibilities and elements common to all agencies
  - establishment of a co-ordination mechanism and monitoring framework
  - substantially enhanced resourcing for disability representative, advocacy and advisory bodies to ensure they are able to provide the input governments will require.<sup>146</sup>

## **8 The right to vote**

248. The Commission has repeatedly raised concerns about the ability of Australians to exercise their right to vote and participate in the political process without discrimination.<sup>147</sup> These concerns have included:
- the lack of availability of electronic voting for people with a vision impairment
  - difficulties faced by people who are homeless
  - restrictions on the voting rights of prisoners.

249. Electronically assisted voting for people with vision impairment was trialed at the 2007 federal election. In March 2009 the Joint Committee on Electoral Matters released a report on the trial, recommending that electronic voting be discontinued, largely due to the high level of expense involved.<sup>148</sup>
250. However, the Commission believes it is important that this method of voting be made permanently available and be provided in as many locations as possible. Eligibility to use this method of voting should be extended to all people who are unable to complete a secret ballot using a pencil and paper, including people with physical disability and people who cannot effectively use written instructions in completing a ballot paper, whether by reason of intellectual or learning disability, or other language or literacy difficulties.
251. People experiencing homelessness in Australia often face significant difficulties in exercising their right to vote. For example, some people may have difficulty meeting proof of identity requirements because they do not have and cannot afford to obtain the necessary identity documents. Further, the threat of monetary penalties for failure to vote or failure to register changes of address may also discourage homeless people from enrolling to vote.
252. Under Australian law, persons serving sentences of imprisonment of three years or more are not eligible to vote.<sup>149</sup> The Commission is concerned that this restriction on the right of prisoners to vote may not be proportionate, as required by article 25 of the ICCPR.<sup>150</sup> Further, this restriction may have a disproportionate impact on groups who are overrepresented in the prison population, such as Indigenous peoples, people with mental illness and people with an intellectual disability.

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<sup>1</sup> These issues are discussed in detail in: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2004), at [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport03/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport03/index.html) (viewed 4 June 2009). See also Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005* (2005), at [www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf](http://www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf) (viewed 4 June 2009); Australian Institute of Health and Welfare, *Australia's Health No. 11* (2008), at <http://www.aihw.gov.au/publications/aus/ah08/ah08-c03.pdf> (viewed 4 June 2009). In May 2009, the Australian Bureau of Statistics issued new data indicating that the life expectancy gap between Indigenous and non-Indigenous people is approximately 10 years and not 17 years as previously estimated. See further Aboriginal and Torres Strait Islander Social Justice Commissioner, 'More accurate reporting needed to address life expectancy gap' (Press Release, 26 May 2009). At [http://www.humanrights.gov.au/about/media/media\\_releases/2009/41\\_09.html](http://www.humanrights.gov.au/about/media/media_releases/2009/41_09.html) (viewed 4 June 2009).

<sup>2</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, note 1.

<sup>3</sup> The Hon J Macklin MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009), at [http://www.un.org/esa/socdev/unpfii/documents/Australia\\_official\\_statement\\_endorsement\\_UNDRIP.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf) (viewed 4 June 2009); The Hon R McClelland MP, *Remarks in Support of the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009), at [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2009\\_3April2009-](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2009_3April2009-)

[Remarks in Support of the United Nations Declaration on the Rights of Indigenous Peoples](#) (viewed 1 June 2009).

<sup>4</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (Advance Unedited Version), UN Doc E/C.12/AUS/CO/4 (2009), para 33. At

<http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 9 June 2009).

<sup>5</sup> Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT' (Media Release, 21 June 2007). At

[http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency\\_21june07.htm](http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm) (viewed 4 June 2009). The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'* (2007). At <http://www.inquirysaac.nt.gov.au/> (viewed 4 June 2009).

<sup>6</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

<sup>7</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008). At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html) (viewed 4 June 2009).

<sup>8</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above, pp 238 - 239.

<sup>9</sup> In response to an Early Warning and Urgent Action Procedure, the UN Committee on the Elimination of Racial Discrimination has asked Australia to submit further details and information on the NTER no later than 31 July 2009. See F Victoire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, Correspondence to C Millar, Ambassador, Permanent Representative, Permanent Mission of Australia to the United Nations at Geneva, 13 March 2009. At

[http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia130309.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf) (viewed 9 June 2009). See also UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – Australia* (Advanced Unedited Version), UN Doc CCPR/C/AUS/CO/5 (2 April 2009), at

<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc> (viewed 9 June 2009); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 4.

<sup>10</sup> Northern Territory Emergency Response Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 10. At <http://www.terreview.gov.au> (viewed 4 June 2009).

<sup>11</sup> *Australian Government and Northern Territory Government Response to the Report of the NTER Review Board* (21 May 2009). At [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/response\\_to\\_reportNTER/Documents/Aust\\_response\\_1882953\\_1.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Documents/Aust_response_1882953_1.pdf) (viewed 4 June 2009).

<sup>12</sup> Australian Government, *Future Directions for the Northern Territory Emergency Response Discussion Paper* (21 May 2009). At

[http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/future\\_directions/Documents/discussion\\_paper\\_6.pdf](http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/future_directions/Documents/discussion_paper_6.pdf) (viewed 4 June 2009).

<sup>13</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, note 5; Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future. Addressing child sexual assault in Aboriginal communities in NSW* (2006), at

<http://www.lawlink.nsw.gov.au/acsat> (viewed 4 June 2009).

<sup>14</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, note 7, p 116.

<sup>15</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2007-2008*, Child Welfare Series No 45 (2009), p 65. At <http://www.aihw.gov.au/publications/cws/cpa07-08/cpa07-08.pdf> (viewed 4 June 2009).

<sup>16</sup> Council of Australian Governments, *Protecting children is everyone's business: National Framework for Protecting Australia's Children 2009-2020* (2009). At

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- <sup>17</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues* (2006), pp 5 - 6. At [http://www.humanrights.gov.au/social\\_justice/familyviolence/index.html](http://www.humanrights.gov.au/social_justice/familyviolence/index.html) (viewed 4 June 2009). See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, note 7, pp 194 - 195.
- <sup>18</sup> Cape York Institute for Policy and Leadership, *From hand out to hand up* (2007). At [http://www.cyi.org.au/WEBSITE%20uploads/Welfare%20Reform%20Attachments/From%20Hand%20Out%20to%20Hand%20Up\\_Welfare%20Reform%20Report.pdf](http://www.cyi.org.au/WEBSITE%20uploads/Welfare%20Reform%20Attachments/From%20Hand%20Out%20to%20Hand%20Up_Welfare%20Reform%20Report.pdf) (viewed 4 June 2009).
- <sup>19</sup> Council of Australian Governments, *Protecting children is everyone's business*, note 16, p 19.
- <sup>20</sup> Close the Gap, at <http://www.closesthegap.com.au>, (viewed 4 June 2009).
- <sup>21</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'More accurate reporting needed to address life expectancy gap', note 1.
- <sup>22</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 167 (Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf> (viewed 4 June 2009).
- <sup>23</sup> Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, note 1, p 46.
- <sup>24</sup> Australian Bureau of Statistics, above, p 47.
- <sup>25</sup> UN Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Addendum - Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2, (2007), para 80. At <http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/72/PDF/G0712572.pdf?OpenElement> (viewed 4 June 2009).
- <sup>26</sup> The UN Committee on Economic, Social and Cultural Rights has noted that cultural adequacy is an essential aspect of housing adequacy: 'the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'. UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The right to adequate housing*, UN Doc E/1992/23, annex III (1991) 114, para 8(g). At [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument) (viewed 4 June 2009).
- <sup>27</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 4, para 26.
- <sup>28</sup> See the *National Affordable Housing Agreement* and its associated National Partnerships (NPs) and the Council of Australian Governments Commitments from February 2009: Council of Australian Governments, *Special Council Of Australian Governments Meeting: Nation Building And Jobs Plan – Communiqué* (2009). At [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-02-05/docs/20090205\\_communique.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-02-05/docs/20090205_communique.pdf) (viewed 4 June 2009).
- <sup>29</sup> Council of Australian Governments, *National Partnership on Remote Indigenous Housing Agreement*, Fact Sheet. At [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-11-29/docs/20081129\\_remote\\_indigenous\\_housing\\_factsheet.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/docs/20081129_remote_indigenous_housing_factsheet.pdf) (viewed 4 June 2009).
- <sup>30</sup> Both of these partnerships fall within the Australian Government's overarching *National Indigenous Reform Agreement (NIRA)*. This provides a summary of action being taken by all governments against the 'Closing the Gap' targets, as well as the operation of the mainstream national agreements in health, schools, vocational education and training, disability services and housing and several National Partnerships.
- <sup>31</sup> Tangentyere Council, 'Tangentyere Supports Open and Transparent Tenancy Reform' (Media Release, 25 May 2009). At <http://www.tangentyere.org.au/publications/documents/TENANCYREFORM25MAY2009.pdf> (viewed 4 June 2009).
- <sup>32</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples), GA Resolution 61/295, UN Doc A/61/L.67 (2007), arts 5, 8, 10, 19, 23, 27, 28. At [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (viewed 29 May 2009).
- <sup>33</sup> Laynhapuy Homelands Association, 'No future for Yolngu living on homelands' (Press Release, 21 May 2008). At <http://stoptheintervention.org/facts/your-voice/laynhapuy-homelands-association> (viewed 4 June 2009).
- <sup>34</sup> Northern Territory Government, *Working Future - Fresh ideas/real results: Outstations/homelands policy - Headline Policy Statement* (2009). At [http://www.workingfuture.nt.gov.au/download/Headline\\_Policy\\_Statement.pdf](http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf) (viewed 4 June 2009).

- <sup>35</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in association with the Federation of Aboriginal and Torres Strait Islander Languages (FATSIL), *National Indigenous Languages Survey Report 2005* (2005), p 3. At [http://www.arts.gov.au/\\_data/assets/pdf\\_file/0006/35637/NILS\\_Report\\_2005.pdf](http://www.arts.gov.au/_data/assets/pdf_file/0006/35637/NILS_Report_2005.pdf) (viewed 4 June 2009).
- <sup>36</sup> AIATSIS and FATSIL, above.
- <sup>37</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 4, para 33.
- <sup>38</sup> See Hon John von Doussa QC, *Legal Protection of Cultural Artistic Works and Folklore in Australia* (Presentation to the International Association for the Protection of Intellectual Property and The Malaysia Bar Council's Intellectual Property Committee - Joint Conference, Kuala Lumpur, 1 September 2006). At [http://www.humanrights.gov.au/about/media/speeches/speeches\\_president/2006/20060901\\_Malaysia.html](http://www.humanrights.gov.au/about/media/speeches/speeches_president/2006/20060901_Malaysia.html) (viewed 4 June 2009).
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- <sup>42</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 4, para 31.
- <sup>43</sup> Department of Employment, Education and Training, *Northern Territory Government, Indigenous Languages and Culture in Northern Territory Schools Report 2004 – 2005*, pp 34 – 37. At [http://www.det.nt.gov.au/education/indigenous\\_education/previous\\_publications/indigenous\\_languages\\_culture\\_report/indigenous\\_languages\\_culture\\_report.pdf](http://www.det.nt.gov.au/education/indigenous_education/previous_publications/indigenous_languages_culture_report/indigenous_languages_culture_report.pdf) (viewed 4 June 2009).
- <sup>44</sup> Australian Bureau of Statistics, *Prisoners in Australia* (2008), p 3. At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/\\$File/45170\\_2008.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/$File/45170_2008.pdf) (viewed 1 June 2009).
- <sup>45</sup> Australian Bureau of Statistics, above, p 6.
- <sup>46</sup> Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006-2007* (2008). At <http://www.aihw.gov.au/publications/juv/jjia06-07/jjia06-07.pdf> (viewed 1 June 2009).
- <sup>47</sup> UN Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008). At <http://www2.ohchr.org/english/bodies/cat/cats40.htm> (viewed 4 June 2009)
- <sup>48</sup> *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).
- <sup>49</sup> *International Covenant on Civil and Political Rights* (ICCPR), 1966, art 27, at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (viewed 22 May 2009); UN Human Rights Committee, *General Comment 23: The rights of minorities (Art 27)*, UN CCPR/C/21/Rev.1/Add.5 (1994), para 7, at <http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> (viewed 4 June 2009). For further details, see Human Rights and Equal Opportunity Commission, *Senate Legal and Constitutional Affairs Committee on the Crimes Amendment (Bail And Sentencing) Bill 2006* (27 September 2006). At: [http://www.humanrights.gov.au/legal/submissions/crimes\\_amendment.html](http://www.humanrights.gov.au/legal/submissions/crimes_amendment.html) (viewed 4 June 2009).
- <sup>50</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1979. At <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm> (viewed 29 May 2009).
- <sup>51</sup> *Convention on the Rights of the Child* (CRC), 1989. At <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (viewed 29 May 2009).
- <sup>52</sup> See *Sentencing Act 1995* (NT), ss 78BA, 78BB.
- <sup>53</sup> Human Rights and Equal Opportunity Commission, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). At [http://www.humanrights.gov.au/social\\_justice/bth\\_report/report/index.html](http://www.humanrights.gov.au/social_justice/bth_report/report/index.html) (viewed 4 June 2009).
- <sup>54</sup> Commonwealth, *Parliamentary Debates*, note 22, p 167.

<sup>55</sup> UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000). At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40.paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40.paras.498-528.En?OpenDocument) (viewed 2 June 2009).

<sup>56</sup> See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional References and Legislation Committee Inquiry into Stolen Wages* (1 August 2006), paras 13 - 24. At [http://www.humanrights.gov.au/legal/submissions/stolen\\_wages\\_2006.html](http://www.humanrights.gov.au/legal/submissions/stolen_wages_2006.html) (viewed 4 June 2009).

<sup>57</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006). At [http://www.aph.gov.au/senate/committee/legcon\\_ctte/stolen\\_wages/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/report/index.htm) (viewed 4 June 2009).

<sup>58</sup> *Native Title Act 1993* (Cth), Preamble.

<sup>59</sup> *Bodney v Bennell* [2008] FCAFC 63, para 89 (Finn, Sundberg and Mansfield JJ); affirming *Risk v Northern Territory of Australia* [2006] FCA 404, para 97 (Mansfield J).

