



A WA HUMAN RIGHTS ACT



REPORT OF THE CONSULTATION COMMITTEE FOR A PROPOSED WA HUMAN RIGHTS ACT

NOVEMBER 2007



Department of the Attorney General
Government of Western Australia

Consultation Committee for a Proposed Human Rights Act

The Hon Jim McGinty MLA
Attorney General
Parliament House
Perth WA 6000

Dear Mr McGinty,

In May 2007 you announced that the Government wanted to consult the Western Australian community about the matters which should be included in a Human Rights Act, and a series of related matters on which you wanted the opinion of the community. You appointed us as a committee to conduct that consultation and asked us to report to you by 16 November 2007.

We are pleased to present our report to you which addresses the terms of reference set out in the *Statement of Intent* which you published at the time of the announcement.

Yours sincerely,

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16 November 2007

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The work of the Human Rights Consultation Committee has been greatly assisted by a number of people. We are grateful to the many Western Australian individuals, public officials, statutory bodies and non-government organisations who provided views and advice at public meetings and through written submissions. We also thank those who agreed to participate in the random survey of public opinion we commissioned with Patterson Market Research.

The secretariat drawn from the Department of the Attorney General, led by Ms Joanne Hunt and which included at various times Ms Melissa Fleming, Ms Carolyn Davis and Ms Triona McCann, provided support and assistance throughout. Mr Richard Goodwin, as Manager of the Public Affairs Branch of the Department, also provided administrative and public information support. As the Committee was not made up of lawyers (the Chairman was a lawyer but last practised in 1974) it was particularly grateful for the technical and general advice, as well as drafting assistance, it received from Ms Janine Pritchard, Senior Assistant State Counsel, State Solicitors Office and Ms Jean Shaw, a legal officer from that same Office. Their application to the task and the quality of their work could not be faulted.

Mr Damien Norris was engaged by the Committee to conduct additional consultations with disadvantaged individuals and groups and provided us with information and insights in that area. We also received valuable advice early in our consultation process from Professor George Williams, Gilbert and Tobin Professor of Public Law at the Law School of the University of NSW. Professor Williams led the similar consultation in Victoria which resulted in the enactment of the Charter of Rights in that state.

The Constitutional Centre of Western Australia was an active and enthusiastic partner in the whole project and the Committee acknowledges its support and involvement.

Many other people gave us advice and assistance including information about the operation of similar laws in other jurisdictions: Mr Finlay McRae, Director of Legal Services, Victoria Police; Ms Mmaskepe Sejoe, Project Leader for the Human Rights Project, Victoria Police; Ms Catherine Dixon, Manager, Human Rights Unit, Department of Justice, Victoria; Mr Matthew Carroll, Victorian Equal Opportunity and Human Rights Commission (VEOHRC); Mr Paul Mullett, Secretary of the Police Association of Victoria; Mr Bruce McKenzie, Assistant Secretary of the Police Association of Victoria; Ms Pamela Tate QC, the Solicitor General for Victoria; Ms Padma Raman, CEO of the Victorian Law Reform Commission; Ms Anna Forsyth, Legal Officer from the Human Rights Unit, VEOHRC; Ms Michelle Burrell, formerly the Secretary to the Victorian Human Rights Consultation Committee and now with the Victorian Law Reform Commission; Mr Chris Humphrey, Director, Civil Law Policy, Department of Justice, Victoria; Ms Gabrielle McKinnon, Director of the ACT Human Rights Act Research Project,

Centre for International Governance and Justice, Australian National University; Mr Stephen Goggs, Deputy Director, Department of Justice and Community Safety (DJCS), Australian Capital Territory (ACT); Mr Nathan Hancock, Principal Legal Officer, and staff, Human Rights Unit, DJCS ACT; Dr Helen Watchirs, Human Rights and Discrimination Commissioner, ACT; Dr Pene Mathew, Legal Officer, Human Rights Commission, ACT; and Ms Belinda Barnard, Policy Officer, Human Rights Commission, ACT.

All of these people helped us better to understand comparable legislative provisions in other jurisdictions and to understand the practical issues which would have to be dealt with if legislation is put in place.

While all of those mentioned assisted us, the responsibility for our report on the views of Western Australians about human rights and the recommendations we have made rests wholly with us. We approached the consultation on the basis that we should maintain an open mind on the issues until we had heard from the Western Australian community and taken such advice as was necessary to understand the issues. Having done so, we report on both the community's input and our own ultimate conclusions. Our views and recommendations are substantially in accord with the weight of advice we received from the Western Australian community. We hope that this report will assist the Government, the Parliament, and the people of Western Australia to enhance the enjoyment of human rights in our State.

Consultation Committee for a Proposed WA Human Rights Act



SUMMARY OF REPORT AND RECOMMENDATIONS

This Report records the process of consultation with Western Australians undertaken by the Committee for a Proposed WA Human Rights Act to ascertain if there is support for a WA Human Rights Act and, more broadly, what the Government and the community can do to encourage a human rights culture within this State. It records the consultation process, the varied views of Western Australians about these matters and the conclusions and recommendations of the Committee.

While there were conflicting views, there was clear majority support for a WA Human Rights Act, although some supporters wanted a stronger law than that proposed by the Government and reflected in its draft Human Rights Bill 2007. The principal arguments put forward by opponents of the proposal concerned the lack of need for additional measures to protect human rights and the desire to maintain the sovereignty of Parliament to avoid shifting power to unelected judges. A smaller number were particularly concerned about the Right to Life provisions in the draft Bill.

The Committee's consultations established that a wide range of people believe that their rights, or the rights of others, are not given sufficient respect and need greater protection. The breadth of individual and personal concerns was striking. Equally striking was that government agencies with responsibility for monitoring the activities of other departments and agencies which have difficult and sensitive roles were concerned about the need for improved approaches to protecting human rights. The view that "it ain't broke so don't fix it" was comprehensively answered by the submissions we received from both the public and from government agencies.

The Committee concluded that a WA Human Rights Act which was an ordinary Act of Parliament would contribute to an increased awareness of, and concern for, human rights in Western Australia. If a WA Human Rights Act was binding on Government and the way it treated people it could meet many of the concerns raised with the Committee. We therefore recommend that a Human Rights Act be enacted in Western Australia.

In making this recommendation the Committee strongly supports the maintenance of parliamentary sovereignty. We agree that democratically elected politicians should retain the responsibility for determining how different rights should be balanced and when rights have to be limited for the common good of the community. We do not believe that judges should have the power to override the clear legislative intention of Parliament. We believe the draft Bill is designed to achieve that objective, and does, and that the "dialogue" model of human rights protection which is proposed (rather than an entrenched bill of rights) is appropriate to the legal and constitutional traditions many people told us they want to see preserved.

The Committee recommends a number of changes to the draft Bill to reflect concerns raised during the consultation and which are intended to promote a human rights culture in Western Australia. These recommendations are set out below. Three amendments, in particular, warrant mention.

The Committee recommends an amendment to the Right to Life provision in the draft Bill, to ensure that the principle objection to it is removed and that the difficult and deeply divisive issue of abortion remains one for the elected Parliament to determine.

The Committee also recommends an amendment to reflect concerns about the freedom of religious bodies to put their beliefs into practice as they carry out their work, often as an agent of government.

The Committee was also faced with widespread requests that the draft Bill be expanded to include economic, social and cultural rights. We therefore examined the reasons which have led other Australian jurisdictions to exclude most of these rights from their legislation. We came to the conclusion that there is no practical reason why such rights could not be added to the draft Bill and we recommend accordingly. As in all these matters, it will be for Parliament to decide whether or not to enact a WA Human Rights Act and, if so, what it should contain.

The Committee's recommendations are set out below. The reasons for the recommendations and the relevance of the outcomes of the consultation process to them is explained in the body of the Report.

The recommendations set out below follow the structure of the draft Bill. The recommendations are duplicated in the relevant Chapters of the Report and cross-referenced using the same recommendation number while still reflecting the order in which the issues are discussed in the Report.

RECOMMENDATIONS

1. A Human Rights Act should be enacted in Western Australia. That Act should be in the terms of the draft Bill, together with the specific recommendations set out below in relation to the amendment of the draft Bill. [\(Chapter 3\)](#)
2. A WA Human Rights Act should take the form of an ordinary Act of the Parliament. [\(Chapter 5\)](#)
3. That Act should be called a "Human Rights Act". [\(Chapter 5\)](#)
4. A preamble should be included in a WA Human Rights Act. A draft Preamble is attached to this Report in Appendix G. [\(Chapter 5\)](#)
5. The Government should give careful consideration to the wording of a draft Preamble to ensure that it fully captures the Government's aspirations of promoting a culture of human rights in Western Australia and the relevance of such a culture to the long term wellbeing of the people of this State. [\(Chapter 5\)](#)
6. The dialogue approach reflected in the draft Bill is the most appropriate model for a WA Human Rights Act and no fundamental changes are needed to the basic approach to the protection of rights taken in the draft Bill. [\(Chapter 6\)](#)
7. A WA Human Rights Act should recognise and protect the following economic, social and cultural rights, in addition to those economic, social and cultural rights already included in the draft Bill:
 - (a) the right of everyone to the highest attainable standard of physical and mental health;
 - (b) the right to an education;
 - (c) the right to have access to adequate housing;
 - (d) the right to take part in cultural life; and
 - (e) the right not to be deprived of property other than in accordance with the law, and on "just terms" (as that phrase is understood in s51 (xxx) of the Commonwealth Constitution).[\(Chapter 4\)](#)

8. Economic, social and cultural rights should be implemented in a WA Human Rights Act in the following way:
- (a) Economic, social and cultural rights should be treated in the same way as civil and political rights in a WA Human Rights Act;
 - (b) In the alternative:
 - (i) economic, social and cultural rights should be treated in the same way as civil and political rights, except in relation to the remedies available for a breach of those rights (set out in Part 6 of the draft Bill). A breach of an economic, social or cultural right should not be able to be the subject of a remedy in the courts. However, complaints about a breach of these rights should be addressed through the internal complaint process of a government agency or contractor, or by conciliation; and
 - (ii) a WA Human Rights Act should expressly include a statement to the effect that economic, social and cultural rights are to be progressively implemented. This should be assessed by reference to all relevant circumstances of the particular case, including the nature of the benefit or detriment likely to accrue or be suffered by any person concerned, and the financial circumstances and the estimated amount of expenditure required to be made by a government agency to act in a manner compatible with the economic, social or cultural right in question.
[\(Chapter 4\)](#)
9. The definition of “discrimination” in clause 4(1) of the draft Bill should be deleted, but clause 4(2) of the draft Bill should remain in place. [\(Chapter 6\)](#)
10. Clause 5 of the draft Bill should be amended to provide that only “human beings” have human rights. [\(Chapter 4\)](#)
11. Clause 7 of the draft Bill should be amended to remove the words “after he or she is born” so that it could not be said that the Human Rights Act gives any “signal” as to how issues such as abortion should be dealt with in the context of the right to life. [\(Chapter 4\)](#)
12. A WA Human Rights Act should expressly recognise that it is not applicable to existing laws in relation to abortion. [\(Chapter 4\)](#)
13. Clause 8(c) of the draft Bill should be amended so that it refers to medical and scientific “treatment” as well as “experimentation” and the words “unless this is otherwise authorised by law” should be included in clause 8(c). [\(Chapter 4\)](#)
14. The clauses in the draft Bill which set out human rights should be amended to use gender neutral language eg “the individual” or “the person” or “the child” or “their”, rather than “him or her” which recognises intersex persons (persons born biologically neither male nor female or persons who choose to identify as neither male nor female). [\(Chapter 4\)](#)
15. Clause 18(a) of the draft Bill should be amended to substitute the word “representatives” for the word “elections”. [\(Chapter 4\)](#)
16. Clause 20(1) of the draft Bill should be amended to insert the words “practise and” before the words “enjoy his or her culture”. [\(Chapter 4\)](#)

17. Clause 20(2) of the draft Bill should be amended to reflect the first sentence of article 31(1) of the Draft United Nations Declaration on the Rights of Indigenous Peoples. Accordingly, clause 20(2) of the draft Bill should provide:

Aboriginal peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. [\(Chapter 4\)](#)

18. Clause 20(2) should also make specific reference to Torres Strait Islander people. That is, it should read “Aboriginal and Torres Strait Islander people have the right to maintain, control, protect and develop their cultural heritage...”. [\(Chapter 4\)](#)

19. Clause 20(2) of the draft Bill (as amended) should be moved into a new clause headed “Indigenous rights”. [\(Chapter 4\)](#)

20. The new clause headed “Indigenous rights” should be amended to include an express right for Indigenous Western Australians to work in partnership with the Government in setting priorities for, and in the development, implementation and review of, policies, programs and services as they impact on Indigenous people. [\(Chapter 4\)](#)

21. Clause 23 of the draft Bill should be amended to include a right for every person not to be compelled to provide incriminating evidence against themselves, except in accordance with law. This right should also provide that if a person is compelled to provide incriminating evidence against themselves, such evidence cannot be subsequently used against them in criminal or civil proceedings. [\(Chapter 4\)](#)

22. Clause 23 of the draft Bill should be amended to include an additional right for all people involved in legal proceedings (and not just defendants) to be treated with dignity and respect. [\(Chapter 4\)](#)

23. Clause 24(1) of the draft Bill should be amended so that it refers to a right of a person charged with an offence to be presumed innocent until proven guilty beyond reasonable doubt as opposed to proven guilty according to law. [\(Chapter 4\)](#)

24. Clause 24(2)(b) of the draft Bill should be amended to provide “communicate with his or her lawyer or advisor” instead of “with a lawyer or advisor chosen by him or her”. [\(Chapter 4\)](#)

25. Clause 24(2)(j) of the draft Bill should be amended to indicate that a person charged with an offence is entitled to obtain the production of documents or other evidence, as well as to obtain the attendance and examination of witnesses, under the same conditions as the prosecution. [\(Chapter 4\)](#)

26. Clause 24(2)(h) of the draft Bill should be amended to delete the words “without payment by him or her”. [\(Chapter 4\)](#)

27. Clause 25 of the draft Bill should be amended to provide that in the case of a child who is arrested for, or charged with, an offence, the child’s parent or guardian should be promptly informed that the child has been arrested for, or charged with, an offence, and the parent or guardian should be informed promptly and in detail, in a manner that he or she understands, of the nature and reason for the charge against the child. [\(Chapter 4\)](#)

28. A WA Human Rights Act should include a provision which makes it clear that human rights may be subject to some limitations (the permissible limitations clause). The permissible limitations clause should incorporate the factors set out in clause 34(4) of the draft Bill. [\(Chapter 4\)](#)
29. The permissible limitations clause should apply to all of the human rights in a WA Human Rights Act [\(Chapter 4\)](#)
30. The permissible limitations clause should be taken out of clause 34 of the draft Bill and relocated into that Part of a WA Human Rights Act which sets out the human rights recognised by the Act (Part 2 of the draft Bill). [\(Chapter 4\)](#)
31. If the permissible limitations clause is relocated, there should be retained within that Part of a WA Human Rights Act which deals with the interpretation of written laws (Part 5 of the draft Bill) a provision which makes clear that a law will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. [\(Chapter 4\)](#)
32. There should be included in that Part of a WA Human Rights Act which deals with the duties of government agencies (Part 6 of the draft Bill) a provision which makes clear that an act or decision of a government agency will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. This provision should be included within clause 40(3) of the draft Bill. [\(Chapter 4\)](#)
33. There should be included in that Part of a WA Human Rights Act which deals with the compatibility of written laws with human rights (Part 4 of the draft Bill) a provision which makes clear that a Bill for an Act will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. [\(Chapter 4\)](#)
34. Clause 31 of the draft Bill should be amended to require that if a Bill for an Act imposes a limitation on a human right, but is nevertheless considered to be compatible with human rights, the statement of compatibility should expressly state that the Bill is considered to meet the criteria in the permissible limitations clause. [\(Chapter 4\)](#)
35. Clause 31(4) of the draft Bill should be amended to require that reasons be given for why a Bill is considered to be compatible with human rights. [\(Chapter 6\)](#)
36. Clause 31(3) of the draft Bill should be amended to require that in respect of Government Bills, statements of compatibility should be presented to each House of Parliament by the Minister in charge of the Bill in the House. In any other case, clause 31(3) should require the Member of Parliament introducing the Bill to present the statement. [\(Chapter 6\)](#)
37. A WA Human Rights Act should include a provision in the terms set out in clause 31(5) of the draft Bill. [\(Chapter 6\)](#)
38. A WA Human Rights Act should give a parliamentary committee a role in scrutinising all Bills and subsidiary legislation for their compatibility with human rights. This role should be given to the Joint Standing Committee on Delegated Legislation, and the Terms of Reference for this Committee should be amended accordingly. The extension of this Committee's role should be achieved either by including a provision in a WA Human Rights Act, or alternatively, by the Parliament through its Standing Orders. [\(Chapter 6\)](#)

39. A parliamentary committee should only be given the function of scrutinising Bills and subsidiary legislation for compatibility with human rights if that Committee is adequately resourced to carry out that function. [\(Chapter 6\)](#)
40. A WA Human Rights Act should include an override declarations clause in the terms set out in clause 30 of the draft Bill, but clause 30 of the draft Bill should be amended to expressly provide that an override declaration may only be made in exceptional circumstances. “Exceptional circumstances” should not be defined. [\(Chapter 6\)](#)
41. If a WA Human Rights Act is enacted, government agencies should be encouraged to develop and implement action plans about how they will meet their obligations under the provision set out in clause 40 of the draft Bill. The development of such action plans should be implemented administratively, and should not be mandated in a WA Human Rights Act. [\(Chapter 6\)](#)
42. If a WA Human Rights Act is enacted, all Cabinet submissions should contain a human rights impact statement. This requirement should be implemented administratively and should not be mandated in a WA Human Rights Act. [\(Chapter 6\)](#)
43. If a WA Human Rights Act is enacted, a central government agency should be given the role of the lead agency within Government in relation to human rights. The role of this agency should be determined administratively, and should not be specified in a WA Human Rights Act. [\(Chapter 6\)](#)
44. If economic, social and cultural rights are included in a WA Human Rights, clause 33(1) of the draft Bill should be amended to include a specific reference to the International Covenant on Economic, Social and Cultural Rights. Clause 33(1) should otherwise not be amended to expressly permit consideration of a broader range of international jurisprudence. [\(Chapter 6\)](#)
45. A WA Human Rights Act should include an interpretive obligation clause in the terms set out in clause 34(3) of the draft Bill. However, clause 34(3)(c) should be amended by inserting the word “is” after the word “it” to correct what appears to be a typographical error. [\(Chapter 6\)](#)
46. The words “of this State” should be deleted from the opening words of clause 34(4) of the draft Bill. [\(Chapter 6\)](#)
47. A WA Human Rights Act should include an express provision permitting a court or tribunal dealing with a human rights question to grant leave to any person or body to intervene in the proceedings to make submissions in relation to the human rights question. The appropriate place for such a provision appears to be in clause 35(1). [\(Chapter 6\)](#)
48. A WA Human Rights Act should include a provision in the terms of clause 35(2) of the draft Bill, to the effect that only the Supreme Court may make a declaration of incompatibility. [\(Chapter 6\)](#)
49. A WA Human Rights Act should include a provision in the terms of clause 36(1) of the draft Bill, to the effect that proceedings cannot be commenced in the Supreme Court that seek only a declaration of incompatibility. [\(Chapter 6\)](#)
50. A WA Human Rights Act should, at least initially, focus on requiring compliance by the Western Australian government with the human rights recognised in the Act. Other people in the community, and corporations, should not be required to comply with the rights set out in a WA Human Rights Act at this stage. [\(Chapter 7\)](#)

51. Clause 38 of the draft Bill is unnecessary and liable to cause confusion and should not be included in a WA Human Rights Act. [\(Chapter 7\)](#)
52. A WA Human Rights Act should contain a definition of “government agency” in the terms set out in clause 39(2) of the draft Bill. [\(Chapter 7\)](#)
53. A WA Human Rights Act should extend the requirement to comply with human rights (presently contained in Part 6 of the draft Bill) to the private sector in certain circumstances, namely to persons or bodies (contractors) in so far as they perform services under contract with a government agency. [\(Chapter 7\)](#)
54. If the Government is not willing to accommodate an increase in the cost of the provision of services by contractors in light of their requirement to comply with a WA Human Rights Act, it should not extend the obligation to comply to contractors. [\(Chapter 7\)](#)
55. A WA Human Rights Act should contain a provision which makes it clear that a government agency is under an obligation to ensure that services provided by a contractor pursuant to a contract with that government agency are carried out in a manner which is compatible with the human rights in the Human Rights Act. [\(Chapter 7\)](#)
56. A WA Human Rights Act should not create a new cause of action against a contractor for a breach of human rights. [\(Chapter 7\)](#)
57. A WA Human Rights Act should provide that a complaint about a breach of a human rights by a contractor should be able to be addressed through the internal complaint process of the contractor, or through conciliation. [\(Chapter 7\)](#)
58. A WA Human Rights Act should contain an express exemption for religious bodies and organisations which are contractors. That exemption should be in similar terms to the text of section 38(4) of the Victorian Charter, which provides:
- (4) Subsection (1) 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 (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.
- [\(Chapter 7\)](#)
59. A WA Human Rights Act define the term “religious body” in a similar way to the definition in section 38(5) of the Victorian Charter, which provides:
- (5) In this section “religious body” means—
- (a) a body established for a religious purpose; or
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.
- [\(Chapter 7\)](#)

60. Clause 39(3)(c) of the draft Bill should be amended to provide that courts and tribunals are not “government agencies” for the purposes of a WA Human Rights Act “except when they are acting in an administrative capacity”. [\(Chapter 7\)](#)
61. A multi-layered system for dealing with breaches of human rights, comprising the following layers, should be included in a WA Human Rights Act:
- (a) internal processes within government agencies and contractors for trying to resolve human rights complaints;
 - (b) a conciliation process run by an independent agency; and
 - (c) limited rights to take legal action against government agencies in courts and tribunals for a breach of human rights.
- [\(Chapter 8\)](#)
62. If it is alleged that a government agency or a contractor has breached the human rights set out in the draft Bill, then that breach should be subject to each of the three layers of the enforcement system outlined above. [\(Chapter 8\)](#)
63. If economic, social and cultural rights are included in a WA Human Rights Act and are dealt with in the same way as civil and political rights, then a breach of any of the rights in a WA Human Rights Act should be subject to each of the three layers of the enforcement system outlined above. [\(Chapter 8\)](#)
64. If economic, social and cultural rights are included in a WA Human Rights Act, but those rights are implemented using the alternative model recommended above, then those additional economic, social and cultural rights, (together with the economic, social and cultural rights presently included in clause 20 of the draft Bill) should be subject to the informal complaint processes outlined in (a) and (b) above, but should not be able to be pursued through litigation (as outlined in (c) above). [\(Chapter 8\)](#)
65. A WA Human Rights Act should require each government agency and contractor to establish an informal complaints process for receiving, considering and responding to complaints about human rights, and which incorporates the following elements as a minimum:
- (a) it should identify one or more designated officers to whom complaints can be made that a decision or action of the agency or contractor was incompatible with human rights;
 - (b) it should make provision for that officer to receive written complaints, both in paper and electronic form and, where reasonably practicable, to receive complaints in alternative forms (eg orally, for complainants who are visually impaired, or have language or literacy difficulties);
 - (c) no fees should be permitted in relation to complaints;
 - (d) the designated officer should be required to provide the complainant with a response to the complaint on behalf of the government agency or organisation as soon as practicable, and in any event within 14 days of receiving the complaint;

- (e) the government agency or contractor should be required to make widely available a statement explaining its informal complaints system, which sets out how to make a complaint, and the time frame in which complaints will be addressed;
- (f) complaints should be able to be made by an individual whose human rights have been breached, or by a person on behalf of that individual. In the latter case, complaints should be permitted to be made without identifying the person whose rights have been breached where it is practicable to do so having regard to the nature of the complaint; and
- (g) in any communications between the agency or contractor and the complainant, the complainant should be entitled to receive the assistance of another individual.

[\(Chapter 8\)](#)

66. A WA Human Rights Act should permit an individual who claims that their human rights have been breached (or someone else on behalf of the individual) to request that the Commissioner for Equal Opportunity endeavour to conciliate their complaint against the government agency or contractor.

[\(Chapter 8\)](#)

67. A WA Human Rights Act should provide that a complainant is entitled to be accompanied during the conciliation by a third party. [\(Chapter 8\)](#)

68. A WA Human Rights Act should provide that no party should be permitted to be legally represented during a conciliation, unless the complainant agrees to this course of action. [\(Chapter 8\)](#)

69. A WA Human Rights Act should expressly provide that no fees should apply to conciliations.

[\(Chapter 8\)](#)

70. A WA Human Rights Act should expressly provide that nothing said by a party in a conciliation may be used in any proceedings in a court or tribunal. [\(Chapter 8\)](#)

71. A WA Human Rights Act should provide that a person cannot apply for conciliation by the Commissioner for Equal Opportunity unless they have first tried to resolve their complaint through the internal complaints process of the agency or contractor who is the subject of the complaint.

[\(Chapter 8\)](#)

72. A WA Human Rights Act should focus on preventing breaches of human rights and not on compensation-based litigation. A WA Human Rights Act should therefore contain a provision in the terms of clause 41 of the draft Bill. [\(Chapter 8\)](#)

73. Clause 41 of the draft Bill should be amended to indicate that a person may not pursue a remedy for a breach of their human rights through a court action if that breach has been resolved to the satisfaction of both parties through an internal complaint process or by conciliation. [\(Chapter 8\)](#)

74. If economic, social and cultural rights are included in a WA Human Rights Act, but those rights are implemented using the alternative model recommended above, then a WA Human Rights Act would need to make clear that clause 41 does not apply to breaches of economic, social and cultural rights. [\(Chapter 8\)](#)

75. The definition of “human rights question” in clause 32 of the draft Bill should be amended to include proceedings of the kind contemplated in clause 41 of the draft Bill. [\(Chapter 8\)](#)

76. A WA Human Rights Act should confer the following additional functions and powers on the Commissioner for Equal Opportunity and the Equal Opportunity Commission in addition to the functions conferred in clause 45 of the draft Bill:

- (a) the power to conduct audits of a government agency to determine the extent to which its practices and procedures are compatible with human rights. The power to conduct an audit should not depend upon an invitation from an agency to do so or upon the existence of a complaint in relation to a particular agency;
- (b) the power to make recommendations to an agency about changes to its practices and procedures to improve compliance with a WA Human Rights Act, following an audit. If an agency does not propose to comply with such recommendations it should be required to provide the Commissioner for Equal Opportunity with reasons for its refusal to do so;
- (c) the power to review the legislation under which a government agency operates or from which it derives its powers and obligations, to determine whether that legislation is compatible with human rights;
- (d) the power to conduct a review of the compatibility of particular legislation with human rights, following a request by the Attorney General to do so, and to report to the Attorney General on the outcome of that review.

[\(Chapter 8\)](#)

77. A WA Human Rights Act should require the Commissioner for Equal Opportunity to include in his or her annual report to the Parliament the following information:

- (a) the number of complaints about breaches of human rights which the Commissioner was asked to conciliate and the percentage of complaints resolved through conciliation;
- (b) details of any audit of a government agency conducted during the year, any recommendations made as a result of that audit and the agency's response to those recommendations;
- (c) the results of any review of legislation conducted by the Equal Opportunity Commission during the year including (if necessary) any recommendations for amendment of that legislation to make it compatible with human rights; and
- (d) an outline of the steps taken by the Commissioner during the year to promote public knowledge of and respect for human rights.

[\(Chapter 8\)](#)

78. If economic, social and cultural rights are included in a WA Human Rights Act (as recommended above), the functions of the Commissioner for Equal Opportunity and the Equal Opportunity Commission should be exercisable with respect to those rights, as well as with respect to the rights presently included in the draft Bill. [\(Chapter 8\)](#)

79. If a WA Human Rights Act is enacted, the Equal Opportunity Commission should be renamed the Western Australian Human Rights and Equal Opportunity Commission and the office of the Commissioner should be renamed the Commissioner for Human Rights and Equal Opportunity.

[\(Chapter 8\)](#)

80. A WA Human Rights Act should make a consequential amendment to s25(1) of the Parliamentary Commissioner Act 1971 to make clear that the Ombudsman can express an opinion that the action of a government agency was contrary to the agency's obligation to act compatibly with human rights under the Human Rights Act. ([Chapter 8](#))
81. There is a critical role for political and bureaucratic leadership if a culture of human rights is to be created in Western Australia. ([Chapter 9](#))
82. Human rights education in schools would be important to the creation of a human rights culture in Western Australia. Education about human rights should be incorporated into existing courses which deal with the obligations of citizenship and our system of government. The Preamble to a WA Human Rights Act could serve as a useful tool in the education process. ([Chapter 9](#))
83. A key element in creating a human rights culture in Western Australia would be educating the broader community about a WA Human Rights Act. A WA Human Rights Act should therefore contain a provision in the terms of clause 45 of the draft Bill which provides for the *Equal Opportunity Act 1984* to be amended to expand the functions of the Commissioner for Equal Opportunity to include promoting public knowledge of, and respect for, the human rights set out in the draft Bill. ([Chapter 9](#))
84. If a WA Human Rights Act is enacted, it would be imperative to its proper implementation that public servants within government agencies, judges and the legal profession receive specialised human rights education and training. It would be a matter for the Government as to how, and through whom, any public sector education and training was delivered. ([Chapter 9](#))
85. To the extent that a WA Human Rights Act also covers contractors, they would need to receive education and training about their obligations under the Act. ([Chapter 9](#))
86. In so far as the enactment of a WA Human Rights Act would have financial implications for government agencies, including, in particular, the Police, the Office of the Director of Public Prosecutions, the Supreme Court, the Commissioner for Equal Opportunity, the Equal Opportunity Commission, and the Ombudsman, a WA Human Rights Act should not be pursued without a commitment from Government that it is prepared to ensure that agencies are adequately resourced to comply with it. ([Chapter 9](#))
87. Consideration should be given to the following additional proposals for encouraging a culture of respect for human rights which were raised during the consultations:
- (a) Establishing a fund for supporting community based human rights initiatives, which may also include annual awards in recognition of community members or public officers who demonstrate excellent human rights practice. This could be done in partnership with business as a collaborative way of including the private sector in the growth of a human rights culture;
 - (b) Making use of film and sports celebrity human rights ambassadors to further mainstream a human rights culture;
 - (c) Encouraging individuals and businesses to take voluntary steps to promote human rights in the broader community, such as social charters or corporate social responsibility programmes.
 - (d) Enforcing better standards in the media and advertising.

(e) Ensuring the availability of advice, assistance and advocacy about human rights, and ensuring that human rights advocacy and legal services are available to marginalised and disadvantaged individuals and groups.

[\(Chapter 9\)](#)

88. The provisions of a WA Human Rights Act should commence operation, in their entirety, at least one year (but preferably two years), after the enactment of that Act. [\(Chapter 9\)](#)

89. If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. A WA Human Rights Act should not require that reviews of the Act be conducted by an independent committee or agency. However, clause 43 of the draft Bill should be amended to require that such reviews should involve consultation with all stakeholders, including the community.

[\(Chapter 4\)](#) [\(Chapter 9\)](#)

90. Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):

(a) whether economic, social or cultural rights, or additional economic, social or cultural rights, should be included in the Act;

(b) whether a right to self-determination for Indigenous people should be included in the Act;

(c) whether a right to cultural security for Indigenous people should be included in the Act;

(d) whether a right for Indigenous people to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs should be included in the Act;

(e) whether a freedom to establish, maintain, protect and access places of worship and religious or spiritual significance and a freedom from desecration or damage to such places should be included in the Act;

(f) whether specific rights for children and people with disabilities should be included in the Act;

(g) whether rights to environmental protection should be included in the Act;

(h) whether internal limitations on human rights in the Act can or should be removed;

(i) whether statements of compatibility should be required for subsidiary legislation;

(j) the operation of override declarations and whether override declarations should be subject to a sunset clause;

(k) whether courts and tribunals should be included within the definition of “government agency” when performing their judicial functions; and

(l) whether compensation should be payable for a failure to act compatibly with human rights.