<sup>60</sup> See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, paras 25 - 26, 44, 78 - 89 (Gleeson CJ, Gummow and Hayne JJ) for the High Court's comments on the Full Federal Court's consideration of 'traditional', and for the level of adaptation of traditional law and custom permitted. For commentary on the limitations of the Native Title Act in recognising or allowing for revitalisation of culture, and limited adaptation of cultural traditions, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2008), pp 178 - 181, at [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport07/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html) (viewed 4 June 2009) and *Native Title Report 2008* (2009), pp 87 - 88, at

[http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport08/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html) (viewed 4 June 2009). See also Chief Justice RS French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Native Title User Group, Adelaide, 9 July 2008). At [http://www.fedcourt.gov.au/aboutct/judges\\_papers/speeches\\_frenchj35.rtf](http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf).

<sup>61</sup> The Native Title Act was amended by the *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth). The Native Title Amendment Bill 2009 was before Parliament at the time of writing.

<sup>62</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, note 60.

<sup>63</sup> National Native Title Tribunal, *National Report: Native Title* (2009). At <http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/National%20Report%20Card%20-%20March%202009.pdf> (viewed 4 June 2009).

<sup>64</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, note 60.

<sup>65</sup> *Northern Territory National Emergency Response Act 2007* (Cth), ss 51(1), 51(2).

<sup>66</sup> Australian Human Rights Commission, Reports to the Minister under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). At [http://www.humanrights.gov.au/legal/HREOCA\\_reports/index.html](http://www.humanrights.gov.au/legal/HREOCA_reports/index.html).

<sup>67</sup> Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (January 2009), at [http://humanrights.gov.au/human\\_rights/immigration/idc2008.html](http://humanrights.gov.au/human_rights/immigration/idc2008.html) (viewed 4 June 2009); Human Rights and Equal Opportunity Commission, *Summary of observations following the inspection of mainland immigration detention facilities 2007* (December 2007), at [http://www.humanrights.gov.au/pdf/human\\_rights/asylum\\_seekers/summary\\_idc\\_report07.pdf](http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/summary_idc_report07.pdf); Human Rights and Equal Opportunity Commission, *Summary of observations following the inspection of mainland immigration detention facilities 2006* (January 2007), at [http://www.humanrights.gov.au/pdf/human\\_rights/HREOC\\_IDC\\_20070119.pdf](http://www.humanrights.gov.au/pdf/human_rights/HREOC_IDC_20070119.pdf) (viewed 4 June 2009).

<sup>68</sup> See, for example, Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (4 August 2008), at [http://www.humanrights.gov.au/legal/submissions/2008/20080829\\_immigration\\_detention.html](http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html) (viewed 4 June 2009).

<sup>69</sup> Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004), at [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/report/PDF/alr\\_complete.pdf](http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf) (viewed 2 June 2009); Human Rights and Equal Opportunity Commission, *Those who've come across*



*the seas – Detention of unauthorised arrivals* (1998), at

[http://www.humanrights.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf) (viewed 2 June 2009).

<sup>70</sup> Australian Human Rights Commission, *2008 Immigration detention report*, note 67.

<sup>71</sup> Conclusion No 44 of the Executive Committee of the United Nations High Commissioner for Refugees states that where the detention of asylum seekers is deemed necessary, it should only be used to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identification documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. See United Nations High Commissioner for Refugees, Executive Committee, *Conclusion No. 44 (XXXVII) - Detention of Refugees and Asylum Seekers* (13 October 1986). At <http://www.unhcr.org/refworld/docid/3ae68c43c0.html> (viewed 4 June 2009).

<sup>72</sup> Human Rights and Equal Opportunity Commission, *A last resort?*, note 69.

<sup>73</sup> ICCPR, note 49, art 9(1); CRC, note 51, art 37 (b).

<sup>74</sup> CRC, above, art 37(b).

<sup>75</sup> See, for example, Human Rights and Equal Opportunity Commission, *A last resort?*, note 69, ch 9.

<sup>76</sup> C Evans, *New Directions in Detention – Restoring Integrity to Australia’s Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, ANU, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 4 June 2009).

<sup>77</sup> See, for example, Human Rights and Equal Opportunity Commission, *Commission submission to Joint Standing Committee on Migration*, note 68, pp 13 - 15.

<sup>78</sup> UN Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), at [http://www.bayefsky.com/html/109\\_australiavws560.php](http://www.bayefsky.com/html/109_australiavws560.php) (viewed 1 June 2009); UN Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), at

<http://www.unhchr.ch/tbs/doc.nsf/0/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument> (viewed 2 June 2009); UN Human Rights Committee, *Bakhtiyari v Australia*, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), at <http://www.unhchr.ch/tbs/doc.nsf/0/8662db397d948638c1256de2003b3d6a?Opendocument> (viewed 4 June 2009); UN Human Rights Committee, *D & E v Australia*, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006), at <https://www1.umn.edu/humanrts/undocs/1050-2002.html> (viewed 4 June 2009).

<sup>79</sup> *Migration Act 1958* (Cth), s 46A.

<sup>80</sup> *Migration Act 1958* (Cth), s 494AA.

<sup>81</sup> *Convention Relating to the Status of Refugees*, 1951. At [http://www.unhchr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) (viewed 5 June 2009).

<sup>82</sup> For further details, see Australian Human Rights Commission, *2008 Immigration detention report*, note 67, pp 70 - 79; Human Rights and Equal Opportunity Commission, *Submission to Joint Standing Committee on Migration*, note 68, pp 15 - 16; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (22 May 2006), at <http://www.humanrights.gov.au/legal/submissions/migration20060522.html> (viewed 4 June 2009)

<sup>83</sup> See Human Rights and Equal Opportunity Commission, *A last resort?*, note 69, Recommendation 4, pp 877 - 880; Australian Human Rights Commission, *2008 Immigration detention report*, note 67, p 18; Australian Human Rights Commission, *Comments on Australia’s Compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (April 2008), at [http://www.humanrights.gov.au/legal/submissions/2008/080415\\_torture.html](http://www.humanrights.gov.au/legal/submissions/2008/080415_torture.html) (viewed 4 June 2009). In 2008, the UN Committee against Torture also recommended that immigration detention standards be codified in legislation: Committee against Torture, *Concluding Observations: Australia*, note 47.

<sup>84</sup> See Human Rights and Equal Opportunity Commission, *Submission to Joint Standing Committee on Migration*, note 68, pp 20 - 22; Australian Human Rights Commission, *Submission to the Senate Select Committee on Ministerial Discretion in Migration* (2003), at [http://www.humanrights.gov.au/legal/submissions/migration\\_matters.html](http://www.humanrights.gov.au/legal/submissions/migration_matters.html) (viewed 4 June 2009).

<sup>85</sup> See, for example, Human Rights and Equal Opportunity Commission, *Submission to the Citizenship Taskforce on the discussion paper ‘Australian citizenship: much more than just a ceremony’* (September 2006), at

[http://www.humanrights.gov.au/racial\\_discrimination/report/citizenship\\_paper\\_2006.html](http://www.humanrights.gov.au/racial_discrimination/report/citizenship_paper_2006.html) (viewed 4 June 2009); Human Rights and Equal Opportunity Commission, *Submission to the Legal and*

Constitutional Affairs Committee on the Australian Citizenship Amendment (Citizenship Testing Bill) 2007 (6 July 2007), at [http://www.humanrights.gov.au/legal/submissions/2007/aust\\_citizenship\\_amendment.html](http://www.humanrights.gov.au/legal/submissions/2007/aust_citizenship_amendment.html) (viewed 4 June 2009).

<sup>86</sup> This is consistent with the UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council*, UN Doc E/2002/68/Add.1 (2002). At [http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/caf3deb2b05d4f35c1256bf30051a003?open\\_document](http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/caf3deb2b05d4f35c1256bf30051a003?open_document) (viewed 4 June 2009). See further E Broderick, *Slavery in the 21<sup>st</sup> Century: A Human Rights Challenge* (Speech delivered at the Australian Human Rights Commission, Sydney, 16 October 2008). At [http://www.humanrights.gov.au/about/media/speeches/sex\\_discrim/2008/20081014\\_slavery.html](http://www.humanrights.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html) (viewed 4 June 2009).

<sup>87</sup> UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 9, para 22.

<sup>88</sup> Australian National Audit Office, *Management of the Australian Government's Action Plan to Eradicate Trafficking in Persons*, Report No 30 (2008-2009), para 2.10. At <http://www.anao.gov.au/director/publications/auditreports/2008-2009.cfm?pageNumber=3> (viewed 4 June 2009).

<sup>89</sup> The award was made under the *Victims Support and Rehabilitation Act 1996* (NSW) in response to a claim for compensation for sexual assault by a Thai woman who was trafficked to Australia in 1995 when she was 13: N Craig, 'Sex slave victim wins abuse claim', *The Age*, 29 May 2007. At <http://www.theage.com.au/news/national/sex-slave-victim-wins-abuse-claim/2007/05/28/1180205160434.html> (viewed 4 June 2009).

<sup>90</sup> These could include establishing a federal compensation scheme for victims of crime; exploring the potential of the *Proceeds of Crime Act 2002* (Cth) to enable the forfeiture of an offender's assets to provide compensation to victims and pursuing reparations orders under the *Crimes Act 1914* (Cth); and improving the access of trafficked people to information and legal advice about their existing avenues for making compensation claims, including claims for the recovery of unpaid wages.

<sup>91</sup> Australian Government National Roundtable on People Trafficking, 'Statement of Outcomes' (23 October 2008). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~TraffickingRoundtableOnPeopleTrafficking-StatementofOutcomes-October2008.doc/\\$file/TraffickingRoundtableOnPeopleTrafficking-StatementofOutcomes-October2008.doc](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~TraffickingRoundtableOnPeopleTrafficking-StatementofOutcomes-October2008.doc/$file/TraffickingRoundtableOnPeopleTrafficking-StatementofOutcomes-October2008.doc). See further Australian Institute of Criminology, *Labour Trafficking: key concepts and issues*, Transnational Crime Brief, No. 3 (2009). At <http://www.aic.gov.au/publications/tcb/tcb003.html> (viewed 4 June 2009).

<sup>92</sup> ICCPR, note 49, art 9(1).

<sup>93</sup> ICCPR, above, art 9(4).

<sup>94</sup> *Crimes Act 1914* (Cth), pt IC, div 2.

<sup>95</sup> *Crimes Act 1914* (Cth), s 23CA(4)(b).

<sup>96</sup> *Crimes Act 1914* (Cth), s 23DA(7).

<sup>97</sup> *Crimes Act 1914* (Cth), s 23CA(8).

<sup>98</sup> *Crimes Act 1914* (Cth), s 23CA(8)(m).

<sup>99</sup> *Crimes Act 1914* (Cth), s 23CA(8)(m).

<sup>100</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), pt III, div 3.

<sup>101</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4).

<sup>102</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS.

<sup>103</sup> See Human Rights and Equal Opportunity Commission, *Submission to the Security Legislation Review Committee* (January 2006), at

[http://www.humanrights.gov.au/legal/submissions/security\\_legislation\\_review.html](http://www.humanrights.gov.au/legal/submissions/security_legislation_review.html) (viewed 4 June 2009); Human Rights and Equal Opportunity Commission, *Submission to the Clarke Inquiry on the case of Dr Mohamed Haneef* (May 2008), at [http://www.humanrights.gov.au/legal/submissions/2008/200805\\_haneef.html](http://www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html) (viewed 4 June 2009).

<sup>104</sup> *Inquiry by the Hon. John Clarke QC into the case of Dr Mohamed Haneef* (November 2008), Recommendation 4 at <http://www.haneefcaseinquiry.gov.au> (viewed 4 June 2009); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007), Recommendation 7(b), at <http://www.aph.gov.au/House/committee/pjcis/proscription/report/front.pdf> (viewed 4 June 2009); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of*

*Security and Counter Terrorism Legislation* (December 2006), Recommendation 2, at <http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm> (viewed 4 June 2009); Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006), para 18.2, at [http://www.ag.gov.au/www/agd/agd.nsf/Page/National\\_securityReviewsSecurity\\_Legislation\\_Review\\_Committee](http://www.ag.gov.au/www/agd/agd.nsf/Page/National_securityReviewsSecurity_Legislation_Review_Committee) (viewed 4 June 2009).

<sup>105</sup> The Hon R McClelland, *Statement on the tabling of the Government's response to reviews of national security legislation and the public report of the Inquiry by the Hon. John Clarke QC into the case of Dr Mohamed Haneef* (23 December 2008), paras 16 - 18. At [http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/50GS6/upload\\_binary/50gs60.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/50GS6/upload_binary/50gs60.pdf;fileType=application/pdf) (viewed 4 June 2009).

<sup>106</sup> Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations'*, note 104, Recommendation 7(b); Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, note 104, p 21. The *Review of Security and Counter Terrorism Legislation* supported many of the recommendations of the earlier report.

<sup>107</sup> Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, note 104, pp 23 – 38.

<sup>108</sup> See, for example, reports by Australian Muslim Civil Rights Advocacy Network, available at: <http://www.amcran.org> (viewed 4 June 2009).

<sup>109</sup> Human Rights and Equal Opportunity Commission, *Ismae – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, 2004. At [http://www.humanrights.gov.au/racial\\_discrimination/isma/index.html](http://www.humanrights.gov.au/racial_discrimination/isma/index.html) (viewed 5 June 2009).

<sup>110</sup> Security Legislation Review Committee, note 104, p 12.

<sup>111</sup> Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, note 104, para 3.3.

<sup>112</sup> Parliamentary Joint Committee on Intelligence and Security, above, para 3.5.

<sup>113</sup> Parliamentary Joint Committee on Intelligence and Security, above; Security Legislation Review Committee, note 104.

<sup>114</sup> Australian Human Rights Commission, *Muslim and Community Partnerships*, <http://www.humanrights.gov.au/partnerships/index.html> (viewed 4 June 2009).

<sup>115</sup> Human Rights and Equal Opportunity Commission, *Gender Equality: What matters for Australian women and men* (2008). At [http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/index.html](http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html) (viewed 4 June 2009).

<sup>116</sup> Human Rights and Equal Opportunity Commission, above, p 20.

<sup>117</sup> See Human Rights and Equal Opportunity Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (1 September 2008). At [http://www.humanrights.gov.au/legal/submissions/2008/20080901\\_SDA.html](http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html) (viewed 7 June 2009).

<sup>118</sup> Human Rights and Equal Opportunity Commission, above.

<sup>119</sup> See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008). At [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/sex\\_discrim/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/index.htm) (viewed 7 June 2009).

<sup>120</sup> *Maternity Protection Convention, 2000* (No 183). At <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183> (viewed 9 June 2009).