[\(Chapter 6\)](#) [\(Chapter 7\)](#) [\(Chapter 8\)](#) [\(Chapter 9\)](#)

91. A WA Human Rights Act should require all government agencies which are “agencies” under the *Financial Management Act 2006* to include in their annual reports a human rights compliance report addressing the following matters:

- (a) details of any cases before courts or tribunals in which a WA Human Rights Act has been relied upon to support a cause or action against the agency, or in which a court or tribunal has concluded that a provision in a law administered by the agency is incompatible with human rights;
- (b) details of any measures implemented by the agency to ensure its practices and procedures are compatible with the requirements of a WA Human Rights Act
- (c) any training or education undertaken by staff during the year in relation to human rights;
- (d) the number of complaints the agency received during the year which alleged a failure by the agency to act, or make a decision, compatibly with human rights;
- (e) the internal complaints process which the agency established, the number of complaints received through that process during the year and the proportion of complaints which were resolved through that internal process;
- (f) the number of complaints against the agency which were the subject of conciliation by the Commissioner for Equal Opportunity and the percentage of those complaints resolved through conciliation;
- (g) the number of occasions during the year on which a failure by the agency to act, or make a decision, compatibly with human rights was relied upon as a ground for the unlawfulness of the agency’s conduct in an action before a court or tribunal, and the result of any such litigation completed during the year;
- (h) details of any audit of the agency’s practices and procedures conducted by the Equal Opportunity Commission during the year, any recommendations made as a result of that audit, the agency’s response to those recommendations, and, if the agency determined not to implement a recommendation, the reasons for that decision.

[\(Chapter 6\)](#) [\(Chapter 8\)](#)

92. If any government agency under a WA Human Rights Act would not be covered by the requirement to prepare an annual report in the *Financial Management Act 2006*, a WA Human Rights Act should require that government agency to provide a human rights compliance report to the Commissioner for Equal Opportunity on an annual basis. The Commissioner should be required to table any such reports in the Parliament. [\(Chapter 6\)](#)

93. If economic, social and cultural rights are included in a WA Human Rights Act (as recommended above), these reporting requirements should apply with respect to those economic, social and cultural rights, as well as with respect to the rights presently included in the draft Bill. [\(Chapter 8\)](#)

GLOSSARY

Aboriginal Legal Service of Western Australia Inc	ALSWA
ACT Bill of Rights Consultative Committee	ACT Consultative Committee
Australian Capital Territory	ACT
Australian Lawyers for Human Rights	ALHR
Bill of Rights in the 1996 <i>Constitution of the Republic of South Africa</i>	South African Bill of Rights
<i>Canadian Charter of Rights and Freedoms 1982</i>	Canadian Charter
<i>Charter of Rights and Responsibilities 2006 (Vic)</i>	Victorian Charter
Commonwealth Human Rights and Equal Opportunity Commission	HREOC
Consultation Committee for a Proposed WA Human Rights Act	Committee
Draft Human Rights Bill 2007	draft Bill
Economic, social and cultural rights	ESC rights
<i>Human Rights Act 1998 (UK)</i>	UK Act
<i>Human Rights Act 2004 (ACT)</i>	ACT Act
Human Rights Act for Western Australia	WA Human Rights Act
Human Rights Law Resource Centre Ltd	HRLRC
<i>International Covenant on Civil and Political Rights</i>	ICCPR
<i>International Covenant on Economic Social and Cultural Rights</i>	ICESCR
International Human Rights Lawyers' Working Group	IHRL Working Group
<i>New Zealand Bill of Rights Act 1990 (NZ)</i>	New Zealand Bill of Rights
Southern Communities Advocacy Legal & Education Service Inc	SCALES
State Administrative Tribunal	SAT
United Kingdom	UK
Victorian Human Rights Consultation Committee	Victorian Consultation Committee
Western Australian Council of Social Service	WACOSS

Note: the above terms are defined where they first appear in each of those chapters in which they are frequently used.





CHAPTER 1: INTRODUCTION

1.1 Background

On 3 May 2007, the Attorney General, the Honourable Jim McGinty MLA, announced the Government's intention to consult with the Western Australian community about the introduction of a Human Rights Act for Western Australia (a WA Human Rights Act).

In launching the consultation process at the Constitutional Centre of Western Australia, the Attorney General issued a *Statement of Intent* on behalf of the Government. *The Statement of Intent* (see Appendix A) set out the Government's view that Western Australia should introduce a Human Rights Act as this would help to create a political and administrative culture in *which* the need to respect human rights is understood and acted upon. *The Statement of Intent* explained that the purpose of the consultation process was to ask the Western Australian community about the matters which should be included in such a law and, more broadly, about what the Government and the community could do to encourage a human rights culture.

In order to provide a focus for the community's consideration of the question of a WA Human Rights Act, the Government simultaneously released a draft Human Rights Bill 2007 (draft Bill) which drew on recent examples from Victoria and the Australian Capital Territory (ACT). The purpose of the draft Bill (see Appendix B) was to indicate the types of provisions a WA Human Rights Act might contain if one was introduced and to incorporate the Government's preferred model for such a law.

Finally, as part of the launch of the consultation process, the Government announced the appointment of an independent Consultation Committee for a Proposed WA Human Rights Act (the Committee) comprised of the following people:

- The Honourable Fred Chaney AO (Chairman), a Director of Reconciliation Australia Ltd, former Deputy President of the National Native Title Tribunal and former Chancellor of Murdoch University;
- Ms Lisa Baker, Executive Director of the Western Australian Council of Social Service;
- The Most Reverend Dr Peter Carnley AC, former Anglican Archbishop of Perth and Primate of the Anglican Church of Australia; and
- Associate Professor Colleen Hayward, Manager, Kulunga Research Network, Telethon Institute for Child Health Research.

1.2 The Committee's brief

In its *Statement of Intent*, the Government asked the Committee to:

- consider and consult with Western Australians about the ways in which greater awareness of, respect for, and observance of, human rights could be achieved at all levels of the State government and throughout the Western Australian community;
- ask the community what it thinks about the Government's preferred model for a WA Human Rights Act set out in the draft Bill;
- identify a human rights framework that will serve the needs of Western Australians in the future rather than to look at past and present policies and actions; and
- make recommendations to the Government about the matters which should be addressed in a WA Human Rights Act in order to create a human rights culture in the State.

The *Statement of Intent* indicated that, in the Government's view, there were five issues that should be considered when talking about a WA Human Rights Act. The Government wanted these issues to form the basis for the Committee's community consultations, submissions from the community and the Committee's final Report to the Government. The five essential issues were:

1. Which human rights should be recognised in a WA Human Rights Act.
2. The form that a WA Human Rights Act should take and how human rights should be taken into account when new laws are made by Parliament.
3. How a WA Human Rights Act could create greater understanding of, and respect for, human rights within government departments and agencies.
4. The role to be played by the courts in increasing awareness of, respect for, and observance of, human rights in the Western Australian community under a WA Human Rights Act.
5. Whether anyone other than government departments and agencies should be required to comply with a WA Human Rights Act and how community awareness of, and respect for, human rights should be promoted.

The Government asked the Committee to consult widely with individuals, community groups and organisations, and government departments and agencies through forums, public meetings and written submissions.

The timeline set by the Government called for the Committee to report by 16 November 2007.

For the purposes of conducting its consultations and preparing its Report to the Government, the Committee was provided with administrative and legal assistance by officers from the Department of the Attorney General and the State Solicitor's Office.

The Committee was also provided with an operating budget of \$636,494 by the Department of the Attorney General. The Committee completed its project within the specified time and within its budget.



1.3 This Report

During the Committee's community consultation it became apparent that there were differences of view among Western Australians on the issue of how best to protect and advance human rights in this State. While some broad themes did emerge, none of them was supported unanimously. The Committee saw its task in reporting to the Government as two-fold:

1. to report fairly and accurately the views of the Western Australian community expressed during the consultation process; and
2. to make recommendations to the Government based on an independent assessment of those views.

The Committee was presented with a vast number of opinions, stories and suggestions covering an exceptionally wide range of issues during its consultations with the community. While all of these helped to inform the Committee's thinking, it is beyond the scope of this Report to present or discuss every one of them. The Committee has framed this Report to deal with those issues which appear to be of most concern to the community and those issues which, in its view, are most relevant to its brief from the Government. It would, however, like to thank everyone who contributed their thoughts, ideas and experiences, which were, in the latter case, often deeply personal.

A number of issues raised with the Committee concerned the conduct of Commonwealth agencies or the operation of Commonwealth laws. The Committee took these into account in so far as they were illustrative of relevant human rights issues at the State level, but does not generally refer to them in this Report. Commonwealth agencies and laws would not be affected by a WA Human Rights Act and the brief given to the Committee was to focus on improving awareness of, and respect for, human rights within the State government and the Western Australian community. The Committee has drawn the attention of the Commonwealth Attorney General's Department to the fact that human rights issues within the Commonwealth's jurisdiction were raised with us.

THE COMMITTEE WAS PRESENTED WITH A VAST NUMBER OF OPINIONS, STORIES AND SUGGESTIONS COVERING AN EXCEPTIONALLY WIDE RANGE OF ISSUES DURING ITS CONSULTATIONS WITH THE COMMUNITY...

The Committee also notes that it received a number of submissions from outside Western Australia during the course of its consultations. While all of these were taken into account, and a number are referenced in the Report, the Committee generally placed greater emphasis on Western Australian views, as these were what the Committee was tasked to gather.



CHAPTER 2: OVERVIEW OF THE CONSULTATION PROCESS

This consultation process is a fabulous opportunity to demonstrate that human rights are not just a discussion happening at the United Nations in Geneva or New York. It is an opportunity to illuminate the fact that human rights are everybody's rights and that they start at a very grass roots level.

Submission 372: Southern Communities Advocacy & Legal Education Service

The consultation process began on 3 May 2007 when the Government issued its *Statement of Intent* in the presence of the media at a formal launch at the Constitutional Centre of Western Australia.

2.1 Calling for submissions and disseminating information

As part of the launch, the Committee released a community discussion paper entitled *Human Rights for WA* and invited people to make submissions by 31 August 2007. The purpose of the discussion paper was to provide information about the consultation process and background information about the matters the Government had asked the Committee to consider. In addition to the discussion paper, a shorter summary document, entitled *Talking Human Rights in Western Australia*, and a pamphlet, entitled *We Want Your Views*, were prepared to provide a brief background to the issues, and information on the variety of ways in which people could participate.

The release of these documents was an important first step in generating a dialogue with the people of Western Australia. Each of the documents listed eight key questions relevant to the Committee's brief, which the Committee asked the community to answer. The key questions were:

1. Should WA have a Human Rights Act?
2. What rights should be protected in a WA Human Rights Act?
3. What form should a WA Human Rights Act take?
4. How should a WA Human Rights Act require human rights to be protected?
5. Who should be required to comply with the human rights recognised in a WA Human Rights Act?
6. What should happen if a person's human rights are breached?
7. If WA introduced a Human Rights Act what wider changes would be needed?
8. What else can the Government and the community do to encourage a culture of respect for human rights in WA?

The Committee's documents helped to "unpack" these questions further into a number of sub-issues. While the Committee encouraged participants to refer to these questions when preparing written submissions, it stressed that they were not intended to limit discussion. People were free to answer some or none of the questions, discuss other issues, answer different questions altogether or simply tell the Committee their stories.

In total, 1,652 printed copies of the discussion paper, 2,638 printed copies of the summary document and 3,102 printed copies of the pamphlet were distributed throughout the consultation together with 2,972 copies of the Government's Statement of Intent and 1,292 copies of the draft Bill. An audio recording of the Government's *Statement of Intent* and the Committee's *Talking Human Rights* document was also provided on request.

In May 2007, the Department of the Attorney General set up a website to provide information about the consultation process and the work of the Committee at the address:

www.humanrights.wa.gov.au. Electronic copies of the discussion paper, summary document and pamphlet, together with the *Government's Statement of Intent* and draft Bill were made available on the site¹. Links to various international human rights instruments and overseas and interstate human rights legislation were also made available and answers to some frequently asked questions were published.

The website attracted more than 10,000 distinct visits from internet users who performed more than 34,000 file downloads during the period from its creation to the end of October 2007.

2.2 Promoting the consultations

The Committee took the view that it was not, and ought not to be seen as, the proponent of the Government's proposal for a WA Human Rights Act or the draft Bill in particular. In order to carry out its task of consulting with the community properly, the Committee determined that it must reserve its own judgment about the proposal until the consultation process had ended. The Committee did, however, consider itself responsible for actively promoting and encouraging participation in the consultation process.

The Committee planned a range of public forums to engage the public as set out in further detail below. Committee members, particularly the Chairman, contributed newspaper, magazine and online articles for the purpose of raising awareness of the forums, providing information about some of the issues and inviting people to make submissions. Committee members also made themselves available for a range of media interviews during the period of the public consultation. Radio interviews on talkback programs and regional stations triggered a degree of debate and attracted some interest in the public forums, especially those held in regional centres. Regional forums were also given some coverage by local television stations in Broome, Albany and Bunbury. ABC's *Stateline* program broadcast a story on the Government's proposal and the consultation which helped to publicise the process.

Public forums were advertised in local newspapers, in the Government Noticeboard section of *The West Australian* newspaper and on the project website. Flyers promoting the forums were distributed widely through a range of community organisations to encourage public involvement. Participation in forums was also encouraged through letters, emails and phone calls to a wide range of organisations identified as potentially interested, for example, Rotary, Regional Development Commissions, family and youth support program centres and community legal centres.

¹ Copies of the Committee's documents will remain available on the website until 30 June 2008.

Despite the above efforts, the Committee received a number of comments that insufficient publicity was being given to the public forums and that, as a result, people were not aware of the opportunity to attend and express views². Accordingly, midway through the consultation the Committee agreed to allocate funds from its budget to a full page advertisement in *The West Australian* about the consultation process.

This advertisement, which was published on 24 July 2007, produced a flurry of responses (see page 8). It also drew criticism from the State Opposition in a press release for being designed to “spruik” a series of “talkfests” and “push” the Attorney General’s agenda³. This is a reminder that the issues on which the Committee has consulted the community are of political interest and can be politically contentious. The Committee sees the political choices as matters with which politicians must deal. The Committee’s responsibility was to ask the community for its views about these matters, to report on those consultations and to make recommendations to the Government. The ultimate responsibility for what (if anything) is legislated is in the hands of democratically elected politicians. The advertisement was published to widen the reach of publicity in order to encourage wider public participation.

The substance of the media coverage of the Government’s proposal throughout the consultation period is discussed in more detail under heading 2.8 below.

2.3 Face-to-face consultations

Altogether, the Committee arranged or participated in 39 public forums throughout metropolitan and regional Western Australia, six focused forums with specific organisations, 50 meetings with various stakeholders and nine interstate “lesson learning” meetings.

2.3.1 Public forums – the “travelling human rights road-show”⁴

A community consultation of the type required of the Committee presented unique challenges in Western Australia because of the size of the State. Nevertheless, the Committee held 39 public forums throughout metropolitan and regional Western Australia over a period of three months from mid-June to mid-September 2007. Three additional regional forums were organised but did not proceed because of a lack of attendance.

The first two forums were conducted at the Constitutional Centre of Western Australia in West Perth, a central venue readily accessible to most people in the metropolitan area. A third central forum was held at the Western Australian Cricket Association ground in East Perth in late August.

Metropolitan forums were also held in the afternoon or evening in Mandurah, Fremantle, Bateman, Midland, Armadale, Sorrento, and Wanneroo. Two regional forums were conducted in each of Broome, Derby, Kununurra, Albany, Merredin, Kalgoorlie, Bunbury, Busselton, Geraldton, Carnarvon, Northam, Narrogin and Esperance. One regional forum was conducted in each of Karratha, Port Hedland and Newman. A list of these forums together with the dates on which they were held is set out in Appendix C.

The format of the forums varied slightly depending upon the wishes and number of participants, but typically involved a 15 minute overview by one or more Committee members (usually each forum was attended by two Committee members, one being the Chairman). The overview provided background information and information about the draft Bill, the eight key questions that the Committee was seeking

² For example, submission 184: Western Australian Farmers Federation (Inc); submission 195: Joan Hodsdon; submission 220: Ingrid Hall.

³ Paul Omodei, “Speak up for your rights” (Press Release, 24 July 2007) available from <http://www.loop.wa.gov.au>.

⁴ This was the name that the Committee was dubbed by some of the media.

A HUMAN RIGHTS ACT FOR WESTERN AUSTRALIA

A once-in-a-lifetime chance to... Speak up for your rights

COULD you stand up in public, in a courtroom, or even stare down a government and its bureaucracy and confidently demand your human rights?

If your answer is "probably" perhaps you think that all of your human rights are already enshrined in law... they're not.

And if your answer is "but I don't know my rights", chances are, you're not alone.

The tentacles of bureaucracy now extend into many aspects of people's day-to-day lives, mostly with good intentions but, on occasions, respect for individuals' rights may be lacking.

Human rights are not automatically protected in WA and you now have a chance to help change that.

The WA Government has put human rights firmly on the public agenda in this State, suggesting that its own agencies and bureaucracies set the lead.

Attorney-General Jim McGinty launched a Statement of Intent,

outlining the WA Government's intention to undertake a public consultation, and a draft Human Rights Bill, in early May.

The draft Bill, if presented to Parliament and passed, would

If you think WA should not have human rights laws at all, or should restrict rights on specific issues, or should protect additional rights to those proposed, the consultative committee needs to hear from you if it is to represent your views back to the Government.

enshrine your basic human rights in a single law for the first time and would require all new laws to be assessed in terms of their compatibility with these rights.

The idea behind the draft Bill is to promote respect for each person's basic human rights.

All departments and agencies of the State Government would have to observe these human rights in the way they treat people through their actions and decision-making.

As a guide to public discussion, several background documents are available on a web site, www.humanrights.wa.gov.au

A Consultation Committee has been established to seek your views during the next few months.

It is running a series of advertised public forums on "A Human Rights Act for WA" across the State.

You are invited to attend the forums. More importantly, whether you attend a forum or not, you are invited to send your comments to the committee.

You can do this online via the feedback page on the web site or by lodging a written submission by August 31.

The Committee will report back to the Government by 16 November 2007.



Good public service... respecting your rights

UNDER the draft Bill, the requirement to respect human rights laws would impact primarily on government departments and agencies.

The public service would need to observe these rights when dealing with people and when making decisions that affect the community.

A recent report by the British Institute of Human Rights called "The Human Rights Act - Changing Lives" shows that the UK Human Rights Act has been a real help to ordinary people in their dealings with public authorities.

Training members of the bureaucracy and other service providers has encouraged them to look for solutions and make decisions which respect human rights.

This important aspect of the UK experience should be echoed under WA's draft Bill even though there are some differences between the UK Human Rights Act and WA's draft Bill.

Some of the case studies in the UK report are particularly interesting and illustrate the kinds of benefits that might arise from a WA Human Rights Act. In one case, a woman with mental health problems, was

put in 24-hour care and her children were fostered following the death of her husband. The children's visits with their mother were cut from the agreed three times each week to once a week because the authority did not have enough staff to supervise the visits. The mother's advocate invoked the children's right to respect for family life to convince the authorities to restore the three visits each week.

In another case, a local authority had a policy of providing school transport for children with special educational needs living more than three miles from their school. Transport was refused to a learning disabled girl who lived 2.8 miles from her school even though she was unable to travel independently. An independent parental supporter helped the girl's mother successfully challenge the refusal on the basis that the decision was a disproportionate interference with the girl's right to respect for private life.

The UK report can be accessed from its link on the Wider Role page on www.humanrights.wa.gov.au

Questions to get you started

YOU can make a submission on human rights by providing your views online about eight key questions posed by the Consultation Committee. They are:

1. Should WA have a Human Rights Act?
2. What rights should be protected in a WA Human Rights Act?
3. What form should a WA Human Rights Act take?
4. How should a WA Human Rights Act require human rights to be protected?
5. Who should be required to comply with the human rights recognised in a WA Human Rights Act?

6. What should happen if a person's human rights are breached?
7. If WA introduced a Human Rights Act what wider changes would be needed?
8. What else can the Government and the community do to encourage a culture of respect for human rights in WA?

You can also make general comments in your responses. The eight key questions are also online on the FEEDBACK page of the Committee's website at www.humanrights.wa.gov.au.

If you are answering online, make sure you press the SUBMIT button when you have completed your comments.



A balancing act to boost privacy and security

STRIKING the balance between competing rights will always be a challenge.

Just look at laws to address privacy and to combat terrorism.

No privacy laws exist requiring information about you held by the WA Government, or even WA's local councils, to be kept confidential.

Freedom of Information laws indirectly protect some information but they are not a complete guarantee.

The draft WA Human Rights Bill would create a right not to have your privacy "unlawfully or arbitrarily interfered with".

In this way, the draft Bill recognises the importance of privacy but also that there may sometimes be legitimate reasons for interfering with it.

They are designed to keep us safe but they can invade our privacy and even curtail our freedom if they allow us to be detained for some time for suspicious activities.

The challenge is to find an acceptable compromise between the human rights to liberty, freedom of movement and privacy versus the rights to life and security.

If you have views on how to go about this, let the Consultation Committee know.

What can you do?

THE most important contribution you can make is to write your views to the consultation committee.

Apart from your views on human rights laws, the committee especially wants to hear about examples of where human rights have not been respected in WA.

Tips on writing a submission can be found on the "Submissions" page at www.humanrights.wa.gov.au, just look for the link to the tips.

If you do not have access to the internet, information booklets can be mailed to you. Contact the Department of the Attorney General on 9264 1712 or write to the address below.

If you don't want to write a separate submission, you can complete the online questionnaire on the "Feedback" page at our website.

Contact us

CONTACT the Consultation Committee through:

**The Public Affairs Branch
Department of the Attorney
General
GPO Box 6317
PERTH WA 6841
Telephone: (08) 9264 1712
Facsimile: (08) 9264 1836
humanrights@justice.wa.gov.au
www.humanrights.wa.gov.au**



Attend a forum

EVERYONE is invited to attend the Consultation Committee's public forums. Forums have already been held in some regional and metropolitan locations and more will be held this month and next.

To find out where the next forums will be held, go to www.humanrights.wa.gov.au. To register your interest in attending a forum, contact the Department of the Attorney General on 9264 1712 or by email humanrights@justice.wa.gov.au



Above: A range of key background documents and information on issues involved in human rights laws can be accessed from www.humanrights.wa.gov.au. They can also be obtained through the post by calling 9264 1712.

Meet the Consultation Committee

THE Committee is headed by one of the Directors of Reconciliation Australia, Fred Chaney.

He is joined by three prominent Western Australians who are leaders in their fields: the head of the Council of Social Services, Lisa Baker; retired Anglican archbishop of Perth, Dr Peter Carnley; and an associate

professor in child health research and a senior Noongar woman with family ties throughout the south-west of Western Australia, Colleen Hayward.

The committee's closing date for receiving submissions is 31 August as it needs to report back to the Government by 16 November.

WRITTEN SUBMISSIONS MUST BE RECEIVED BY 31 AUGUST 2007.

Statewide press advertising invited public participation in the human rights consultation process.



answers to and the other ways in which people could contribute their views. Each forum was then essentially “handed over” to the participants to discuss the issues important to them, with Committee members helping to facilitate the discussion and answer questions. Participants were advised that they should contribute whatever they thought was important and not feel constrained by the eight questions. They were also invited to share stories with the Committee. Everyone who attended a forum was provided with an opportunity to have a say and many of the forums ran well over their scheduled one and half hours.

Participant numbers at the public forums varied from one to 40. In the case of small numbers of participants, a single group discussion was held. With larger public forums, to ensure that all those attending had an opportunity to contribute, participants were often divided into smaller groups, which were encouraged to report back to the whole forum at the end.

Notes of the views expressed at each of the forums were taken by one or more of the Committee’s support staff. While participants were also encouraged to lodge written submissions, the Committee undertook to treat these notes as a record of people’s views which would be reflected in its report to the Government.

Summaries of some of the early forums were placed on the website at various points in the process in order to stimulate further discussion.

2.3.2 Other forums

The Committee was invited to participate in a number of forums and workshops organised by the Law Society of Western Australia, Chamber of Commerce and Industry of Western Australia, Western Australian Council of Social Service (WACOSS), University of Western Australia law students and the Mental Health Division of the Department of Health. These forums and workshops provided the Committee with an opportunity to raise awareness about the Government’s proposal and to encourage submissions.

2.3.3 Meetings with individuals, organisations and agencies

For the purposes of raising awareness and engaging community organisations members of the Committee and its support staff met or corresponded with a range of stakeholders early in the process. They included representatives of religious faiths, the Ethnic Communities Council of Western Australia, Parliament, the media, the Police Union, the legal profession, industry and local government. These meetings were used to explain the Government’s proposal for a WA Human Rights Act and to invite

leaders to engage their own organisations in conversations about human rights, with a view to providing the Committee with a submission.

The Committee also came to the view that it was important to meet early in the process with those government departments which are required, on a daily basis, to deal with human rights issues. Accordingly, it arranged for a roundtable discussion with representatives from the Departments of Child Protection, Health, Corrective Services and Police. As well as explaining the Government's proposal and the Committee's work, the meeting was used to encourage these agencies to assist the Committee in understanding the human rights aspects of their operations, to hold discussions about the proposal with their employees and to invite them to make submissions.

The Committee regards those agencies involved in law enforcement as having a central role in the protection of human rights. For this reason, one of the Committee's first priorities was to arrange a meeting with the Director of Public Prosecutions for Western Australia, Robert Cock QC, and to seek a meeting with the Commissioner of Police, Karl O'Callaghan APM. In the end, the Committee did not meet directly with the Commissioner until 23 July 2007, after it had met with the Police Union and other representatives of the Police Department. At the meeting with the Police Commissioner, in line with some of his publicly reported comments, he indicated that he had some concerns about likely administrative burdens on the Western Australian Police should a WA Human Rights Act be enacted and whether the legislation might interfere with crime fighting legislation. The Commissioner was encouraged to make a formal submission and in due course a submission was received. The issues raised in that submission are discussed in further detail in the substantive chapters of this Report.

Throughout the course of the consultation, the Committee also met with a wide range of other individuals, organisations and agencies including the Chief Justice of Western Australia, the Commissioner for Equal Opportunity, the Ombudsman, the Inspector of Custodial Services, Legal Aid Western Australia Inc, the Aboriginal Legal Service of Western Australia (Inc), UnionsWA, the WA Property Rights Association (Inc), the Country Women's Association of Western Australia (Inc) and the Principal Advisor Aboriginal Issues within the Department of the Attorney General. For many of these, human rights issues arise in dealing with their core activities. As the Committee travelled around regional Western Australia it offered to meet with local governments in the areas it visited and a number of them took up this offer.

A complete list of all of the Committee's meetings is set out in Appendix C.

2.3.4 Meetings in Victoria and the Australian Capital Territory

The draft Bill draws heavily on the *Human Rights Act 2004* (ACT) (ACT Act) and the *Charter of Rights and Responsibilities 2006* (Vic) (Victorian Charter). The ACT Act has been in operation for over three years⁵, while the Victorian Charter (save for Divisions 3 and 4 of Part 3⁶) has been in operation since 1 January 2007⁷. The Committee was keen to hear what lessons might be learned from the experiences in the ACT and Victoria in relation to the operation of the ACT Act and the Victorian Charter.

For that purpose, members of the Committee met with a range of people closely involved in the drafting, implementation or study of the ACT Act and the Victorian Charter. These people included the Victorian Solicitor General and representatives from the Victorian Police Department, the Victorian Department of

⁵ Sections 1 and 2 of the ACT Act commenced on 10 March 2004, while the remainder of that Act commenced operation on 1 July 2004.

⁶ Section 2(2) of the Victorian Charter.

⁷ Section 2(1) of the Victorian Charter.

Justice, the Victorian Equal Opportunity and Human Rights Commission, the ACT Department of Justice and the ACT Human Rights Commission. A complete list of these meetings is set out in Appendix C. The Committee derived considerable assistance from the feedback it received and the major themes which emerged from these consultations are discussed where relevant in the substantive chapters of this Report.

On 25 September 2007, two members of the Committee also attended the Protecting Human Rights Conference at the University of Melbourne (where the Chairman of the Committee delivered a brief speech about its Western Australian consultations). The speakers at this conference, which included professionals working under the ACT Act, the Victorian Charter, the *Human Rights Act 1998* (UK) (UK Act) and the Bill of Rights in the 1996 *Constitution of the Republic of South Africa* (South African Bill of Rights) also provided the Committee with many insights to consider.

Overall, the lessons learned by the Committee from the operation of the ACT Act, the Victorian Charter, the UK Act and the South African Bill of Rights have informed a number of the Committee's recommendations, as discussed in the following chapters of this Report.

2.4 Submissions

The Committee was keen to encourage as many people as possible to make submissions and ensure that the process for contributing submissions was as accessible as possible. It invited submissions to be sent by post, facsimile or email or to be made through the website using an interactive online submission form. This form allowed people to type in free text responses to each of the eight key questions developed by the Committee and to include any other comments that they wished to make. A standard hard copy questionnaire, which was similar to the online submission form, was also distributed by the Committee during its face-to-face consultations.

People were free to lodge submissions anonymously if they preferred and to request that their submission be kept confidential.

The Committee received a total of 377 written submissions. While the submissions period officially closed on 31 August 2007, the Committee continued to accept submissions up until Friday 28 September 2007. A few submissions were received after that date. These submissions were considered where possible but were not counted in the numerical and statistical analysis included in this Report.

A full list of submissions received up to 28 September is set out in Appendix D.

THE COMMITTEE WAS KEEN TO ENCOURAGE AS MANY PEOPLE AS POSSIBLE TO MAKE SUBMISSIONS...

Two hundred and seventeen submissions were submitted electronically by email or using the online submission form, while 160 submissions were submitted in hard copy form. The Committee also accepted a submission from a person with dyslexia on cassette tape and arranged for it to be transcribed.

Of the submissions received, 270 were from individuals and 107 were from organisations and agencies, including key government agencies, religious organisations, legal centres, specialist human rights organisations and a wide range of community groups. Of the 270 individual submissions, a number were from small groups of individuals, for example couples or small groups of legal professionals or academics writing in their personal capacity. Two were in petition form, one containing 79 signatures, the other containing 81 signatures.

Many of the organisations which made submissions indicated that they represent significant memberships. For example, WACOSS represents 286 member agencies, the Chamber of Commerce and Industry of WA represents 5,000 organisations and the Community and Public Service Union/ Civil Service Association represents 40,000 State public service employees. Irra Wangga – Geraldton Language Programme represents 6,000 Aboriginal people, the Multicultural Services Centre for WA represents 5,000 clients, St Vincent de Paul represents 3,000 members and volunteers and the Aboriginal Legal Service of Western Australia (Inc) represents Aboriginal and Torres Strait Islanders throughout Western Australia via 17 regional/remote offices and one metropolitan office.

A number of the submissions both for and against a WA Human Rights Act were in similar or identical format, which, together with the petitions, suggested the existence of organised campaigns on both sides of the debate. For example, 12 identical (or nearly identical) submissions were received opposing a WA Human Rights Act. These appeared to be based on an article by Bill Muehlenberg published on the website of Salt Shakers Inc⁸. Many of these submissions also enclosed a copy of a newspaper article written by Professor Greg Craven of the John Curtin Institute of Public Policy at Curtin University which opposed the introduction of an Act.⁹

It was also apparent, particularly among those in favour of a WA Human Rights Act, that a number of organisations had shared submissions or shown each other drafts during the writing process. A number of submissions explicitly referred to, and at times endorsed, views expressed in other submissions.

Of all the submissions received, 17 were classified as “non-WA submissions”, in that they came from individuals or organisations based outside of Western Australia. The Committee recognises that some of these organisations are national organisations which inevitably have Western Australian members. Where it was clear that a submission was prepared by the Western Australian branch of a national organisation it was regarded as a “WA submission”.

A selection of quotes from the written submissions was published on the website and some organisations made their own submissions publicly available during the consultation process. The Committee has received requests for broader access to the submissions. The Committee’s view is that, unless there are proper legal reasons for denying access (for example, where submissions contain personal information or were provided on a confidential basis) the submissions should be made publicly available.