<sup>121</sup> See Human Rights and Equal Opportunity Commission, *Submission (No 1) to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave* (2 June 2008), at [http://humanrights.gov.au/legal/submissions/2008/20080602\\_productivity.html](http://humanrights.gov.au/legal/submissions/2008/20080602_productivity.html) (viewed 4 June 2009); Human Rights and Equal Opportunity Commission, *Submission (No 2) to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave* (24 November 2008), at [http://humanrights.gov.au/legal/submissions/2008/20081124\\_maternity.html](http://humanrights.gov.au/legal/submissions/2008/20081124_maternity.html) (viewed 4 June 2009).

<sup>122</sup> Publications from the Commission's two-year Women, Men, Work and Family project are available at [http://www.humanrights.gov.au/sex\\_discrimination/its\\_about\\_time/index.html](http://www.humanrights.gov.au/sex_discrimination/its_about_time/index.html) (viewed 4 June 2009).

<sup>123</sup> Australian Human Rights Commission, *Submission to the Australian Government Department of Education, Employment and Workplace Relations on the Discussion Paper National Employment*



*Standards Exposure Draft* (4 April 2008). At

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<sup>124</sup> See Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act 1984*, note 117, recommendations.

<sup>125</sup> Human Rights and Equal Opportunity Commission, above.

<sup>126</sup> R Clare, *Retirement Savings Update* (2008), p 3. At

<http://www.superannuation.asn.au/Reports/default.aspx> (viewed 4 June 2009).

<sup>127</sup> The poverty measurement tool for this study is 50% of the median income poverty line. B Heady & D Warren, *Families, Incomes and Jobs, Volume 3: A Statistical Report on Waves 1 to 5 of the HILDA Survey* (2008), p 55. At <http://www.melbourneinstitute.com/hilda/statreport/statreport-v3-2008.pdf> (viewed 4 June 2009).

<sup>128</sup> R Tanton et al, *Old Single and Poor: Using Microsimulation and Microdata to Analyse Poverty and the Impact of Policy Change Among Older Australians* (2008), p 15. At

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<sup>129</sup> Australian Human Rights Commission, *Submission to Australia's Future Tax System (Retirement Income System)* (27 February 2009). At

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<sup>130</sup> Senate Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984*, note 119.

<sup>131</sup> Australian Bureau of Statistics, *Average Weekly Earnings, August 2008*, Cat no. 6302.0 (2008). At

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<sup>132</sup> Human Rights and Equal Opportunity Commission, *Sexual harassment: Serious business, Results of the 2008 Sexual Harassment National Telephone Survey* (2008). At

[http://www.humanrights.gov.au/sexualharassment/serious\\_business/index.html](http://www.humanrights.gov.au/sexualharassment/serious_business/index.html) (viewed 4 June 2009).

<sup>133</sup> Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act 1984*, note 117.

<sup>134</sup> J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004), p 3. At

<http://www.aic.gov.au/publications/rpp/56/RPP56.pdf> (viewed 4 June 2009).

<sup>135</sup> Australian Bureau of Statistics, *Personal Safety Survey (Reissue)* (2005), p 11. At

[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060\\_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf) (viewed 4 June 2009).

<sup>136</sup> VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004), p 11. At

<http://www.vichealth.vic.gov.au/~media/ProgramsandProjects/MentalHealthandWellBeing/DiscriminationandViolence/IntimatePartnerViolence/ipv.ashx> (viewed 4 June 2009).

<sup>137</sup> Australian Institute of Health and Welfare, *Homeless people in SAAP: SAAP National Data Collection annual report 2006-07 Australia* (2008), p 35. At

<http://www.aihw.gov.au/publications/index.cfm/title/10523> (viewed 4 June 2009).

<sup>138</sup> Women With Disabilities Australia, *Forgotten Sisters: A Global Review of Violence against Women with Disabilities* (2007).

<sup>139</sup> CEDAW, note 50, art 2; United Nations Fourth World Conference for Women, *Beijing Platform for Action* (1995), section h. At [www.un.org/womenwatch/daw/beijing/platform/institu.htm](http://www.un.org/womenwatch/daw/beijing/platform/institu.htm) (viewed 4 June 2009).

<sup>140</sup> Australian Human Rights Commission, *Submission to the Review Panel on Australia's Future Tax System*, note 129, recommendation 15.

<sup>141</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act*, note 119, recommendation 33.

<sup>142</sup> Senate Standing Committee on Legal and Constitutional Affairs, above, recommendation 33.

<sup>143</sup> ICCPR, note 49, arts 2, 12, 18, 19.

<sup>144</sup> See further Human Rights and Equal Opportunity Commission, *Report of initial consultation of the Sex and Gender Diversity Project* (July 2008). At

[http://www.humanrights.gov.au/genderdiversity/consultation\\_report2008.html](http://www.humanrights.gov.au/genderdiversity/consultation_report2008.html) (viewed 4 June 2009).

<sup>145</sup> Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, Concluding Paper of the sex and gender diversity project (2009), at

[http://humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://humanrights.gov.au/genderdiversity/sex_files2009.html) (viewed 1 June 2009).

<sup>146</sup> The Commission's views on the role of a National Disability Strategy in implementing the Disability Convention are set out in full in: Australian Human Rights Commission, *National Disability Strategy*:

*Australian Human Rights Commission Submission* (November 2008). At [http://www.humanrights.gov.au/disability\\_rights/commonwealth/NDS.htm](http://www.humanrights.gov.au/disability_rights/commonwealth/NDS.htm)

<sup>147</sup> See, for example, Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2007 federal election* (15 May 2008). At <http://www.aph.gov.au/house/committee/em/elect07/subs/sub097.pdf> (viewed 4 June 2009).

<sup>148</sup> Joint Standing Committee on Electoral Matters, *Report on the 2007 federal election electronic voting trials*, 16 March 2009. At *Report on the 2007 federal election electronic voting trials* (viewed 11 June 2009).

<sup>149</sup> In 2006, the Australian Government passed legislation which excluded all people serving a sentence of imprisonment, of any length, from voting. The High Court later found that these amendments were constitutionally invalid: *Roach v Electoral Commissioner* (2007) 233 CLR 162.

<sup>150</sup> UN Human Rights Committee, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, UN Doc CCPR/C/21/Rev.1/Add.7 (1996), para 14. At

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) (viewed 4 June 2009).



## **Appendix 3 – Statement of Constitutional Validity of an Australian Human Rights Act**

### **Constitutional Validity of an Australian Human Rights Act**

On 22 April 2009 the Australian Human Rights Commission convened a meeting of Australian constitutional and human rights lawyers to discuss the constitutional implications of an Australian Human Rights Act. This statement records the consensus reached by those at the meeting. Their names are listed below.

#### **Agreement on constitutional validity**

The unanimous view of the meeting was that a Human Rights Act for Australia can be drafted that would be constitutionally valid.

In particular, it was agreed that there is no constitutional impediment to an Act that has the following elements:

#### **1. Human rights defined**

The Act would identify the human rights to be protected, being rights contained in the International Covenant on Civil and Political Rights.

#### **2. Limitation of rights**

It would allow the rights identified in the Act to be limited in defined circumstances, taking into account factors such as the nature of the right and considerations of necessity and proportionality.

#### **3. Bills tabled in federal Parliament to be accompanied by a human rights ‘statement of compatibility’**

The Act would require the Attorney-General, or the member introducing legislation, to prepare and table in federal Parliament a human rights ‘statement of compatibility’. The statement of compatibility would, at a minimum, give reasoned consideration to whether the Bill was compatible with the human rights identified in the Act.

#### **4. Federal public authorities would be bound by a Human Rights Act**

It would require federal public authorities to act in a way that is compatible with the rights identified in the Act unless required by law to do otherwise. This obligation could extend to organisations acting on behalf of the Commonwealth in carrying out public functions.

#### **5. Courts to interpret legislation consistently with human rights**

It would require courts to interpret all legislation of the Commonwealth in a way that is consistent with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation.

## **6. The Government to respond publicly if a court finds that a law is inconsistent with human rights**

If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of federal Parliament and require a government response.

An example of a possible process is as follows:

*The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in federal Parliament. The Government would be required to respond to the notification within a defined period (for example, 6 months).*

Following the Government's response, Parliament might decide to amend the law in question to ensure its consistency with the Act. It would not, however, be required to do so.

There may be other models for a Human Rights Act that would also be constitutionally sound. Those participating in the meeting hold differing views on the best model for an Australian Human Rights Act, including which rights should be included and the details of how best to implement some of the elements set out above.

However, all agreed that the Australian Constitution is no barrier to an effective Australian Human Rights Act.

## **Participants**

The Hon Sir Anthony Mason AC, KBE

The Hon Michael McHugh AC, QC

The Hon Catherine Branson QC, President, Australian Human Rights Commission

Ms Pamela Tate SC, Solicitor-General of Victoria

Mr Simeon Beckett, New South Wales Bar Association

Ms Sarah Moulds, Law Council of Australia

Mr Edward Santow, Gilbert + Tobin Centre of Public Law

Associate Professor James Stellios, Australian National University

Associate Professor Anne Twomey, University of Sydney

Mr Bret Walker SC, New South Wales Bar Association

Associate Professor Kristen Walker, University of Melbourne

Professor George Williams, University of New South Wales

Professor Spencer Zifcak, Australian Catholic University

## **Appendix 4 – What legal mechanisms protecting human rights exist in other jurisdictions?**

1. In many other countries, human rights are protected through uniform human rights legislation, such as a Human Rights Act, or are entrenched in the country's constitution.
2. Statutory human rights protection has also been introduced in the Australian Capital Territory (ACT) and Victoria.
3. This Appendix outlines how human rights are protected in Canada, New Zealand, South Africa, the United Kingdom (UK), the ACT and Victoria.<sup>1</sup>
4. Civil and political rights contained in the *International Covenant on Civil and Political Rights* (ICCPR) form the base minimum of human rights protections in these jurisdictions.<sup>2</sup> In South Africa, some economic, social, and cultural rights are protected. The UK recognises the right to education in addition to civil and political rights.
5. While the United States also has a Bill of Rights as part of its Constitution, it has not been included in this overview as it is not modelled on international human rights law.

### **1 Canada**

6. Human rights are protected under the *Canadian Charter of Rights and Freedoms* (Canadian Charter), which forms part of the Constitution of Canada.<sup>3</sup>
7. The Canadian Charter came into effect in 1982, with the exception of the provisions governing equality rights, which came into effect in 1985.<sup>4</sup>
8. The Canadian Charter was preceded by the *Canadian Bill of Rights 1960* (Can) (Canadian Bill of Rights). This is a federal statute that applies only to the Parliament and government of Canada (and not to the governments or legislatures of Canada's provinces). The Canadian Charter did not repeal the Canadian Bill of Rights. It has however, in practice, replaced the Canadian Bill of Rights, as it provides more comprehensive human rights protection, with a greater role for the courts.

#### **1.1 Which rights are protected under the Canadian Charter?**

9. The Canadian Charter mainly protects civil and political rights, as well as guaranteeing the language rights of Canadian citizens. Rights are organised in the following groups:
  - fundamental freedoms (for example, freedom of conscience and religion)<sup>5</sup>
  - democratic rights (for example, the right to vote)<sup>6</sup>

- mobility rights (for example, the right to enter, remain in and leave Canada)<sup>7</sup>
  - legal rights (for example, the rights of an accused person)<sup>8</sup>
  - equality rights (the right to equality before and under law, and equal protection and benefit of law; and affirmative action programs)<sup>9</sup>
  - official languages of Canada (the official languages are English and French)<sup>10</sup>
  - minority language education rights (rights to obtain education in English and French throughout Canada).<sup>11</sup>
10. Economic, social and cultural rights are not expressly recognised in the Canadian Charter. The guarantee of equality contained in the Charter has been interpreted, however, to guarantee the delivery of some government services on a non-discriminatory basis.<sup>12</sup>

## **1.2 How are rights limited under the Canadian Charter?**

11. The rights protected in the Canadian Charter are subject to a general limitations clause:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>13</sup>

12. The Canadian Charter also enables the federal Parliament or the legislature of a province to override some of the protected human rights:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.<sup>14</sup>

13. If the Parliament or a legislature of a province exercises the override power, the limitation is valid for up to five years,<sup>15</sup> and the limitation may be renewed.<sup>16</sup>

## **1.3 Does the Canadian Charter impact on law-making?**

14. As noted above, the Parliament or the legislature of a province can restrict a right protected in the Canadian Charter by exercising the 'notwithstanding' clause in section 33(1).
15. The Canadian Charter does not impose any requirements on the law-making process. The fact that rights are constitutionally entrenched is likely to ensure that they are taken into account when legislation is drafted. Where the Parliament or legislature of a province has not exercised the override power, a court can invalidate a legislative provision which infringes a constitutionally protected right.

#### **1.4 Does the Canadian Charter require the government to act consistently with the protected rights?**

16. Yes. The Charter applies to:

- the Parliament and government of Canada in respect of all matters within the authority of Parliament<sup>17</sup>
- the legislature and government of each province in respect of all matters within the authority of the legislature of each province.<sup>18</sup>

#### **1.5 What is the role of the courts under the Canadian Charter?**

17. Courts have the power to invalidate any legislative provision which impermissibly breaches a protected right. As set out in section 1 of the Canadian Charter, protected rights are subject only to reasonable limits, which are prescribed by law and can be demonstrably justified in a free and democratic society. If a restriction on a protected right does not meet these requirements, it can be invalidated.<sup>19</sup>

18. Where a person's human rights have been infringed or denied, the Canadian Charter provides that an individual can apply to a court for a remedy, and the court may provide a remedy which it considers 'appropriate and just in the circumstances'.<sup>20</sup>

## **2 New Zealand**

19. Human rights are protected under the *New Zealand Bill of Rights Act 1990* (NZ) (NZ Bill of Rights). The NZ Bill of Rights is an ordinary Act, which came into effect on 25 September 1990.<sup>21</sup>

#### **2.1 Which rights are protected under the New Zealand Bill of Rights?**

20. The NZ Bill of Rights protects civil and political rights. Most of the rights contained in the ICCPR are included in the NZ Bill of Rights, with some notable exceptions such as the right to privacy. Protected rights in the NZ Bill of Rights are grouped under the following headings:

- life and security of the person<sup>22</sup>
- democratic and civil rights<sup>23</sup>
- non-discrimination and minority rights<sup>24</sup>
- search, arrest and detention.<sup>25</sup>

21. The NZ Bill of Rights does not expressly protect economic, social and cultural rights.

## **2.2 How are rights limited under the New Zealand Bill of Rights?**

22. Human rights contained in the NZ Bill of Rights are subject to a general limitations clause, which states that rights:

may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>26</sup>

## **2.3 Does the New Zealand Bill of Rights impact on law-making?**

23. Yes. When a bill is introduced into the House of Representatives, the Attorney-General must bring to the attention of the House any provision of the bill which appears to be inconsistent with the rights protected in the NZ Bill of Rights.<sup>27</sup>

## **2.4 Does the New Zealand Bill of Rights require the government to act consistently with the protected rights?**

24. Yes. Section 3 states that the NZ Bill of Rights applies to acts done:

- (a) By the legislative, executive, or judicial branches of the government of New Zealand;  
or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

25. The New Zealand Ministry of Justice has published guidelines to assist government and public authorities to ensure that their legislation, policies and practices are consistent with the NZ Bill of Rights.<sup>28</sup>

26. The guidelines also recognise that the scope of section 3(b) of the NZ Bill of Rights is not completely certain. The guidelines provide a list of relevant factors for determining whether an organisation is covered by section 3(b), including whether the organisation is:

- acting in the public interest
- conferring a public benefit
- acting to implement or in furtherance of government policy or strategy
- under special obligations or responsibilities that other (private) bodies do not have
- receiving or involved with public funding (although this is not determinative on its own)
- exercising powers under statute or regulation.<sup>29</sup>

## **2.5 What is the role of the courts under the New Zealand Bill of Rights?**

27. Courts do not have the power to invalidate legislative provisions if they are inconsistent with the NZ Bill of Rights.

28. The courts have the power to find that a body included in section 3 of the NZ Bill of Rights has infringed an individual's human rights. Although the NZ Bill of Rights does not expressly provide for remedies in the event of an infringement, in 1994 the New Zealand Court of Appeal held that effective and appropriate remedies must be available for a breach of one of the rights contained in the NZ Bill of Rights.<sup>30</sup> President Cooke stated that 'we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed'.<sup>31</sup>
29. Since 1994, courts have applied a range of remedies in respect of a breach of an individual's human rights, including issuing a stay of proceedings, excluding 'tainted' evidence, reducing an offender's sentence, and awarding monetary compensation.<sup>32</sup>

### **3 South Africa**

30. The South African Bill of Rights forms part of the Constitution of the Republic of South Africa. The Constitution, including the Bill of Rights, was approved by the South African Constitutional Court on 4 December 1996 and took effect on 4 February 1997.

#### **3.1 Which rights are protected under the Bill of Rights?**

31. The South African Bill of Rights protects the majority of the civil and political rights contained in the ICCPR.
32. The South African Bill of Rights is particularly notable for constitutionally entrenching a range of human rights in addition to the rights contained in the ICCPR, including:
  - enhanced protection of equality rights<sup>33</sup>
  - some economic, social and cultural rights<sup>34</sup>
  - rights specific to children<sup>35</sup>
  - rights directed at ensuring procedural fairness in dealing with government, public authorities and the courts<sup>36</sup>
  - a right to a clean environment and environmental conservation.<sup>37</sup>

##### *(a) Protection of equality*

33. The South African Bill of Rights contains detailed equality provisions. Section 9(1) states that:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

34. Section 9(2) provides further detail, clarifying that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or

advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

35. In other words, the objective of the South African Bill of Rights is the achievement of substantive equality. It is not sufficient that individuals have formal recognition of equality before the law – individuals are also entitled to ‘full and equal enjoyment’ of all rights and freedoms. This places upon the state a significantly greater obligation of ensuring equality.

36. Section 9(3) provides broad grounds of non-discrimination, including ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

*(b) Economic, social and cultural rights*

37. Some of the economic, social and cultural rights included in the South African Bill of Rights are:

- labour relations, such as the right to fair labour practices and the right(s) to join and participate in a trade union<sup>38</sup>
- the right to access adequate housing<sup>39</sup>
- the right to access healthcare services, sufficient food and water and social security<sup>40</sup>
- the right to basic education for all.<sup>41</sup>

*(c) Rights of the child*

38. The South African Bill of Rights constitutionally entrenches a number of the human rights contained in the *Convention on the Rights of the Child (CRC)*.<sup>42</sup> These are directed at ensuring that children are protected from ill-treatment or exploitation, and that the best interests of the child are a primary consideration in all decisions affecting the child.<sup>43</sup>

*(d) Procedural fairness rights*

39. The South African Bill of Rights contains some rights which are not specifically stated in international human rights instruments, but which promote the fair and effective functioning of a democratic state.

40. The first of these is the right of access to information held by the state, or held by another person and which is required for the exercise or protection of any rights.<sup>44</sup> The South African Bill of Rights requires national legislation to be enacted to give effect to this right.<sup>45</sup> The right of access to information is derived from the right to freedom of expression, which is outlined in article 19 of the ICCPR. International courts and tribunals have held that the right to freedom of expression includes the right of access to information.<sup>46</sup> The South African Bill of Rights is one of the first national constitutions to expressly recognise the right of access to information.



41. The second of these rights is the right to just administrative action.<sup>47</sup> This right brings together some of the key principles of administrative law, including that:
- administrative action should be lawful, reasonable and procedurally fair
  - where a person is adversely affected by administrative action, that person has the right to be given written reasons
  - judicial review shall be available in respect of administrative action.
42. The third of these rights is the right to have legal disputes decided in a fair public hearing before a court or, where appropriate, by another independent and impartial tribunal.<sup>48</sup> This right of access to the courts seeks to ensure that all persons have the benefit of the protection and enforcement of legal rights, not just in respect of criminal proceedings.

(e) *Environmental rights*

43. The South African Bill of Rights also includes the right to a clean environment, both in respect of an individual's immediate environment and in respect of the environment of future generations, including the right:
- to an environment that is not harmful to one's health or well-being<sup>49</sup>
  - to have the environment protected from degradation, for the benefit of future generations.<sup>50</sup>

### **3.2 *How are rights limited under the South African Bill of Rights?***

44. The South African Bill of Rights provides the following criteria for the limitation of protected rights:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justification in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.<sup>51</sup>
45. Certain rights may be limited or suspended in the event that 'a state of emergency' is declared.<sup>52</sup> Section 37(2) provides general guidelines on the extent to which rights may be limited or suspended. Section 37(5) outlines a list of 'non-derogable' rights which cannot be limited or suspended, even in a state of emergency, including:
- the right to equality
  - the right to human dignity

- the right to life
- the right to freedom and security of the person
- the prohibition on slavery and servitude
- the rights of the child outlined in section 28
- the rights of arrested, detained and accused persons outlined in section 35.<sup>53</sup>

### **3.3 *Does the South African Bill of Rights impact on law-making?***

46. The South African Bill of Rights does not impose specific requirements on the law-making process. However, the fact that rights are constitutionally entrenched helps to ensure that rights are taken into account when legislation is drafted, as legislative provisions which infringe a constitutionally protected right can be invalidated by the courts.

### **3.4 *Does the South African Bill of Rights require the government to act consistently with the protected rights?***

47. Yes. The South African Bill of Rights imposes a positive duty on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.<sup>54</sup> The South African Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state'.<sup>55</sup>

### **3.5 *What is the role of the courts under the South African Bill of Rights?***

48. When interpreting the South African Bill of Rights, courts 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.<sup>56</sup> When interpreting the Bill of Rights, courts must take international law into account,<sup>57</sup> and may take foreign law into account.<sup>58</sup>
49. The Bill of Rights further provides that when interpreting legislation, or developing the common law or customary law, courts must promote 'the spirit, purport and objects of the South African Bill of Rights'.<sup>59</sup>
50. As rights are constitutionally enshrined, courts have the power to invalidate any legislative provision which breaches a protected right.
51. However, the role of the courts is framed differently in respect of different rights. Specifically, in respect of the right of access to adequate housing, healthcare, sufficient food and water, and social security, the court's role is to assess whether the state has taken 'reasonable legislative and other measures, within its available resources to achieve the progressive realisation of ... these rights'.<sup>60</sup> In other words, the state has a duty of progressive realisation in relation to economic, social and cultural rights, rather than a duty to ensure that those rights are immediately guaranteed to all persons within the jurisdiction.

52. The South African Bill of Rights also specifically provides that a broad range of people may seek the enforcement of any of the protected rights, including:
- anyone acting in their own interest
  - anyone acting on behalf of another person who cannot act in their own name
  - anyone acting as a member of, or in the interest of, a group or class of persons
  - anyone acting in the public interest
  - an association acting in the interest of its members.<sup>61</sup>
53. A court may grant ‘appropriate relief’ in respect of an infringement of a protected right, including a declaration of rights.<sup>62</sup>

## **4 United Kingdom**

54. In the UK, human rights are protected under the *Human Rights Act 1998* (UK) (UK Human Rights Act). The UK Human Rights Act came into full force on 2 October 2000. It is an ordinary piece of legislation.
55. The UK Human Rights Act makes the rights contained in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>63</sup> (European Convention on Human Rights) part of domestic UK law.
56. Previously, to enforce rights under the European Convention on Human Rights it was necessary for an individual to first exhaust all remedies in the domestic courts, and then apply to the European Court of Human Rights. The UK Government estimated this process took an average of five years and cost on average £30,000.<sup>64</sup> Under the UK Human Rights Act, victims of violations of rights contained in the European Convention on Human Rights are able to have their cases examined in domestic courts and seek remedies which would afford them ‘just satisfaction’ for the wrong suffered.<sup>65</sup>

### **4.1 Which rights are protected under the UK Human Rights Act?**

57. The UK Human Rights Act protects the rights contained in:
- articles 2 to 12 and 14 of the European Convention on Human Rights (these restate, in very similar terms, many of the civil and political rights contained in the ICCPR)
  - articles 1 (protection of property), 2 (right to education) and 3 (right to free elections) of the First Protocol to the European Convention on Human Rights<sup>66</sup>
  - articles 1 and 2 of the Sixth Protocol to the European Convention on Human Rights,<sup>67</sup> which restrict the application of the death penalty to times of war or ‘imminent threat of war’.<sup>68</sup>

58. Accordingly, the UK Human Rights Act protects predominantly civil and political rights. However, it also recognises the right to education.

#### **4.2 How are rights limited under the UK Human Rights Act?**

59. The UK Human Rights Act adopts the mechanism contained in the European Convention on Human Rights for the limitation of rights.

60. The rights protected in the European Convention on Human Rights fall into three categories: absolute, limited and qualified.<sup>69</sup>

61. An absolute right cannot be limited in any circumstances. Examples of absolute rights are the prohibition on torture and the prohibition on slavery and servitude.<sup>70</sup>

62. Limited rights can be limited in specific circumstances, set out in the limitations clause which forms part of that right. It has been suggested that the limitations on these rights are those which may be necessary so as to strike a fair balance between the protection of individuals and the demands of the general interests of the whole community.<sup>71</sup> Limited rights include:

- the right to liberty and security of the person<sup>72</sup>
- the prohibition on forced labour<sup>73</sup>
- the requirement that there is no punishment without law<sup>74</sup>
- the right to marry<sup>75</sup>
- the right to an education.<sup>76</sup>

63. Qualified rights tend to be those which most obviously raise conflicts with the overall interests of society or the rights of others.<sup>77</sup> The scope of these rights is necessarily qualified by the effect that their protection has on the rights of others.<sup>78</sup> Qualified rights include:

- the right to respect for private and family life<sup>79</sup>
- the right to freedom of thought, conscience and religion – to the extent it relates to manifestation of religious beliefs<sup>80</sup>
- the right to freedom of expression<sup>81</sup>
- the right to freedom of assembly and association<sup>82</sup>
- the right to peaceful enjoyment of possessions.<sup>83</sup>

#### **4.3 Does the UK Human Rights Act impact on law-making?**

64. Yes. The UK Human Rights Act requires the minister with conduct of any bill, before its second reading, to either make a 'statement of compatibility' or make a statement that he or she is unable to state that the bill is compatible with the rights contained in the European Convention on Human Rights.<sup>84</sup> Either statement must be in writing and published.<sup>85</sup> Where the minister has stated

that the bill is compatible with the European Convention on Human Rights, this may assist the courts in finding a compatible meaning.

65. The rationale behind this provision is that the government will not often wish to state publicly that it is acting incompatibly with an internationally binding human rights instrument.<sup>86</sup>
66. The 'statement of compatibility' mechanism is complemented by the work of the UK Joint Committee on Human Rights. This is a parliamentary committee of twelve members, drawn from both houses of Parliament. One of the functions of the Joint Committee is to scrutinise all government bills and identify those with significant human rights implications for further examination.

#### **4.4 Does the UK Human Rights Act require the government to act consistently with the protected rights?**

67. Yes. The UK Human Rights Act requires public authorities (defined to include the government) to act consistently with human rights. It is unlawful for a public authority to act in a way which is incompatible with a right protected in the European Convention on Human Rights.<sup>87</sup> This prohibition does not apply where, as a result of one or more provisions of primary legislation, the public authority could not have acted differently.<sup>88</sup>
68. The UK Human Rights Act defines a 'public authority' to include:
  - a court or tribunal
  - any person certain of whose functions are functions of a public nature.<sup>89</sup>
69. In order to preserve the sovereignty of the legislature, both houses of Parliament are excluded from the definition of 'public authority'.
70. Where a body has some functions of a public nature and some private functions, it is a 'public authority' to the extent of its public functions.<sup>90</sup>

#### **4.5 What is the role of the courts under the UK Human Rights Act?**

71. So far as is possible, courts must read and give effect to primary and subordinate legislation in a way that is compatible with the rights protected by the UK Human Rights Act.<sup>91</sup> When determining an issue which has arisen in connection with rights contained in the European Convention on Human Rights, the courts are required to take into account decisions by the European Court of Human Rights, amongst other sources, where the court considers the material to be relevant to the proceedings.<sup>92</sup>
72. The UK Human Rights Act creates a cause of action for a person who has had his or her human rights breached by a public authority.<sup>93</sup> Where a court finds that a public authority has acted (or proposes to act) in a way that is inconsistent with a right protected by the European Convention on Human Rights, the court or tribunal has the power to 'grant such relief or remedy, or

make such order, within its powers as it considers just and appropriate'.<sup>94</sup>  
Damages may be awarded in civil cases, where damages are necessary to afford 'just satisfaction'.<sup>95</sup>

73. Courts also have the power to issue a 'declaration of incompatibility' if it is impossible for them to interpret primary legislation in a way that is compatible with the European Convention on Human Rights. This is a discretionary power.
74. The courts have commented that a declaration of incompatibility is intended to be 'a matter of last resort ... [which] ... must be avoided unless it is plainly impossible to do so'.<sup>96</sup>
75. A declaration of incompatibility does not invalidate the legislation. The purpose of a declaration of incompatibility is to bring the tension between a law and human rights to the attention of Parliament. It also triggers the power for a minister to take remedial action to amend legislation in response to a declaration of incompatibility.<sup>97</sup>

## **5 Australian Capital Territory**

76. In the ACT, human rights are protected by the *Human Rights Act 2004* (ACT) (ACT Human Rights Act). This is an ordinary statute. It was enacted following a consultation process conducted by an independent Consultative Committee. The ACT Human Rights Act came into full force on 1 July 2004.