2.5 Public opinion survey

Fairly early in the consultation process the Committee became concerned that a number of possible criticisms could be made of the use of public forums and written submissions as a means of gauging Western Australian opinion generally.

One possible criticism was that the sample of those attending the forums and lodging submissions was, by definition, self-selecting and that an early apparent majority support for a WA Human Rights Act flowed from the fact that people with a particular interest or bias would participate. The “silent majority” might be said to have been ignored. Indeed, this particular criticism was made in several submissions received by the Committee¹⁰.

⁸ Jenny Stokes, *Western Australia - Human Rights Bill*, 2007, Salt Shakers Inc <http://www.saltshakers.org.au/html/P/302/B/420/>.

⁹ Greg Craven, “Don’t be fooled by sugar-coated sales pitch”, *The West Australian*, 5 May 2007, 14.

¹⁰ For example, submission 239: Elliot Nicholls; submission 226: Gail Gifford.

The Committee therefore decided to engage the services of Patterson Market Research to conduct a survey of a random sample of 400 people who were 18 years or older across Western Australia. Patterson is the leading polling organisation in the State and conducts the *Westpoll* surveys for the State's daily newspaper, *The West Australian*. The survey commissioned by the Committee was conducted by telephone over the evenings of 6–8 August 2007 and asked respondents the following questions:

1. Should WA have a law that aims to protect the human rights of people?
2. To what extent do you support or oppose that law protecting political and civil rights, such as freedom of speech, the right to a fair trial and the right not to be tortured?
3. To what extent do you support or oppose that law protecting economic and social rights, such as the right to work, the right to housing, and the right to an education?
4. To what extent do you agree or disagree that government departments and agencies should be required by law to respect people's human rights?
5. To what extent do you agree or disagree that business and corporations should be required by law to respect people's human rights?
6. To what extent do you agree or disagree that individuals should be required to respect people's human rights?
7. Do you agree or disagree that an aggrieved person should be able to take a matter to an independent umpire if their human rights have been infringed?
8. Do you agree or disagree that an aggrieved person should be able to take legal action if their human rights have been infringed?
9. Do you agree or disagree that an aggrieved person should have no right of action or other form of recourse available if their human rights have been infringed?
10. Do you have any other suggestions for the recourse that should be available for a person who has had their human rights infringed?

A copy of the survey report is contained in Appendix E and the results of the survey are discussed where relevant in the substantive chapters of this Report. Interestingly, the results of the survey were generally consistent with, and surprisingly stronger than, the support for a WA Human Rights Act which emerged from the public forums and written submissions.

2.6 Devolved consultations

2.6.1 Consultation with the disadvantaged

Early in its consideration of how to tap into the views of Western Australians, the Committee concluded that disadvantaged members of the community were the least likely to be heard through written submissions or by attending public forums in response to advertisements. That proved to be the case. Attendance at the public forums and the authorship of written submissions appeared overwhelmingly to be from people and groups not normally considered to be disadvantaged. As the disadvantaged are more likely to be subject to human rights abuses than the general community, the Committee retained an external consultant to assist it by engaging with disadvantaged groups.



The Consultant organised a reference group with members from across the community sector to provide advice and guidance on the scope and methodology of the consultation.

Over a period of three months, a total of 405 people were consulted from groups in the community which could be considered “marginalised, isolated and at-risk” or from groups which assist people falling within that category. Thematic target groups consulted were: people from culturally and linguistically diverse backgrounds, children and young people, the homeless, people with disabilities, refugees and recent migrants, people suffering from mental health problems, prisoners and people with a criminal record, lesbian, gay, bisexual and transgender people, Indigenous people and people with drug and alcohol dependencies. Consultations focused on the possible introduction of a WA Human Rights Act and participants’ “real life” experiences.

The Consultant predominantly conducted his consultation activities in face-to-face settings. However, he also used hard copy and electronic survey and feedback forms, an online discussion forum, email and SMS.

The Committee was keen to ensure that consultations employed best practice methodologies and were educative, accessible, inclusive, transparent, conversational, culturally sensitive, open, plain-speaking and representative of diversity. It is confident that the Consultant achieved those goals.

The general findings of the devolved consultation with the disadvantaged are set out where relevant in the substantive chapters of this Report. A copy of the Consultant’s report, entitled *Human Rights ‘at the Margins’*, which describes his methodology and results in detail is contained in Appendix F.

2.6.2 Schools Constitutional Conventions

On 14, 15 and 21 August 2007, the annual WA Schools Constitutional Conventions were held in Perth and Albany¹¹. The Conventions brought together a total of 168 secondary students from 25 different schools around the State. This year’s program was designed to provide students with an opportunity to participate in the community consultation about a WA Human Rights Act. It focused on the topics of whether Western Australia should have a Human Rights Act and, if so, what rights should be protected in such an Act.

An officer from the State Solicitor’s Office attended the two Perth conventions on behalf of the Committee to provide students with background information about the draft Bill and the other options

¹¹ The sessions held in Perth were conducted at the Constitutional Centre of Western Australia, while the session held in Albany was conducted at the Dog Rock Motel.

available. Students were then given the opportunity to discuss and debate the above topics. A summary of the views expressed during the conventions was provided to the Committee by the Constitutional Centre for Western Australia. These views are referenced in Chapters 3 and 4 of this Report and a list of the schools which participated in the Conventions is set out in Appendix D.

2.7 Independent consultations

A number of organisations and agencies conducted their own consultation processes in order to help them formulate their submissions to the Committee. These organisations included:

- WACOSS, which hosted a workshop for the community services sector through which attendees were able to provide input into the organisation's submission;
- the Western Australian Homeless Persons' Legal Advice Clinic (WA) Steering Committee Inc, which organised a consultation session with members of the Big Issue and distributed a questionnaire through various agencies in contact with homeless people;
- Civil Liberties Australia, which consulted with members of the ACT Bill of Rights Consultative Committee in order to provide the Committee with advice on lessons learned in the ACT;
- the Department of Corrective Services, which undertook internal and external consultations, including a number of information sessions and workshops with other agencies, such as Corrections Victoria, and a number of information sessions supported by a process which allowed adult and juvenile offenders to comment; and
- the Chamber of Commerce and Industry, which conducted a consultation process across its membership base to ensure that its submission reflected the views of Western Australian industry to the greatest extent possible.

The Committee is also aware of a number of public forums held in the metropolitan area which were organised by other groups and individuals for the purposes of raising awareness and fostering public debate about the introduction of a WA Human Rights Act. While these events did not directly involve the Committee, they helped to stimulate a climate of public interest in the broad issues with which the Committee was dealing.

2.8 Media coverage

Throughout the consultation process, the Government's proposal for a WA Human Rights Act attracted considerable attention in the mass media. This coverage undoubtedly formed part of the backdrop against which the Committee's dialogue with the Western Australian community took place.

The West Australian reported and editorialised on the launch of the Government's proposal and the consultation process. It returned to the topic from time to time, mainly to air the views of significant contributors to the public discussion. Contributions from writers of letters to the editor were also prolific and at times spirited. *The Sunday Times* commenced its media coverage with for and against cases across a double-page spread.

In total, there were 97 media items recorded between May and September of 2007, including 67 items which were instigated by the media or members of the public. Of these 67 items:

- 24 were radio;
- 13 were newspaper articles (eight in *The West Australian*, two in *The Sunday Times* and three in local newspapers);
- three were editorial opinion pieces (*The West Australian*); and
- 27 were letters to the editor (23 to *The West Australian*, three to *The Sunday Times* and one to a local newspaper).

The debate included comments from some leading Western Australian legal professionals and organisations. One of the draft Bill's main public supporters was Professor of Law at the University of Notre Dame Australia and former Chief Justice of Western Australia, the Honourable David Malcolm AC QC. One of the draft Bill's main critics was Professor Greg Craven of Curtin University and his views were reported widely throughout the media.

The media coverage of the WA Human Rights Act debate touched upon such issues as the adequacy or inadequacy of existing legal protections of commonly accepted rights, including the right to privacy, the right to a fair trial and freedom of expression.

Some of the discussion in the media noted that many other nations already have legally protected human rights and that it was important to bring Western Australian laws into line with such international standards. Two editorial opinion pieces in *The West Australian*, however, claimed that the Government had not proved the need for a WA Human Rights Act.

There was discussion of whether a federal bill of rights may be more appropriate than State legislation and the issue of whether or not we should focus more on educating people about their individual responsibilities was frequently raised in letters to the editor.

Ten per cent of the media coverage included discussion as to whether the Government's draft Bill needed to be expanded to include a broader set of rights. The right to housing, and particularly affordable housing, was repeatedly raised, no doubt reflecting the current housing market in Western Australia.

The media coverage touched upon the potential positive effect that a law would have on holding government agencies accountable and protecting the rights of minority groups.

A significant amount of debate also centred around the potential negative impact that a WA Human Rights Act might have on the Western Australian legal system. Particular issues included whether such an Act would increase judicial power, undermine existing laws and increase the number of legal cases coming before the courts. Twenty per cent of all media items included discussion of the potential shift in power from the Parliament to the courts. Professor Craven was quoted numerous times in support of the view that a WA Human Rights Act would lead to a shift in power. On the other hand, in a small number of items, the Attorney General and the Chairman of the Committee were quoted as saying that the draft Bill would not override the Parliament's powers to make laws.

THROUGHOUT THE CONSULTATION PROCESS, THE GOVERNMENT'S PROPOSAL FOR A WA HUMAN RIGHTS ACT ATTRACTED CONSIDERABLE ATTENTION IN THE MASS MEDIA.



While offering its support for the draft Bill, the Community and Public Sector Union/Civil Service Association were reported as raising questions about the cost of implementing a WA Human Rights Act in terms of supporting public servants with training and managing their expected increase in workloads.

There was some criticism of the Government's motives in trying to introduce a WA Human Rights Act and establishing the consultation process. Several letters to the editor viewed the draft Bill as a tool for deflecting criticism from other issues, such as justice and health.

A NUMBER OF ORGANISATIONS AND AGENCIES CONDUCTED THEIR OWN CONSULTATION PROCESSES IN ORDER TO HELP THEM FORMULATE THEIR SUBMISSIONS ...

There were also two main criticisms of the consultation process. One was a criticism of the Committee for denying media access to the public submissions made to it. The second was a letter to the editor expressing concern about the make-up of the Committee, claiming a bias towards Indigenous affairs activists.

Although the media coverage of the Government's proposal for a WA Human Rights Act tended to favour the arguments against the introduction of such an Act, the range of arguments presented for and against the Government's proposal reflected the range of arguments expressed at the public forums and in the written submissions (discussed in Chapter 3). Understanding these views has enriched the Committee's thinking and influenced some of its recommendations, as set out in the following chapters of this Report.



THE WESTERN
AUSTRALIAN
GOVERNMENT
BELIEVES THAT

THE WESTERN AUSTRALIAN
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CHAPTER 3: SHOULD WESTERN AUSTRALIA HAVE A HUMAN RIGHTS ACT?

3.1 The Government's position

In its *Statement of Intent*, the Government stated its view as follows:

The Western Australian Government believes that human rights will only be adequately protected if a human rights culture prevails in our community, in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community...The Western Australian Government believes that introducing a WA Human Rights Act would help to establish a human rights culture in this State because it would create a political and administrative culture in which the need to respect human rights is understood and acted upon.

3.2 The community's general views

At most of the public meetings there were expressions of views for and against a WA Human Rights Act. Support for laws to advance human rights, often going further than the Government's draft Bill, outnumbered the frequent expressions of opposition to any legislative rights package.

...THE WESTERN AUSTRALIAN GOVERNMENT BELIEVES THAT INTRODUCING A WA HUMAN RIGHTS ACT WOULD HELP TO ESTABLISH A HUMAN RIGHTS CULTURE IN THIS STATE...

In addition, at some meetings, individuals who were initially opposed or sceptical moved to a more supportive position after hearing other people's accounts of their concerns and after learning more about how the draft Bill was intended to work. For example, an attendee at a Narrogin public forum who later put in a written submission to the Committee told us that "listening to people's stories is always of value and often makes you realise that matters of life and dealings with government departments are not always to everyone's satisfaction."¹

Not unexpectedly, there was a division of opinion among the written submissions as to whether or not WA should have a Human Rights Act. Of the 377 written submissions that we received:

- 50% were in favour of a WA Human Rights Act;
- 34% were opposed to a WA Human Rights Act; and
- 16% did not express a clear view as to whether a WA Human Rights Act should be introduced.



¹Submission 273: Uffe Geysner.

Counting only those submissions expressing a view as to whether a WA Human Rights Act should be introduced, it can be seen that 59% were in favour and 41% were opposed.

Of the 107 organisations and agencies that lodged written submissions, 70% were in favour of a WA Human Rights Act, while 14% were opposed and 16% expressed no clear view.

Of the 270 individual submissions, 42% were in favour of a WA Human Rights Act, 42% were opposed and 16% expressed no clear view. Two individual submissions were in petition form. One, containing 79 signatures, was in favour of a WA Human Rights Act² while the other, containing 81 signatures, was opposed to a WA Human Rights Act³.

We treated those submissions which indicated general support for a WA Human Rights Act or the draft Bill and those which suggested amendments to the draft Bill in a supportive way as “in favour” of a WA Human Rights Act. Similarly, we treated those which expressed general reservations about a WA Human Rights Act or the draft Bill and those which suggested that WA needs other reforms instead as “opposed” to a WA Human Rights Act. Sixteen per cent of submissions were submissions on which there was no basis to assign them as either “in favour” or “opposed”.

The results of the public opinion survey conducted on behalf of the Committee were stronger than the trends which emerged from the public forums and written submissions. In particular, 89% of respondents believed that Western Australia should have a law that aims to protect the human rights of people.⁴ The survey report (which is contained in Appendix E) indicates that younger people, females and country residents were slightly more likely than their respective counterparts to be of this view.

High level support for better protection of people’s human rights emerged from the devolved consultation with the disadvantaged.

Ninety five per cent of respondents surveyed during this devolved consultation were in favour of a WA Human Rights Act. Moreover, the majority of people consulted during face-to-face activities supported the introduction of an Act. On the other hand, the majority of the students attending the three WA Schools Constitutional Conventions were opposed to the introduction of a WA Human Rights Act.

Those putting forward the conflicting views as to whether or not a WA Human Rights Act should be introduced generally conformed with the position enunciated by the most public challenger of the Government’s proposal, Professor Greg Craven of the John Curtin Institute of Public Policy at Curtin University, namely that “this is not a debate between people who like human rights and people who don’t like human rights – by and large, rational people like human rights – it’s a question about what is the best means of protecting those rights.”⁵

People’s views as to whether or not a WA Human Rights Act should be introduced were often connected to their views regarding the form and content of any proposed Act. As the Consultant retained by the Committee to consult with the disadvantaged observed, “while levels of support for a WA Human Rights Act were high, a wide range of qualifying statements accompanied this sentiment.”⁶

OF THE 107 ORGANISATIONS AND AGENCIES THAT LODGED WRITTEN SUBMISSIONS, 70% WERE IN FAVOUR OF A WA HUMAN RIGHTS ACT WHILE 14% WERE OPPOSED...

² Submission 235: Vic and Laura Fullin.

³ Submission 239: Elliot Nicholls.

⁴ S Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 1 (see Appendix E).

⁵ S Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

⁶ Human Rights Solutions, *Human Rights ‘at the Margins’*, August 2007, 23 (see Appendix F).



Numerous submissions which supported the introduction of a WA Human Rights Act expressed concerns about specific aspects of the draft Bill. Some, however, indicated that, while they would like to see changes to its content, they preferred the draft Bill in its current form to no Act at all. For example, Dr Jennifer Binns of the University of Western Australia stated that:

The current Human Rights Draft Bill 2007 is a minimalist approach to a Human Rights Charter that focuses on the civil and political rights of Western Australians and the duties of government agencies to protect those rights ... In the event that the government of Western Australia is not prepared to adopt [a] broader approach, then passing this minimalist Bill is an important first step.⁷

Other submissions which indicated that they could not support the draft Bill in its current form indicated that they would, in fact, support an Act in a different form. The Lingiari Foundation Inc, for example, indicated that:

While it is commendable that the State Government is moving to focus attention on human rights, it is unfortunate that we are unable to support the proposed Human Rights Bill. The Bill fails to adequately protect and recognise the social, cultural and economic rights of Indigenous peoples and the special status that should be accorded to Indigenous people.⁸

Some of the written submissions suggested that there be further public consultations before any WA Human Rights Act is introduced and 14 submissions suggested that the question of whether or not to have an Act should be put to the community at a referendum. Chris Melville observed that “if the people can be asked to express their views on daylight savings, then they can be asked to do the same on something else that should be of at least equal importance to them!”⁹

Sven Sorenson, however, expressly argued against the holding of a referendum. He considered that a WA Human Rights Act was overdue, and would “need to be done in discussion with [the] community but not by a popular vote. WA people are very conservative and ultimately intolerant of change that can affect them (eg daylight savings, shopping hours, a republic).”¹⁰

An extremely broad range of reasons was advanced in the written submissions both for and against a WA Human Rights Act. Generally speaking, this reflected the range of reasons put forward during the Committee’s public forums and the three WA Schools Constitutional Conventions. Overall, the main reasons for and against a WA Human Rights Act were (in no particular order) as follows:

⁷ Submission 84.

⁸ Submission 373.

⁹ Submission 47.

¹⁰ Submission 41.

Reasons for	Reasons against
(i) There are current human rights problems in Western Australia.	There is no evidence of problems with human rights abuse – "if it ain't broke, don't fix it".
(ii) Existing legal protections of human rights are inadequate.	A WA Human Rights Act is unnecessary in light of existing legal protections or the existing legal and political system.
(iii) A WA Human Rights Act would help to protect the rights of disadvantaged and marginalised people in particular.	A WA Human Rights Act would simply pander to the concerns of minority groups.
(iv) A WA Human Rights Act would help to create a human rights culture.	A WA Human Rights Act would make little practical difference other than to impose an administrative burden on government agencies.
(v) A WA Human Rights Act could limit what government agencies can do in their dealings with individuals and help keep them accountable.	A WA Human Rights Act would increase the powers of the judiciary, who are not democratically elected and would politicise the judiciary.
(vi) A WA Human Rights Act would ensure that human rights are taken into consideration more during the development of legislation.	The "winners" will be criminals and law-breakers.
(vii) A WA Human Rights Act would help to give effect to Australia's international human rights obligations.	A WA Human Rights Act would lead to increased litigation and associated court delays and increased costs.
(viii) A WA Human Rights Act could increase the possibility of a federal Human Rights Act being introduced in the future.	There is a need to promote individual responsibilities rather than rights.

Many of these reasons are closely connected to one another and it can be seen that some of the arguments for are mirror images of some of the arguments against. These reasons and the Committee's views regarding them are discussed below.

3.3 Arguments for a WA Human Rights Act

(i) *There are current human rights problems in Western Australia*

The Committee learned that many Western Australians strongly believe that human rights issues currently bear heavily on them or others. Moreover, the various watchdog agencies established by Government to oversee the operation of legislative protections for human rights routinely drew the Committee's attention to compliance problems experienced by government agencies.

The range of those expressing concerns and the nature of the concerns was one of the surprising but illuminating elements of our consultation process. They included:

- various individuals who believed that the rights of their family members had been ignored by hospital staff;
- a social worker who believed that nursing home staff had infringed the rights of elderly patients by ignoring their requests for medical assistance and by shunting them around between homes. *“One issue that I see that we will get more of with our ageing population is elder abuse. There are problems with emotional abuse, neglect and physical abuse. There is a lot more of it going on than people suspect. I have seen cases in my work”*;¹¹
- a prospective adoptive parent who believed she had been treated without respect by the authorities.
- grandmothers whose grandchildren were caught up in child protection proceedings who believed their rights and those of their families had been ignored or overridden. *“Do we have human rights? It doesn't feel like it”*;¹²
- others concerned about the child protection system. *“I am not sure that the authorities are following proper guidelines. It is quite scary, but no-one wants to talk about it. I don't know how much notice families are given before children are removed...Insufficient attention is paid to possible remedial action being taken prior to removal”*;¹³
- land owners, including householders and farmers, who believed that excessive environmental regulation had deprived them of their property rights without fair compensation and others who were subject to planning restrictions, re-zonings or resumptions which had taken their homes without fair compensation. Many of these people had to endure extremely long delays in decision-making by the authorities and felt they had been treated disrespectfully as well as unfairly by the authorities;
- public servants who described a devastating level of detachment from the judicial process on behalf of accused persons, which meant that they were incapable of involvement in, or understanding of, the process;
- public servants who queried the effectiveness of the processes supposedly providing them with protection from unfair treatment within the public service;
- ratepayers concerned about local governments abusing their power and demonstrating a lack of respect for their rights to free speech and enjoyment of their property without undue interference;

¹¹ Participant in Busselton public forum.

¹² Participant in Narrogin public forum.

¹³ Participant in Carnarvon public forum.



- a wide range of people, some whom had been treated for mental illness and some of whom worked within the mental health system, concerned with discrimination against the mentally ill in the community generally and the abuse of human rights by mental health authorities;
- people concerned about police behaviour, including wrongful arrests, entry onto premises without warrant and a failure to respect the rights of those in detention. *“About 2 years ago a female cousin of mine was in detention and she wasn’t treated with respect – she was treated like an animal. She wasn’t given appropriate female hygiene products when she needed them. She was told to use ‘something else’”*;¹⁴
- farmers concerned at their lack of rights in their dealings with large corporations;
- people concerned about the lack of protection of whistleblowers;
- various individuals involved in legal, administrative and disciplinary proceedings who were denied procedural fairness or the right to a fair trial. *“I was in hospital when the rebuttal was required and I was rung up in my hospital bed and asked for it. The inquiry was conducted while I was on sick leave and I was never informed”*;¹⁵
- public servants concerned that the necessary policing or abuse prevention role that they perform as part of their jobs leads to a bureaucratic culture where all people are regarded with suspicion and treated accordingly;
- people who had encountered a lack of interpreters in a wide range of circumstances where interpreter services were required in order to access rights effectively;
- a person with dyslexia who had experienced difficulties in accessing communications vital to him;
- Aboriginal Western Australians who had experienced discrimination in a wide variety of circumstances. *“I have problems with access to services. When I go to the hospital, I take a white person with me to make sure I get treatment on time.”*¹⁶ *“Being black isn’t easy. It’s damn hard... When I lived in Perth and caught the bus home from work, the seat next to me was always the last one filled”*;¹⁷
- Frontier Services workers who had encountered abuse of Aboriginal elders by younger Aboriginal people;
- individuals who worked with people with disabilities and were concerned that their rights were regularly infringed. *“People with intellectual disabilities who display challenging behaviours are at risk of having their freedoms (especially freedom of movement) restricted...this happens now”*;¹⁸
- carers of family members with disabilities who felt that they had been ignored by the authorities;
- a father of a disabled child who was concerned about the imposition of a fee for a government issued “companion card”;
- an intersex individual who raised concerns about a number of rights issues facing people who are born neither male nor female;

¹⁴ Participant in Carnarvon public forum.

¹⁵ Participant in Albany public forum.

¹⁶ Participant in Geraldton public forum.

¹⁷ Participant in Carnarvon public forum.

¹⁸ Participant in Busselton public forum.



- church groups who worked with refugees concerned about racist attitudes among the broader community towards those readily identifiable as Muslim. “*Men are taunted in their workplace as ‘Osama’ or ‘terrorist’*”,¹⁹
- a dental health professional concerned about specific problems in the dental health care of elderly people which, in his view, amounted to a breach of human rights;
- people concerned about the use of chemicals by authorities and their negative effects on the health of community members;
- an individual concerned about the use of regular supervised urine testing by private companies as a “degrading and unjustified breach of the citizen’s right to privacy”,²⁰ and
- people who felt that they had been denied access to justice in the courts.

One of the strongest themes to emerge from both the public forums and the written submissions was the relevance and importance of effective service delivery (including culturally appropriate and timely service delivery) to the enjoyment of human rights, particularly in regional areas. An attendee at the Fremantle public forum summed up the views of many in stating that “you cannot protect human rights if you are not delivering services. The delivery of good and adequate government services is intrinsic to respecting human rights”. Likewise, a Bunbury forum attendee observed that “the Government needs to resource programs and services adequately to uphold people’s rights. If it did this we wouldn’t need a human rights law.”

Many people reported problems in relation to service delivery and it became clear to the Committee during the course of its consultations around the State that the further one gets from Perth, the bigger the problems become. Some of the complaints that we received were:

- “Shortages of services in regional areas, and transfer of ‘psychiatric emergencies’, leads to consumers being transferred to metropolitan facilities for assessment and treatment. These [mental health] consumers can languish, a long way from home, and family support, in a foreign setting and environment.”²¹
- “The advocacy of human rights is made much harder in WA’s more remote parts. In closed or isolated communities, language difficulties, distance from Perth, scarce legal support and other restraints naturally limit what bureaucrats can do to protect people’s rights. Governments need to move away from a ‘Perth-centric’ service delivery model.”²²



¹⁹ Submission 283: Social Responsibilities Commission – Anglican Province of Western Australia.

²⁰ Submission 79: Ray Briggs.

²¹ Submission 139: Health Consumers’ Council (WA) Inc.

²² Participant in Fremantle public forum.

- “In Derby there is no Legal Aid lawyer – they haven’t been able to retain one for years. There was a tender to get someone from a Sydney law firm to provide advice, but how can they give advice to local people on the ground?”²³
- “Equality before the law is paramount but elusive. Inequality equates with diminished rights. For example, access to fewer sentencing options in remote areas. In a regional or remote situation, sentencing options are a lot different to those in the metropolitan area. In remote areas you will often have anomalies where someone is given a greater or lesser sentence as there is no other way of dealing with them. Therefore people’s rights are not being respected...In remote areas, some people are being sentenced by a JP instead of a Magistrate. Some of these cases warrant being heard by a Magistrate. Another breach of someone’s right to a fair trial.”²⁴
- “There is a problem [in Kununurra] with Aboriginal people not being able to understand their responsibilities and rights because of the unavailability of culturally appropriate information.”²⁵
- “CDEP has been cut off in Broome. This has caused a lot of problems... non-profit organisations have not been able to cater for youths. Agencies which were previously able to provide after-school care for numerous children are no longer able to do so...A message needs to be given to the State government – if the Commonwealth is going to cut off CDEP, someone else needs to support these services.”²⁶

Many of the people attending our public forums and contributing written submissions explicitly or implicitly referred to the above concerns regarding human rights in Western Australia as providing strong justification for the introduction of a WA Human Rights Act.

“THE ADVOCACY OF HUMAN RIGHTS IS MADE MUCH HARDER IN WA’S MORE REMOTE PARTS... GOVERNMENTS NEED TO MOVE AWAY FROM A ‘PERTH-CENTRIC’ SERVICE DELIVERY MODEL.”

²³ Participant in Derby public forum.

²⁴ Participant in Fremantle public forum.

²⁵ Participant in Kununurra public forum.

²⁶ Participant in Broome public forum.



(ii) Existing legal protections of human rights are inadequate

In the past, I have not been supportive of a bill of rights, having been convinced that the Westminster system of government contained sufficient safeguards for the rights of individuals through the appropriate precedents of the Legislature (with its bicameral structure), the Judiciary and the Executive. As the nation drifts towards a process of Executive dominance in the style of the United States of America presidential system there seems to me to be a requirement to add to the legal framework of both the federation and the states the additional checks and balances that go with that system. This includes the introduction of an instrument that establishes international human rights standards as part of the ongoing work of all state instrumentalities.

Submission 300: Lt General John Sanderson AC (Retd), Special Advisor on Indigenous Affairs, Department of Premier and Cabinet

One of the dominant arguments advanced in the written submissions in favour of a WA Human Rights Act was that existing legal protections of human rights are inadequate or, in the words of Australian Lawyers for Human Rights (ALHR), “piecemeal and limited in nature”.²⁷

Submissions making this argument came from a wide variety of individuals, organisations and agencies. Notably, almost all of the universities, legal academics, practising lawyers and legal centres that made submissions shared this view. The Sussex Street Community Law Service Inc observed that:

In the provision of legal advice and community legal education we often hear members of the public making assumptions about what they believe their rights are. It always comes as a shock to those without legal training that our rights are not entrenched in law, but can be taken away by a simple Act of Parliament. The general public seem to believe that in a democratic country like Australia they already have the kinds of rights we call human rights. This is not the case and our law should be amended to reflect these existing values that are widely held in the community.²⁸

The current legal situation in Western Australia was summarised by Gordon Payne as follows:

The current State Constitution was written over 100 years ago with the limited objective of setting up a self-governing Australian state within the British Empire. There was little thought given to the rights of citizens in the new state. The Australian Constitution is a little better but, when judged by modern standards, it does not outline many rights for Australian citizens. State legislation has, over time, built up a set of human rights, some directly and some by inference. There is now a need to combine and expand on these rights and to define them in a Human Rights Act.²⁹

A limited number of rights are protected by the *Commonwealth Constitution* and those rights are often expressed in narrow terms or are interpreted narrowly by the courts. The High Court has implied certain rights from the *Constitution*, however, these rights are also limited in number and the extent of the protection that they offer is, by their very nature, often unclear.

Departmental submissions to the Committee in sensitive areas such as mental health, child protection and corrective services properly drew our attention to existing legislative and administrative provisions designed to protect the rights of individuals affected by their operations. Undoubtedly, there is a range

²⁷ Submission 299.

²⁸ Submission 192.

²⁹ Submission 101.

of ordinary legislation dealing with rights at both the federal and State level. For example, in Western Australia, the *Evidence Act 1906*, *Criminal Procedure Act 2004*, *Equal Opportunity Act 1984*, *Disability Services Act 1993* and the *Criminal Code* all contain or reflect human rights provisions. Commonwealth privacy and anti-discrimination legislation also protects some human rights. Such State and federal legislative protections are, however, far from comprehensive. Many of them are “single issue” statutes and when the sum total of them is examined it appears that a number of important human rights are not covered or are covered in an incomplete way.

Indeed, a number of submissions that we received complained of specific deficiencies in the *Equal Opportunity Act 1984*, for example, its failure to protect intersex and androgynous people³⁰ or the homeless,³¹ the limitations of its provisions dealing with discrimination on the grounds of gender history,³² and the unfair application of its “comparability requirement” to people suffering from disabilities.³³ Comments made by attendees at many of the public forums also highlighted the ineffectiveness of existing laws meant to prevent unfairness and discrimination.

ALHR further noted that “the right to peaceful assembly...currently has only piecemeal protection from a patchwork of laws, and the level of protection of this right changes, depending on the context.”³⁴ Ben Caradoc-Davies observed that “most Australians are ignorant of human rights, and assume, after watching too much American television, that Australians have similar rights, such as freedom of expression, when in fact they have no such rights.”³⁵ Moreover, the Committee heard from numerous individuals and organisations, such as the Pastoralists and Grazier’s Association – Private Property Committee, concerned about the lack of existing legal protections for property owners at the State level.

It became clear during our consultations that many people believe that the common law (ie “judge-made law”) adequately protects human rights. In this regard, there seemed to be a perception that the common law can withstand encroachment by Parliament. This is not so—the Parliament of Western Australia has unlimited power to legislate so as to override or limit the common law at any time. Furthermore, while the common law recognises some human rights (eg the presumption of innocence), its protection of rights is far from complete—it fails to recognise a number of important human rights (eg the right to privacy).

The Committee was provided with anecdotal evidence of the failure of the *Commonwealth Constitution* and the common law to protect human rights in the submission of Dr Peter Johnston of the University of Western Australia which discussed some of his experiences in litigating human rights in WA without a Bill of Rights over a period of 30 years. Dr Johnston’s experiences illustrated that, while constitutional and administrative law issues can sometimes provide a collateral means of challenging government action that involves infringement of human rights, reliance on constitutional and administrative law doctrines often obscures the fundamental human rights issues at the core of such cases and the chances of success in legal terms are fairly remote. His submission concluded:

From the perspective of those of us who have attempted to advance civil and political rights arguments in courts over the last 30 years this [a Human Rights Act] represents a much more direct approach to addressing such issues. It squarely requires courts to adapt their thinking to

³⁰ Submission 125: Chris Somers xxy.

³¹ Submission 321: Homeless Persons’ Legal Advice Clinic (WA) Steering Committee Inc.

³² Submission 270: Gay and Lesbian Equality (WA) Inc.