### **5.1 Which rights are protected under the ACT Human Rights Act?**

77. The rights protected in the ACT Human Rights Act are sourced from the ICCPR. However, the right to self-determination is amongst those not included.
78. The ACT Human Rights Act does not protect economic, social or cultural rights. The inclusion of these rights was originally recommended by the Consultative Committee.<sup>98</sup> The first review of the ACT Human Rights Act proposed that the ACT Government should explore support for including certain economic, social and cultural rights (such as the rights to health, education and housing), and should revisit the issue as part of the five year review of the Act.<sup>99</sup>
79. The ACT Human Rights Act is not exhaustive of the rights an individual may have under domestic or international law.<sup>100</sup>

### **5.2 How are rights limited under the ACT Human Rights Act?**

80. The ACT Human Rights Act states that human rights 'may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.<sup>101</sup>
81. All relevant factors must be considered in deciding whether a limit is reasonable. This includes:

- the nature of the right affected
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.<sup>102</sup>

82. Certain rights in the ACT Human Rights Act have internal limitations. For example, the Act states that the right to life applies to a person from the time of birth,<sup>103</sup> and it requires that an accused person be segregated from convicted people 'except in exceptional circumstances'.<sup>104</sup>

### **5.3 Does the ACT Human Rights Act impact on law-making?**

83. Yes. Bills presented to the Legislative Assembly by a minister must be accompanied by a written statement which states whether the bill is consistent with the human rights set out in the ACT Human Rights Act. If the bill is not consistent with human rights, the statement must explain how it is not consistent. The statement is to be prepared by the Attorney-General.<sup>105</sup>

84. A standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.<sup>106</sup>

85. A failure to comply with these requirements does not affect the validity, operation or enforcement of any ACT law.<sup>107</sup>

### **5.4 Does the ACT Human Rights Act require the government to act consistently with the protected rights?**

86. The ACT Human Rights Act applies to public authorities, which include administrative units, ACT authorities and instrumentalities, ministers, police officers exercising functions under ACT laws and public employees.<sup>108</sup>

87. The definition of 'public authority' also includes an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority.<sup>109</sup>

88. The ACT Human Rights Act outlines a list of factors that may be considered when determining whether a particular function is 'of a public nature'. It also outlines functions which are taken to be of a public nature, including the operation of places of detention and correctional centres.<sup>110</sup>

89. Courts and the ACT Legislative Assembly are excluded from the definition of 'public authority', except when they are acting in an administrative capacity.<sup>111</sup>

90. Other entities may 'opt-in' and become subject to the obligations of a public authority under the ACT Human Rights Act.<sup>112</sup>

91. It is unlawful for a public authority to act in a way that is incompatible with a human right set out in the ACT Human Rights Act, or to fail to give proper consideration to a relevant human right in making a decision.<sup>113</sup>
92. This does not apply if the act is done, or the decision made, under a law in force in the ACT:
  - that expressly requires the act to be done or the decision made in a way that is inconsistent with a human right
  - that cannot be interpreted consistently with a human right.<sup>114</sup>

## **5.5 What is the role of the courts under the ACT Human Rights Act?**

93. An ACT law must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the law.<sup>115</sup>
94. International law and the judgments of foreign and international courts and tribunals may be considered in interpreting a human right. The ACT Human Rights Act sets out criteria that must be taken into account in deciding whether such material should be considered.<sup>116</sup>
95. The ACT Supreme Court may issue a declaration of incompatibility if it is satisfied that a Territory law is not consistent with a human right set out in the ACT Human Rights Act. This does not affect the validity, operation or enforcement of the incompatible law, or the rights or obligations of anyone.<sup>117</sup>
96. There is no freestanding right to apply for a declaration – there must be an ‘existing litigious dispute’.<sup>118</sup>
97. If the Supreme Court issues a declaration of incompatibility, the registrar of the Supreme Court must promptly provide a copy to the Attorney-General.<sup>119</sup> The Attorney-General must present a copy of the declaration to the Legislative Assembly within six sitting days of receiving it, and present a written response to the Assembly within six months of presenting the declaration.<sup>120</sup>
98. Since 1 January 2009, the ACT Human Rights Act has provided for a direct right of action against a public authority for breach of its obligations under the Act. In such an action, the ACT Supreme Court can grant the relief it considers appropriate, with the exception of damages. This does not affect a right a person has to seek relief in relation to an act or decision of a public authority, or a right to damages, that exists independently of the ACT Human Right Act.<sup>121</sup>

## **6 Victoria**

99. In Victoria, human rights are protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter).
100. The Victorian Charter came into operation on 1 January 2007, with the exception of Divisions 3 and 4 of Part 3 (relating to the interpretation of laws



and the obligations on public authorities). Divisions 3 and 4 of Part 3 came into operation on 1 January 2008.<sup>122</sup>

### **6.1 Which rights are protected under the Victorian Charter?**

101. The rights protected by the Victorian Charter are predominantly civil and political rights.
102. The Victorian Charter does not protect the right to self-determination.
103. In general, the Victorian Charter does not protect economic, social and cultural rights. However, it does protect the right of persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, declare and practise their religion, and use their language.<sup>123</sup> It recognises that ‘Aboriginal persons hold distinct cultural rights’.<sup>124</sup> And it provides that a person must not be deprived of their property other than in accordance with law.<sup>125</sup>
104. The four-year review of the Charter must consider whether additional rights should be included in the Charter, including the right to self-determination, and rights under the ICESCR, the CRC and CEDAW.<sup>126</sup>
105. A right or freedom not included in the Victorian Charter must not be taken to be abrogated or limited only because it is not included, or is only partly included, in the Charter.<sup>127</sup>

### **6.2 How are rights limited under the Victorian Charter?**

106. The rights included in the Victorian Charter ‘may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’, and taking into account all relevant factors including:
  - the nature of the right
  - the importance and purpose of the limitation
  - the nature and extent of the limitation
  - the relationship between the limitation and its purpose
  - any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>128</sup>
107. Certain rights in the Charter also contain internal limitations. For example, the right to vote is limited to ‘every eligible person’.<sup>129</sup>

### **6.3 Does the Victorian Charter impact on law-making?**

108. Yes. Bills introduced into Parliament must be accompanied by a statement that assesses whether the bill is compatible with the human rights protected by the Victorian Charter. This ‘statement of compatibility’ must state:

- whether the bill is compatible with human rights and, if so, how it is compatible
  - if any part of the bill is incompatible with human rights, the nature and extent of the incompatibility.<sup>130</sup>
109. A failure to comply with the statement of compatibility requirements in relation to any bill that becomes a law does not affect the validity, operation or enforcement of that law, or of any other statutory provision.<sup>131</sup>
110. The Scrutiny of Acts and Regulations Committee must consider any bill introduced into Parliament and report to Parliament as to whether the bill is incompatible with human rights.<sup>132</sup>
111. Parliament may make an ‘override declaration’ that expressly declares that an Act or a provision of an Act has effect despite being incompatible with the Victorian Charter.<sup>133</sup> This means that the Victorian Charter has no application to that Act or provision, to the extent of the override declaration.<sup>134</sup>
112. The Charter specifies that it is the ‘intention of Parliament that an override declaration will only be made in exceptional circumstances’.<sup>135</sup> The Member of Parliament introducing a bill containing an override declaration must explain to Parliament the exceptional circumstances that justify the inclusion of the override declaration.<sup>136</sup> A provision of an Act containing an override declaration expires after five years.<sup>137</sup> However, Parliament can re-enact an override declaration at any time.<sup>138</sup>
113. The Victorian Charter has no operation in relation to laws applicable to abortion or ‘child destruction’.<sup>139</sup>

#### **6.4 Does the Victorian Charter require the government to act consistently with the protected rights?**

114. Yes. The Victorian Charter applies to ‘public authorities’, including public officials, Victoria police, local councils, ministers and members of parliamentary committees (when the committee is acting in an administrative capacity). It also applies to statutory authorities that have functions of a public nature, and to other entities whose functions are or include functions of a public nature, when they exercise those functions on behalf of the state or a public authority.<sup>140</sup>
115. The Victorian Charter sets out a list of factors that may be taken into account in determining whether a function is of a public nature.<sup>141</sup>
116. The definition of ‘public authority’ excludes Parliament. It also excludes courts and tribunals (except when they are acting in an administrative capacity).<sup>142</sup>
117. The Victorian Charter requires public authorities to act consistently with human rights. It is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.<sup>143</sup> This requirement does not apply if, under law, the

public authority could not reasonably have acted differently or made a different decision.<sup>144</sup>

118. Further, the Victorian Charter does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body from acting in conformity with its religious doctrines, beliefs or principles.<sup>145</sup>

## **6.5 What is the role of the courts under the Victorian Charter?**

119. All statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provision.<sup>146</sup> In interpreting a statutory provision, international law and the judgments of domestic, foreign and international courts and tribunals may be considered.<sup>147</sup>
120. The Victorian Supreme Court may make a 'declaration of inconsistent interpretation' if it is of the opinion that a statutory provision cannot be interpreted consistently with a human right.<sup>148</sup>
121. There is no freestanding right to apply for a declaration of inconsistent interpretation – there must be an 'existing litigious dispute'.<sup>149</sup>
122. A declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in respect of which the declaration was made. Nor does it create any legal right or give rise to any civil cause of action.<sup>150</sup>
123. The Supreme Court must provide a copy of any declaration of inconsistent interpretation to the Attorney-General.<sup>151</sup> As soon as reasonably practicable, the Attorney-General must give a copy of the declaration to the minister administering the statutory provision in question.<sup>152</sup> Within six months of receiving the declaration, that minister must prepare a written response and table both the declaration and the response before each House of Parliament, as well as publish them in the Government Gazette.<sup>153</sup>
124. There is no freestanding cause of action under the Victorian Charter. However, if a person is otherwise entitled to seek a remedy against a public authority for an unlawful act or decision, the person may seek that remedy on a ground of unlawfulness under the Charter.<sup>154</sup> People are not entitled to be awarded damages for breaches of the Charter.<sup>155</sup>

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<sup>1</sup> See also Human Rights Law Resource Centre, *The National Human Rights Consultation: Engaging in the Debate* (2008), pp 88 – 101. At <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/engaging-in-the-debate/#hide> (28 May 2009).

<sup>2</sup> *International Covenant on Civil and Political Rights* (ICCPR), 1966. At [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (viewed 22 May 2009).

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK).

- <sup>4</sup> *Canadian Charter of Rights and Freedoms*, s 32(2).
- <sup>5</sup> *Canadian Charter of Rights and Freedoms*, s 2.
- <sup>6</sup> *Canadian Charter of Rights and Freedoms*, ss 3 - 5.
- <sup>7</sup> *Canadian Charter of Rights and Freedoms*, s 6.
- <sup>8</sup> *Canadian Charter of Rights and Freedoms*, ss 7 - 14.
- <sup>9</sup> *Canadian Charter of Rights and Freedoms*, s 15.
- <sup>10</sup> *Canadian Charter of Rights and Freedoms*, ss 16 - 22.
- <sup>11</sup> *Canadian Charter of Rights and Freedoms*, s 23.
- <sup>12</sup> *Canadian Charter of Rights and Freedoms*, s 15; *Eldridge v Attorney-General of British Columbia* [1997] 3 SCR 624.
- <sup>13</sup> *Canadian Charter of Rights and Freedoms*, s 1.
- <sup>14</sup> *Canadian Charter of Rights and Freedoms*, s 33(1).
- <sup>15</sup> *Canadian Charter of Rights and Freedoms*, s 33(3).
- <sup>16</sup> *Canadian Charter of Rights and Freedoms*, s 33(4).
- <sup>17</sup> *Canadian Charter of Rights and Freedoms*, s 32(1)(a).
- <sup>18</sup> *Canadian Charter of Rights and Freedoms*, s 32(1)(b).
- <sup>19</sup> See *R v Oakes* [1986] 1 SCR 103.
- <sup>20</sup> *Canadian Charter of Rights and Freedoms*, s 24(1).
- <sup>21</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, s 1(2).
- <sup>22</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, ss 8 - 11.
- <sup>23</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, ss 12 - 18.
- <sup>24</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, ss 19 - 20.
- <sup>25</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, ss 21 - 27.
- <sup>26</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, s 5.
- <sup>27</sup> *New Zealand Bill of Rights Act 1990 (NZ)*, s 7.
- <sup>28</sup> New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004). At <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html> (viewed 28 May 2009).
- <sup>29</sup> New Zealand Ministry of Justice, above, pt I.
- <sup>30</sup> *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667.
- <sup>31</sup> *Baigent's Case*, above, p 676.
- <sup>32</sup> New Zealand Ministry of Justice, note 28, pt IV.
- <sup>33</sup> *Constitution of the Republic of South Africa, 1996*, s 9.
- <sup>34</sup> *Constitution of the Republic of South Africa, 1996*, ss 26(1), 26(3), 27(1), 27(3).
- <sup>35</sup> *Constitution of the Republic of South Africa, 1996*, s 28.
- <sup>36</sup> *Constitution of the Republic of South Africa, 1996*, ss 32, 33, 34.
- <sup>37</sup> *Constitution of the Republic of South Africa, 1996*, s 24.
- <sup>38</sup> *Constitution of the Republic of South Africa, 1996*, s 23. The right to form and join a trade union is also a civil and political right – see ICCPR, note 2, art 22.
- <sup>39</sup> *Constitution of the Republic of South Africa, 1996*, s 26(1).
- <sup>40</sup> *Constitution of the Republic of South Africa, 1996*, s 27(1).
- <sup>41</sup> *Constitution of the Republic of South Africa, 1996*, s 29(1).
- <sup>42</sup> *Convention on the Rights of the Child (CRC)*, 1989. At <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (viewed 29 May 2009).
- <sup>43</sup> *Constitution of the Republic of South Africa, 1996*, s 28.
- <sup>44</sup> *Constitution of the Republic of South Africa, 1996*, s 32(1).
- <sup>45</sup> *Constitution of the Republic of South Africa, 1996*, s 32(2).
- <sup>46</sup> UN Human Rights Committee, *Gauthier v Canada*, Communication No. 633/1995, UN Doc CCPR/C/65/D/633/1995 (1995), at <http://www1.umn.edu/humanrts/undocs/session65/view633.htm> (viewed 22 May 2009); Inter-American Commission on Human Rights, *Reyes v Chile*, Case 12.108, Report No. 60/03, at <http://www1.umn.edu/humanrts/cases/60-03.html#1> (viewed 22 May 2009). See also G Malinverni, 'Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights' (1983) 4 *Human Rights Law Journal* 443.
- <sup>47</sup> *Constitution of the Republic of South Africa, 1996*, s 33.
- <sup>48</sup> *Constitution of the Republic of South Africa, 1996*, s 34.

- <sup>49</sup> *Constitution of the Republic of South Africa, 1996*, s 24(a).
- <sup>50</sup> *Constitution of the Republic of South Africa, 1996*, s 24(b).
- <sup>51</sup> *Constitution of the Republic of South Africa, 1996*, ss 36(1)(a) - 36(1)(e).
- <sup>52</sup> *Constitution of the Republic of South Africa, 1996*, ss 37(1), 37(4).
- <sup>53</sup> Section 37(5) contains a table of non-derogable rights which sets out in further detail the extent to which each of those rights is protected from derogation. Sections 37(6) and 37(7) provide further procedural safeguards in respect of persons detained without trial during a state of emergency.
- <sup>54</sup> *Constitution of the Republic of South Africa, 1996*, s 7(2).
- <sup>55</sup> *Constitution of the Republic of South Africa, 1996*, s 8(1).
- <sup>56</sup> *Constitution of the Republic of South Africa, 1996*, s 39(1)(a).
- <sup>57</sup> *Constitution of the Republic of South Africa, 1996*, s 39(1)(b).
- <sup>58</sup> *Constitution of the Republic of South Africa, 1996*, s 39(1)(c).
- <sup>59</sup> *Constitution of the Republic of South Africa, 1996*, s 39(2).
- <sup>60</sup> *Constitution of the Republic of South Africa, 1996*, ss 26(2), 27(2).
- <sup>61</sup> *Constitution of the Republic of South Africa, 1996*, s 38.
- <sup>62</sup> *Constitution of the Republic of South Africa, 1996*, s 38.
- <sup>63</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* (European Convention on Human Rights). At <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (viewed at 29 May 2009).
- <sup>64</sup> United Kingdom Government White Paper, *Rights Brought Home: The Human Rights Bill* (1997), para 1.14.
- <sup>65</sup> Article 41 of the European Convention on Human Rights states that: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'
- <sup>66</sup> *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952* (Protocol 1 to the European Convention on Human Rights). At <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (viewed at 29 May 2009).
- <sup>67</sup> *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, 1983*. At <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (viewed at 29 May 2009).
- <sup>68</sup> These rights are to be read with articles 16 - 18 of the European Convention on Human Rights: *Human Rights Act 1998* (UK), s 1.
- <sup>69</sup> See further J Wadham et al, *Blackstone's Guide to the Human Rights Act 1998* (4<sup>th</sup> ed, 2007), paras 2.31 - 2.40.
- <sup>70</sup> See European Convention on Human Rights, note 63, arts 3, 4(1).
- <sup>71</sup> Wadham et al, note 69, para 2.34.
- <sup>72</sup> European Convention on Human Rights, note 63, art 5.
- <sup>73</sup> European Convention on Human Rights, note 63, arts 4(2), 4(3).
- <sup>74</sup> European Convention on Human Rights, note 63, art 7.
- <sup>75</sup> European Convention on Human Rights, note 63, art 12.
- <sup>76</sup> Protocol 1 to the European Convention on Human Rights, note 66, art 2.
- <sup>77</sup> Wadham et al, note 69, para 2.37.
- <sup>78</sup> See *Kroon v Netherlands* (1994) 19 EHRR 263; *Soering v United Kingdom* (1989) 11 EHRR 439.
- <sup>79</sup> European Convention on Human Rights, note 63, art 8.
- <sup>80</sup> European Convention on Human Rights, note 63, art 9.
- <sup>81</sup> European Convention on Human Rights, note 63, art 10.
- <sup>82</sup> European Convention on Human Rights, note 63, art 11.
- <sup>83</sup> Protocol 1 to the European Convention on Human Rights, note 66, art 1.
- <sup>84</sup> *Human Rights Act 1998* (UK), s 19(1).
- <sup>85</sup> *Human Rights Act 1998* (UK), s 19(2).
- <sup>86</sup> Wadham et al, note 69, para. 3.11.
- <sup>87</sup> *Human Rights Act 1998* (UK), s 6(1).

- <sup>88</sup> *Human Rights Act 1998* (UK), s 6(2)(a).
- <sup>89</sup> *Human Rights Act 1998* (UK), s 6(3).
- <sup>90</sup> *Human Rights Act 1998* (UK), ss 6(3)(b), 6(5).
- <sup>91</sup> *Human Rights Act 1998* (UK), s 3(1).
- <sup>92</sup> *Human Rights Act 1998* (UK), s 2(1).
- <sup>93</sup> *Human Rights Act 1998* (UK), s 7(1).
- <sup>94</sup> *Human Rights Act 1998* (UK), s 8(1).
- <sup>95</sup> *Human Rights Act 1998* (UK), ss 8(2), 8(3).
- <sup>96</sup> See *R v A (No. 2)* [2001] UKHL 25, (2002) 1 AC 45, para 44 (Lord Steyn).
- <sup>97</sup> *Human Rights Act 1998* (UK), s 10.
- <sup>98</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), pp 6, 109. At <http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf> (viewed 9 June 2009).
- <sup>99</sup> ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006), p 49. At [http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve\\_month\\_review.pdf](http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf) (viewed 28 May 2009).
- <sup>100</sup> *Human Rights Act 2004* (ACT), s 7.
- <sup>101</sup> *Human Rights Act 2004* (ACT), s 28(1).
- <sup>102</sup> *Human Rights Act 2004* (ACT), s 28(2).
- <sup>103</sup> *Human Rights Act 2004* (ACT), s 9(2).
- <sup>104</sup> *Human Rights Act 2004* (ACT), s 19(2).
- <sup>105</sup> *Human Rights Act 2004* (ACT), s 37.
- <sup>106</sup> *Human Rights Act 2004* (ACT), s 38.
- <sup>107</sup> *Human Rights Act 2004* (ACT), s 39.
- <sup>108</sup> *Human Rights Act 2004* (ACT), ss 40(1)(a) - 40(1)(f).
- <sup>109</sup> *Human Rights Act 2004* (ACT), s 40(1)(g).
- <sup>110</sup> *Human Rights Act 2004* (ACT), s 40A.
- <sup>111</sup> *Human Rights Act 2004* (ACT), s 40(2).
- <sup>112</sup> *Human Rights Act 2004* (ACT), s 40D.
- <sup>113</sup> *Human Rights Act 2004* (ACT), s 40B(1).
- <sup>114</sup> *Human Rights Act 2004* (ACT), s 40B(2).
- <sup>115</sup> *Human Rights Act 2004* (ACT), s 30.
- <sup>116</sup> *Human Rights Act 2004* (ACT), s 31.
- <sup>117</sup> *Human Rights Act 2004* (ACT), s 32.
- <sup>118</sup> Human Rights Law Resource Centre, note 1, p 115.
- <sup>119</sup> *Human Rights Act 2004* (ACT), s 32(4).
- <sup>120</sup> *Human Rights Act 2004* (ACT), s 33.
- <sup>121</sup> *Human Rights Act 2004* (ACT), s 40C.
- <sup>122</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 2(2).
- <sup>123</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(1).
- <sup>124</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(2).
- <sup>125</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 20.
- <sup>126</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 44.
- <sup>127</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.
- <sup>128</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).
- <sup>129</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 18(2).
- <sup>130</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28.
- <sup>131</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 29.
- <sup>132</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 30.
- <sup>133</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1).
- <sup>134</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(6).
- <sup>135</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(4).
- <sup>136</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(3).
- <sup>137</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(7).

- <sup>138</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(8).  
<sup>139</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 48.  
<sup>140</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1).  
<sup>141</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 4(2), 4(3).  
<sup>142</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 4(1)(i), 4(1)(j).  
<sup>143</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1).  
<sup>144</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2).  
<sup>145</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(4).  
<sup>146</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).  
<sup>147</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2).  
<sup>148</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(2).  
<sup>149</sup> Human Rights Law Resource Centre, note 1, p 115.  
<sup>150</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).  
<sup>151</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(6).  
<sup>152</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(7).  
<sup>153</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37.  
<sup>154</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(1).  
<sup>155</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3).



## **Appendix 5 – Australian Human Rights Commission activities during the National Human Rights Consultation**

1. The Australian Human Rights Commission (the Commission) has undertaken an extensive range of human rights education activities to support engagement in the National Human Rights Consultation (the Consultation).

### **1 Consultation materials**

#### **1.1 ‘Let’s talk about rights’ toolkit**

2. To help organisations and individuals participate in the National Consultation process, the Commission produced a toolkit, *Let’s talk about rights*, available at [www.humanrights.gov.au/letstalkaboutrights/index.html](http://www.humanrights.gov.au/letstalkaboutrights/index.html) and in printed form. Copies of the toolkit were distributed during Commission workshops and presentations, and were also sent to relevant stakeholders by email and post. The Commission also developed and distributed submission forms to make it easier for people to make a submission.

#### **1.2 ‘Let’s talk about rights’ for children and young people**

3. The Commission developed a guide for children and young people, available at [www.humanrights.gov.au/letstalkaboutrights/youth.html](http://www.humanrights.gov.au/letstalkaboutrights/youth.html) and in printed form. The guide explained the purpose of the Consultation, and how children and young people could make a submission about the human rights issues they felt most strongly about. Copies of the toolkit for children and young people were distributed during Commission workshops and presentations, and were sent to relevant stakeholders by email and post. The Commission also developed and distributed submission forms designed specifically for children and young people to make it easier for them to make a submission.

### **2 Roundtables**

#### **2.1 Australian Human Rights Group roundtable**

4. On 19 February 2009 the Commission and the Gilbert + Tobin Centre of Public Law co-hosted the second Australian Human Rights Group roundtable, held at the Commission. The roundtable brought together 40 key organisations and individuals who support a Human Rights Act for Australia to discuss approaches to the National Human Rights Consultation. Father Frank Brennan and Mary Kostakidis from the Consultation Committee addressed the roundtable during the opening session.



## **2.2 Roundtable on constitutional issues arising from a Human Rights Act**

5. On 22 April 2009 the Commission hosted a roundtable to bring together experts in constitutional law to discuss how a Human Rights Act could avoid the potential constitutional difficulties identified by the Hon Michael McHugh AC QC in his presentation at the Commission on 5 March 2009. Participants agreed that it is possible to draft a Human Rights Act that retains a mechanism to notify Parliament if a court finds that a law is inconsistent with human rights in a way that is constitutionally sound. A record of what was agreed at the roundtable was submitted to the Consultation Committee and subsequently publicly released. A copy of the statement is provided in Appendix 3 of this submission.

## **3 National workshop series**

6. The Commission conducted a series of national workshops in each state and territory to support community sector engagement in the Consultation. The workshops included general community sector organisation workshops as well as some sector-specific workshops and briefing sessions with refugee groups, disability groups and Indigenous groups. The Commission also conducted workshops aimed at community legal centres and the legal profession.
7. A list of the sessions is below:

4 February	Sydney Indigenous community session
16 February	Sydney Indigenous community session
27 February	Sydney submission writing workshop held in conjunction with the Gilbert + Tobin Centre for Public Law and the Australian Law Reform Commission
10 March	Brisbane community sector workshop
10 March	Brisbane community legal centre workshop (presented in conjunction with the Queensland Association of Independent Legal Services Inc)
10 March	Brisbane legal workshop
11 March	Toowoomba community legal centre workshop
17 March	ACT women's sector workshop
18 March	ACT legal workshop (presented in conjunction with the Welfare Rights and Legal Centre)
18 March	ACT community sector workshop (presented in conjunction with the ACT Council of Social Services)
19-20 March	Canberra Indigenous community session
24 March	Sydney workshop for refugee and asylum seeker organisations (presented in conjunction with Amnesty International Australia)
26 March	Brisbane women's sector workshop
30 March	Cairns legal workshop
30 March	Torres Strait Prescribed Bodies Corporate consultation, Badu Island
31 March	Cairns Indigenous community workshop
1 April	Townsville legal workshop
1 April	Townsville Indigenous community workshop

2 April	Palm Island Indigenous community workshop
15 April	Adelaide community sector workshop (presented in conjunction with the SA Council of Social Services)
15 April	Adelaide legal workshop
16 April	Adelaide session at Byron Place Community Centre
16 April	Adelaide session (in conjunction with The Salvation Army and Adelaide Family Support Services)
21 April	Hobart community sector workshop
21 April	Alice Springs Indigenous community meeting – Lhere Artepe Traditional Owners
21 April	Alice Springs community legal centre workshop
21 April	Alice Springs Indigenous community meeting – Tangentyere Council
22 April	Devonport and northern Tasmania community sector workshop
22 April	Alice Springs community workshop
24 April	Yuendumu Indigenous community workshop
27 April	Darwin community legal centre workshop
28 April	Yirrkala Indigenous community meeting – Laynhapuy Homelands Association Incorporated
28 April	Sydney community sector workshop
30 April	Darwin Indigenous community workshop
30 April	Darwin community legal centre meeting – NT Welfare Rights Workers
30 April	Perth workshop for culturally and linguistically diverse communities
30 April	Perth legal workshop
1 May	Perth community sector workshop
1 May	Perth workshop for Indigenous legal organisations
4 May	Kununurra Community Legal Service workshop
7 May	Fitzroy Crossing Indigenous community workshop
1 June	Workshop for people with an intellectual disability

### **3.1 Engaging children and young people**

8. The Commission also conducted a program of workshops around the country aimed at youth advocates and children and young people themselves. A summary of the workshops for young people and/or their advocates is provided in Appendix 6.
9. In addition to specific workshops and materials, the Commission conducted a variety of online activities to engage children and young people in the Consultation. This included a Commission presence on Facebook and MySpace, and the facilitation of online discussion and information relevant to the Consultation on youth portals such as Heywire (<http://blogs.abc.net.au/heywire>) and JustAct (<http://www.justact.org.au/action-35-realise-human-rights/>). Commission staff also participated in discussions about human rights in the *e-festival of ideas*, an online youth conference run by Vibewire.