³³ Submission 38: Owen Lonergan.

³⁴ Submission 299.

³⁵ Submission 123.



accommodate important international human rights instruments such as the [*International Covenant on Civil and Political Rights*]. The encouragement of that rights culture alone is likely to have a significant, if not spectacular, outcome in the future.³⁶

In terms of existing legal enforcement mechanisms, a number of people complained to us that the watchdog bodies responsible for administering and enforcing legislative protections were fragmented:

We have got the CCC [Crime and Corruption Commission], we have the Ombudsman's office, the State Administrative Tribunal, we've got the Industrial Relations Courts, we've got the Equal Opportunity Commission and they all stand alone. None of them abut and provide a protective shield to the individual...and every misdemeanour that you try to follow in a government department falls between the cracks.³⁷

The Committee accepts that the submissions made to it confirm that existing legal protections of human rights are fragmented, ad hoc and incomplete. We agree that a comprehensive statute which protects the human rights of Western Australians would represent a more direct approach to their protection and that there is something to be said for gathering together all basic rights in one place.

We also note that it was in recognition of the inadequacies of existing legal protections for human rights that the ACT and Victorian Parliaments introduced the Human Rights Act 2004 (ACT) (ACT Act) and the *Charter of Rights and Responsibilities 2006 (Vic)* (Victorian Charter) respectively. Similarly, in recognition of the inadequacies of existing protections, the Human Rights Committee of the New South Wales Bar Association came out in support of a statutory charter of human rights for New South Wales in July this year³⁸ and the Tasmania Law Reform Institute has recently recommended the introduction of a Charter of Human Rights for Tasmania.³⁹ The Committee is keen to point out that it does not believe that Western Australia needs a Human Rights Act simply because "everyone else is doing it", as was suggested by a couple of submissions.⁴⁰ Rather the Committee agrees with Janice Dudley who said in her submission to the Committee:

All other Anglo-American democracies have either bills of rights or Human Rights Acts. Other States and Territories in Australia are adopting Human Rights Acts. We don't need a Bill of Rights or a Human Rights Act just to 'keep up with the Jones' but this suggests there are good reasons for having a bill of rights or a Human Rights Act.⁴¹

³⁶ Submission 45.

³⁷ Participant in Albany public forum.

³⁸ New South Wales Bar Association Human Rights Committee, *Options Paper for a Charter of Human Rights for NSW*, July 2007, available from http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf.

³⁹ Tasmania Law Reform Institute, *A Charter of Rights For Tasmania*, Report No 10, October 2007.

⁴⁰ For example, submission 266: Salt Shakers Inc.

⁴¹ Submission 352.

(iii) A WA Human Rights Act would especially help to protect the rights of disadvantaged and marginalised people

Human rights are fragile. While many Western Australians may believe that formal equality is afforded to each citizen, the reality for many disadvantaged and vulnerable groups and individuals is very different. The Human Rights Act will be a big step toward reconciling the reality and the ideal.

Submission 72: Human Rights Law Resource Centre

Our Consultant who worked with disadvantaged and marginalised groups reported many concerns about current rights abuses on their behalf.⁴² The Committee itself was presented with a broad range of human rights concerns from an extensive range of people. Many of these concerns related to people who could be considered disadvantaged or marginalised. In particular, the Committee received a number of submissions from organisations working with people with mental health problems and people with physical and decision-making disabilities highlighting current problems in the system.

Some current concerns in the mental health area

The Council has outlined complaints of men and women being stripped of all their clothing while secluded; of not having been provided with toilet facilities and voiding on the floor then being made to clean it ... This disregard for patient dignity and respect whilst secluded can only make the people concerned assess their seclusion as punitive ...

An [Official Visitor] of the Council recently observed a woman who in effect had been secluded with her chair facing a corner of the room and her walking frame removed. Medical records were read, there was no authorisation as required by the [Mental Health Act 1996], the frame was said to have been threatened as a weapon. However to punish this woman by placing her in a position saved from the practices of Edwardian era schools is both distressing and frankly unbelievable – had it not been observed.

Submission 313: Council of Official Visitors

Many voluntary mental health consumers report suffering under a regime of coerced consent, where any resistance will automatically result in the revocation of freedoms or the imposition of more severe restrictions. Services with locked wards as part of their facility profile are able to coerce agreement from voluntary consumers under the threat of greater restrictions, such as transfer to a locked ward.

In over a decade of operation, the Mental Health Review Board (MHRB) has refused to exercise its jurisdiction to address complaints under Sec 146 Complaints. This leaves consumers who are certain that their rights have been breached under the [Mental Health Act] with no avenue of redress or review. The MHRB only reviews involuntary status. The Board will not address questions of the grounds for apprehension or other questions about abuses of the Mental Health Act or any issues relating to treatment.

Psychiatrist members of the MHRB seem rarely to test the content of the psychiatric reports provided to the Board... Presiding members are generally protective of clinicians and limit active questioning by parties supportive to the consumer. Such a culture denies procedural fairness and therapeutic jurisprudence.

Submission 139: Health Consumers' Council WA (Inc)

⁴² Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007 (see Appendix F).

Some current concerns in relation to people suffering from disabilities

Cathy is a 20 year old woman with an intellectual disability. Cathy also has a range of physical illnesses that have required her to undergo numerous hospital visits throughout her life. After one particularly severe attack, Cathy was submitted to a hospital's emergency department. The Doctor rang the Public Advocate who was Cathy's Legal Guardian. Although he had not examined Cathy and did not know the extent of her condition or her chance of recovery, the Doctor asked the Public Advocate to sign a Not For Resuscitation (NFR) certificate. The Doctor appeared to have made a significant and unjustified value judgement about the quality of Cathy's life, recommending that she should not be resuscitated due to her intellectual disability and ongoing health issues. The Public Advocate refused, arguing that Cathy had the same right to life as anyone else. After appropriate treatment, Cathy recovered and returned to her previous lifestyle.

... the act of voting in itself can be problematic for people with disabilities. This can be due to difficulties in accessing polling booths, privacy issues, or difficulties in navigating the electoral enrolment system. The implications of this, of course, is that people with a disability can become excluded from the electoral process and thus be unable to influence the formation of a government whose policies may best affect their life.

Submission 86: Office of the Public Advocate

While some organisations argued that the draft Bill should include additional specific rights for disadvantaged groups such as the disabled, there was broad recognition that the general rights in the Bill would provide assistance for such people. For example, in terms of the concerns raised above, it can be seen that the following general rights are relevant:

- the right of those detained to be treated with humanity and with respect for the dignity of all persons;
- the right to liberty;
- the right not to be arbitrarily detained;
- the right to a fair hearing;
- the right to life; and
- the right to vote and to otherwise participate in the conduct of public affairs.

Accordingly, many advocacy groups perceived that a WA Human Rights Act would help in terms of "the promotion of improved policies, programs and services"⁴³ for disadvantaged groups and provide a means through which some of their concerns could be addressed.

... THE ACT OF VOTING
IN ITSELF CAN BE
PROBLEMATIC FOR PEOPLE
WITH DISABILITIES.

The Committee agrees that a WA Human Rights Act would provide significant protection for disadvantaged and marginalised people, who may be considered particularly vulnerable to infringements of their rights. In this regard, we note the recent report by the British Institute of Human Rights entitled *The Human Rights Act – Changing Lives*, which shows that the *Human Rights Act 1998* (UK) (UK Act) has been of real help to such people.⁴⁴ Two of the case studies in the report illustrate the kinds of benefits that might arise:

⁴³ Submission 86: Office of the Public Advocate.

⁴⁴ The British Institute of Human Rights, *The Human Rights Act – Changing Lives*, 2006, available from: http://www.bih.org/downloads/bihr_hra_changing_lives.pdf.

1. Staff in a mental health hospital, who had refused to clean up after a patient who continually soiled himself, changed their practice after the patient's advocate challenged their conduct as a breach of the patient's right not to be treated in an inhuman and degrading way and his right to respect for private life.
2. A local authority had a policy of providing school transport for children with special educational needs living more than 3 miles from their school. Transport was refused to a learning disabled girl who lived 2.8 miles from her school even though she was unable to travel independently. An independent parental supporter helped the girl's mother successfully challenge the refusal on the basis that the decision was a disproportionate interference with the girl's right to respect for private life, given the failure to consider her specific circumstances.

The Committee also notes, however, that a WA Human Rights Act would not only be useful for disadvantaged and marginalised people. The feedback we received from our public forums and the written submissions was that a WA Human Rights Act would be of general relevance. As the Office of the Public Advocate pointed out in its submission, the Act would "introduce a common language of rights across the community that would enable individuals to seek to realise their full potential".⁴⁵

(iv) A WA Human Rights Act would help to create a human rights culture

Human rights should be part of our culture like 'slip, slop, slap'.

Participant in Sorrento public forum

Numerous submissions argued that one of the benefits of a WA Human Rights Act, in the form of the draft Bill, would be to create greater awareness of and respect for human rights, particularly within the executive government and throughout the broader community. In his submission to the Committee, Lt General John Sanderson AC stated:

It is fundamental to good government that our public institutions comply with international human rights standards and I believe that the proposed legislation could create a greater sense of awareness among public sector officers as to their professional responsibilities.⁴⁶

This sentiment was echoed at many of the public forums. For example, a participant in our Karratha public forum stated that the draft Bill is about "changing mindsets so that [human rights] become intrinsic".

It was apparent from both the written submissions and the views expressed at the public forums that many Western Australians perceive there to be problems with the current operating culture of the bureaucracy. For example, the following observations were made:

- "Government often acts in an arrogant way - they simply swoop in and do what they like."⁴⁷
- "The Government officials do not understand where people come from – physically and culturally. There is a problem with a lack of understanding of people's needs."⁴⁸

⁴⁵ Submission 86.

⁴⁶ Submission 300.

⁴⁷ Participant in Broome public forum.

⁴⁸ Participant in Kununurra public forum.



- “Many comments have been made to me in Meekatharra by white public service workers that ‘you can’t say anything to me about culture – there is no culture up here’. The perception is that there is no culture unless Aboriginal people are standing on one leg with a spear. In that sense, they think they can deal with Aboriginal people as if they are just ordinary members of the community. That is, they don’t need to take culture into account!”⁴⁹
- “Debasement of the value of diversity is the curse of the day. Public policy does not have proper regard to diversity. It is very much ‘one size fits all’ because that is economically efficient.”⁵⁰
- “It has been my experience that, no matter which government department one writes to, Sir Humphrey Appleby replies! More seriously, no government department, in my experience, perceives that an individual has civil and human rights. The public interest is a noble concept, but how ironic that it is used as an excuse for denying an individual his/her rights. How awful that the apportionment of resources to investigate alleged ill treatment relates to the perceived impact of the findings upon the respective department and that the individual’s loss of rights is seen as ‘collateral damage’.”⁵¹
- “It is almost like a police state in some government departments such as the Department of Child Protection and DOLA. It scares me what is happening.”⁵²

Many of the people who offered comments highlighted the importance of government agencies being culturally aware and treating everyone with respect. As a participant in one of our Kununurra public forums noted, “people understand that they can’t always get what they want from government, but they want to be treated with respect”. It was also apparent from our discussions with the community that, it was not so much a problem of public officials being malicious – rather, it was an issue of awareness. Many of them simply did not see the human rights implications of their actions or decisions.

MANY OF THE PEOPLE WHO OFFERED COMMENTS HIGHLIGHTED THE IMPORTANCE OF GOVERNMENT AGENCIES BEING CULTURALLY AWARE AND TREATING EVERYONE WITH RESPECT.

The views put to the Committee support the need for a cultural shift which would facilitate a shift in practice in the delivery of government services to the people of Western Australia. We note that the experience in other jurisdictions with human rights legislation such as the United Kingdom (UK) and ACT has been that such legislation has had a significant impact on public sector culture and improved the community’s experience of government. (We cannot comment on the impact in Victoria as the provisions of the Victorian Charter which apply to public authorities are yet to commence.)

⁴⁹ Participant in Carnarvon public forum.

⁵⁰ Participant in Bateman public forum.

⁵¹ Submission 154: Dot Price.

⁵² Participant in Geraldton public forum.

For example, in its review of the first five years of the UK Act, the UK Department for Constitutional Affairs found that the Act had conferred a range of benefits, including:

Overall the Human Rights Act can be shown to have had a positive and beneficial impact upon 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 evidence provided to the DCA by Departments shows how 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.⁵³

The recent report by the British Institute of Human Rights entitled *The Human Rights Act – Changing Lives* also shows that the UK Act has been a real help to ordinary people in their dealings with public authorities.⁵⁴ Training received by members of the bureaucracy and other service providers following the introduction of the Act has encouraged them to look for solutions and make decisions which respect human rights.

Similarly, the report on the 12-month review of the ACT Act found that the biggest impact of that Act was outside of the courts and in influencing the formulation of government policy.⁵⁵ Moreover, in her survey of the first 18 months of the ACT Act, the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, observed that:

...our experience is that it takes time and effort to build a human rights culture, but that positive improvements are already noticeable. There has been increased awareness of human rights principles.⁵⁶

Keeping any bureaucracy sensitive to human rights is an ongoing project. The issue is not whether a legislative statement of basic rights will permanently solve that problem so much as whether it would provide a tool which improves the capacity of the system to maintain a culture of respect for human rights and lift the performance of government.

The Committee is of the opinion that a WA Human Rights Act, particularly one in the form of the draft Bill, would provide such a tool. Amidst a plethora of detailed legislative and other provisions, it would provide a defined set of rights as a point of reference and would stand as a different type of educational tool within the many agencies of government. In its recent publication, *Becoming an Australian Citizen. Citizenship – Your Commitment to Australia*,⁵⁷ the Commonwealth Government outlined a list of values which it considers to be important in modern Australia. Just as the Commonwealth sees the recital of these values (which are broadly similar to a number of the human rights in the draft Bill) as a means of maintaining those values through the expanding and increasingly diverse Australian community, we see a WA Human Rights Act as a potentially powerful tool to improve attitudes within the public service and as a reminder to the community of fundamental democratic principles.

A REVIEW OF THE AUSTRALIAN CAPITAL TERRITORY ACT FOUND THAT THE BIGGEST IMPACT WAS OUTSIDE OF THE COURTS AND IN INFLUENCING THE FORMULATION OF GOVERNMENT POLICY.

⁵³ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, 4.

⁵⁴ The British Institute of Human Rights, *The Human Rights Act – Changing Lives*, 2006, available from: http://www.bihr.org/downloads/bihr_hra_changing_lives.pdf.

⁵⁵ ACT Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, 13.

⁵⁶ H. Watchirs, *Protecting Rights in the ACT*, January 2006, 3, available from: <http://acthra.anu.edu.au/articles/Watchirs%20Protecting%20Rights%20in%20the%20ACT.pdf>

⁵⁷ Commonwealth of Australia, *Becoming an Australian Citizen. Citizenship – Your Commitment to Australia*, September 2007, available from: www.citizenship.gov.au/test/resource-booklet/cit-z-booklet-full-ver.pdf.

The Committee considered whether the same cultural impact could be achieved by incorporating the same statement of rights in the internal working rules of the public service. However, we concluded that giving them the force of law and making them binding on the public service would be the most effective way to impose an obligation to ensure a human rights culture is developed throughout the service. As discussed further in Chapter 9 of this Report, however, the implementation of a WA Human Rights Act will only achieve the desired cultural shift if it is properly resourced.

In terms of creating a broader human rights culture, the Committee believes that improvements in public service attitudes could be expected to filter throughout the rest of the community. As the Human Rights Law Resource Centre Ltd (HRLRC) noted in its submission, encouraging a human rights culture within the executive is likely to have symbolic benefits “because Government itself will be seen to be committed to human rights protection, helping to foster a broader culture that recognises the importance of human rights”.⁵⁸ While the experience in other jurisdictions suggests that entrenching a human rights culture within the community will take some time, the introduction of a WA Human Rights Act would be likely to lead to some increase in public consciousness about rights in the shorter term.⁵⁹ In her survey of the first 12 months of the ACT Act, Dr Helen Watchirs concluded that “[t]he Act is not a magic bullet for creating a society based on full recognition of human rights, but it does at least represent progress in the right direction.”⁶⁰

(v) A WA Human Rights Act could limit what government agencies can do in their dealings with individuals and help keep them accountable

Many people were supportive of a WA Human Rights Act on the basis that it could help to limit what governments could do in their dealings with individuals and could help to keep government accountable. They considered that if public officials knew they would be accountable for infringing human rights, they would be less likely to do so. For example, an attendee at one of our Busselton public forums noted that:

I think a statement of rights would influence policy, which would have a positive impact. Organisations are risk managers. A bill of rights would create risks (in terms of consequences for breaching) that they would need to take into account.⁶¹

In its submission to the Committee, the HRLRC commented that:

New laws, policies and public programs will be measured against the Human Rights Act to ensure that human rights are safeguarded. Government departments and agencies will have to consider the impact that their day-to-day operations are likely to have on human rights. In this way, the ‘ordinary citizen can have a check on the government when it comes to their rights’.⁶²

⁵⁸ Submission 72.

⁵⁹ ACT Department of Justice and Community Safety, Human Rights Act 2004 Twelve-Month Review Report, June 2006, 16.

⁶⁰ H. Watchirs, *Review of the First Year of Operation of the Human Rights Act 2004*, June 2005, Democratic Audit of Australia, Australian National University, available from: http://democratic.audit.anu.edu.au/search_keyw_frm.htm.

⁶¹ Submission 72.

⁶² Submission 86.

The Committee agrees that a WA Human Rights Act could represent a significant check on government and be a valuable tool in promoting better public administration. We agree with the submission of the Office of the Public Advocate that:

The overarching priority of a WA Human Rights Act should ensure that the State Government, and future governments, are at all times cognisant of the 'baseline of rights' – those fundamental freedoms and liberties. A Human Rights Act should help prevent misuse of public power and ensure that governments have legal limits on their interference with these rights.⁶²

(vi) A WA Human Rights Act would ensure that human rights are taken into consideration more during the development of legislation

A number of written submissions and attendees at public forums voiced concerns about the steady erosion of human rights through legislation passed by both the Western Australian and federal Parliaments. Jane Foreman commented that:

The government could admit that it has been eroding the people's rights in this State insidiously for at least the last 8 years and if they are really serious go through the current legislation with this proposed Act as its policy to overturn some of the statutory laws and start giving the people back some rights.⁶³

Some people pointed to specific laws which, in their view, impacted negatively on human rights, such as Western Australia's mandatory sentencing laws,⁶⁴ the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*,⁶⁵ the *Censorship Act 1996 (WA)*,⁶⁶ restrictive Sunday trading laws,⁶⁷ police "search and seizure" legislation,⁶⁸ the *Corruption and Crime Commission Act 2003 (WA)*⁶⁹ and the *Criminal Property Confiscation Act 2000 (WA)*.⁷⁰ Isla Sharp expressed concern over recent anti-terrorism laws and restrictions on freedom of speech:

I am deeply concerned by the recent attrition of civil liberties in Australia, and in the western world generally, in connection with new anti-terrorism laws etc. I feel the lines have to be drawn around what we must retain for the future health of democracy, before it is too late. As a former journalist, I am also concerned by apparent recent trends towards muzzling or curbing both the media and the judiciary.⁷¹

Mike Sultanowsky expressed more general concerns about legislative incursions into the presumption of innocence:

I would like to speak out over what I call a blatant breach of basic human rights. The continual reversal on onus of proof. Every human should have a basic right to remain silent. We see this ever encroaching trend by politicians in our society. I point out CCC [Corruption and Crime Commission] powers to jail people who remain silent. It's up to the authorities to prove people are guilty, not to prove your innocence. We see this in the police powers to confiscate our possessions, then we have to prove our innocence. I think in this modern age with all the tools that the authorities have via phone intercepts, listening devices, etc. Why do the authorities need such draconian laws?⁷²

⁶² Submission 86.

⁶³ Submission 277.

⁶⁴ Participant in Kalgoorlie public forum.

⁶⁵ Participant in Geraldton public forum.

^{66, 67 and 68} Submission 123; Ben Caradoc-Davies.

⁶⁹ Submission 46; Mike Sultanowsky.

⁷⁰ Submission 78; Andrew Smart; submission 123; Ben Caradoc-Davies.

⁷¹ Submission 69.

⁷² Submission 46.



Many people identified the need to improve Parliament’s consideration of human rights during the law-making process. For example, Elisha Ladhams noted that:

Too often in times of insecurity and danger, societies and individuals claim that we must put human rights and such philosophical ‘impracticalities’ to one side and get on with what really matters – things like security, or progressing the economy. Afterwards, when things are ‘back to normal’ we can take notice of such philosophical luxuries as human rights.⁷³

Recurring topics of conversation at many of our public forums reflected issues of the day, such as the Australian Government’s intervention in Aboriginal communities in the Northern Territory and the detention of Dr Mohammed Haneef. Many people were concerned about the rushed way in which the legislation supporting each of these actions had been passed. Tim Bugg of the Law Council of Australia captured the sentiments of this group when he stated, during a recent interview on *Meet the Press*, with respect to the detention of Dr Haneef:

The Law Council deplores terrorism, we all do, however, that doesn’t mean that long-held rights are jettisoned without proper consideration. It may be that those rights have to be somehow reduced to account for the threats that we face, but if we go back to the detention process, there wasn’t proper debate at the time ... the problem we now confront in Australia is legislation ... introduced speedily without proper consultation.⁷⁴

While the people attending our forums recognised that neither the Northern Territory intervention nor the detention of Dr Haneef would be affected by a WA Human Rights Act, they also recognised that these cases highlighted the need to guard against similar occurrences at the State level. As a participant in one of our Esperance public forums put it, “there are times when the government needs to drop on people, but it needs to know what rights it is infringing when it does so.”

Many submissions argued that a major advantage of a WA Human Rights Act, particularly one in the form of the draft Bill, would be to ensure that Parliament considers the human rights implications of proposed new laws. One submission noted that, in addition to creating increased public transparency in the law-making process, an Act would create a greater level of debate about the role of Parliament itself in protecting human rights.⁷⁵ The Committee agrees that a WA Human Rights Act would help to improve the consideration of human rights by Parliament.



⁷³ Submission 330.

⁷⁴ Ten Network, “Interviews with Shadow Housing Minister Tanya Plibersek and Law Council President Tim Bugg. Discussions about Housing Affordability, Rent Assistance, First Home-Buyers Grant,

Dr Mohammad Haneef, Detention Laws”, *Meet the Press*, 22 July 2007, transcript available from: http://ten.com.au/ten/tv_meetthepress.html.

⁷⁵ Submission 309: Commonwealth Human Rights and Equal Opportunities Commission.

In reaching this conclusion, the Committee notes the view of the Commissioner of Police that there is no evidence to suggest that Parliament does not already consider human rights when examining new laws.⁷⁶ It certainly cannot be said that human rights are never taken into account during the consideration of legislation. The submission from the Department of Health confirms that when the *Mental Health Act 1996 (WA)* was reviewed in 2003 it was assessed against the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.⁷⁷ However, the Committee agrees with the submission of the Association for Services to Torture and Trauma Survivors Inc that:

The WA Parliament does not, in the course of its current debates, have a standing human rights reference point for assessing the State's laws or for its debates on the effectiveness of State services and administration. A proposed Act would provide this reference point.⁷⁸

The Commissioner of Police, Karl O'Callaghan APM, also submitted that a WA Human Rights Act would be ineffective because "if a majority [of the Parliament] want a Bill passed it is unlikely that an unfavourable statement of compatibility will stop them".⁷⁹ Furthermore, the Commissioner pointed out that Parliament could ignore all of the requirements of clause 31 of the draft Bill without this affecting the validity of legislation enacted and that this negated any obligation for the Parliament to assess a new law's compatibility with human rights in any meaningful way.⁸⁰

We agree with the Commissioner's assessment that Parliament will reserve to itself the right to determine when a law which impacts on human rights should be enacted in the public interest.

A key feature of the Government's proposal is the maintenance of parliamentary sovereignty. There will be occasions on which the Parliament considers that a law which limits human rights should nevertheless be passed. The requirement to produce a statement of compatibility is not intended to prevent the Parliament from passing such a law. Rather, the purpose of the statement is to ensure a dialogue between the Government and the Parliament as to why the limitation on human rights is justified, so that the Parliament may assess the merits of that legislation with full awareness of its implications for human rights. That is, the draft Bill is designed to ensure that human rights are not unwittingly eroded by Parliament.

Although it would be possible for Parliament to ignore the requirements of clause 31 of the draft Bill, the experience in the ACT and Victoria suggests that it would be more likely that Parliament would carefully consider the human rights implications of Bills which impose limitations on human rights. For example, in the ACT, there has been serious debate about the human rights implications of the use of clauses in legislation which are designed to restrict judicial review of government action (and thus potentially infringe the right to a fair trial and access to the courts) and the use of strict liability offences.⁸¹ Furthermore, in relation to the *ACT Terrorism (Extraordinary Temporary Powers) Bill 2006* there was:

detailed debate about the human rights implications of the legislation, which resulted in the additional safeguards including greater judicial oversight of preventative detention and the omission of penalties. The Opposition did not support the legislation, arguing that the HRA [Human Rights Act]

⁷⁶ Submission 301.

⁷⁷ Submission 353.

⁷⁸ Submission 369.

⁷⁹ Submission 301

⁸⁰ Submission 301.

⁸¹ G. McKinnon, "The ACT Human Rights Act – The Second Year" (paper presented at the Australian Bills of Rights Conference, 21 June 2006) 9, available from: <http://acthra.anu.edu.au/articles/Gabrielle%20McKinnon%20ACTHRA%20second%20year.pdf>.

had been construed too narrowly, and that interests in community safety should have been given more weight in deciding whether derogations from rights were justified and proportionate. The debate in the ACT was also able to influence the debate at the national level.⁸²

(vii) A WA Human Rights Act would help to give effect to Australia's international human rights obligations

Many submissions expressed disappointment that Australia has signed numerous international covenants and treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights but has failed to incorporate them into domestic law.⁸³ ALHR referred to the concluding observations of the UN Human Rights Committee on Australia's third and fourth reports under the ICCPR, which noted "concern...that in the absence of a constitutional bill of rights, or a constitutional provision giving effect to the [ICCPR], there remain lacunae in the protection of [ICCPR] rights in the Australian legal system."⁸⁴

Six identical submissions received in favour of a WA Human Rights Act commented that "Australia is obliged under international law to implement the signed and ratified treaties. This legal obligation extends to Australian states."⁸⁵

The Committee notes that a WA Human Rights Act in the form of the draft Bill would help to give effect to Australia's international obligations under the ICCPR. An Act which incorporated economic, social and cultural rights (an issue considered further in Chapter 4) could help to give effect to Australia's obligations under the International Covenant on Economic Social and Cultural Rights. We agree with the submission of the HRLRC, which noted that such a law would at least demonstrate this State's commitment to our nation's international human rights obligations.⁸⁶

(viii) A WA Human Rights Act could increase the possibility of a federal Human Rights Act being introduced in the future

Numerous written submissions and attendees at public forums raised the issue of a federal Human Rights Act or bill of rights in the Commonwealth Constitution. Some of those in favour of such an Act or bill of rights believed that this was the only appropriate option and that we should not have state human rights legislation as well.⁸⁷ Others, however, were of the view that a State Act was still necessary and the two could comfortably co-exist. In this regard, Sussex Street Community Law Service commented:

We believe that it is entirely appropriate and necessary for the State of Western Australia to enact a Human Rights Act to provide basic levels of protection for Western Australians. This is for two reasons. Firstly, the State government provides the basic services that set the standard of living in Western Australia. It is in the provision of education, health, criminal justice and law enforcement, and property ownership that human rights issues are likely to be raised against the Government. Even if federal Human Rights legislation was in place, the State Government would arguably still need its own human rights legislation in order for human rights to be taken into account in state services.⁸⁸

⁸² Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Kim Pham and Gabrielle McKinnon.

⁸³ For example, submission 9: Paul Stow; submission 108: Ruth Heady; submission 189: Sean Reith; submission 197: Women with Disabilities WA Inc; submission 210: Rosalie Miles; submission 275: Loftus Community Centre; submission 276: Bilingual Families Perth.

⁸⁴ Submission 299.

⁸⁵ Submission 108: Ruth Heady; submission 189: Sean Reith; submission 197: Women with Disabilities WA Inc; submission 210: Rosalie Miles; submission 275: Loftus Community Centre; submission 276: Bilingual Families Perth.

⁸⁶ Submission 72. Also, submission 199: National Children's and Youth Law Centre.

⁸⁷ For example, submission 22: Amour; submission 131: George Sulc; submission 258: Mark and Linda Bovill; submission 358: Greg McIntyre SC, Dr Johannes Schoombee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey.

⁸⁸ Submission 192.



Many people, in fact, argued that a reason for having a State Act was that it could increase the likelihood of a federal Act or bill of rights being introduced. For example, a participant in one of our Bunbury public forums stated that “this is a beginning. If we incorporate these reforms at a State level, I would expect it would roll onto the federal level as well.” Similarly, in response to the question of whether WA should have a Human Rights Act, Linda Paisley said “absolutely - let’s push hard for a national Act”.⁸⁹

The Committee was not asked to consider the issue of federal human rights legislation and so it does not express any view as to whether such legislation is appropriate or desirable. We note simply that this was a frequent argument made in favour of a WA Human Rights Act and that, in our view, there would not be any inconsistency or difficulty in having both a State and federal Act.

3.4 Arguments against a WA Human Rights Act

(i) There is no evidence of problems with human rights abuse – “if it ain’t broke, don’t fix it”

I am confident that the vast majority of people in Western Australia live a life where they feel secure in their homes and unthreatened by police, political or government process. What then is driving this need for change? An ideology – not a need – an ideology.

Submission 8: Michael Cardy

A number of written submissions expressed doubt as to the need for a WA Human Rights Act, arguing that there is no evidence that people are being mistreated or mismanaged in Western Australia.⁹⁰ Some suggested that a WA Human Rights Act would therefore constitute an inappropriate “pre-emptive strike”. For example, the submission of Elliot Nicholls, which was in the form of a petition signed by 80 other people stated:

Given that the State has functioned extremely well for hundreds of years without a Human Rights Act, one questions if introducing such an Act now is a wise move. It would almost appear that certain elements of the community are scare mongering on the issue to prepare a ‘pre-emptive strike’ on human rights abuses that may occur in the future. But what are we striking at? What documented cases on human rights abuse in Western Australia do we have? Would we not be better off collecting and reviewing these to form legislation on a real needs basis rather than on a perceived needs or ‘anticipated future needs’ basis?⁹¹

⁸⁹ Submission 42.

⁹⁰ For example, submission 334: Alan Wilson.

⁹¹ Submission 239.

This sentiment was echoed during our face-to-face consultations. The expression “if it ain’t broke, don’t fix it” was used at one of the earliest public forums in Perth and came up from time to time after that.

The Commissioner of Police submitted that he was “unable to conclude there is sufficient justification for human rights legislation”.⁹² The Commissioner submitted:

First, almost all of the rights the Bill purports to protect are already afforded protection by either existing legislation or the common law. More significantly the protection already available is invariably superior to that which the Bill would provide.

Secondly, those rights in the Bill that are not already the subject of protection are such that it is doubtful they require protection. For example, clause 10(1) purports to protect the right to travel freely within, and to enter and leave, Western Australia. I am unaware personally nor have I ever heard of any person (not in custody or on bail) complain that such a right has been infringed. The counter argument is, I suppose, that unless the right is enshrined in legislation it is susceptible to erosion by future governments. In my view, it cannot seriously be suggested that the democratic process would permit such an eventuality. Furthermore, it is difficult to imagine any reason to do so.⁹³

THE COMMITTEE
CONSIDERS THE
ARGUMENT “IF IT AIN’T
BROKE, DON’T FIX IT” TO
BE AN IMPORTANT ONE.