## 4 Seminar series

10. The Commission organised and hosted a seminar series to support engagement in the Consultation:
  - 17 February 2009: *UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia*, presented by Mr Murray Hunt, Legal Adviser to the UK Parliament's Joint Committee on Human Rights. An audio recording of the seminar is available at:  
[http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt\\_2009.html](http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html).
  - 5 March 2009: *A Human Rights Act, the courts and the Constitution*, presented by the Hon Michael McHugh AC QC. An audio recording of the seminar and Mr McHugh's paper are available at:  
[http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh\\_2009.html](http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html).
  - 28 April 2009: *The Constitution and a Human Rights Act* (co-hosted by the Commission and the Centre for Comparative Constitutional Studies), presented by Mr Mark Moshinsky SC, Professor Adrienne Stone and Associate Professor Kristen Walker.

## 5 Speaking engagements

11. The President and Commissioners have delivered speeches at a broad spectrum of events across Australia to encourage involvement in the Consultation. These speeches are available on the Commission website at [http://humanrights.gov.au/about/media/speeches/human\\_rights/index.html](http://humanrights.gov.au/about/media/speeches/human_rights/index.html).

## **Appendix 6 – Summary of Commission workshops for children and young people**

1. In February 2009, the Australian Human Rights Commission (the Commission) was funded by the Foundation for Young Australians (FYA) to undertake a project to support the participation of children and young people in the National Human Rights Consultation. The core element of this project was the conduct of workshops designed to encourage the participation of children and young people. This Appendix describes these workshops and summarises the key issues raised in the workshops.

### **1 Description of workshops**

#### **1.1 *How many workshops were conducted?***

2. In total, the Commission conducted 26 workshops with children, young people and youth advocates across Australia. The Commission visited and conducted workshops in each state and territory in the following towns and regions:
  - Queensland – Brisbane, Deception Bay and Toowoomba
  - Tasmania – Hobart and Devonport
  - South Australia – Adelaide
  - Victoria – Melbourne, Koondrook and Knox City
  - Australian Capital Territory – Canberra
  - New South Wales – Sydney and Bathurst
  - Western Australia – Perth, Halls Creek and Kununurra
  - Northern Territory – Yirrkala, Yuendumu, Alice Springs and Darwin.
3. In addition, the Commission made presentations on human rights and the National Human Rights Consultation (the Consultation) at events organised for, or about, children and young people. For example, the Commission made seven presentations at the NSW Parliament's school leadership forum in Sydney, with approximately 100 secondary school students from across NSW attending each event.

#### **1.2 *Who participated in the workshops?***

4. Between March and May 2009, Commission staff met with over 400 children and young people at the workshops across all states and territories in Australia, and approximately 700 young people through the NSW Parliament's school leadership forum (mentioned above). Commission staff also met with over 100 advocates from children's and young people's organisations across Australia.

5. Most of the children and young people who attended the workshops were between 13 and 20 years of age. However, two workshops were held specifically for primary school children.
6. The children and young people came from a variety of backgrounds including:
  - Indigenous (including seven specific workshops in the NT and WA)
  - gay, lesbian, bisexual, transgender or intersex (GLBTI) (including two specific workshops)
  - rural (including 13 workshops in regional or remote locations)
  - homeless (including one workshop held at a drop-in centre for homeless youth)
  - young single mothers
  - culturally and linguistically diverse (including one specific workshop for young CALD people and their advocates).
7. Children and young people's advocates included representatives from a variety of organisations such as youth workers, teachers, youth affairs councils and children's rights organisations.

### **1.3 What were the key aims of the workshops?**

8. The key aims of the workshops were to:
  - educate children and young people about human rights issues in Australia
  - encourage broad participation by children and young people in the Consultation.
9. In the Commission's view, it was important to encourage participation by children and young people in the Consultation because they will inherit the human rights protection framework which may result from the Consultation.
10. Children and young people often do not have a voice in government consultations, especially those on issues of law and politics. Furthermore, recent human rights issues are of particular interest to children and young people, including issues such as children in detention, homelessness, Indigenous children and the Northern Territory intervention, bullying and discrimination issues, and environmental issues.
11. By supporting participation in the Consultation, the Commission was also promoting one of the guiding principles of the United Nations *Convention on the Rights of the Child* (CRC) to which Australia is a party. Article 12 of the Convention on the Rights of the Child states that children have the right to express their views freely in all matters that affect them, and these views are to be given due weight.

#### **1.4 How were the workshops conducted?**

12. Most of the workshops were conducted in a similar format. They were structured to be as interactive as possible, while providing an overview of human rights generally and an overview of the Consultation. Discussions were facilitated around the three consultation questions:
  - Which human rights (and responsibilities) should be protected and promoted?
  - Are these human rights sufficiently protected and promoted in Australia?
  - How could Australia better protect and promote human rights?
13. In discussing these three questions, young people were encouraged to share their stories and their views.
14. The conduct of the workshops was also tailored to the particular needs of the participants. For example, some were more informal than others due to the nature of the group. All participants were asked for their consent for the Commission to take notes and summarise their views in de-identified form.
15. The workshops concluded with suggestions on how young people could participate in the Consultation. Commission materials including a Consultation toolkit designed for children and young people and a submission form were distributed to participants at most workshops.

#### **1.5 Materials to support the participation of children and young people in the Consultation**

16. In addition to conducting workshops, the Commission developed *Let's Talk About Rights – a guide to help young people have their say about human rights in Australia*. The guide explains the purpose of the Consultation, and how children and young people could make a submission about the human rights issues about which they feel most strongly. The Commission printed 5000 copies of the guide, which were distributed through workshops and youth networks. The guide is also available at [www.humanrights.gov.au/letstalkaboutrights/youth.html](http://www.humanrights.gov.au/letstalkaboutrights/youth.html) and in printed form.
17. The Commission also developed and printed submission forms for young people, to make it easier for them to answer the three main questions asked by the Consultation Committee. The submission form is available at <http://humanrights.gov.au/letstalkaboutrights/youth.html> and in printed form.
18. The Commission's materials were highlighted through online activities designed to engage children and young people in the Consultation. This included a Commission presence on Facebook and MySpace, and the facilitation of online discussion and information relevant to the Consultation on youth portals such as Heywire (<http://blogs.abc.net.au/heywire>) and JustAct ([www.justact.org.au/action-35-realise-human-rights](http://www.justact.org.au/action-35-realise-human-rights)). Commission staff also participated in discussions about human rights in the *e-festival of ideas*, which is an online youth conference run by Vibewire.

## 2 Summary of workshop discussions

### 2.1 *What were the main human rights issues raised by participants in the workshops?*

19. Workshops with children and young people and youth advocates provided an opportunity to discuss which human rights are important to young people, and why. The discussion in this part of the workshop corresponded to the first two questions posed by the National Human Rights Consultation.
20. Given the variety of backgrounds of workshop participants, it is not surprising that a wide range of human rights issues were discussed. However, some issues were raised a number of times, as follows:
  - (a) *Equality and freedom from discrimination*
21. Participants thought that it was important for all people to be treated equally and to not be discriminated against because of their race, religion, ethnicity, culture, sex or any other factor. Some participants gave examples of when they thought their treatment before the law had been unequal because they were young. For example, it was felt that magistrates might give more weight to the opinion of an older person over a younger person.
22. One or two participants felt that some minority groups should not be given 'special treatment'. Another participant suggested that measures such as the Northern Territory Intervention should not be applied to certain groups based on their race; rather, if the government felt that measures should be taken in response to a particular problem, those measures should be applied to all people on an equal basis.
23. GBLTI participants were concerned that people who are transgender and sex diverse are not covered by the law. One or two participants raised the difficulties faced by transgender people seeking recognition of their identity on official documents. They thought that this represented a breach of the right to be treated equally before the law. Some participants thought that everyone should be entitled to marry whomever they want to regardless of their sexual preference.
24. Some Indigenous participants told of being treated differently because of their Aboriginal background.
25. One young Sudanese participant said they had experienced conflicts between their culture and Australian culture, which impacted upon their right to a fair trial and to equality before the law. For example, they were assumed to be guilty or lying because they do not make direct eye contact in their culture.
26. Several participants raised examples of racial vilification, particularly towards members of the African community. This included letter drops of race-hate material and the placement of race-hate literature in the children's section of the library.

(b) *The right to education*

27. Participants across Australia identified various aspects of the right to education as very important to them.
28. *Availability* – Participants from workshops in remote areas of Australia expressed concerns that children and young people in remote areas do not enjoy their right to education on an equal basis with young people in urban areas. Likewise, these young people felt that the range of subjects offered is more limited than in urban schools and that teachers were often young, inexperienced and transient.
29. Indigenous participants thought that they should be able to go to a school that is not too far from their home. They said that moving young people away from their homes and their families makes them homesick. Boarding schools do not suit everyone, so schools should be available in local areas. Where students live in very remote communities they should have boarding schools that are not so far away so that students can go home on weekends.
30. *Accessibility* – Many participants noted the interconnectedness between the right to education and many other rights. Young people identified several barriers to accessing and remaining in education, such as:
  - lack of stable housing
  - limited support for young women who are pregnant or parenting
  - lack of access to affordable childcare
  - lack of access to an adequate standard of living and not being able to afford a school uniform (for example, one young person told her story of being expelled on the last day of school for not wearing the correct uniform)
  - inaccessible services for young people with disability
  - the difficulties for some young people to obtain parental consent at school when they have run away from home or their parents are absent.
31. Young people also identified a cascading effect when basic education is not accessible. That is, if a young person is unable to access education, they might be unable to access work, which leads to no money for housing, food and other things needed to fully enjoy their human rights.
32. *Adaptability* – Participants from culturally and linguistically diverse communities thought that education about different cultures should be included in schools. Young people thought that more language officers or teachers should be ‘in touch’ with students of different cultural backgrounds.
33. Other young people from refugee and migrant backgrounds expressed a need for teachers’ aides in the classroom similar to teachers’ aides provided for young people with disabilities in schools. They reported that children from refugee and migrant backgrounds cannot always understand what is going on in the classroom. This can lead to bad behaviours, which can lead to expulsion or



suspension from school. Participants felt that the cause of this frustration – an inability to fully understand Australian English – should be addressed.

34. The Commission heard a number of stories of school yard discrimination and bullying on the grounds of sexual orientation, race and for failing to conform to stereotypes. Bullying was often mentioned by participants as a problem within schools. One participant described an occasion where bullying within school had led to suicide. Many young people thought that more should be done to prevent bullying in schools. Some participants raised the issue of discrimination in schools against young LGBTI people. This was especially of concern for those who were transgender. Participants gave examples of having to use communal showers and toilets being deliberately locked so that they could not change discretely.
35. Bullying and racial discrimination also extended to university students. Participants who were international students gave examples of physical and verbal abuse both on and off the university campus.
36. Many participants thought it was important that human rights education be included in the curriculum. This is discussed in further detail below.
37. *Acceptability* – Indigenous participants and participants from refugee and migrant backgrounds discussed the importance of education which is culturally appropriate and non-discriminatory. In particular, young people in Indigenous-specific workshops valued the right to speak and learn their own language and culture in school. In particular, they thought that the four hours of mandatory English in Northern Territory schools discriminated against Indigenous students affected by this policy. Indigenous young people thought it was unfair to impose English as mandatory on people for whom this is neither the first language nor the language that transmits the culture. No school policy or other policy should stop people from speaking in their mother tongue.
38. Young people from refugee and migrant backgrounds and their advocates emphasised the importance of recognition of prior learning, and also of ensuring culturally sensitive and inclusive teaching practices.

(c) *The right to be safe and free from violence*

39. Many young workshop participants thought that their right, and the right of others, to be safe from violence was important. Young Indigenous people felt that there needed to be more police presence in smaller remote communities to ensure that communities feel safe.
40. Homeless participants described the high levels of violence faced by some young people who are homeless.
41. Domestic violence was an issue of concern amongst many participants, having experienced it themselves in an abusive relationship or having witnessed it between their parents. Some participants had experienced serious and ongoing domestic violence within their families. For example, one 13-year-old participant had grown up in a violent household and had left his family home as a result.

Another 20-year-old participant was living in a refuge after growing up in a house with domestic violence. At one workshop, a high proportion of the young women who attended the workshop had experienced domestic violence and had fled abusive relationships. Several participants raised the issue of child abuse and the need for children to be cared for in appropriate alternative settings if they are subjected to abuse in the family home.

42. GLBTI participants raised concerns about violence, especially in relation to homophobic violence, and emotional violence and abuse. Transgender participants mentioned the importance of being protected from institutionalised violence, such as being put into gender appropriate cells in prison.
43. Young people from refugee and migrant backgrounds also expressed concerns about being subjected to both physical and verbal violence. In particular, international students expressed fear about walking around at night.

(d) *The right to not be separated from your family*

44. Young Indigenous people felt that where parents are unable or incapable of looking after their children, the government has a role to intervene and children should be placed with the right family members. In cases of child abuse or neglect the child should not be further punished by being moved far away from family and country.
45. Some participants described having negative experiences with the child protection system. One participant believed that she had been discriminated against and stereotyped as a bad parent because she had been a foster child herself. Her children had been removed, including one within 24 hours of birth. She felt that she had not been given the chance to prove herself as a mother, had not been given counselling, and her right to participate in decision-making had been breached.

(e) *The right to work and fair working conditions*

46. Many participants expressed the desire to work but had difficulties accessing jobs. One young participant could not get a job or a place to sleep. She had a history of violence and a criminal record. She had been on the streets since she was 12, and felt that she had not been given a 'fair go'.
47. Others also discussed difficulties in getting a job. One participant expressed concern that if you turn up late to an interview, you are not given a second chance. Some participants found it difficult to work when they were homeless and found it difficult to negotiate getting to work or to an interview. Some participants mentioned discrimination experienced by young people from refugee and migrant backgrounds in looking for work and from job network services. They also felt that it was important that employment was appropriate and fell within the young person's skill set.
48. Some participants expressed a view that young people were being exploited in the workplace and in traineeships – being treated as 'cheap labour' and not being paid the same rates as adults when they were doing the same, if not

more, work. They felt that this was not fair and that if they were doing the same amount of work, they should not be discriminated against in terms of pay. Some participants had also experienced that when they turned 21, they were 'too expensive' to be employed.

49. International university students gave examples of being unfairly taken advantage of in the workplace and being paid less, just so that they can get a job. They also thought that the restrictions placed on student visas should be more lenient. One participant gave the example of an international student who was placed in an immigration detention centre for a week over Christmas because, on one occasion, he worked an extra two hours to cover for a work colleague, and in doing so breached his student visa conditions.