We are unable to accept the argument that rights recognised in the draft Bill, but which are not recognised under existing laws are not, and never have been, threatened. In the Committee’s view the example posed by the Commissioner of Police illustrates the point. The right to move freely is very significantly limited by section 27 of the *Criminal Investigation Act 2006* which empowers a police officer who reasonably suspects that a person in a public place is committing a breach of the peace, or who has committed, or intends

to commit, an offence, to issue that person with a “move on” order. Such an order requires the person to leave the public place or to go a reasonable distance from the place for a period of up to 24 hours. That provision clearly imposes a limitation on the right to move freely within Western Australia. It may be that this limitation is “reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom” after taking into account the factors set out in clause 34(4) of the draft Bill and is therefore a “permissible” limitation on human rights. However, the example nevertheless illustrates that rights of all kinds may be limited by legislation and when this occurs, it is important that the Parliament gives careful consideration to whether this is justified. Moreover, a number of people expressed concerns during our consultations that the power to issue “move on” orders is sometimes used inappropriately.

The Committee considers the argument “if it ain’t broke, don’t fix it” to be an important one. If it is true that there are no human rights problems in Western Australia that is a powerful stand alone argument against the need for any new legislation. However, the range of concerns relating to infringements of human rights brought forward during the public forums and in the written submissions, clearly indicate that, for a wide range of Western Australians, rights are not respected as they believe they should be. These concerns are a reminder that, “if as individuals our human rights are not infringed, it is easy to claim that in our society no-one’s human rights are violated.”⁹⁴

⁹² Submission 301.

⁹³ Submission 301.

⁹⁴ Submission 352: Janice Dudley.



This point was also made strongly in the submission from the Office of the Public Advocate, an agency which provides advocacy support for those with decision-making disabilities:

Those who are educated, wealthy and with strong communication skills rarely see their human rights breached and of the existing system they may argue ‘if it ain’t broke, don’t fix it’ ... For the groups who are in most need of protection, the current system is often proving itself to be inadequate. People with a decision-making disability face regular challenges to their human rights and for them, the system isn’t working.⁹⁵

It was anticipated by the Committee that we would hear views from those who work with the disadvantaged about the difficulties they experience in accessing their rights. We did. What also emerged from the consultations, however, was that a significant number of people who could not be regarded as disadvantaged or as holding “minority” status felt they were denied their rights by government action and inaction. To them the system also appeared “broke”. The Committee could not determine quantitatively from our public forums how representative of the whole community these concerns were, but cross referencing them with the written submissions and the survey evidence suggests that they were not isolated or atypical concerns. The cumulative effect of the Committee’s consultations is to confirm that rights issues require attention across a broad range of government activities and functions. The system is sufficiently “broke” to make fixing it a worthwhile objective.

THOSE WHO ARE
EDUCATED, WEALTHY
AND WITH STRONG
COMMUNICATION SKILLS
RARELY SEE THEIR HUMAN
RIGHTS BREACHED

Of course that does not of itself answer the question: is a WA Human Rights Act the best or even an appropriate way to “fix it”? However, a majority of those written submissions expressing a view on the issue, those people attending our public forums, those consulted as part of the devolved consultation with the disadvantaged and those people surveyed, supported a WA Human Rights Act as a way of improving the situation.

(ii) A WA Human Rights Act is unnecessary in light of existing legal and political protections of human rights

The most frequently made argument against a WA Human Rights Act among the written submissions was that such an Act is unnecessary in light of existing legal and political protections of human rights. This argument was also picked up in the public opinion survey, although to a much lesser extent. The survey report indicates that, of the 11% of respondents who did not believe that Western Australia should have a law that aims to protect the human rights of people, most were of the view that current laws “are quite adequate”.⁹⁶ A related argument against a WA Human Rights Act presented in some of the submissions was that, if there are deficiencies in existing laws and practices, the appropriate course of action is to make changes to those existing laws and practices rather than introduce a WA Human Rights Act.⁹⁷

⁹⁵ Submission 86.

⁹⁶ Patterson Market Research, Flashpoll Assessment of Community Support For Human Rights Legislation, August 2007, 1 (see Appendix E).

⁹⁷ For example, submission 65: Brian Marsh; submission 102: M McPhee; submission 103: P Farley; submission 106: S MacFarlane; submission 107: R MacFarlane; submission 112: R Foden; submission 115: B Leicester.

In respect of existing protections for human rights, John Keenan observed in his submission that:

so called ‘rights’ are already enshrined in a multitude of federal and state Acts and regulations outlining what standards of behaviour are both acceptable and not acceptable and interpreted by the judiciary responding to the standards of society at the time. Overlaying all of the Acts and regulations are a multitude of ‘rights’ organisations, including the print and electronic media, which monitor, and respond quickly to, any perceived breaches of the ‘rights’ of residents of Australia.⁹⁸

Festival of Light Australia also commented that:

under common law, everyone has unfettered rights of all kinds unless the Parliament has limited the exercise of those rights by legislation. The justification advanced by the parliamentary majority (usually the government party) for this legislation can be judged by the voters at the next election.⁹⁹

As noted earlier, the Commissioner of Police submitted that almost all of the rights in the draft Bill are already protected by existing legislation or the common law, and that such protection is invariably superior to that which a WA Human Rights Act would provide.¹⁰⁰ Furthermore, in the Commissioner’s view, it could not seriously be suggested that, unless a right was enshrined in legislation it would be susceptible to erosion by future governments. He submitted that existing democratic processes would not permit that to occur and that such processes provide adequate protection of human rights in Western Australia. The Commissioner suggested that the requirement in the draft Bill for Parliament to be provided with a statement of compatibility regarding the impact of proposed legislation on human rights was unnecessary. He submitted that there was no evidence that Parliament “has not been assiduously carrying out its function in determining whether the mischief to which a particular piece of legislation is directed justifies any diminution of individual freedom”.¹⁰¹

Other people who believed that there were sufficient existing protections referred to various international covenants as directly protecting human rights in Western Australia.¹⁰² Moreover, a couple of people pointed to the *English Bill of Rights of 1689* and the Magna Carta as providing sufficient protection for rights within the State.¹⁰³

The argument that the existing system offers adequate protection for human rights is the opposite side of the argument made by those in favour of an Act that existing legal protections are inadequate. The numerous submissions, both oral and written, that the Committee received complaining of breaches of human rights indicate that many Western Australians do not consider that their human rights are adequately protected by existing laws. The list of concerns set out earlier in this Chapter illustrates the range of contexts in which people perceived their human rights to have been breached or inadequately respected. We have also discussed earlier our views that existing legal protections of human rights are fragmented, ad hoc and incomplete and that a WA Human Rights Act would provide the opportunity for a more comprehensive and consistent approach to the protection of human rights.

With respect to the argument that the “minimalist” approach to remedies in the draft Bill has been taken because remedies for a breach of human rights already exist, we understand that the draft Bill was drafted with the intention that breaches of human rights should not create additional litigation. The focus of the Bill is on encouraging a culture of human rights, rather than litigation about breaches of

⁹⁸ Submission 16.

⁹⁹ Submission 34.

¹⁰⁰ Submission 301.

¹⁰¹ Submission 301.

¹⁰² For example, submission 153: LJ Goody Bioethics Centre; submission 126: Lynley Bromwell.

¹⁰³ For example, submission 316: Colin Chapman.

human rights. We do not agree that the absence of litigation-based remedies in the draft Bill means that adequate remedies exist for breaches of human rights already, or that breaches of human rights do not occur. The views put to us during our consultations suggest that is not the case. As we discuss in Chapter 8 of this Report, our view is that additional remedies, which do not involve recourse to litigation, but involve informal and expeditious methods of dispute resolution, should be available.

In so far as the protection of human rights by existing political mechanisms is concerned, we refer to our discussion earlier in this Chapter regarding the scepticism expressed by many people about the scrutiny of legislation by the Parliament in relation to human rights. This scepticism was shared by those legislators who have previously pursued improvements in parliamentary scrutiny through improved committee structures.

The Committee also notes that references to international covenants as protecting human rights in Western Australia appear to be based on a misunderstanding as to the nature and effect of such instruments. International covenants have no binding force unless incorporated into domestic legislation. The draft Bill in fact represents an attempt to give some effect to the ICCPR at the State level.

Furthermore, in respect of the *English Bill of Rights of 1689* and the *Magna Carta*, it should be noted that the *English Bill of Rights of 1689* and the *Magna Carta* (which the colonies of Australia inherited through their adoption of Imperial statutes), remain in force in Western Australia to the extent that they have not been repealed by other State laws. However, as Justice McHugh of the High Court has pointed out:

Any legislature acting within the powers allotted to it by the Constitution is entitled to legislate in total disregard of the *Magna Carta* and the Bill of Rights, as is the United Kingdom Parliament. ... They are not constitutional documents in the sense that the Australian Constitution and the United States Constitution are. ... They are political ideals which most citizens would hope that Parliaments would follow but if Parliaments do not follow them, the remedy is the ballot box because we do not have a Bill of Rights in this country.¹⁰⁴

(iii) A Human Rights Act would simply pander to the concerns of minority groups

Numerous submissions argued that demand for human rights legislation comes largely from “judicial and social activists and vocal minority groups”¹⁰⁵ and that proposals for such legislation are attempts at social engineering by “minorities” who want to impose their views on the (presumably silent) majority. For example, D Lewis expressed general concern that:

We are up to our ears in human rights forced on us by an ever expanding totally out of control feral bunch of left wing loony, politically correct socialist deviants aided and abetted by the current socialist Labor State Government.¹⁰⁶

Some submissions and public forum attendees expressed particular concerns that minority interests could be allowed to interfere with traditional family values, Judeo Christian values and parental rights to control their children’s upbringing.¹⁰⁷ For example, a number of people referred to a case in Victoria where proceedings were taken against two Christian clergymen who had expressed views that were

¹⁰⁵ For example, submission 116: D Koch; submission 159: C Wiggins; submission 161: P Slyth; submission 169: Marie Slyth; submission 180: K Froome; submission 255: Dennis O’Sullivan.

¹⁰⁶ Submission 90.

¹⁰⁷ For example, submission 141: Australian Family Association Western Australian Division; submission 290: David Gould; submission 182: Tony Overheu; submission 316: Colin Chapman; submission 262: Rivers Christian Life Centre; submission 292: Steve Gadsby.



critical of Islam. In fact that case involved proceedings taken under specific vilification legislation in that State and not the Victorian Charter. It is nevertheless relevant in highlighting the difficult issues that arise in drawing the line between freedom of religion and freedom of speech, as well as the need to avoid the sort of racial and religious vilification which has historically, and more recently, been used to justify criminal attacks and social exclusion.

The above concerns are readily understandable at a time of considerable social change, much of which is seen as negative by those seeking social stability. However, the Committee does not consider that a WA Human Rights Act would serve as a tool for vocal minorities to impose their values on an unsuspecting majority.

Attendance at our public forums was in no way predominantly by those usually referred to as “minorities”. The same could be said for those who made written submissions. The list of concerns relating to the infringement of human rights set out earlier in this Chapter indicates that a wide cross-section of Western Australians have rights concerns. As a participant in an Albany public forum stated:

You don't have to be of migrant background, of Aboriginality or extremely impoverished or ill-educated to be marginalised. You can just be closed out.

THE LIST OF CONCERNS RELATING TO THE INFRINGEMENT OF HUMAN RIGHTS SET OUT EARLIER IN THIS CHAPTER INDICATES THAT A WIDE CROSS-SECTION OF WESTERN AUSTRALIANS HAVE RIGHTS CONCERNS.

We also note the apparent acceptance at the Commonwealth level that it is important to identify and seek to preserve the values and principles which are essential to maintaining a good society. As noted earlier, the Commonwealth Government has recently introduced (with support from the Opposition) a requirement that immigrants commit to a statement of values which includes freedom of religion, equality of men and women, equality of opportunity regardless of race, religion or ethnic background, the rules of law, parliamentary democracy, mutual respect, tolerance, fair play and compassion for those in need.

The written submission that we received from the Office of the Public Advocate neatly captured the views of a number of people who attended our public forums in stating that:

The existence of a Human Rights Act would be an important statement to all Western Australians, and to all who come to Western Australia, about the society we are, what we hold dear, and that discrimination, prejudice and vilification will not be tolerated. As a ‘statement of intent’ it is a powerful document.¹⁰⁸

We agree that a WA Human Rights Act could serve as an important statement of the rights and values that are important to Western Australians generally.

(iv) A WA Human Rights Act would make little practical difference other than to impose an administrative burden on government agencies

The Bill is motherhood, apple pie and window dressing.

Participant in Law Society of Western Australia, Human Rights Forum, Perth, 8 May 2007

A number of written submissions and public forum participants warned that merely introducing a WA Human Rights Act would not mean that human rights would be protected.¹⁰⁹ Many were sceptical that a WA Human Rights Act would be a “‘nice’ governmental gesture, that sounds great on paper”, but would not make any difference to “practical life”.¹¹⁰

Some people believed that it was simply not possible to protect human rights through the law. For example, an attendee at one of our Busselton public forums told us that “networks of relationships hold society together. The quality of people’s relationships affects the quality of society and our human rights record, regardless of the law. I don’t know how to address this with a law.”

Others noted that human rights abuses have not been prevented in other nations which have adopted human rights legislation. The former Soviet Union was cited as one specific instance of a country where human rights abuses have occurred despite the adoption of a bill of rights. For example, the Australian Family Association Western Australian Division noted that:

Some of the most oppressive societies on earth, including the former Soviet Union, have operated under elaborately designed Bills of Rights. On paper these superb constitutions have covered every imaginable right; but, especially in the USSR, the reality has been a totally different story. A Bill of Rights is no panacea; and is certainly no guarantee that abuses will not occur.¹¹¹

In considering these arguments, the Committee came to the conclusion that the success or otherwise of human rights legislation was likely to depend a great deal on social context. The fact that human rights abuses have occurred in “despotic states” does not necessarily mean that the same result might be expected in Western Australia with its history of democratic government and the long tradition of respect for the rule of law. In other words, the incommensurability of contexts counts against such arguments. Contemporary Australia can hardly be compared to the former Soviet Union.

On the other hand, we would be deluding ourselves if we imagined that all human rights abuses could be automatically avoided simply by passing a law. After all, murders unfortunately occur from time to time, even though there is a law which proscribes murder as a crime.

¹⁰⁸ For example, submission 34: Festival of Light Australia.

¹⁰⁹ Submission 266: Salt Shakers Inc.

¹¹⁰ Submission 141.

¹¹¹ Submission 352.

It has to be appreciated that, generally speaking, the law establishes a minimal set of standards that are considered necessary for society to cohere and to function reasonably effectively - as a kind of safety net. But the law does not stand alone. In most societies, people are also encouraged to act responsibly and to live by standards of compassion and respect for the needs of others over and above those established in law. Social mores and community values encourage people to live by maximal standards.

While it cannot, therefore, be assumed that simply by passing a law all breaches of human rights would immediately and magically be eliminated, it cannot be denied that in order for human rights to have meaning and practical effect they “must have political and legal backing”. As noted by Janice Dudley, while “a Human Rights Act cannot guarantee that the rights of any individual will never be infringed, it does state a firm and unequivocal commitment to the protections of the human rights of all.”¹¹² The Committee agrees that establishing the right legal framework for the protection of rights is an important starting point.

A second aspect of the argument that a WA Human Rights Act would make little practical difference which was raised during our consultations was that such an Act would actually make a practical difference - but the wrong kind. For example, a participant in one of our Esperance forums expressed concern “that the Bill will simply mean more bureaucracy,

more forms, more reports and more boxes to tick.”¹¹³

...A HUMAN RIGHTS ACT
CANNOT GUARANTEE
THAT THE RIGHTS OF ANY
INDIVIDUAL WILL NEVER
BE INFRINGED...

A number of submissions raised concerns about the impact of a WA Human Rights Act on the practices and policies of government agencies, suggesting that there would be an increased administrative burden, and additional costs, for agencies to ensure that their policies, actions and decisions are compatible with human rights, and to deal with complaints about breaches of human rights.

While the Committee accepts that there would be some administrative burdens and costs on government agencies in complying with a WA Human Rights Act, the information put before us suggests that a number of government agencies already have in place practices, policies and procedures designed to ensure that their decisions and actions respect the rights of individuals, even if those rights are not presently described in human rights terms. For that reason, although an initial review of agencies’ practices, policies and procedures would be required if a WA Human Rights Act was introduced, it may not be that significant changes would be required to ensure that those practices, policies and procedures comply with the requirements of a WA Human Rights Act.

By way of illustration of this view, it is appropriate to refer again to the submission made to us by the Commissioner of Police. The Commissioner stated that “conceivably police would need to receive training in how to deal with people from a range of different ethnic and religious backgrounds. This is clearly impracticable and an onerous burden to impose on the WA Police”.¹¹⁴ The Committee went to the police website to confirm our understanding that in order to do their work, Western Australian police officers already need to be skilled in dealing with the difficulties inherent in our multicultural community.

¹¹² Submission 352.

¹¹³ Participant in Esperance public forum.

¹¹⁴ Submission 301.

In a discussion of “Community Diversity” in the section of the website devoted to the services of the Police, the following appears:

WA Police recognises community and cultural diversity as an enriching and fundamental feature of our society and is committed to providing effective policing services that are accessible, culturally appropriate and equally responsive to all communities of Western Australia’s population.

We strive to ensure:

- the policing needs of Indigenous people, multicultural communities and minority groups are addressed;
- the service it provides is accessible and achieves equitable service delivery outcomes to all members of the community; and
- the implementation of mechanisms that identify, address and discourage any expression of racist behaviour or discrimination by any of its members.

...We have Crime Prevention & Community Diversity Officers in each Police District responsible for:

- Identifying barriers experienced by people from diverse groups when accessing police facilities and services.
- Consulting locally to ensure community diversity issues are identified and dealt with.
- Providing support and information to other police officers in regard to community and cultural diversity issues.¹¹⁵

Similarly, in the section of the website devoted to Indigenous Communities there is a link to the *Strategic Policy on Police and Aboriginal People* (Policy) in which services for Aboriginal people are identified as a priority area. The Introduction to the Policy notes that “it is clear that several aspects of the service provided to Aboriginal people have been less than satisfactory for a number of reasons”.¹¹⁶ After reference to various reports that have contributed to the development of the Policy, the Introduction to the Policy goes on to say:

the key for police in working with Aboriginal people is the relationships formed at individual and community level. These relationships must develop through engagement with Aboriginal people and through partnership in planning and service delivery. Historically these have not always been done well, however there is good work being done to address these issues and the Policy Statement is part of the on-going commitment to continue that work.

The framework for the Policy Statement developed around four core themes:

- Rights – recognition in practice that citizenship rights are inclusive of Aboriginal people ...
- Respect – recognition that respect for individual people and their needs builds respect for policing in return
- Relationship – policing is basically a people business, and building trust, cooperation and partnerships are integral to all aspects of policing and crime prevention

¹¹⁵ See: <http://www.police.wa.gov.au/ABOUTUS/OurServices/EquityandDiversity/tabid/1018/Default.aspx>.

¹¹⁶ See page 2 of the Policy, available from: <http://www.police.wa.gov.au/OurServices/IndigenousCommunities/tabid/995/Default.aspx>

Responsibility – the Police Service taking responsibility for its practices and for engaging with and working collaboratively with the community and other agencies...¹¹⁷

The Policy notes, amongst other things:

The Police Service acknowledges that great diversity exists amongst Aboriginal people and communities and recognises individual and local needs. Police will respect local cultural traditions where the practice of those traditions is within the law and does not put the safety of individuals at risk.¹¹⁸

The Policy Rationale included in the Policy addresses the issue of cultural respect:

The Police Service provides an essential service to the Western Australian community, and is committed to acknowledging and respecting the Aboriginal cultures that exist within Western Australia. The Police Service acknowledges the diversity of social customs and values that form Aboriginal culture and is committed to ensuring that officers develop an appreciation and respect for the differences in the customs and values of Aboriginal people in their district.

An understanding of the diversity of Aboriginal people is essential for all government employees, including police officers. The Police Service is committed to the development of locally specific inter-agency cultural sensitivity training that can be delivered to all service providers. This training will have the involvement of local Aboriginal community members and include information that is relevant to the way in which services will be provided.¹¹⁹

These statements confirm the Committee's perception that the Western Australian Police are one of the key agencies in dealing with Indigenous people and an agency that devotes attention to thinking through and training its staff to undertake the difficult tasks they face. They use the same key words as individuals subject to policing: rights, respect, relationship and responsibility. It would be extraordinary if these statements were not part of existing police training. The Committee agrees with the Commissioner that meeting these responsibilities is an onerous task, however it is an existing task within current policies and one that the Police undertake, often with conspicuous success.

We consider that the same comments are likely to be apt in relation to many government agencies which, through codes of conduct, and charters of service, already strive to respect the rights of their staff and the public of Western Australia, whom they serve.

We are fortified in our view of the likely administrative burden of a WA Human Rights Act on government agencies by the feedback we received from the Victoria Police about the implementation of the Victorian Charter. We were advised that the Victorian Police established a Human Rights Project to implement the Charter within the Victorian Police Service. The review of existing legislation and police procedures which was carried out as part of that Project indicated that:

most current Victoria Police protocols and procedures were found to be consistent with Human Rights standards. Therefore the task for the project is to engender an acceptance of Human Rights as an integral part of policing, already established in Victoria Police 'Values' and ethical framework.¹²⁰

¹¹⁷ Page 3 of the Policy.

¹¹⁸ Page 4 of the Policy.

¹¹⁹ Page 8 of the Policy.

¹²⁰ Draft Victoria Police Human Rights Project 2007 / 2008 at p3.



Further, the Victorian Police Human Rights Project found that “audit of current practice ... demonstrates with evidence that current VicPol practice is well within the expectations of the Charter.”¹²¹

We would anticipate that the same conclusion would be likely to be reached in relation to the practices and policies of the Western Australian Police if a WA Human Rights Act was enacted in this State, given, amongst other things, that the Police already have in place a Charter which notes that:

In their dealings with the Western Australia Police, members of the community have a right to:

- be treated honestly and openly
- be treated fairly and with respect
- request that police officers identify themselves
- communicate or attempt to communicate with a friend, relative or legal practitioner if they are detained in custody
- be cautioned prior to being formally questioned as an offender
- be fully informed of all charges preferred
- only be detained for as long as is lawfully necessary
- have their safety and welfare needs met where detained, including the right to necessary medical attention
- have their concerns acknowledged and responded to in a professional manner.¹²²

In light of all of the above, we do not accept that the administrative burdens and costs imposed by a WA Human Rights Act would be excessive or disproportionate to the benefits to be achieved by the legislation. However, as discussed in further detail in Chapter 9 of this Report, we are firmly of the view that it is imperative to the success of such an Act that government agencies receive adequate ongoing funding to cover any additional administrative burdens and compliance costs they incur.

¹²¹ Draft Victoria Police Human Rights Project 2007 / 2008 at p3.

¹²² See <http://www.police.wa.gov.au/ABOUTUS/EthicsandIntegrity/CharterofRights/tabid/1336/Default.aspx>

(v) A WA Human Rights Act would increase the powers of the judiciary, who are not democratically elected and would politicise the judiciary

In a BoR [Bill of Rights] major policy and legislative issues are wrested from the legislature and given to the judiciary. These issues are the province of the Parliament not unelected judges and bureaucrats. Thus a BoR poses a real threat to democracy as the courts become politicized and activist minority groups and special interest groups promote an agenda at odds with the majority and not supported by the duly elected Parliament.

Submission 112: R Foden¹²³

This argument was one of the most frequently cited and vigorously made against the introduction of a WA Human Rights Act. It found a high profile advocate in Professor Greg Craven, whose views were reported widely in the media and repeated in a number of submissions.

In an article in *The West Australian* entitled “Don’t be fooled by sugar-coated sales pitch”,¹²⁴

Professor Craven argued that:

we should stop talking about “charters” and “Human Rights Acts”. This is a debate about whether we should have a Bill of Rights and we should call a polecat a polecat. A Bill of Rights is simply a law that allows judges to overrule Parliament where rights are involved. It raises two troubling issues. The first is democracy. Whatever problems parliaments have – and they have a few – they are elected. The courts are not, having precisely the same democratic legitimacy as the Weld Club. So why should they be deciding basic social issues, because that is what rights are. ... The second problem is competence. Even if we sneer at democracy, what do judges know about complex social issues?

He went on to suggest that supporters of human rights legislation (who he termed “Rights groupies”) were “profoundly suspicious of elected parliaments and barrackers for judicial superiority” and that the proposed WA Human Rights Act would simply pander to an agenda designed to “shift the balance of power in favour of the courts”.¹²⁵

Other people made similar arguments about the “shift in power” away from Parliament and questioned the competency of the courts to deal with human rights issues. For example, Michael Cardy observed that:

Judges are not trained in social rights, psychology, psychiatry – and yet this is what they are making decisions about when they invoke HRA provisions. Why is a judge any more qualified to make a decision about a person’s position in society and whether their human rights have been met than a doctor, accountant, company director or a public servant?¹²⁶

¹²³ This was one of 12 identical submissions received from different people.

¹²⁴ Greg Craven, “Don’t be fooled by sugar-coated sales pitch”, *The West Australian*, 5 May 2007, 14.

¹²⁵ Greg Craven, “Don’t be fooled by sugar-coated sales pitch”, *The West Australian*, 5 May 2007, 14.

¹²⁶ Submission 8: Michael Cardy.

On the other hand, Professor Craven's article in *The West Australian* provoked a great deal of disagreement. For example, Chris Bailey, commented in a letter to the editor:

Greg Craven your argument that a human rights Bill has the effect of undermining parliamentary sovereignty is unfounded. The Bill clearly provides that a statute of Parliament which is incompatible with any human right is not rendered invalid. ...It is utterly inconceivable and irresponsible that the real effect of the Bill was not mentioned in this editorial. No judge or lawyer can possibly use this Bill to change the legal system in this State. The decisions remain completely in the hands of Parliament. The Bill simply provides a standard or benchmark for human rights in WA.¹²⁷

The Committee has given careful consideration to Professor Craven's arguments, which were reflected in a number of the submissions which were opposed to the Government's proposal, however, we find them to be at odds with the actual content of the draft Bill. Arguments about shifts in the balance of power in favour of the courts and the courts being able to "overrule" Parliament are arguments that have been developed in relation to constitutional Bills of Rights, such as that in the United States. These arguments appear to have simply been transposed onto "dialogue" based Human Rights Acts, despite the fundamental differences between the two models. As noted by the Commonwealth Human Rights and Equal Opportunity Commission, one of the most frequently cited arguments against Human Rights Acts is that they transfer power to an unelected judiciary, however "in the context of a 'dialogue model' of human rights protection, this criticism is misconceived."¹²⁸

It is not correct that the draft Bill would allow judges to "overrule" Parliament. The draft Bill would, if enacted, take the form of an ordinary Act which would preserve parliamentary sovereignty. It would not prevent Parliament from enacting legislation that was incompatible with one or more human rights if it wished to do so. Moreover, it would not give people new substantive rights to challenge the validity of existing laws.

The draft Bill does require courts to interpret legislation compatibly with human rights. However, the court's power to do so is limited to legislation the ordinary meaning of which is "ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable".¹²⁹ In this regard, the draft Bill imposes a higher threshold than other jurisdictions, such as the ACT and Victoria (see Chapter 6 of this Report for further discussion). It is difficult to see how it could be said to be inappropriate for courts, when faced with unclear legislation, to prefer an interpretation that better protects human rights.

The draft Bill also gives power to the Supreme Court (and only the Supreme Court) to make a declaration that legislation coming before it is incompatible with one or more human rights, however, such a declaration takes the form of non-binding "advice" only. Parliament is entirely free to ignore it.

When Professor Craven presented his case against the introduction of a WA Human Rights Act at a forum organised by the Law Society of Western Australia on 6 August 2007 he did not argue that such an Act would allow judges to "overrule" Parliament. Rather, he argued, that a WA Human Rights Act would inevitably "work badly in one or two ways ... each equally bad".¹³⁰ The first possibility was that, whenever the Supreme Court issued a declaration that a particular law was, in its view, incompatible with human rights, Parliament would be "overawed" by the advice and subject to so much political pressure that it would, practically speaking, be obliged to amend the law to make it human rights

¹²⁷ Chris Bailey, letter to the editor, *The West Australian*, 28 August 2007, 23.

¹²⁸ Submission 309.

¹²⁹ Clause 34(3) of the draft Bill.

¹³⁰ Greg Craven, "The Proposed WA Human Rights Act" (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

compliant. Professor Craven stated that, if that was the case, “of course, you’ve got a classic bill of rights, with all the problems that I’ve said about mixing policy, undermining Parliament, so on and so forth. Now, I think that’s quite possible.”¹³¹

The other alternative was that whenever the Supreme Court issued a declaration that a law was, in its view, incompatible with human rights, Parliament would routinely ignore the advice. It would “crush their judgements and carry on regardless”. He believed that this would foster contempt for the courts and contempt for human rights.¹³²

It seems to the Committee that Professor Craven’s first possibility may be somewhat overstated in that it appears to be based on a perception of Parliament as a set of rather timid politicians. Anyone who has sat in on a debate in the Western Australian Parliament or read through the Western Australian *Parliamentary Debates* knows that is simply not the case.

While Professor Craven presented two possible scenarios (which were a case of “heads you lose, tails you lose”),¹³³ it seems to us that there is a distinct and very real third possibility. Parliament in some cases would decide to, or perhaps even feel obliged to, follow the advice of the Supreme Court and amend the law, but in other cases it would decide not to act on the advice of the Court.

This third possibility is in fact what the draft Bill and similar legislative models seek to achieve. They recognise that all three arms of government – the executive, the legislature and the judiciary – have a role to play in protecting human rights and aim to create a dialogue between them.

A WA HUMAN RIGHTS ACT WOULD NOT SIGNIFICANTLY ALTER THE CONSTITUTIONAL BALANCE BETWEEN THE PARLIAMENT, THE GOVERNMENT AND THE COURTS.

As Professor Craven himself recognises, parliaments are not perfect and they are certainly “imperfectly representative”.¹³⁴ The premise of the draft Bill is that the Government and the Parliament may sometimes benefit from receiving non-binding advice from an independent court about the human rights implications of their legislation. The draft Bill recognises the political reality that the human rights dimensions of legislation are not regularly considered by Parliament and that debate is often governed by party allegiances. The other important premise of the Bill, however, is that judges are not democratically elected or representative and so should not be able to issue anything more than non-binding advice. They too may benefit from a “response” from Parliament which confirms that, in Parliament’s view, a particular restriction on a human right is “reasonable and demonstrably justifiable in a free and democratic society”. A WA Human Rights Act would not significantly alter the constitutional balance between the Parliament, the Government and the courts. As Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University has observed of dialogue based human rights legislation:

the arms of government are locked into a continuing dialogue that no arm can once and for all determine. The initial views of the executive and legislature do not trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the number of representative response mechanisms.¹³⁵

¹³¹ Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

¹³² Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

¹³³ Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

¹³⁴ Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

¹³⁵ Submission 267.

To the extent that a WA Human Rights Act would require the courts to make decisions or express opinions about social issues, the Committee notes that this would not be an unusual or necessarily foreign role. During his speech at the Law Society of Western Australia forum on the proposed WA Human Rights Act, Professor Craven argued that “this is not legislation like other legislation because, by definition, this type of legislation is expressed in broad and vague and compendious terms”. In response to this however, another speaker at the forum, John Sutherland of ALHR, observed that:

I don't think there's anything particularly unique about this piece of law. Judges have been engaging with fairly wide policy impacting areas for a long time. Think about the law of negligence. What is 'reasonably foreseeable'; what should be guarded against? That's changed incredibly over, I guess, the course of the common law. What's 'unconscionable'? If we look at statutory law, what is 'misleading and deceptive'? What's 'unfair market share'? These are very vague and ambiguous terms that the courts have been dealing with...¹³⁶

Similarly, Dr Ben Saul of the University of Sydney argued in his submission to the Committee:

It is often objected that rights are so vague and indeterminate that they transfer to judges subjective control over what are really political choices. Yet, this criticism equally applies to many other well-accepted legal concepts applied by the courts, such as tests of reasonableness, equity, fairness, justice and so forth, which mask broad discretionary power. This objection is grounded in a fundamental misunderstanding of the judicial function, which in reality involves the exercise of a range of discretions, rather than the automatic or technical application of precise and limited legal rules.¹³⁷

Finally, most of the people who attended our public forums or who made written submissions were not “rights groupies” seeking to transfer power away from Parliament to the courts. Rather, they were ordinary people who were expressly concerned about maintaining parliamentary sovereignty while wanting to improve our democratic processes to better ensure the protection of human rights.