(f) *Police harassment*

50. Police harassment was identified by participants across Australia as a major issue. Several participants felt that police 'pick on' young people 'for fun' and that there was nothing that young people could do:

My brother was just walking down the street with his friends ... the police officer said to him 'I've been doing this for so long, I know how to pick youse'. And, like, just because of the way they were walking and the way they were dressed. He had a backpack on. The police pulled over and said 'what's in your backpack, let me look in your backpack'.

51. Young Indigenous people felt that they were discriminated against or 'hounded' by police. They also felt that they should not be questioned by police unless they have an elder or a parent with them, and they should be informed of their rights before being questioned.
52. Participants from African communities raised issues of police harassment and racial discrimination. Some mentioned the use of 'move on' powers by police. It was felt that this was used against young people who are homeless, young African people and young people generally because of their age. As one homeless participant stated:

This is where we live so how can we not be in the streets here?

(g) *Access to services*

53. Many participants identified difficulties in accessing various services.
54. Economic, social and cultural rights were often raised as being the most important rights for young people. There was a strong awareness that these rights were interconnected and that there are flow-on effects if one right is violated.

The security of having a job ... to pay for your house, to pay for food, to pay for your health care, to have you finish off your education ... there's so many intertwined things.

(i) Housing and shelter

55. Many participants emphasised the importance of access to shelter and the right to an adequate standard of living and highlighted problems with homelessness in both rural and urban areas. Several participants felt that homelessness was perhaps less visible in rural areas, but that people at risk of homelessness in rural communities are disadvantaged in that they do not have access to as many support services as people in urban areas.
56. Several participants described difficulties they have experienced in accessing shelter, and problems faced by homeless young people and members of the GLBTI community in accessing housing. Some participants felt that there needed to be alternative accommodation available for victims of domestic violence.
57. Participants from Toowoomba stated that there was no place for young pregnant women to go when they needed emergency crisis housing. The women's shelters would not take them if they were under 18, and the mixed young people's shelters would not take them if they were pregnant, out of concern about the potential risks to the unborn child in that environment.

With me being a mum of a little boy ... my main focus is housing and food ... it's just survival mode.

58. The lack of housing for Indigenous people was also raised as an area of concern by some participants.

(ii) Mental health services

59. Participants identified the high need, but inadequate funding for, counselling and mental health support services.
60. Some participants also felt that it was especially difficult for people with mental illness to find a place to live.

(iii) Health care

61. Many participants agreed on the importance of a right to adequate health care.
62. Some participants were concerned about the lack of health services for Indigenous people.
63. Young mothers were concerned about waiting times in hospital (citing examples of up to 6-10 hours duration). They felt that hospitals were inefficient and there were not enough staff or beds.
64. Participants from rural and remote areas were concerned about the fact that their remote communities do not have equal or adequate access to health services including GPs and hospitals. Participants gave examples of lengthy doctors' waiting periods, hospitals being located far away, and of not being listened to when visiting a doctor. One participant raised concerns about difficulties faced by young people in rural and remote areas in getting access to

adequate, safe and confidential advice and services related to safe sex, contraception and abortion. Another raised concerns about the lack of adequate access to youth de-tox services in rural and remote areas.

65. Some participants gave examples of the importance of access to health care such as the stigmas associated with body image and reduced self-esteem.

(iv) Adequate standard of living

66. One participant stated that the Centrelink rates of social security payments were insufficient to provide for an adequate standard of living for families.

(h) *Participation in decisions that affect young people*

67. Some participants mentioned the problem of young people not being listened to and their views being disregarded.

68. Participants generally agreed that young people should be given greater opportunities to participate in decisions that affect their lives. One participant gave the example that young people should have a say in decisions such as designing public spaces. Participants mentioned that participation should not be merely 'lip service' and that decisions should not already be made when the consultation process begins.

69. This right was also thought to be important in terms of 'move-on' laws which often affect young people on a disproportionate basis.

(i) *The right to language, culture and religion*

70. Several participants who had come to Australia as migrants raised the importance of being able to speak their native language and practice their own culture, and also to be able to access services in their own language. There was concern expressed that current measures to address these issues were tokenistic. One participant told of being laughed at for speaking another language.

71. Some Indigenous participants emphasised the right to practice their languages and culture both in the school environment and in other places. They thought that no school policy or other policy should stop people from speaking in their mother tongue. If such policies were to be introduced, they would destroy Indigenous society.

72. Some participants thought it was important to be able to practice your religion and not be harassed about it.

(j) *The right to privacy*

73. Transgender participants thought that it was important that their gender history was kept private. They also mentioned the importance of privacy in places such as the changing rooms in schools.

74. Several participants thought that the right to privacy was very important, particularly given the development of new technologies (such as social networking sites on the internet). Some participants expressed the need for laws to remain current with technological development.

(k) *The right to country*

75. Indigenous participants thought that it was important that Aboriginal people should be able to fish on their country, and should not have to obey laws about fish size or bag limits that apply to other people who are not traditional owners. For example, Yolngu people have a right to the fish and take other resources from Yolngu land and they should not have to obey Australian laws and by-laws about hunting and gathering on this land.

(l) *Other issues*

76. Other human rights issues which were raised by young people included:

- access to water
- the rights of prisoners to fair treatment
- child protection
- the right not to be separated from family
- the rights of non-biological parents in same-sex relationships
- the rights of section 457 (temporary worker) visa holders
- the rights of victims of crimes
- the right to a fair trial
- the rights of people with disability
- freedom of expression
- environmental rights and the effects of climate change.

**2.2 *What were some ideas for better protection of human rights raised by workshop participants?***

77. At most workshops, participants were asked to discuss their ideas for addressing the human rights issues they had raised. Common ideas were as follows:

(a) *Better human rights education*

(i) At school

78. Many children and young workshop participants thought that there needed to be a change in attitudes in Australia. It was suggested that one of the ways this could be done was through human rights education – both in the school system

and through community education. Several participants thought that this should be done as early as possible – in kindergarten and when children are learning literacy and numeracy. Young participants felt that, although you might not be able to change people's opinions, you could give them a better perspective of human rights. For example, some participants emphasised the need for GLBTI issues to be taught at school and to teachers. Participants from refugee and migrant backgrounds emphasised the need to teach about different cultures in the classroom.

79. Many participants said that human rights education should begin at school:

Human rights [education] would be better than tricky algebra

[School] should have a whole class for [human rights education]

[Human rights education is] not just for yourself but so you know what other people's rights are so you have to respect the other person because of their rights

[Human rights education] might even help with bullying.

80. Some participants said that subjects such as Society and Environment, Legal Studies and events such as Harmony Day or Refugee Day (where they learn about other cultures) were a good way of educating about human rights. However, some participants did not feel as though they had been taught enough about specific human rights through those avenues. Another participant noted that anything they learn in school about human rights issues is focussed on other countries, not Australia:

It never seems to have anything to do with close to home, its always Iraq, Rwanda, Chernobyl.

81. He wondered why human rights are not talked about in connection with matters closer to home – such as the cost of basic necessities and the inadequate level of social security payments.

82. One participant suggested a solution following the example of American schools. They thought that if Australia could set up an ally system to connect schools in the region, they could connect different communities and strengthen minority groups.

83. One participant suggested that human rights education should be provided to young people who are not in mainstream schools or who may not be attending school regularly.

- (ii) For teachers, employers, police and courts

84. Some participants thought that there needed to be funding in order for teachers to be trained in teaching human rights in the classroom.

85. Many participants thought that there should also be specific education or training on human rights obligations and cultural diversity for employers, employees, police and the courts.

(iii) For the community

86. Many participants thought that more was needed in order to address community attitudes and to target stereotypes and racism. In terms of community education, participants thought that initiatives such as television advertising, video games, internet and public forums could be used to change attitudes. One participant mentioned that there should be an advertising campaign on the causes and effects of discrimination and domestic violence – in the same way that there are advertisements about the effects of smoking, sun-tanning and drug use. Some participants thought that there needed to be increased education about the rights of members of the GLBTI community.
87. Better leadership was raised as a means to send out a human rights message. It was suggested that Kevin Rudd should go on television and talk about human rights. Some participants also thought that there should be a federal Minister for Human Rights which would place human rights high on the agenda.
88. Some participants thought that there should be more workshops about human rights – similar to these Commission workshops – and that more funding should be given to the Commission to conduct its educative role. Others thought that there should be more regular consultation on human rights issues in order to draw attention to issues of concern in the community. This, it was thought, would be a proactive way for government to engage with vulnerable groups to identify major concerns.
89. A number of participants said that young people need to know what their human rights are, and to assist with that, it would be a good idea to have all our human rights listed in one area. Some participants thought that signs about children's rights should be put up in train stations so that young people knew their rights if they encountered police or a transit officer.
90. Several participants thought that there should be more social inclusion of people from culturally and linguistically diverse backgrounds and GLBTI and other minority groups as this is 'when you learn'.
91. Some Indigenous participants thought that government should provide education about child neglect and protect children when their parents are unable to look after them.

(b) *School programs to address bullying*

92. Many children and young people suggested that there need to be measures that address discrimination and bullying in schools. Some ideas included:
  - mediation processes in schools for bullying
  - changing terminology for bullying – 'bullying' sounds too young and not serious enough for the effect it has
  - anti-bullying policies at schools.



(c) *Legal protections for human rights*

93. Some participants expressed the view that protection of human rights in Australia was currently only tokenistic.
94. Some participants suggested that there should be stronger legal protections for human rights. Some thought that there should be a national Human Rights Act, while others stated that there should be a new law with all human rights set out in a clear and specific way. Some participants who raised this said that it was important that this law 'was not just words'. Any Human Rights Act needed to have real 'teeth' and be community-driven.
95. One participant thought that because there was no Australian statement of human rights, it was hard to know what their rights were. He thought that at a minimum there should be some statement of rights in Australia. Some participants thought that it was important to be able to enforce your human rights. Other participants thought that there should also be corresponding responsibilities.
96. However, one participant was concerned that a national law might be used by criminals to 'beat the system'. Others expressed concerns about limiting human rights by defining them too narrowly, or not being able to change them in the future.
97. Some participants felt that there needed to be more transparency in government. One participant suggested that there should be a stronger body charged with monitoring human rights in Australia in order to keep the Australian Government more accountable. Another participant emphasised the importance of making sure that governments are held accountable for implementing the obligations they have agreed to which relate to economic, social and cultural rights. He noted that human rights are not just about restraining government action, but are also about placing positive obligations on government to act to ensure that rights are fulfilled.

(i) *Legal protections for young people and their families*

98. Some participants thought that there should be enforceable remedies for young people being exploited in traineeships.
99. Other participants thought that there should be a mechanism to challenge the use of 'move on' powers, especially when they discriminate against young people who are homeless or on the basis of race or age.
100. One participant thought that laws should be strengthened to prevent domestic violence. Another thought that it should be illegal for parents to hit their children.

(ii) *Legal protections for GLBTI young people*

101. Some participants thought that state and federal discrimination laws should be amended to provide coverage for people who are GLBTI.

(iii) Legal protections for Indigenous peoples

102. Indigenous participants thought that police and others should be provided with more information about Aboriginal customary law, especially as it applies to Aboriginal marriage and consent to a relationship.
103. In addition, Indigenous participants thought that there should be special laws for Aboriginal people so they can practice their culture. They thought that government should make a commitment to value Indigenous language and culture.
104. They also thought that laws should be changed so that Aboriginal people have particular rights to the resources on their country, and this information should be made available to all Aboriginal people so they know what the rules are.

(d) *Young people should have more say in decisions that affect them*

105. A number of participants felt that children and young people should have more say in decisions that affect them, and that this would improve protection of human rights. As one participant suggested, 'everyone should have a say'.
106. Participants thought that there should be increased access to information, and that if young people were made aware of processes, they could be involved in the decision-making processes that affect them.
107. Some young people were concerned that children and young people did not know where to go if they felt that their human rights had been breached. Several participants said that there was a need for greater access to advice about what children and young people can do when their human rights have been breached. Primary school children suggested that:

There needs to be an organisation that listens to parents and kids – and you need to be able to walk or drive there!

We need a big complaints box at school.
108. There was also recognition that children may need an adult that they trust, and who understands them, to speak up for them, or to help them when their human rights have been violated.
109. There were also suggestions that the voting age be lowered so that young people can have their say in elections.

(e) *Relations between young people and police*

110. Many participants suggested ways of improving relations between young people and police, and protecting young people's rights. These included:
  - education for young people, such as a 'police in schools' program; more information for young people about their rights, especially in regard to police questioning and what they can do if they are harassed by the police

- education and training for the police, courts and other people in positions of authority – including training on social inclusion and cultural diversity; respect for human rights and training about the law so that police do not question young people who are underage without an adult present; training in child development
- youth community liaison officers to assist young people when they are detained or when police want to question them
- greater accountability of the police and people in positions of authority such as greater power for the Ombudsman in relation to complaints made about the police or a separate body from the police to inform police that they need to protect human rights
- increased government funding of police stations in small communities. Indigenous participants in remote communities thought that if there are more than 50 people in the community there should be a local police officer.

(f) *Appropriate funding and access to services*

111. A number of participants across Australia thought that there needed to be appropriate funding for all initiatives to protect human rights. Some participants thought that there should be increased rates of social security payments to ensure an adequate standard of living for all people in Australia.

(i) *Rural and remote communities*

112. Participants in rural and remote areas, were unanimous in supporting the need for greater access to basic services in particular in terms of education, health care and support services for people at risk of homelessness.

113. Indigenous participants thought that government should use technology to bring quality drinking water to communities, even if they are small. People have the right to be on their land and should not have to leave because the drinking water is bad.

114. Indigenous participants thought that government should provide resources for remote communities and make sure that all people are able to live healthy lives.

(ii) *People with disability*

115. Participants suggested that there was a need for more public housing and support services for young people who are homeless or have a mental illness.

116. One participant thought that more employers should link people with disability to specific disability support agencies, as these agencies can train and help people with a disability to perform certain jobs.

117. Some participants thought that buildings needed to be made more accessible for people with disabilities.

(iii) People who are homeless

118. One participant who had moved out of home because of domestic violence thought that more public housing should be made available to young people who are homeless.

119. Another young person living in a refuge said that government agencies should work faster to help people at risk of homelessness. If homeless people could get into public accommodation more quickly, they would have an address they could use to receive social security payments.

(iv) Young people

120. One participant thought that there should be more support services (accommodation, police support, child protection, psychological counselling) for young people subjected to domestic violence, homeless young people and young people with mental illness.

121. Some participants thought that there should be more support for young people so that they are not afraid to identify as GLBTI.