(vi) The “winners” will be criminals and law-breakers

New rights charter ‘may help criminals’

Headline on the front cover of The West Australian, 25 August 2007

This argument against a WA Human Rights Act was succinctly stated by the first written submission received by the Committee, which stated that if “this Act gets the go-ahead, the winners will be the lawyers and the law breakers.”¹³⁸

Other people expressed similar views. John and Sara Clothier stated that they were opposed to a WA Human Rights Act as it was their belief that “those who will benefit most are criminals, pro-terrorists and other evil types”.¹³⁹ They did not believe “that this Bill is intended to mainly help ordinary decent people”.¹⁴⁰ A participant in one of our Geraldton public forums argued that “[t]he whole legal structure is offender based. It has swung too far in favour of offenders.” Similarly, a participant in our Mandurah forum pointed to “the recent case of that man being punished for pulling a gun on a home intruder -

¹³⁶ Greg Craven, “The Proposed WA Human Rights Act” (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).

¹³⁷ Submission 2.

¹³⁸ Submission 1: Suzanne Cash.

¹³⁹ Submission 58.

¹⁴⁰ Submission 58.

where are his rights to protect himself and his property?” In her submission to the Committee, Janet Maguire stated:

I just don't want to see a complete fiasco occur here as it has in the UK since the 1998 law was introduced. The majority of human rights cases have been launched by criminals in prison claiming that the government has breached their human rights in some way or another. Once you commit a crime, your rights should be revoked.¹⁴¹

The Committee received a number of submissions suggesting that a WA Human Rights Act could serve to undermine “tough on crime” laws such as Western Australia’s *Criminal Property Confiscation Act 2000* in one of two ways. First, the Commissioner of Police expressed concern that a WA Human Rights Act “will encourage an overly cautious approach to the development of important legislation directed to protecting the public. Legislation dealing with terrorism and organised crime [is] still evolving and will require amendment in the future.”¹⁴² We think this is unlikely. A WA Human Rights Act would require the Parliament to consider the impact of legislation on human rights. However we have no doubt that the Parliament will enact whatever legislation it considers necessary to protect the public in relation to terrorism and organised crime.

Secondly, it was suggested that a WA Human Rights Act could undermine criminal legislation by allowing defence lawyers to challenge legislation and by requiring courts to interpret legislation so as to minimise its restrictions on human rights. Professor Craven was reported in the media as sharing these concerns.¹⁴³ With respect to this second concern, the Committee notes that Western Australia’s “tough on crime” laws probably do involve restrictions on basic human rights. However, as previously stated, the draft Bill clearly maintains the power of Parliament to enact such legislation. Its provisions do not permit existing legislation to be declared invalid, nor do they restrict the right of Parliament to make such laws as it believes are necessary to protect the public and fight organised crime. Furthermore, the draft Bill only permits the courts to interpret legislation compatibly with human rights where its ordinary meaning is ambiguous or manifestly absurd. Accordingly, where “tough” criminal legislation clearly abrogates human rights, the courts cannot interfere. The aim of the draft Bill is simply to encourage informed dialogue between the Government and the Parliament, and within the Parliament itself, about the impact of legislation on human rights, and about what limitations on human rights are acceptable.

Aside from the impact of a WA Human Rights Act on criminal legislation, the Commissioner of Police expressed concern in his submission that:

...a breach of the Act may be used to argue that evidence has been unlawfully obtained and it is therefore not admissible in any criminal trial. For example, if a person is interviewed by police having been arrested or detained without having ‘promptly’ been brought before a court (see cl 22(6)(a)), it may be argued the confession should be excluded because it was unlawfully obtained.¹⁴⁴

The Commissioner of Police was concerned that in those circumstances a WA Human Rights Act would place an obligation on police that they may not be reasonably able to meet. In his view, it was difficult to see how it would be in the interests of justice to permit a Human Rights Act to be used as a means to “attack a prosecution” in those circumstances.¹⁴⁵

¹⁴¹ Submission 33.

¹⁴² Submission 301.

¹⁴³ Amanda Banks, “New rights charter ‘may help criminals’”, *The West Australian*, 25 August 2007, front page.

¹⁴⁴ Submission 301.

¹⁴⁵ Submission 301.

If a WA Human Rights Act was enacted, there could well be cases in which arguments were put that evidence obtained by the police in criminal trials should be excluded because of some illegal or unfair conduct by the police. Arguments of that kind are, however, already put in criminal trials, and a well established body of case law exists in relation to the discretion of the courts to admit evidence said to have been obtained illegally or unfairly.

On the information presently available to us, we do not see a WA Human Rights Act as likely to undermine the proper conduct of the criminal justice system. In this respect, we have been assisted in our conclusion by the views expressed in the submission of the Director of Public Prosecutions for Western Australia, Robert Cock QC:

ON THE INFORMATION PRESENTLY AVAILABLE TO US, WE DO NOT SEE A WA HUMAN RIGHTS ACT AS LIKELY TO UNDERMINE THE PROPER CONDUCT OF THE CRIMINAL JUSTICE SYSTEM.

From a criminal law perspective, the currently proposed Human Rights Bill does not introduce sweeping substantive law changes to persons involved in the criminal justice process. Many of the provisions set out in the Human rights Bill, such as the right to liberty and security (s 21) and the right to a fair trial (s 24), the components of which are set out in Division 5 – *Liberty and the Law*, in effect codify established common law principles and rights which are current pillars of the criminal justice system.

It is my preliminary view that the proposed Human Rights Bill will not, in any significant manner, introduce new substantive rights that would greatly impact, alter or hinder the prosecution of offences or the administration of criminal justice...I welcome the Human Rights Bill.¹⁴⁶

The Director noted that since the introduction of the ACT Act, a modest 28 criminal law cases had referred to human rights provisions. He noted that in the prosecution context, the most common challenges had been to the validity of search warrants under drugs legislation in the ACT, and the admissibility of evidence pursuant to an illegal or defective search warrant. In these cases, arguments had been based on rights such as the right to privacy and the right to liberty. The Director expressed the view that:

...the Human Rights Act, if implemented, will become increasingly prominent, and become the benchmark by which criminal law provisions and procedures will be assessed and reviewed at trial and appellate levels, providing for great dialogue between Parliament and the Courts.¹⁴⁷

A number of submissions that we received referred to individual cases in other jurisdictions as evidence that the Act will be a boon for criminals. The Committee notes however, that generally speaking other jurisdictions have not experienced great difficulties in this regard.

For example, in its review of the first five years of the UK Act, the UK Department for Constitutional Affairs concluded that the Act had had “no significant impact on criminal law, or on the Government’s ability to fight crime.”¹⁴⁸ Similarly, in a paper presented at the 2007 Protecting Human Rights Conference, ACT Director of Public Prosecutions, Richard Refshauge SC, concluded that:

...the enactment of the *Human Rights Act 2004* (ACT) has not been the enactment of a ‘Rogues Charter’. There have been no more acquittals or technical defeats for the prosecution than before the Act, nor an express reliance on the Act in ways that are different from the common law.¹⁴⁹

¹⁴⁶ Submission 296.

¹⁴⁷ Submission 296.

¹⁴⁸ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006.

¹⁴⁹ Richard Refshauge SC, “Impact on Criminal Law and Procedure” (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007) 13, available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207CBACDCBB595F4481B&flushcache=1&showdraft=1>

Other people noted the argument that a WA Human Rights Act would benefit criminals appeared to be based on misunderstandings of the type commonly found in other jurisdictions with human rights legislation. For example, the UK Department of Constitutional Affairs has noted that “the purpose and effect of the [UK] Human Rights Act has been widely misrepresented and misunderstood” and that, “[s]o far as the wider public are concerned, there are ... different types of myths in play.”¹⁵⁰

Urban myths

First, there are ... [myths] which derive from the reporting (and often partial reporting) of the launch of cases but not their ultimate outcomes. This leaves the impression in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court. The most notable example in this category is the application made by Denis Nilson in 2001 to challenge a decision of the Prison Governor to deny him access to pornographic material. The case is now often cited as a leading example of a bad decision made as a result of the Human Rights Act. In fact it failed at the very first hurdle.

Secondly, there are pure urban myths: instances of situations in which someone (often it may not even be clear who) is reported to have said that human rights require some outcome or other, and this is subsequently trotted out as established fact. A recent example is the case in which food, drink and cigarettes were supplied to Barry Chambers who, in the course of evading arrest, had taken refuge on a roof of a domestic dwelling. The suspect had, of course, no ‘human right’ to receive food in these circumstances, but instead, as part of a police operational decision aimed at resolving the stand-off quickly and peaceably, his demands for food and other refreshments were met ...¹⁵¹

Some of these myths were referred to in submissions received by the Committee as evidence of the problems that a WA Human Rights Act could cause. The Committee also notes that these myths not only exist among the general public, but are kept alive by some politicians. In a recent article published in *The Sydney Morning Herald*, Philip Ruddock referred to the case of the suspect on the roof (discussed in the quotation above) as an example of the inappropriate consequences of bills of rights.¹⁵²

The Committee does not agree that a WA Human Rights Act would undermine Western Australia’s criminal legislation or serve only to benefit criminals. The range of the rights set out in the draft Bill is broad. While it is in the criminal justice system that the State’s coercive powers are most intrusive in the lives of individuals and human rights issues are therefore most obvious, this is by no means the only area in which human rights are relevant.¹⁵³ As explicitly or implicitly recognised by many of the written submissions and attendees at our public forums, a WA Human Rights Act would be relevant to people of all people in our society.¹⁵⁴

¹⁵⁰ UK Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act, July 2006, 5.

¹⁵¹ UK Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act, July 2006, 5.

¹⁵² Philip Ruddock, “Bills of rights do not protect freedoms”, *Sydney Morning Herald*, 31 August 2007, available from: www.smh.com.au/articles/2007/08/30/1188067275092.html.

¹⁵³ Richard Refshauge SC, “Impact on Criminal Law and Procedure” (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007) 2, available from:

<http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>

¹⁵⁴ Submission 83: Brian Tennant JP.

(vii) A WA Human Rights Act would lead to increased litigation and associated court delays and increased costs

Our society is becoming increasingly litigious and I think that if we have legislation setting down exactly what our rights are, then it will only mean more litigation.

Submission 50: Blodwyn Timms

A number of people argued that we should not have a WA Human Rights Act because it might lead to an increase in litigation. It was also feared that this increase in litigation would result in longer and more expensive trials and greater delays in court lists generally. For example, the Coalition for the Defence of Human Life observed:

Despite periodic reorganisations and the appointment of more judges, litigants in WA face long delays in having their cases heard. These delays can only increase if there is a Human Rights Act which cannot fail to lead to a substantial increase in litigation. Increased delays will not be restricted to cases involving ‘human rights’.¹⁵⁵

Related to these concerns was the belief expressed by a number of people that a WA Human Rights Act would simply “lay golden eggs for the legal profession”¹⁵⁶ and be “a lawyers’ picnic.”¹⁵⁷

Concern about increases in litigation, longer trials and increased costs were shared by some people who were in favour of an Act. A number of them suggested that the answer was to ensure that the Act did not focus on litigation but rather provided alternative means of enforcing rights.¹⁵⁸ Others, such as the Director of Public Prosecutions for Western Australia, saw the matter as more of a resourcing issue. His views in this regard are discussed in further detail in Chapter 9 of this Report. Ultimately, he “welcomed” the draft Bill.

In his submission to the Committee, the Commissioner of Police referred to feedback from the UK which suggested that their human rights legislation had created “a climate of fear and a risk averse environment”.¹⁵⁹ The information we have been able to obtain about the operation of human rights legislation in the UK and elsewhere is inconsistent with this feedback.

Instead, although there has been some litigation in relation to compliance with human rights, our understanding is that there has not been a flood of such litigation. Furthermore, it appears that there have been demonstrable improvements and benefits in the decision making and conduct of government agencies, without recourse to litigation. We have referred earlier to a couple of the case studies discussed by the British Institute for Human Rights in its report *The Human Rights Act – Changing Lives*,¹⁶⁰ which illustrated the tangible benefits that the UK Act has had on the lives of ordinary people. The benefits discussed in that report were attributed to the fact that greater knowledge of human rights within government agencies has meant that those agencies are more receptive to submissions put to them informally, to the effect that their policies or practices failed to adequately respect human rights.

¹⁵⁵ Submission 11.

¹⁵⁶ Participant in Broome public forum.

¹⁵⁷ Participant in Broome public forum.

¹⁵⁸ For example, submission 275: Loftus Community Centre.

¹⁵⁹ Submission 301.

¹⁶⁰ The British Institute of Human Rights, *The Human Rights Act – Changing Lives*, 2006, available from: http://www.bihhr.org/downloads/bihr_hra_changing_lives.pdf



Furthermore, in their joint submission to the Committee on the impact of the ACT Act, Professor Andrew Byrnes of the University of New South Wales and Professor Hilary Charlesworth, Kim Pham and Gabrielle McKinnon from the Australian National University, observed that “[d]espite fears that the HRA [Human Rights Act] would lead to a large increase in unmeritorious litigation, the HRA has had a relatively minor impact in the courts. To date, the HRA has been referred to in a total of 50 cases”.¹⁶¹

The report on the 12 month review of the ACT Act also noted that the courts and tribunals had arguably been the least affected by the Act.¹⁶² There certainly had not yet been a flood of litigation as a result of its introduction. The report referred to a paper by Gabrielle McKinnon in which she concluded that, while the ACT Act had “not gone entirely unnoticed”, it could not be said to have been a “decisive factor” or to have been considered in “any great depth” by the courts so far.¹⁶³ At most, it had been used “to lend support to a conclusion already reached by other reasoning”. The report also referred to similar observations by the ACT Director of Public Prosecutions that:

The decisions [in the criminal sphere] were all ... made on the basis of law or the exercise of a discretion that were unexceptional applications of the common law and which were unaffected by or independent of the [HRA] ... The same seems true of those decisions in the civil area also.¹⁶⁴

Similarly, in her survey of the first 18 months of the ACT Act, Dr Helen Watchirs, the ACT Human Rights and Discrimination Commissioner, observed that:

Critics predicted that the HR Act would: be a litigious feast for lawyers; undemocratic, giving judges too much power to overturn laws; or have no impact at all. None of these have occurred – there has been no avalanche of cases pursued by lawyers, wayward judgments or an increase in failed criminal cases.¹⁶⁵

The Committee does not find the above conclusions surprising and would expect similar results to follow the introduction of a WA Human Rights Act. The draft Bill does not allow people to initiate court actions against government agencies arising from a breach of their human rights unless they already have some existing legal claim which exists independently of the Bill. It is therefore difficult to see how it could lead to a significant increase in the number of cases coming before the courts.

¹⁶¹ Submission 320.

¹⁶² Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, at 11.

¹⁶³ McKinnon, G “The ACT Human Rights Act 2004 – the First Year”, paper presented to ANU Conference *Assessing the First Year of the ACT Human Rights Act*, 29 June 2005, at 2 cited in Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, at 11.

¹⁶⁴ Refshauge, R “*The Human Rights Act 2004 and the Criminal Law*”, paper presented to ANU Conference *Assessing the First Year of the ACT Human Rights Act*, 29 June 2005, at 5-6, cited in Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, at 11-12.

¹⁶⁵ H. Watchirs, *Protecting Rights in the ACT*, January 2006, 1, available from: <http://acthra.anu.edu.au/articles/Watchirs%20Protecting%20Rights%20in%20the%20ACT.pdf>

Moreover, in terms of increasing the length of existing trials, the Committee considers it unlikely that a WA Human Rights Act would have any major impact. As the submission of the Director of Public Prosecutions for Western Australia expressly notes:

Western Australian Courts are already conversant with human rights law and incorporate analysis of this law in legal reasoning where relevant. For example, quite recently the WA Court of Appeal canvassed common law and international human rights law in considering the scope of disclosure in a fair trial in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49.

Another example of the Court's reference to international human rights legislation is found in *The State of Western Australia v Christie* [2005] WASC 214, in which McKechnie J compared the similar nature of the Canadian constitutional and Western Australian duty of disclosure, in reference to the right of the accused to make full answer and defence.¹⁶⁶

Given that the provisions of the draft Bill reflect the ICCPR and in many respects the common law (particularly in relation to criminal process rights), it does not appear to us that a WA Human Rights Act would require judges to look at a whole new set of issues. Arguments based on human rights, which require consideration of their scope and content, are already being raised in, and considered by, the courts.

(viii) There is a need to promote individual responsibilities rather than rights

To quote Emile Durkheim, 'When mores are sufficient, laws are unnecessary. When mores are insufficient, laws are unenforceable.'

Submission 355: Carol Adams

There was a fair amount of discussion of the interrelationship between rights and responsibilities at most of the public forums and this notion also filtered through the written submissions. A participant in our Karratha public forum captured the views of many in stating that "rights and responsibilities are like a coin – they are two sides of the one thing and one doesn't work without the other".

A number of submissions argued that introducing a WA Human Rights Act would promote a selfish society¹⁶⁷ and that, rather than promote the protection of rights, we need to focus more on people's responsibilities. For example, Brian Hills was concerned that:

What is needed more urgently than anything else is a Human Obligations Act. Discussions with my contemporaries invariably lead to consensus that the general public is dismayed at the seemingly endless campaign being waged for rights, but with no mention whatsoever that rights should neither be due to, nor claimed by, persons who eschew any obligations to behave in a law-abiding and civilised manner towards their fellow citizens.¹⁶⁸

This sentiment was expressed slightly differently by Salt Shakers Inc, which stated that it would be "healthier for our society if we did not travel further down the path of 'rights', but rather invested greater effort into educating the community as to their responsibilities as citizens."¹⁶⁹

¹⁶⁶ Submission 296.

¹⁶⁷ Submission 50: Blodwyn Timms; submission 144: W Morris; submission 157: E Birt; submission 206: Australian Christian Lobby.

¹⁶⁸ Submission 7.

¹⁶⁹ Submission 266.

Others were of the view that promoting responsibilities would in fact be the best way to promote rights:

Hand in hand with rights, and much more important, are responsibilities. Promote a culture of individual responsibility for the community that each of us enjoys and receives support from, and you automatically generate a culture of respect for individuals' human rights and the rights of the community in which they live, without having to resort to legislation.¹⁷⁰

The Committee agrees that rights and responsibilities are intrinsically linked and is sympathetic to the view that there needs to be greater awareness of people's obligations to respect one another. However, the Committee considers that, rather than detract from an awareness of individual responsibility, a WA Human Rights Act could, by promoting a culture of human rights within government and the broader community, raise such awareness. In particular, as set out in Chapter 5 of this Report, we believe that a WA Human Rights Act should begin with a preamble which explicitly recognises the importance of individual responsibilities and their relationship to the enjoyment of human rights.

3.5 Committee's conclusion as to whether WA should have a WA Human Rights Act

Significant arguments were presented at both the public forums and in the written submissions against the introduction of a WA Human Rights Act. After careful consideration of these arguments, after weighing them against the arguments in favour of an Act and after taking into account the apparent majority view in favour of Act among the people we consulted, the Committee is of the view that the law should be changed to better promote human rights in Western Australia. In this regard, we hope that those opposed to the introduction of a WA Human Rights Act will take some comfort in the comment of Professor Greg Craven, who was arguably the most outspoken opponent of the Government's draft Bill, that "believe it or not, the world will not end whatever happens to a Bill like this."¹⁷¹

RECOMMENDATION

- A Human Rights Act should be enacted in Western Australia. That Act should be in the terms of the draft Bill, together with the specific recommendations set out below in relation to the amendment of the draft Bill. (*Recommendation 1*)

¹⁷⁰ Submission 94: Deborah Delahunty.

¹⁷¹ Greg Craven, "The Proposed WA Human Rights Act" (speech delivered at Law Society of Western Australia forum, Constitutional Centre of Western Australia, 6 August 2007).



CHAPTER 4: WHAT RIGHTS SHOULD BE PROTECTED IN A WA HUMAN RIGHTS ACT?

4.1 The Government's position

As set out in its Statement of Intent and Part 2 of the draft Bill, the Government's preferred approach is that:

...a WA Human Rights Act should focus on the civil and political rights set out in the *International Covenant on Civil and Political Rights*. These rights include, for example, the right to be free from discrimination, freedom of speech, freedom of religion, the right to vote and the right to a fair trial. The rights recognised in Victoria and the ACT are drawn from the International Covenant. The Government considers it preferable that, at least initially, a WA Human Rights Act does not include economic, social and cultural rights; for example, the right to work, the right to social security and the right to housing. The possible extension of a WA Human Rights Act to address those rights could, however, be considered at a later stage.

The Government's preference for implementing civil and political rights to begin with and revisiting economic, social and cultural rights ("ESC rights") later on reflects the position adopted in the *Human Rights Act 2004 (ACT)* (ACT Act) and the *Charter of Rights and Responsibilities 2006 (Vic)* (Victorian Charter).

4.2 The type of rights to be included: civil and political rights only or economic, social and cultural rights also?

A central issue raised with the Committee during its consultations with the community was the type of rights that should be included in a WA Human Rights Act. Should such an Act include civil and political rights such as those set out in the *International Covenant on Civil and Political Rights (ICCPR)*¹ and incorporated into the draft Bill? If so, should it be limited to those rights or should it also include economic, social and cultural rights (ESC rights) such as those set out in the *International Covenant on Economic Social and Cultural Rights (ICESCR)*?²

¹ A copy of the ICCPR is available from: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1980/23.html?query=International%20Covenant%20on%20Civil%20and%20Political%20Rights>

² A copy of the ICESCR is available from: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1976/5.html?query=International%20Covenant%20on%20Economic,%20Social%20and%20Cultural%20Rights>

4.2.1 Community support for civil and political rights

There was overwhelming support among the people we consulted for the inclusion of civil and political rights such as those set out in the ICCPR in a WA Human Rights Act; there was consensus that these rights are “critical, fundamental rights that need to be safeguarded in law”.³

In terms of the written submissions, 159 submissions (42% of total written submissions) considered the issue of what rights should be protected in a WA Human Rights Act and 98% of those submissions indicated that civil and political rights should be protected. In the public opinion survey, 91% of respondents supported the notion of a human rights law that protected civil and political rights. Of the remaining 9% of respondents, 5% reported “mixed feelings” while 1% “didn’t know”. Only 3% were opposed to the notion.⁴ Support for the inclusion of civil and political rights was also strong among those people surveyed during the devolved consultation with the disadvantaged. Of a total of 162 survey participants, 72% indicated that such rights were most important to them and should be included in a WA Human Rights Act.⁵

Participants in our consultations generally approved of the particular civil and political rights contained in the draft Bill, although some expressed concern about the broad wording of the rights, suggested specific modifications to some of the rights or proposed that additional civil and political rights be included.⁶ The rights in the draft Bill most frequently identified as important in the written submissions were:⁷

- Freedom of expression.
- The right to life.
- Freedom of religion.
- The rights of children.
- Freedom from discrimination.
- The right to liberty.
- The right to security.
- The rights of minority groups.
- The right to a fair and public hearing.

³ Submission 86: Office of the Public Advocate.

⁴ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 2 (see Appendix E).

⁵ Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 25 (see Appendix F).

⁶ Some of these specific modifications and additional rights are considered further below under the heading “Specific rights issues”.

⁷ See Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 27 (Appendix F) for a “Top 10” list of ICCPR rights arising out of the survey conducted as part of the devolved consultation with the disadvantaged.



4.2.2 Community support for economic, social and cultural rights

If you are going to be serious about human rights you may as well include the entire set of rights.

*Young CaLD person quoted in Human Rights Solutions,
Human Rights 'at the Margins' (2007) 35 (see Appendix F)*

One of the strongest themes to emerge from the Committee's public consultations was that there was broad community support for expanding the rights currently contained in the draft Bill to include ESC rights.

Participants in the public forums repeatedly questioned the current exclusion of ESC rights from the draft Bill and argued for their inclusion. Of the 159 written submissions dealing with the issue of what rights should be protected, 79% of those indicated that ESC rights should be protected. This represents 33% of the total number of submissions. Interestingly, these submissions came from a wide range of people and organisations, including individuals, legal and advocacy centres, human rights groups, universities, religious bodies, government agencies, political parties, unions and various organisations representing farmers, women, those with disabilities, people from culturally and linguistically diverse backgrounds, gay and lesbian people and Aboriginal people.

...COUNTRY RESPONDENTS
WERE SLIGHTLY MORE
LIKELY THAN THEIR
METROPOLITAN
COUNTERPARTS TO
SUPPORT THE INCLUSION
OF ECONOMIC AND
SOCIAL RIGHTS...

In the public opinion survey, 88% of respondents either "strongly supported" or "supported" human rights legislation protecting economic and social rights.⁸ Of the remaining 12% of respondents, 7% had "mixed feelings" and 1% were "unsure".⁹ Only 4% of respondents recorded opposition to the inclusion of such rights.¹⁰

In terms of demographics, it is noteworthy that country respondents were slightly more likely than their metropolitan counterparts to support the inclusion of economic and social rights and that lower income earners and higher income earners were equally supportive of their inclusion.¹¹

There was also strong support for the inclusion of ESC rights among those people surveyed during the devolved consultation with the disadvantaged. Of a total of 162 survey participants, 77% indicated that ESC rights were most important to them and should be included in a WA Human Rights Act.¹² Some support for the inclusion of ESC rights was also expressed during the three WA Schools Constitutional Conventions.

Some people suggested that all of the rights in the ICESCR or the *Universal Declaration of Human Rights* should be incorporated into a WA while other people focused on particular ESC rights. Those rights most frequently identified as important during the public forums and in the written submissions were:¹³

⁸ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 3 (see Appendix E).

⁹ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 3 (see Appendix E).

¹⁰ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 3 (see Appendix E).

¹¹ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 3 (see Appendix E).

¹² Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 25 (see Appendix F)

¹³ See Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 27 (Appendix F) for a "Top 10" list of ICESCR rights arising out of the survey conducted as part of the devolved consultation with the disadvantaged.

- The right to housing.
- The right to education.
- The right to health care.
- The right not to be deprived of property (or to have it devalued by the actions of government) other than on just terms.

Of particular interest to the Committee was the fact that the ESC rights supported were not solely those rights which may be considered the obvious concerns of the disadvantaged.

Even some of the people who recommended against the general inclusion of ESC rights in a WA Human Rights Act identified the right not to be unjustly deprived of property as an exceptional right which ought to be included.¹⁴

Many of the submissions we received canvassed the arguments for and against the inclusion of ESC rights. These arguments are discussed in further detail below.

4.2.3 Arguments against including ESC rights

The Committee's discussion paper entitled *Human Rights for WA* set out a number of arguments against including ESC rights in a WA Human Rights Act for the purpose of stimulating debate on the issue. The arguments were as follows:

- Civil and political rights limit what governments can do (they are “negative rights”) while ESC rights require governments to take action and spend money (they are “positive rights”).
- Including ESC rights in a WA Human Rights Act may inappropriately restrict the Government's financial policies and resource allocation. The democratically elected Parliament, rather than the courts, should have responsibility for controlling social and financial policy within the State.
- With clear exceptions, ESC rights are not generally part of the human rights legislation in New Zealand, the UK, the ACT or Victoria. By including ESC rights in a WA Human Rights Act, this State would become an exception amongst other jurisdictions with similar human rights legislation.
- The commentary and case law relating to ESC rights is not as developed as that relating to civil and political rights and the likely practical impact of formally recognising ESC rights is unclear.

The latter point was made in a recent academic paper on the inclusion of ESC rights in the Bill of Rights in the 1996 *Constitution of the Republic of South Africa* (South African Bill of Rights):

A significant point about the interpretation of social and economic rights in South Africa is that to a large extent the script is being written at the outset by the Constitutional Court judges themselves, with very little to draw from in terms of comparative jurisprudence. Although the United Nations Economic and Social Council has attempted to grapple with the enforcement of socio-economic rights globally, it has done so not as a court of law but, instead, has relied on compliance by member states.¹⁵

¹⁴ For example, submission 259: Ralph Prestage; submission 339: Chamber of Commerce and Industry Western Australia; submission 358: Greg McIntyre SC, Dr Johannes Schoombee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey; submission 171: R Street.

¹⁵ A. Andrews, “The South African Bill of Rights: Lessons for Australia” in C. Debono and T. Colwell (eds) *Comparative Perspectives on Bills of Rights*, 2004.

The above arguments against including ESC rights in a WA Human Rights Act were supported in a number of written submissions and by some participants in the public forums. For example, Sussex Street Community Law Service Inc noted that “a broad inclusion of ICESCR rights would make an unfeasible imposition on the State’s allocation of resources,”¹⁶ while a participant in one of our Bunbury forums stated that it would be “very ideological to bring social and economic rights into the Bill. Maybe it is better to leave these things to the Government.”

In opposing the inclusion of ESC rights other than property rights, the Chamber of Commerce and Industry Western Australia observed that it has “not been the practice in other similar jurisdictions to incorporate a broad concept of rights into their respective human rights documents”.¹⁷ The Australian Church Women – Western Australia Unit also stated:

Though we would ultimately like to see a Human Rights Act with a wider scope than the Act currently proposed, we acknowledge the practical merits of beginning with a framework that has been tested in other jurisdictions ... We recognise the importance of learning from the experience of other jurisdictions by beginning with civil and political rights. We also note with approval the government’s commitment to regular review and the possibility of extension.¹⁸

The Committee notes that this essentially represents the position taken by the Victorian Human Rights Consultation Committee (Victorian Consultation Committee) in recommending that the Victorian Charter not include ESC rights, at least to begin with.¹⁹

4.2.4 Arguments in favour of including ESC rights

A clear majority of submissions, however, argued forcefully in favour of the inclusion of ESC rights in a WA Human Rights Act and comprehensively dealt with the arguments against their inclusion discussed above. Many people believed that the exclusion of ESC rights in other jurisdictions, especially the ACT and Victoria, would encourage the Western Australian Government to follow suit and they challenged the Government to reconsider its position. For example, the St Vincent de Paul Society (WA) urged the Government to “be a leader rather than a follower”.²⁰ While “recognising the need to learn from and adapt where practicable initiatives from other jurisdictions”, The Western Australian Farmers Federation Inc questioned “the need to merely follow these jurisdictions rather than demonstrate leadership and develop Human Rights legislation that delivers equity across all sectors of the community including the recognition of economic and social rights.”²¹

The International Human Rights Lawyers’ Working Group (IHRL Working Group) submitted that “the limits and inadequacies of Human Rights Acts in other jurisdictions should not be used to stifle the comprehensiveness of a Human Rights Act for WA. If all jurisdictions were to adopt such reasoning, human rights protections would never have, and could never, develop.”²² The Western Australian Equal Opportunity Commission further observed that:

¹⁶ Submission 192.

¹⁷ Submission 339.

¹⁸ Submission 253.

¹⁹ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, Rights, Responsibilities and Respect. *The Report of the Human Rights Consultation Committee*, 2005, 29.

²⁰ Submission 284.

²¹ Submission 184.

²² Submission 354.



The uncertainty of ‘going it alone’ may not be considered an adequate reason not to include ICESCR rights in the WA Bill, particularly if the Committee finds that community support is high. There is a risk that the community will feel ignored in the human rights dialogue.²³

The Committee was also told that “there are some signs that the ACT government will seriously consider the inclusion of new rights over time, with the Chief Minister specifically noting his support for including the right to education.”²⁴

The main arguments put to us for including ESC rights in a WA Human Rights Act, which are discussed below, were:

- (i) ESC rights cover areas of human life that are fundamental.
- (ii) Some of the biggest human rights issues in Western Australia relate to ESC rights.
- (iii) Including ESC rights would help to give effect to Australia’s ICESCR obligations.
- (iv) Civil and political rights and ESC rights are interdependent.
- (v) The characterisation of ESC rights as “positive rights” which are “costly” and civil and political rights as “negative rights” which are “cost-free” is misconceived.
- (vi) The argument that ESC rights are not capable of enforcement by the courts because they involve questions of policy and resource allocation is misconceived.
- (vii) The practical impact of recognising ESC rights is not unclear as has been claimed.
- (viii) ESC rights could be incorporated into a WA Human Rights Act in a number of different ways which would address some of the concerns about their inclusion.

(i) Economic, social and cultural rights cover areas of human life that are fundamental

“Economic, social and cultural rights are essential for people to live a dignified life and reach their full potential as human beings.”²⁵ Indeed, many people argued that ESC rights are some of the most fundamental rights of all. For example, Peter Davidson commented that “[a]ny other discussion of rights is superfluous when you can’t fill your belly or quench your thirst!”²⁶

The Community and Public Sector Union/Civil Service Association argued that if “a marginalised group in our society has inadequate food, shelter, and clothing, will they feel part of that society just because they have a right to vote? We believe the answer is no.”²⁷



²³ Submission 337.

²⁴ Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham. Professor Charlesworth chaired the ACT Bill of Rights Consultative Committee.

²⁵ Submission 304: Centre for Human Rights Education, Curtin University. This was one of many submissions making this point.

²⁶ Submission 5.

²⁷ Submission 282.

The Geraldton Resource Centre Inc summarised the point succinctly as follows:

...while [civil and political] rights are important they are of less significance in terms of people being able to lead lives of dignity and value when basic needs remain unmet such as the need for shelter, health care and education. ... in order for a Human Rights Act to have meaning 'at the coalface' of our communities it must also include social and economic rights.²⁸

(ii) Some of the biggest human rights issues in Western Australia relate to economic, social and cultural rights

Some of the biggest human rights issues in Western Australia at present relate to ESC rights which are not enjoyed by a large number of people.²⁹ Western Australian Council of Social Service (WACOSS) strongly argued in its submission to the Committee that:

The most compelling argument for the inclusion of ESC rights in a WA Human Rights Act is the simple fact that these rights are not being fulfilled in our community. For example, there are currently eleven thousand and four hundred Western Australians unable to access secure, appropriate or affordable housing; the gender pay gap in WA is thirty percent – the largest in the nation; there is a backlog of four hundred Western Australians with a disability who are in critical need of accommodation support; and Aboriginal people in WA continue to experience disadvantage in the areas of employment, housing and education.³⁰

The Disability Services Commission noted that “while the rights of people with disabilities are often disregarded, it is within the economic, social and cultural areas where there is greatest disadvantage and discrimination.”³¹ In particular, the Office of the Public Advocate observed that the “right to quality health care, the right to an adequate standard of living and the right to an environment that is not harmful to health or well-being are just three examples of areas where the current system can fail people with a decision-making disability.”³²

Similarly, the Aboriginal Legal Service of Western Australia Inc (ALSWA) argued that ESC rights are those rights most often breached in terms of equitable access for Aboriginal people. By way of example, the Service referred to the Equal Opportunity Commission’s housing inquiry, which found that:

...in WA the state government needs to redefine and reassert its role as a pro-active effective provider of public housing – especially for Aboriginal people. ... the current housing strategy for Aboriginal people [i]s ‘reactive, legalistic and unplanned’.³³

Organisations representing other groups which could be considered “disadvantaged or marginalised” made similar arguments. For example, Gay and Lesbian Equality (WA) Inc indicated that the Government has traditionally had a very poor response to the educational and health needs of people with diverse sexual orientations and gender identities. With respect to the right to health care, they referred to the recent mass immunisation campaign to protect girls and young women against the Human Papilloma Virus, which can lead to certain types of cancers.

²⁸ Submission 281.

²⁹ Submission 192: Sussex Street Community Law Service.

³⁰ Submission 315. See also, Shelter WA & Tenants Advice Service *Report to the Western Australian Homeless Person's Legal Advice Clinic Steering Committee*, 2006, as to the extent of homelessness in Western Australia.

³¹ Submission 229.

³² Submission 86.

³³ Submission for the EOC Housing Inquiry implementation and monitoring committee – summary see: <http://www.equalopportunity.wa.gov.au/pdf/submission.doc> - cited in submission 312.

This campaign completely ignored the gay male community even though the Virus in gay men has been similarly linked to certain types of cancers.³⁴

...ONE OF THE DOMINANT THEMES TO EMERGE FROM THE COMMITTEE'S PUBLIC FORUMS IN REGIONAL WESTERN AUSTRALIA WAS THAT, THE FURTHER YOU GET FROM PERTH, THE LESS LIKELY YOU ARE TO ENJOY ESC RIGHTS...

The Committee also heard from people with mental health problems, who face homelessness because they do not meet the income criteria for priority Homeswest housing. They find it difficult to secure private accommodation in an extremely competitive rental market as they feel obliged to disclose their mental health status when applying for properties and there is insufficient mental health service accommodation available. One person - who attended the forum organised by the Mental Health Division of the Department of Health and later put in a written submission - told the Committee that his current transitional residential mental health service accommodation was finishing in September 2007. After that, he said "I will have to sleep in my car, in the bush."³⁵

While disadvantaged groups may be particularly vulnerable to breaches of ESC rights, we were presented with evidence that suggests there is also a wide range of "ordinary people" who do not currently enjoy such rights. As recorded in Chapter 3, we heard numerous stories from property owners across the State, including householders and farmers, claiming that excessive environmental regulation and planning restrictions, re-zonings and resumptions had deprived them of their property rights without timely or adequate compensation.

As with civil and political rights, one of the dominant themes to emerge from the Committee's public forums in regional Western Australia was that, the further you get from Perth, the less likely you are to enjoy ESC rights. For example, the WA Farmers Federation argued that:

The recent closure of several regional police stations and downgrading of health and education services highlights a major inequity of the provision of essential services in many regional areas. ... access to these services at an equivalent level for all Western Australians is a basic human right that is clearly not being delivered and should be enshrined in any proposed WA Human Rights Act.³⁶

(iii) Including economic social and cultural rights would help to give effect to Australia's international obligations

Several submissions argued that, just as a WA Human Rights Act in the form of the draft Bill would help to give effect to Australia's international obligations under the ICCPR, incorporating ICESCR rights would be consistent with Australia's obligations to implement that Covenant. Australian Lawyers for Human Rights (ALHR) noted that the ICESCR "has been ratified by 156 countries – only 4 fewer than the ICCPR".³⁷ The IHRL Working Group also pointed out that, as a State party to both Covenants, "Australia is legally bound and has obligations in the same way under both instruments".³⁸

³⁴ Submission 270.

³⁵ Submission 244: Mr Janusz Zelski.

³⁶ Submission 184.

³⁷ Submission 299.

³⁸ Submission 354.

(iv) Civil and political rights and economic, social and cultural rights are interdependent

...our humanity cannot be separated into different categories, fragmented and atomised... Human beings see and participate in the world through complex layered responses and such distinctions are less than helpful.

Submission 245: Community Vision Inc

A large number of submissions argued that it would be artificial to include civil and political rights in a WA Human Rights Act but to exclude ESC rights because the two sets of rights are universal, indivisible and interconnected. A participant in our Mandurah public forum described the situation in mechanical terms as “like buying a car with two wheels – when are you going to get it on the road?”

A number of people provided examples to illustrate this point:

- “One cannot be expected to take part in public affairs and to vote if one does not have a house, has not been educated or is in poor health.”³⁹
- “...the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing.”⁴⁰
- “The ability to enjoy other rights is based on having the property with which to do so. A right to freedom of religion is useless if the State owns all available land and prevents access to a venue to facilitate its free exercise. An inability to own productive equipment prevents the manufacture and reproduction of texts on printing presses, thereby preventing speech. Throughout history, the worst instances of gross human rights violations have been preceded by the violation, suspension or removal of property rights (for example in Hitler’s Germany or Stalin’s Soviet Union and more recently Mugabe’s Zimbabwe).”⁴¹
- “...for our client group in particular, civil and political rights are inextricably linked with economic, social and cultural rights. The right to liberty, for example, is undermined if a person with a decision-making disability is detained in a psychiatric ward simply because there is no appropriate accommodation elsewhere. That is, the right to liberty is linked to the right to adequate housing; without the enforcement of the latter right, the former cannot be obtained.”⁴²
- “Lack of housing, education, health and adequate protection of cultural heritage are some of the key underlying issues listed by the Royal Commission into Aboriginal Deaths in Custody as to why there is such as huge overrepresentation of Aboriginal people in the criminal justice system. Aboriginal people’s [in]equitable access to the above mentioned rights [was] also identified as [a key factor] behind the sexual abuse of Aboriginal children as stated in the recent ‘Little Children are Sacred report’”.⁴³

In its 2003 report to the ACT Government, the ACT Bill of Rights Consultative Committee (ACT Consultative Committee) observed that the *Universal Declaration of Human Rights* includes both civil and political rights and ESC rights in the one document, and that the splitting of the Declaration into the ICCPR and the ICESCR was a product of Cold War tensions between the West and the socialist bloc

³⁹ Submission 284: St Vincent de Paul Society (WA).

⁴⁰ Submission 72: HRLRC.

⁴¹ Submission 339: Chamber of Commerce and Industry Western Australia.

⁴² Submission 86: Office of the Public Advocate.

⁴³ Submission 312: ALSWA.

countries.⁴⁴ A number of submissions⁴⁵ pointed out that the international community had since resolved at the Vienna World Conference on Human Rights in 1993 to “treat human rights globally in a fair and equal manner on the same footing and with the same emphasis” and Australia has signalled support for this approach,⁴⁶ including in domestic legislation.⁴⁷

(v) The characterisation of ESC rights as “positive rights” which are “costly” and civil and political rights as “negative rights” which are “cost-free” is misconceived

WACOSS observed in its submission that “all human rights have resource implications. The notion that civil and political rights do not require government spending whereas economic, social and cultural rights do is misleading.”⁴⁸ The Centre for Human Rights Education at Curtin University similarly noted that many civil and political rights “do require government spending such as on a functional electoral office, a well trained and resourced police service, judiciary, and legal aid system to name a few.”⁴⁹ As discussed in Chapter 3, the link between service delivery and the enjoyment of rights was one of the main themes to emerge from the Committee’s community consultations, particularly those in regional areas. Notably, many of the examples provided to the Committee highlighting the link involved civil and political rights.

In her submission to the Committee, Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University stated that all rights “have positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on”.⁵⁰ Dr Debeljak illustrated her point by comparing the “costs” of the implementation of the right to life (a classic civil and political right) with that of the right to housing (a classic ESC right), as set out in table form below:

Right to life	Right to housing
Imposes a duty on government to respect the right to life – a largely negative, cost-free duty not to take life.	Imposes a duty on government to <i>respect</i> the right to adequate housing – a largely negative, cost-free duty to, for example, not forcibly evict people.
Imposes a duty on government to <i>protect</i> the right to life – a partly negative, partly positive, partly cost-free and partly costly duty to regulate society to reduce the risk of community members taking other people’s lives.	Imposes a duty on government to <i>protect</i> the right to adequate housing – a partly negative, partly positive, partly cost-free and partly costly duty to, for example, regulate evictions by third parties.
Imposes a duty on government to <i>fulfil</i> the right to life – a positive and costly duty to take measures for example, to reduce infant mortality, ensure adequate responses to epidemics etc.	Imposes a duty on government to <i>fulfil</i> the right to adequate housing – a positive and costly duty to, for example, house the homeless.

⁴⁴ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 99.

⁴⁵ For example, submission 354: IHRL Working Group; submission 299: ALHR.

⁴⁶ Department of Foreign Affairs and Trade, *Human Rights Manual*, 2nd Edition, 1998, 13-14.

⁴⁷ Section 10A of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) requires the Human Rights and Equal Opportunity Commission to ensure that its functions under the Act are performed “with regard for the indivisibility of human rights”.

⁴⁸ Submission 315: WACOSS.

⁴⁹ Submission 304.

⁵⁰ Submission 267.

Some submissions argued that the cost of implementing ESC rights is not as significant as is often thought. While ESC rights do require some expenditure, this is generally in areas where the Government already spends considerable funds such as healthcare, education and housing.⁵¹ Moreover, the ICESCR focuses on the “progressive realisation” of such rights subject to maximum available resources.⁵² Accordingly, while there may be strong ethical and moral rationales for the inclusion of economic, social and cultural rights in a WA Human Rights Act in the context of Western Australia’s “booming” economy,⁵³ the incorporation of some or all of the ICESCR “would not mean that the WA government would have to devote all of its resources to attempting to meet those rights. Instead, it would need to take reasonable steps (in light of the resources at its disposal) towards eventually achieving full economic, social and cultural rights for all persons in WA.”⁵⁴

(vi) The argument that ESC rights are not capable of enforcement by the courts because they involve questions of policy and resource allocation, is misconceived

A number of submissions argued strongly that the objection that ESC rights are not capable of enforcement by the courts because they involve questions of policy and resource allocation is misconceived.⁵⁵

Dr Ben Saul of the University of Sydney pointed out to the Committee that:

this objection has always been misleading. The courts already decide questions of resource allocation on a daily basis, as when they: (a) award large compensatory damages against government, thus depriving it of control over significant resources; (b) prohibit certain governmental action (whether in the fields of construction, trade, finance, taxation and so on), possibly resulting in significant economic loss to government; or (c) are faced with ambiguity in the law and decisions must be made between competing policies and public interests, some of which may have starkly different economic consequences for governments.⁵⁶

He further noted that courts are considered competent to make decisions involving civil and political rights, yet these too have resource implications (as discussed above).

In any event, several submissions pointed out that this objection to including ESC rights disappears once a dialogue model for the protection of human rights is adopted, such as that set out in the draft Bill.⁵⁷ For example, the Western Australian Equal Opportunity Commission noted that, under a dialogue model, the courts do not have the power to strike down legislation, meaning that the Government and the Parliament retain ultimate responsibility for policy and resource allocation.⁵⁸ In this regard, the IHRL Working Group commented that the inclusion of ESC rights in a dialogue model would allow Parliament and the Government to retain primary responsibility for economic and social policy, while still ensuring that governmental action in the spheres of ESC rights was not “unaccountable against the standards which Australia has taken on board.”⁵⁹

A NUMBER OF SUBMISSIONS ARGUED STRONGLY THAT THE OBJECTION THAT ESC RIGHTS ARE NOT CAPABLE OF ENFORCEMENT BY THE COURTS BECAUSE THEY INVOLVE QUESTIONS OF POLICY AND RESOURCE ALLOCATION IS MISCONCEIVED.

⁵¹ Submission 304: Centre for Human Rights Education, Curtin University.

⁵² For example, submission 299: ALHR; submission 312: WACOSS; submission 354: IHRL Working Group.

⁵³ Submission 315: WACOSS.

⁵⁴ Submission 299: ALHR.

⁵⁵ For example, submission 315: WACOSS; submission 337: Western Australian Equal Opportunity Commission; submission 2: Dr Ben Saul; submission 72: HRLRC.

⁵⁶ Submission 2.

⁵⁷ For example, submission 315: WACOSS; submission 337: Western Australian Equal Opportunity Commission; submission 2: Dr Ben Saul; submission 72: HRLRC.

⁵⁸ Submission 337: Western Australian Equal Opportunity Commission.

⁵⁹ Submission 354.

Furthermore, dialogue models are designed to avoid creating new grounds for litigation and to restrict the court's ability to award compensation – they are more about promoting a consciousness of human rights amongst parliamentarians and government officers.⁶⁰ In light of this, the Centre for Human Rights Education at Curtin University argued:

Economic, social and cultural rights fit very well within this model. Their inclusion could promote a rights consciousness amongst government officers making decisions at an administrative level such as Department of Housing which have direct impact on people's lived experiences of rights.⁶¹

(vii) The practical impact of recognising economic, social and cultural rights is not unclear as has been claimed

One of the main arguments presented in the submissions in favour of including ESC rights was that the practical impact of formally recognising such rights is not unclear. There is a growing body of national and international knowledge and experience backed up by case law that allows governments, courts and the community to better understand and apply ESC rights as well as civil and political rights.⁶² For example, there are numerous cases in which Australian courts and tribunals have considered such rights.⁶³

Furthermore, the inclusion of ESC rights in human rights instruments is not unprecedented. Other common law jurisdictions that have adopted some or all of the rights in the ICESCR include South Africa, Canada and to a much more limited extent, the UK, ACT and Victoria. A number of submissions pointed to the experience in South Africa in particular as showing that the inclusion of such rights would not result in “a flood of litigation or the imposition of unreasonable demands on government resources.”⁶⁴ The South African Constitutional Court has said that the protection of ESC rights does not oblige a government to go beyond its available resources.⁶⁵ The issue for the courts is whether the measures taken to protect rights are reasonable:

A court considering reasonableness will not enquire whether other or 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 ... to meet [human rights] obligations. Many of these would meet the test of reasonableness.⁶⁶

Dr Julie Debeljak observed that this type of judicial supervision “is well known to the Western Australian and Australian legal systems, being no more and no less than what we require of administrative decision makers.”⁶⁷

⁶⁰ Submission 304: Centre for Human Rights Education, Curtin University; submission 315: WACOSS; submission 72: HRLRC.

⁶¹ Submission 304.

⁶² For example, submission 354: IHRL Working Group; submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham.

⁶³ New South Wales Bar Association Human Rights Committee, *Options Paper for a Charter of Human Rights for NSW*, July 2007, available from http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf, as cited in Submission 320. These cases included: *Wickham v Canberra District Rugby League Football Club Ltd* [1988] SCACT 95 and *Communications Electrical v WA Electrical Energy Specialty Alloys Pty Ltd* (1995) IRCA (the right to work); *Sheather v Daley* [2003] NSWADT 51 (the right to adequate housing); *McBain v State of Victoria* (2000) 177 ALR 320 (recognition of the family as the fundamental group in society); *Secretary Department of Social Security v Dagher* (1997) AAT (the right to social security); and *Victoria v McBean* (1996) 138 ALR 456 (the right to strike).

⁶⁴ Submission 299: ALHR.

⁶⁵ Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Kim Pham and Gabrielle McKinnon.

⁶⁶ *Government of South Africa v Grootboom* [2001] 1 SA 46, [41] (Justice Yacoob).

⁶⁷ Submission 267.

The Committee notes that the UN Committee on Economic, Social and Cultural Rights has provided some guidance on the measurement of the implementation of ESC rights⁶⁸ and that the South African courts have established a number of criteria for assessing the reasonableness of government programmes impacting on these rights.⁶⁹

A number of submissions observed that, overall, the experience in South Africa, Canada and the UK has been that the courts have shown restraint and have been slow to interfere with the policy choices of the legislature.⁷⁰

By way of final comments, ALHR also pointed out that:

the fact that (outside of South Africa, and perhaps the UK) commentary and case law in relation to economic, social and cultural rights is not as developed as the jurisprudence in relation to civil and political rights is no reason to shy away from including those rights in the WA Human Rights Act. The WA judicial system is a sophisticated, mature legal system and is well-equipped to address new or unclear areas of law.⁷¹

(viii) ESC rights could be incorporated into a WA Human Rights Act in a number of different ways which would address some of the concerns about their inclusion

The issue of whether the rights in the ICESCR should be included in a WA Human Rights Act “cannot be considered without also considering how the rights would be protected and implemented”.⁷² ALHR suggested to the Committee that a WA Human Rights Act could “adopt a flexible approach to enforcing economic, social and cultural rights. There is no reason why such rights must necessarily be treated identically to civil and political rights.”⁷³ Similarly, the submission from the Human Rights Law Resource Centre Ltd (HRLRC) submitted that the protection of ESC rights could be incorporated into a WA Human Rights Act in a “workable way” that would not expose the Government to liability for its resource allocation decisions and which could operate comfortably alongside the protection of the civil and political rights contained in the ICCPR.⁷⁴ The submission from the HRLRC was in this regard expressly endorsed by Legal Aid Western Australia Inc and the National Children’s and Youth Law Centre.

Overall, the Committee received a number of submissions proposing a variety of different models for the protection of ESC rights which were designed to address some of the concerns about their inclusion. The details of these different models are set out later in this Chapter under the heading “How might economic, social and cultural rights be protected by a WA Human Rights Act?”

⁶⁸ Committee on Economic, Social and Cultural Rights, *General Comment 9*, 1998.

⁶⁹ *Government of South Africa v Grootboom* [2001] 1 SA 46 and *Minister of Health v Treatment Action Campaign* [2002] 5 SA 721, cited in Sandra Liebenberg, “Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights Under Bills of Rights – The South African Experience” (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007) 10, available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectId=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.

⁷⁰ Submission 299: Australian Lawyers for Human Rights, submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Kim Pham and Gabrielle McKinnon, submission 72: Human Rights Law Resource Centre Ltd and submission 354: International Human Rights Lawyers’ Working Group.

⁷¹ Submission 299: ALHR.

⁷² Submission 299: ALHR.

⁷³ Submission 299: ALHR.

⁷⁴ Submission 72.



4.2.5 The absence of a clear distinction in the draft Bill between civil and political rights and economic, social and cultural rights

The draft Bill focuses on the implementation of civil and political rights drawn from the ICCPR and not on ESC rights drawn from other international instruments such as the ICESCR.

However, in two respects the draft Bill expressly recognises cultural rights:

1. Clause 20(1) of the draft Bill implements clause 27 of the ICCPR which recognises the right of ethnic, religious or linguistic minorities not to be denied “the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.
2. The draft Bill also expressly recognises the cultural rights of Aboriginal persons. Clause 20(2) of the draft Bill recognises that Aboriginal persons have distinct cultural rights and provides that Aboriginal people must not be denied the right, with other members of their community, “to enjoy their identity and culture, to maintain and use their language, and to maintain their kinship ties”.

It is clear from these examples that the draft Bill currently contains limited recognition of certain cultural rights and does not only address civil and political rights. This point was made in the submission of Gail Gifford who noted that clause 20 of the draft Bill:

clearly deals with specific cultural rights, despite a number of express statements in the Discussion Paper (see ‘Summary of what the Governments draft Bill does NOT do’ on p37 for example) that cultural social and economic rights would NOT be covered.⁷⁵

In other jurisdictions, despite a focus on the implementation of civil and political rights, some ESC rights have been recognised in human rights legislation. The ACT Act and the Victorian Charter each contain a provision in similar terms to clause 20(1) of the draft Bill,⁷⁶ while the Victorian Charter also recognises the cultural rights of Aboriginal people.⁷⁷ Furthermore, the Victorian Charter recognises and protects two rights not drawn from the ICCPR, namely the right of Aboriginal people “to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs”⁷⁸ and the right of all people not to be deprived of property other than in accordance with law.⁷⁹

Similarly, the *Human Rights Act 1998* (UK) (UK Act) focuses on civil and political rights but nevertheless recognises and protects

⁷⁵ Submission 226. Emphasis in original.

⁷⁶ Section 27 of the ACT Act and section 19(1) of the Victorian Charter.

⁷⁷ Paragraphs 19(2)(a) – (c) of the Victorian Charter.

⁷⁸ Paragraph 19(2)(d) of the Victorian Charter.

⁷⁹ Section 20 of the Victorian Charter.



two economic and social rights: first, the right of every person “to the peaceful enjoyment of his possessions” and the right not to be “deprived of his possessions except in the public interest and subject to the conditions provided for by law ...”⁸⁰ and secondly, “the right to education”.⁸¹

The approach taken in the ACT Act, the Victorian Charter and the UK Act provides a precedent for recognising and protecting some ESC rights in a WA Human Rights Act. Furthermore, given that the draft Bill already expressly recognises some cultural rights, the inclusion of further ESC rights would not violate the basic structure of the draft Bill.

A Human Rights Act that covers some rights but not all will, at best, provide an ad hoc level of protection and, at worst, erode and abrogate those rights that are excluded.

Submission 86: Office of the Public Advocate

4.2.6 Conclusion in relation to whether economic, social and cultural rights should be included in a WA Human Rights Act

The Committee is of the view that a WA Human Rights Act should include ESC rights, for the following reasons:

- On the basis of our consultations, there is extensive community support for their inclusion.
- Some of the biggest human rights issues in Western Australia relate to ESC rights, which are not enjoyed by a large number of people and in particular are often not enjoyed by the disadvantaged and marginalised in our society, such as people with disabilities, people with mental health problems, Aboriginal people and the elderly.
- There are strong arguments in favour of including ESC rights which appear to answer those arguments generally adopted by governments to exclude them. The arguments against the inclusion of such rights are, in the Committee's view, less than compelling, particularly in light of the “dialogue” model of human rights protection adopted in the draft Bill and endorsed (with some modifications) in Chapter 6.
- As discussed in more detail later in this Chapter, ESC rights could be incorporated into a WA Human Rights Act in a variety of “workable ways” that would minimise the perceived risks associated with their inclusion.

Having regard to the clear support for the inclusion of ESC rights which was evident in our consultations, and in the absence of any compelling argument that it would be impracticable to recognise and protect such rights in a WA Human Rights Act, it is our view that the preferable position would be to include ESC rights in a WA Human Rights Act.

We note that for similar reasons, the ACT Consultative Committee strongly supported the inclusion of ESC rights in the ACT Act,⁸² while most recently the Tasmania Law Reform Institute expressed its strong support for the inclusion of such rights, along with civil and political rights, in a proposed Tasmanian Charter of Human Rights.⁸³

⁸⁰ These rights are part of the “Convention rights”, drawn from the European Convention on Human Rights, which are recognised and protected by the UK Act and are set out in Article 1 of Part II of Schedule 1 to that Act.

⁸¹ Article 2 of Part II of Schedule 1 to the UK Act.

⁸² H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 95 – 100, paras [5.27 – 5.47].

⁸³ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 122 para [4.15.16].

4.3 What economic, social and cultural rights should be protected in a WA Human Rights Act?

ESC rights are protected in a variety of international instruments. The primary instrument devoted to the recognition and protection of these rights is the ICESCR. That document recognises and seeks to protect a range of ESC rights, including:

- the right of all peoples to self-determination, to freely determine their political status and freely pursue their economic, social and cultural development;⁸⁴
- the right to work, including the right of everyone to the opportunity to gain a living by work which she or he freely chooses or accepts;⁸⁵
- the right to the enjoyment of just and favourable conditions of work, which includes fair wages and equal remuneration for work of equal value without distinction of any kind, a decent living for all workers and their families, safe and healthy working conditions, equal opportunity for promotion, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays;⁸⁶
- the right of everyone to form and join trade unions, the right of trade unions to establish national federations and to join international organisations, the right of trade unions to function freely, the right to strike, provided that that is exercised in conformity with the law;⁸⁷
- the right to social security, including social insurance;⁸⁸
- the widest protection and assistance for the family, special protection for mothers during a reasonable period before and after childbirth and for paid leave or adequate social security benefits during that period, the protection of children and young persons from economic and social exploitation, including the setting of age limits below which the employment of children should be prohibited;⁸⁹
- the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions;⁹⁰
- the right to the highest attainable standard of physical and mental health;⁹¹
- the right to education, with a recognition that the full realisation of this right will encompass compulsory and freely available primary education, generally available, accessible and free secondary education, including technical and vocational secondary education, and higher education which is equally accessible to all on the basis of capacity;⁹² and
- the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁹³

⁸⁴ Article 1(1) of the ICESCR.

⁸⁵ Article 6(1) of the ICESCR.

⁸⁶ Article 7 of the ICESCR.

⁸⁷ Article 8 of the ICESCR.

⁸⁸ Article 9 of the ICESCR.

⁸⁹ Article 10 of the ICESCR.

⁹⁰ Article 11(1) of the ICESCR.

⁹¹ Article 12(1) of the ICESCR.

⁹² Articles 13(1) and 13(2) of the ICESCR.

⁹³ Article 15(1) of the ICESCR.

Some national bills of rights have included ESC rights. The most extensive and prescriptive inclusion of such rights in a bill of rights appears in the South African Bill of Rights,⁹⁴ which includes the following ESC rights:

- The right to choose one's trade, occupation or profession freely.⁹⁵
- The right to fair labour practices.⁹⁶
- The right to form and participate in trade unions or employers' organisations and for those organisations to engage in collective bargaining.⁹⁷
- The right of all persons to an environment that is not harmful to health or well-being and to have the environment protected for the benefit of present and future generations.⁹⁸
- The right not to be deprived of property other than pursuant to a law of general application and subject to compensation which is just and equitable.⁹⁹
- The right to have access to adequate housing and not to be evicted from one's home without an order of a court.¹⁰⁰
- The right to have access to health care services.¹⁰¹
- The right not to be refused emergency medical treatment.¹⁰²
- The right to sufficient food and water,¹⁰³ to social security and social assistance.¹⁰⁴
- The right to a basic education, including adult basic education and to further education.¹⁰⁵
- The right of children to (amongst other things) basic nutrition, shelter, basic health care services and social services.¹⁰⁶

4.3.1 Priorities with respect to implementing the ICESCR

It would not be possible or appropriate to implement all of the rights in the ICESCR in a WA Human Rights Act, for two reasons:

1. The subject matter of some of these rights has been regulated extensively by Commonwealth legislation. State legislation in relation to such subjects may well be rendered invalid and ineffective (for example, in relation to social security and intellectual property). Nevertheless, a number of the ESC rights recognised in the ICESCR pertain to subjects which are presently primarily regulated or administered by the State Government (such as in the areas of health and education).
2. Some of the rights in the ICESCR do not relate to individual human beings, but rather to bodies corporate (for example, the rights of trade unions). As discussed later in this Chapter, the Government's preferred position, which the Committee endorses, is that the human rights in a WA Human Rights Act should only apply to individual human beings and not to corporations. The inclusion in a WA Human Rights Act of the rights of trade unions which are contained in the ICESCR would be inconsistent with this approach.

⁹⁴ A copy of the South African Bill of Rights is available from: <http://www.info.gov.za/documents/constitution/index.htm>.

⁹⁵ Section 22 of the South African Bill of Rights.

⁹⁶ Section 23(1) of the South African Bill of Rights.

⁹⁷ Sections 23(2) – (6) of the South African Bill of Rights.

⁹⁸ Section 24 of the South African Bill of Rights.

⁹⁹ Section 25 of the South African Bill of Rights.

¹⁰⁰ Section 26 of the South African Bill of Rights.

¹⁰¹ Section 27(1)(a) of the South African Bill of Rights.

¹⁰² Section 27(3) of the South African Bill of Rights.

¹⁰³ Section 27(1)(b) of the South African Bill of Rights.

¹⁰⁴ Section 27(1)(c) of the South African Bill of Rights.

¹⁰⁵ Section 29(1)(a) of the South African Bill of Rights.

¹⁰⁶ Section 28(1)(c) of the South African Bill of Rights.

Of the ESC rights set out in the ICESCR, those which received the most widespread support during the Committee's consultations related to health, education and housing. In addition, the Committee notes that the draft Bill presently contains a right for people from minority groups not to be denied the right, in community with others with that background, to enjoy their culture. There does not appear to be any compelling reason why that right could not be extended so as to permit all people the right to take part in cultural life, while also preserving the right of minority groups to enjoy their culture in community with others from the same background.

4.3.2 Property rights

As noted in Chapter 3 of this Report and earlier in this Chapter, throughout the consultations we heard numerous stories from property owners that they had been deprived of their property rights without adequate compensation. For example, in its submission, the Greater Region Action Body (GRAB) Inc stated:

The old adage that 'your home is your castle' is no longer true for many Western Australians. As community attitudes to heritage conservation and environmental management have changed, Government has imposed more and more controls on what can be done with privately owned property in many cases without scientific evidence, without consultation with or compensation for long-term owners.¹⁰⁷

A participant in one of our Geraldton public forums stated:

It is absurd that, in one country, the Commonwealth Constitution provides for fair and just terms for the acquisition of property but state constitutions don't. It is like the difference between North Korea and South Korea ... a person's property is of central importance to their life – it not only provides them with a place for shelter, but it is somewhere to raise their children...

The submissions put to us reflected the view that individuals should be protected from the acquisition of their property by the State other than pursuant to law. They also reflected the view that, in the event that the State acquires the property of an individual, the individual should receive fair compensation in a timely manner.

The ICESCR does not include a property right. The ICCPR prohibits discrimination against people on various grounds, including property.¹⁰⁸ Some national bills of rights, such as the South African Constitution, contain property rights, but others, like the *New Zealand Bill of Rights Act 1990* (NZ) (New Zealand Bill of Rights) and the *Canadian Charter of Rights and Freedoms 1982* (Canadian Charter), contain no such guarantees.

No consistent position with respect to property rights has been adopted in other Australian jurisdictions which have enacted human rights legislation, or are considering doing so. The ACT Act does not contain a property right. The Victorian Charter includes a right not to be deprived of property other than in accordance with law.¹⁰⁹ The Victorian Consultation Committee did not consider it appropriate to provide for "an open-ended right to compensation for property deprivation".¹¹⁰ In contrast, the Tasmania Law Reform Institute recommended that a Tasmanian Charter of Human Rights should include a right

¹⁰⁷ Submission 361.

¹⁰⁸ Article 26 of the ICCPR.

¹⁰⁹ Section 20 of the Victorian Charter.

¹¹⁰ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 37.



not to be deprived of property except on fair and just terms, which would apply to deprivations of property by any means and to deprivations of all forms of property.¹¹¹

One of the few express rights contained in the Commonwealth Constitution is contained in section 51(xxxi), which provides:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to –

...

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Section 51(xxxi) of the *Commonwealth Constitution* provides the Commonwealth Parliament with a legislative power to compulsorily acquire property. At the same time, as a condition upon the exercise of the power, it provides the individual or state affected with a protection against governmental interferences with his or her property rights without just compensation.¹¹²

The term “property” in section 51(xxxi) has been given a wide interpretation.¹¹³

A number of factors are used by the courts to determine whether the terms provided for the acquisition of property are just. In particular, “just terms” is determined according to fair market value.¹¹⁴

The legislative power of the ACT Legislative Assembly and of the Northern Territory Legislative Assembly in relation to laws for the acquisition of property is also subject to a condition of “just terms” for that acquisition.¹¹⁵

The legislative power of the States to enact laws for the acquisition of property is not subject to a requirement that those laws provide just terms for that acquisition.¹¹⁶ State laws which authorise the compulsory acquisition of interests in land for example, may nevertheless require the State to pay compensation to landowners.¹¹⁷

¹¹¹ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 128, paras [4.16.15 – 4.16.21].

¹¹² *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 349-50.

¹¹³ *Bank of NSW v Commonwealth* (1948) 76 CLR 1; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Victoria v Commonwealth* (Industrial Relations Act case) (1996) 187 CLR 416 at 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Attorney-General (NT) v Chaffey and Another* 237 ALR 373, 378 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹¹⁴ *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.

¹¹⁵ Section 50 of the *Northern Territory (Self-Government) Act 1978* and section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988*.

¹¹⁶ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408 [7] (Gaudron, McHugh, Gummow and Hayne JJ), 430 [69] (Kirby J) and 433 [79] (Callinan J).

¹¹⁷ See, for example, Parts 9 and 10, and especially section 241, of the *Land Administration Act 1997*.

The inclusion in human rights legislation of a right to “just terms” in the event that one’s property is acquired by the State is contentious. The policy issues were illustrated in a submission by Dr Simon Evans to the Victorian Consultation Committee:

A property rights guarantee limits the range of policy options open to government and makes courts the arbiters of whether legislation affecting property requires compensation. That is a political line-drawing exercise that arises in innumerable contexts and not just where legislation on its face appears to expropriate property rights. The experience under property rights guarantees around the world shows that people whose economic interests are affected by ostensibly regulatory legislation will attempt to argue that the regulations actually amount to an acquisition or deprivation of property requiring compensation. Thus courts will be asked to consider whether a property rights guarantee affects the interpretation or operation of legislation across the public policy landscape: Can the State regulate property use in order to conserve the natural environment? Can it limit water use? Can it enact heritage protection legislation? Can it limit land use in order to preserve public amenity? Can it reallocate or limit commercial fishing licences to preserve fishing stocks? Can it require employers to provide access to their property for union representatives? If it does any of these things, is it required to compensate the affected property owners? All these questions potentially involve legislation that affects property rights and property values. A property rights guarantee – even if the Charter of Rights functions purely as an interpretive tool and provides no direct right of action – bears on the resolution of these policy questions.¹¹⁸

The Committee was impressed by the submissions from a wide range of property owners detailing their sense of grievance and powerlessness in the face of State actions limiting their use and enjoyment of their land, often amounting to effective loss of their property. Their submissions also detailed long delays on behalf of the authorities in dealing with their rights and criticised the overbearing attitude of agencies and departments acting on behalf of the State. The Committee came to the view that protection of property rights in line with that provided in the Constitutions of the Commonwealth, Northern Territory and ACT governments could be a valuable addition to the draft Bill.

Close to the end point of its consideration of this issue, the Committee was further assisted by a communication from the Member for the Legislative Council, the Honourable Barbara Scott, which supported submissions we had received from a number of her constituents in this regard. Mrs Scott asked us to “give serious consideration to their request as currently they appear to have no protection”.

In our view, the political judgments to which Dr Evans refers should properly take place in the Parliament when legislation is introduced which authorises the State to acquire the property of others. Some reconsideration, within government, of those political judgments in relation to existing legislation which authorises the acquisition of property may also be beneficial in the event that a court or tribunal finds itself unable to interpret that legislation compatibly with a property right.

To the extent that property rights may involve the courts in determining policy issues or making political judgments, this concern would be minimised if ESC rights were implemented in a slightly different way to civil and political rights under a WA Human Rights Act.

¹¹⁸ Submission dated 1 August 2005 from Dr Simon Evans, Director, Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne, to the Victorian Consultation Committee.



The different ways in which ESC rights could be implemented in a WA Human Rights Act are discussed in the next section of this Chapter. If, for example, court and tribunal-based remedies were not available for ESC rights, there would be far less opportunity for courts and tribunals to make the political judgments to which Dr Evans refers. The economic and other implications for individuals who have their property acquired by the State are such as to warrant careful consideration of the merits of acquisition when it is proposed (eg in new legislation under consideration by the Parliament, or when considering whether an existing statute, properly interpreted, permits an acquisition of property in particular circumstances). For these reasons, we are persuaded that the inclusion in a WA Human Rights Act of a right directed to the protection of property is both workable and warranted.

In our view, a property right should be included in a WA Human Rights Act. That right should permit the acquisition of property only in accordance with the law (and to that extent could be modelled on section 20 of the Victorian Charter). However, the right should also encompass a right to compensation in respect of the acquisition of property. That compensation should be on “just terms” as that phrase is understood in section 51(xxxi) of the Commonwealth Constitution.

4.3.3 Conclusion regarding what economic, social and cultural rights should be protected in a WA Human Rights Act

Having regard to the practical and legal difficulties in regulating some aspects of the ESC rights set out above, but mindful of the strong community support for the inclusion of particular ESC rights, the Committee’s view is that a WA Human Rights Act should recognise and protect the following rights, in addition to those ESC rights already included in the draft Bill:

- The right of everyone to the highest attainable standard of physical and mental health.
- The right to an education.
- The right to have access to adequate housing.
- The right to take part in cultural life.
- The right not to be deprived of property other than in accordance with the law, and on just terms.

4.4 How should economic, social and cultural rights be protected by a WA Human Rights Act?

As discussed earlier in this Chapter, opposition to the inclusion of ESC rights in bills of rights often draws on perceived difficulties which might arise if Government’s implementation of those rights was reviewable by the courts and if remedies could be awarded to individuals for a breach of their ESC rights. The Committee realised that it was easy to make a decision in principle that ESC rights should be protected. The more difficult question was whether this could be effected in a practical and workable way which would avoid these difficulties. The Committee was greatly assisted in this regard by various submissions which drew our attention to six different models for the implementation of ESC rights.¹¹⁹ These models demonstrate that Parliament and Government have a range of choices about how such rights might be considered and implemented.

¹¹⁹ A number of submissions, such as the one from the Commonwealth Human Rights and Equal Opportunity Commission (submission 309), encouraged the Committee to consider the full range of options for implementing ESC rights.

4.4.1 Model One: treat economic, social and cultural rights in the same way as civil and political rights

The first model for the implementation of ESC rights involves those rights being treated in the same way as the civil and political rights set out in Part 2 of the draft Bill. Under this model, such rights would be subject to limitations which are reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom, in the same way that civil and political rights may be subject to such limitations.

We note that the ACT Consultative Committee expressed a strong preference for the adoption of this first model for the implementation of ESC rights in the ACT Act.¹²⁰

4.4.2 Model Two: progressive implementation of economic, social and cultural rights

Under the second model for the implementation of ESC rights, those rights would be treated in the same way as civil and political rights but a WA Human Rights Act would expressly recognise that such rights should be progressively implemented. The ACT Consultative Committee advocated this approach as an alternative approach to its preferred model for the implementation of ESC rights. That view was referred to with implicit approval in a submission from academic staff working on the ACT Human Rights Project under the auspices of the Regulatory Institutions Network at the Australian National University.¹²¹ A somewhat similar approach described as a “programmatic response to human rights protection” was endorsed by the WACOSS.¹²² A reference to the implementation of ESC rights through progressive realisation was also included in the submission of the Commonwealth Human Rights and Equal Opportunity Commission.¹²³

In its report to the ACT Government, the ACT Consultative Committee observed that the obligation on Government “to protect economic, social and cultural rights ... [was] ... to take reasonable measures within its available resources to realise the rights progressively”¹²⁴ and recommended that a provision should be included in the ACT Act to the following effect:

Where the sole source of human rights is the ICESCR, it is acknowledged that those human rights are subject to progressive realisation. Accordingly, in any proceeding under this Act that raises the application and operation of those human rights, a court or tribunal must consider all relevant circumstances of the particular case including –

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any person concerned; and
- (b) the financial circumstances and the estimated amount of expenditure required to be made by a public authority to act in a manner compatible with human rights

before determining that the provisions of any Territory law or that the acts or conduct of a public authority are incompatible with the Act.¹²⁵

¹²⁰ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 100, para [5.46].

¹²¹ Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham.

¹²² Submission 315.

¹²³ Submission 309.

¹²⁴ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 100, para [5.46].

¹²⁵ See clause 14.3 of the draft ACT Human Rights Bill set out in Appendix 4 to H. H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 23.

This second model bears some similarity to the approach taken in the South African Bill of Rights in relation to ESC rights. The South African Bill of Rights permits human rights to be limited under laws of general application, to the extent that those limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹²⁶ However, it also expressly recognises that in the case of some ESC rights, the State's obligation to implement those rights is a progressive one. For example, the State is required to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the rights to access adequate housing,¹²⁷ to health care services, to sufficient food and water and to social security and social assistance.¹²⁸ Similarly, the State is required to make further education "progressively available and accessible" through "reasonable measures".¹²⁹

The adoption of this model would mean that Parliament's assessment of whether a Bill was compatible with ESC rights, determinations as to whether existing legislation was compatible with these rights, and determinations as to whether government agencies had acted incompatibly with human rights would be made by reference to the fact that those rights need not be immediately realised, but may be progressively realised.

4.4.3 Model Three: modify the operation of certain parts of the Act to economic, social and cultural rights

[A] plunge into the deep end of full enforceability is unnecessary – the Western Australian Government need only dip a toe in the water.

Submission 72: HRLRC

Under the third model advanced for the implementation of ESC rights, those rights would be included as "human rights" under a WA Human Rights Act but some parts of the Act would not apply to those rights, or would have a modified application to those rights. There are a variety of options for the implementation of such rights within this third model. For example:

1. Part 6 of the Act (in relation to remedies) could be modified in its application to ESC rights. Under this model, a two-tiered remedial structure could be adopted, under which breaches of rights by public authorities would be treated differently depending on whether the right involved was a civil and political right or an ESC right. The breach of an ESC right would not be able to be the subject of a remedy in the courts, but could still be the subject of complaints and administrative remedies. This approach was endorsed by the HRLRC,¹³⁰ the National Children's and Youth Law Centre,¹³¹ Legal Aid Western Australia Inc¹³² and Mr Rajiv Singh.¹³³
2. If informal avenues of complaint were available in relation to ESC rights, this approach would permit the gathering of information about future litigation that might arise if these rights were made enforceable in the courts. Consequently, informed decisions could be made as to how and when to take additional steps for the positive enforcement of ESC rights.¹³⁴

¹²⁶ Section 36(1) of the South African Bill of Rights.

¹²⁷ Section 26(2) of the South African Bill of Rights.

¹²⁸ Section 27(2) of the South African Bill of Rights.

¹²⁹ Section 29(1)(b) of the South African Bill of Rights.

¹³⁰ Submission 72.

¹³¹ Submission 199.

¹³² Submission 223.

¹³³ Submission 302.

¹³⁴ Submission 72: HRLRC.

3. The Sussex Street Community Law Service suggested that a WA Human Rights Act could expressly provide that the interpretive obligations in Part 5 of the draft Bill and the obligation on government agencies to act compatibly with human rights, together with the remedies available in the event of a breach (in Part 6) do not apply to ESC rights. That is, ESC rights “could be included in the Bill without being enforceable against the Government, but still be used to direct Parliament when enacting written laws.”¹³⁵
4. ALHR suggested that a WA Human Rights Act could expressly provide that the interpretive provisions in Part 5 of the draft Bill do not apply to ESC rights.¹³⁶ This would leave the balance of a WA Human Rights Act applicable to ESC rights, including those provisions in Part 4 relating to Parliament’s consideration of proposed laws, and the provisions in Part 6 which deal with the obligations on government agencies to comply with human rights, and remedies in the event of a breach of human rights.

4.4.4 Model Four: economic, social and cultural rights as non-binding principles or objectives

Maybe we could simply have a declaration regarding social, economic and cultural rights. Sometimes, just a statement of direction is enough to focus people on where we are going.

Participant in Bunbury public forum

Under this model for the implementation of ESC rights, those rights would be included in a WA Human Rights Act as non-binding principles or objectives.¹³⁷ The precise implications of this model were not elaborated upon but we understand that under this model, ESC rights would be recognised as human rights in a WA Human Rights Act, the Act would contain a statement to the effect that the Parliament and/or the government aspired to observe these rights, but that Parts 4, 5 and 6 of the draft Bill would not apply to such rights.

4.4.5 Model Five: pursue economic, social and cultural rights through different means

It was also suggested that the implementation of ESC rights could be progressively realised through a variety of means quite different from those applicable to civil and political rights. The Western Australian Equal Opportunity Commission suggested that a WA Human Rights Act could establish a body with the power to conduct human rights audits of those government agencies responsible for services such as health care. That body could also be given the responsibility to monitor the implementation of recommendations made in relation to that government agency, and to report to the relevant Minister and Parliament.¹³⁸

The Centre for Human Rights Education at Curtin University also suggested that a WA Human Rights Act could incorporate a Committee review procedure to oversee ESC rights:

In this model government departments could be required to report bi-annually to a committee on actions and policies that each department has made towards progressive realisation of [ESC] rights. This could help to stimulate a creative and rights aware culture within a broad range of government departments. ... The inclusion of a committee system would mean that all relevant government departments and agencies would need to report on steps taken to address this issue.

¹³⁵ Submission 192.

¹³⁶ Submission 299.

¹³⁷ Submission 324: West Perth sub-branch of the Australian Labor Party; submission 213: Matthew Keogh.

¹³⁸ Submission 337.

...The committee would issue a public report making comments and recommendations on each Department's progress. The report would be tabled in Parliament with the appropriate Minister required to respond.¹³⁹

4.4.6 Model Six: indirect protection for economic, social and cultural rights through the application of civil and political rights

The final model for the implementation of ESC rights which should be mentioned is that the application of civil and political rights may indirectly protect such rights. Although recourse to this model was not advocated in any submission received, it warrants mention as it has received attention elsewhere.¹⁴⁰

In the report of the first Review of the ACT Act, it was noted that in some jurisdictions, ESC rights have been advanced indirectly through the interpretation and application of civil and political rights (in particular, the right to equality and non-discrimination, and the right to due process (fair trial)).¹⁴¹ The report referred, by way of example, to the Canadian case of *Eldridge v Attorney General of British Columbia* in which it was held that a failure to provide interpretation services deprived deaf patients of the equal benefit of health services and that this failure could not be justified as a reasonable limitation because there was no evidence that the provision of these services would "unduly strain the fiscal resources of the government".¹⁴²

We note also that in a recent case in the ACT Supreme Court involving the review of a decision relating to public housing, reference was made to the right to the protection of the family and children as requiring that "the rights of a family, and of children in particular, to secure appropriate housing be recognised and [ACT] laws be so interpreted so as to preserve and advance those rights where possible".¹⁴³ In another case relating to housing, in the ACT Residential Tenancies Tribunal, the Tribunal referred to the "social obligations" of the Commissioner for Housing in discharging its public housing functions. Those social obligations derived from, amongst other things, the right to the protection of the family and children in section 11 of the ACT Act.¹⁴⁴

Some indication of how the application of civil and political rights could advance ESC rights in the Western Australian context can be discerned from the work undertaken by the Western Australian Equal Opportunity Commission since 2002 in connection with its inquiry into alleged discriminatory practices in the provision of state housing services to Aboriginal people in Western Australia.¹⁴⁵ The Commission's report contained 165 recommendations relating to various aspects of the provision of public housing services. Since the tabling of the Report in the Parliament, the Commission has worked with the Department of Housing and Works to ensure that the Department's processes are not discriminatory and that staff are trained in appropriate ways for dealing with Indigenous clients.¹⁴⁶

The Committee recognises that there is some scope for the indirect protection of ESC rights through the application of the civil and political rights in the draft Bill. However, the examples discussed above suggest that pursuing this model for the protection of ESC rights would, at best, result in ad hoc and limited protection for some of these rights. If ESC rights are to be included in a WA Human Rights Act,

¹³⁹ Submission 304.

¹⁴⁰ ACT Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, 43 and at Appendix 3

¹⁴¹ ACT Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006 43 and at Appendix 3.

¹⁴² *Eldridge v Attorney General of British Columbia* [1997] 3 BHRG 137, para [92], cited in ACT Department of Justice and Community Safety, *Human Rights Act 2004 Twelve-Month Review Report*, June 2006, Appendix 3, 69.

¹⁴³ *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84, para [48] (Higgins CJ).

¹⁴⁴ *Commissioner for Housing in the ACT v Allan* [2007] ACTRTT 21, paras [68 – 73] (Tribunal Member Mr Anforth).

¹⁴⁵ The inquiry was conducted pursuant to section 80 of the *Equal Opportunity Act 1984* and culminated in the production of the Equal Opportunity Commission's report *Finding a Place* in December 2004.

¹⁴⁶ Submission 337: Western Australian Equal Opportunity Commission. The far-reaching nature of the recommendations made by the Inquiry were also drawn to our attention in submission 223 by Legal Aid Western Australia Inc.



then those rights should be afforded to all persons. We consider it 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.

4.4.7 Conclusion – the preferable model for the implementation of ESC rights

It is the Committee's view that any of the options outlined above may be practically possible. Having said that, we accept that it is a political decision for the Government, and for the Parliament, as to whether to implement ESC rights in the same manner as civil and political rights, to implement such rights in a minimalist way, or to implement ESC rights through a staged approach and therefore to "make haste slowly".¹⁴⁷

Our preference is for the implementation of ESC rights as discussed in Model One outlined above. That is, that the draft Bill should implement specific ESC rights in the same way that civil and political rights are implemented under the draft Bill.

However, we recognise that the first option within Model Three outlined above represents a lesser "risk" for Government by limiting the remedies which would be available for a breach of ESC rights and by ensuring that courts and tribunals would not be involved in making determinations about the compatibility of the actions and decisions of government agencies with these rights. The adoption of this model would still require the Parliament to consider the impact on ESC rights of proposed legislation and would permit courts and tribunals to interpret legislation compatibly with these rights. This approach maximises the potential for dialogue within the Government itself, between the Government and the Parliament, and between the courts, the Government and the Parliament in relation to whether legislation (both proposed and existing) is compatible with ESC rights, and if not, whether any action is required.

Even if the first option within Model Three was adopted, it is our view that a WA Human Rights Act should also expressly recognise that ESC rights are to be progressively implemented. In this, we are suggesting that if Model Three is used, it should incorporate the progressive implementation element of Model Two. That is a WA Human Rights Act should include an express statement that ESC rights are to be progressively implemented, and requiring account to be taken of factors of the kind referred to in the clause proposed by the ACT Consultative Committee (under Model Two above). The inclusion of this statement would be important in ensuring that when the Parliament, the Government and the courts (when interpreting legislation) consider whether legislation is compatible with ESC rights, they will do so on the clear understanding that those rights



¹⁴⁷ Submission 158.

are to be progressively implemented, and that this implementation will need to take into account the availability of government resources and competing demands for government resources.

Finally, whichever model is adopted for the implementation of ESC rights, we are of the view that there is much to be said for pursuing additional means for implementing human rights, based on the suggestions made by the Western Australian Equal Opportunity Commission and the Centre for Human Rights Education at Curtin University. These additional means for implementing rights are discussed further in Chapter 8.

If the Government or the Parliament determines not to accept our recommendation to include ESC rights in a WA Human Rights Act, then we recommend that the provision for reviews of the Act (in clause 43 of the draft Bill) should specifically require that any such reviews consider whether ESC rights should be included in the Act. This view was advanced in a number of submissions to us, including the submission from the Centre for Human Rights Education at Curtin University, which stated:

The Centre would like to see economic, social and cultural rights included in the Act immediately. If however, the government is unwilling to take this step, then at a bare minimum the Act should contain a [review] clause similar to the one from the Victorian *Charter of Human Rights and Responsibilities Act 2006*.¹⁴⁸

4.5 Specific rights issues

During the course of the Committee's community consultation, a large number of people proposed specific additional rights for inclusion in the draft Bill, some of which could be described as civil and political, some of which could be described as economic, social and cultural and some, such as the right to self-determination, which could be regarded as being in the nature of both. In addition, there were many suggestions for specific amendments to the rights already contained in the draft Bill. The additional rights suggested were extremely diverse and over 100 specific amendments to Part 2 of the draft Bill were proposed. In this section of our Report we discuss the most significant of these additional specific rights and proposed amendments.

4.5.1 ICCPR rights not contained in the draft Bill

As noted previously in this Report, the rights set out in Part 2 of the draft Bill are based on the rights contained in the ICCPR. A number of submissions observed that some of the rights in the ICCPR had been left out of the draft Bill and argued that this was inappropriate. For example, Amnesty International Australia pointed out that "Australia is obliged to undertake measures to protect *all* of the rights in the ICCPR, and should not therefore include some and exclude others."¹⁴⁹

The Committee does not consider that a WA Human Rights Act must necessarily include all of the rights in the ICCPR. There are a number of reasons why rights in the ICCPR may be inappropriate for inclusion in state human rights legislation. For example, the protection of some of the rights in the ICCPR has been extensively regulated by the Commonwealth Parliament and state legislation for these rights would be likely to be ineffective. Rights in this category include the right to marry¹⁵⁰ and the right of non-nationals unlawfully within Australia not to be expelled except in accordance with law.¹⁵¹ Other rights in the ICCPR are not particularly relevant to modern human rights legislation (for example, the right to legal

¹⁴⁸ Submission 304.

¹⁴⁹ Submission 311. Emphasis in original.

¹⁵⁰ Article 23(2) of the ICCPR.

¹⁵¹ Article 13 of the ICCPR.

protection from propaganda for war),¹⁵² while others involve concepts which have caused difficulties internationally in their interpretation (for example, the right of all peoples to utilise natural wealth and resources).¹⁵³

One particular ICCPR right (also found in the ICESCR) which is not currently contained in the draft Bill but which, in our view, warrants further consideration is the right of self-determination. This is discussed further below in the section on Indigenous rights.

4.5.2 Broad terms of the rights in the draft Bill

The Western Australian Commissioner of Police, Karl O'Callaghan, submitted that much of the language used in the draft Bill was ambiguous and confusing and may also be impractical for government agencies to comply with. For example, the right of a person to be brought before a court "promptly" may create difficulties in rural areas. The Commissioner submitted that in other respects, the rights contained in the draft Bill were not sufficiently clear. For example, in relation to the right of the family to protection in clause 16, the term "family" is not defined. Similarly, the right to "security" in clause 21(1) of the draft Bill is not defined.¹⁵⁴ A number of other people attending our forums and making submissions shared the Commissioner's concerns.

Some of the language in the draft Bill reflects the terminology of the ICCPR rights which are recognised in it. Clause 33 of the draft Bill permits recourse to international jurisprudence to assist in determining the content of the rights. In other cases, the language in the draft Bill appears to have been used to permit some flexibility in the application of the right in local conditions.

We note, however, that government officers (and police officers) are presently required in many contexts to apply legal principles or standards which are not defined with complete specificity, such as "reasonable care," "reasonable force" and "reasonable suspicion" where case law has developed the content of those principles or standards. We are confident that with adequate education, government agencies and the community will be able to understand the rights and obligations contained in the draft Bill.

4.5.3 Right to life

'Rights' to free speech, political participation, privacy and so on can only be exercised if one is alive.

Submission 11: Coalition for the Defence of Human Life

Clause 7 of the draft Bill provides:

Every person has, after he or she is born –

- (a) the right to life; and
- (b) the right not to be arbitrarily deprived of life.

¹⁵² Article 20(1) of the ICCPR.

¹⁵³ Article 47 of the ICCPR.

¹⁵⁴ Submission 301.

(i) *The Community's views*

The Committee received numerous submissions which expressed strong concerns about the fact that the right to life in clause 7 excludes the unborn. These concerns were echoed by a number of participants in the public forums and some of the participants in the three WA Schools Constitutional Conventions. Some of those expressing concerns opposed the introduction of a WA Human Rights Act entirely on the basis that if it took the form of the draft Bill it would “dehumanise” unborn children. Others supported the introduction of a WA Human Rights Act but recommended that clause 7 be amended.

Those who objected to the current drafting of clause 7 primarily argued that life begins at conception. For example, the Coalition for the Defence of Human Life submitted that:

Life does not begin at birth, but at conception, when an organism is already genetically complete – all the genetic information that will direct its development to maturity is already present – there will never be any more. A wombat foetus is just as much a wombat as an adult wombat. In the same way, a human foetus is just as much a human as an adult human. This is no more than basic biology.¹⁵⁵

People were also concerned that, by excluding unborn children from the right to life, clause 7 of the draft Bill would undermine, erode or abrogate the limited legal protections for unborn children that already exist. In this regard, Gail Gifford argued:

Because this implies that a woman has a right to obtain an abortion right up to the birth of her child, it could be used to challenge reasonable WA laws covering termination that DO limit access to abortion, especially after 20 weeks (ie when the baby could live given adequate medical care).¹⁵⁶

Submissions also referred to the provisions in the *Criminal Code* that make it an offence to cause the death of an unborn child and the common law principles that allow for compensation to be awarded in respect of injuries sustained prior to birth at the hands of negligent doctors.¹⁵⁷ Some people saw these existing legal protections as amounting to “State recognition that an unborn human being has some form of a ‘right to life’”¹⁵⁸ and thought that clause 7 of the draft Bill would send mixed messages.¹⁵⁹ A participant in one of our Geraldton forums suggested that “the Bill does not avoid the abortion issue. By not dealing with abortion, it is implicitly allowing it.”

...RECEIVED NUMEROUS SUBMISSIONS WHICH EXPRESSED STRONG CONCERNS ABOUT THE FACT THAT THE RIGHT TO LIFE IN CLAUSE 7 EXCLUDES THE UNBORN.

In light of the arguments over when life begins, several submissions argued that laws relating to abortion and other clinical practices affecting unborn children should, at the very least, have to be considered and reasonably justified as exceptions to the basic right to life through the ordinary processes of a WA Human Rights Act.¹⁶⁰

The Committee did receive a handful of submissions which expressly approved of the current drafting of clause 7 of the draft Bill. For example, the Women’s Electoral Lobby (WA) Inc stated that “in defining a child, its independent life as a born child is the starting point. ... While a pregnancy is continuing, it is paramount to respect the woman’s bodily integrity and to reinforce her autonomy of her own

¹⁵⁵ Submission 11: Coalition for the Defence of Human Life.

¹⁵⁶ Submission 226. Emphasis in original.

¹⁵⁷ For example, submission 153: L J Goody Bioethics Centre; submission 34: Festival of Light Australia.

¹⁵⁸ Submission 153: L J Goody Bioethics Centre.

¹⁵⁹ Submission 130: Rev Dr Walter Black.

¹⁶⁰ For example, submission 226: Gail Gifford; submission 31: Coalition for the Defence of Human Life; submission 285: Shane and Jacki de Bie; submission 231: Aaron Raap.

reproductive organs”.¹⁶¹ The Public Interest Advocacy Centre Ltd argued that the debate about a WA Human Rights Act should not become a debate about access to abortion. A similar point was made by Peter Lochore, who submitted:

While I personally would prefer the rights of unborn persons to be protected (with some exceptions), I perceive that this is not supported by the majority of the community. Therefore, unless the Government judges there to be widespread public support, the drafting of the proposed clause 7 should remain as it is. I do not consider it is appropriate for the views of a minority (which in this instance includes myself) to be imposed upon the majority.¹⁶²

The consultations with the community did not enable us to assess quantitatively what the majority or minority view may be with respect to this issue. It is, perhaps, unsurprising that more people did not present arguments in favour of clause 7 given that it was presented to the public as the Government’s preferred position. The Committee’s consultations did, however, confirm that there are fundamental differences of opinion among Western Australians on this issue.

(ii) Conclusion in relation to the right to life

The existence of such divergent views in the community about the right to life means that the Committee is not able to formulate an approach to the recognition of this right which would accommodate all of those views.

The present position in Western Australia and universally throughout Australia, is that abortion is permitted within a legal framework, subject to limitations. In the Committee’s view this is likely to continue to be the situation. In those circumstances, neither of the views at the extremes of the right to life debate (that is, pro-life or pro-choice) can be accommodated. The question for the Committee is how the proposed expression of the right to life in clause 7 of the draft Bill relates to that reality.

If clause 7 were to be amended to remove reference to the words “after he or she is born”, that would inevitably provide opportunities for arguments in relation to abortion to be made in any proceedings in which a relevant human rights question was raised. Ultimately, this might mean that the Supreme Court could be called upon to determine whether existing laws relating to abortion were compatible with the right to life in a WA Human Rights Act. The Committee notes that this would not mean that the Supreme Court would have the power to strike down such laws as invalid. It nevertheless raises the possibility that individual judges could be called upon to make judgments about this issue on which there are such fundamental differences of view. The question is whether that is a desirable outcome.

At least in so far as existing abortion laws are concerned, it is the Committee’s view that given the fundamental differences of view which exist on this subject, even within the faiths, this is a matter which peculiarly should remain the exclusive province of elected representatives in the Parliament.

In these circumstances, the Committee recommends:

- In relation to the right to life, clause 7 should be amended to remove the words “after he or she is born” so that it could not be said that the WA Human Rights Act gives any “signal” as to how issues such as abortion should be dealt with in the context of the right to life.

¹⁶¹ Submission 322.

¹⁶² Submission 32.

- A WA Human Rights Act should expressly recognise that, in relation to existing abortion laws, these are a matter for the Parliament, so that the WA Human Rights Act is not applicable to those laws. The Committee notes that this was the approach adopted in section 48 of the Victorian Charter, which expressly recognises that the Charter does not apply to laws relating to abortion or child destruction. This savings provision in the Victorian Charter applied to abortion laws enacted after, as well as those enacted before, Part 2 of the Charter commenced operation. The Committee, however, recommends that the exclusion of abortion laws from the application of a WA Human Rights Act be expressly confined to existing laws in relation to abortion. In relation to any future laws, Parliament should be required to consider the impact, if any, of a proposed law on the right to life. If the Parliament wished to do so, it could include in a future law an override clause (as contemplated by clause 30 of the draft Bill and discussed further in Chapter 6 of this Report) which would mean that the WA Human Rights Act would not apply to the law.

4.5.4 Freedom from discrimination

Discrimination is at the root of virtually all human rights abuses.

*Submission 308: Commonwealth Human Rights and Equal Opportunity Commission*¹⁶³

One of the key themes to emerge from the Committee’s consultations with the community was the importance of ensuring freedom from discrimination in the enjoyment of human rights and ensuring substantive equality. As discussed in Chapter 3 and earlier in this Chapter, a number of different groups reported concerns. For example, Aboriginal people reported problems with racial discrimination and groups representing people with disabilities reported problems with equal access to services. Similar results emerged from the devolved consultation with the disadvantaged. In his report, *Human Rights ‘at the Margins’*, the Committee’s Consultant noted that:

The extent, range and scope of discrimination reported during consultation was broad and complex. The range of violations described during face-to-face discussion cut across all categories currently expressed in the *WA Equal Opportunity Act 1984*. However, the range of violations reported during discussion also went **beyond** the WAEOC Act.¹⁶⁴

Clause 19 of the draft Bill currently provides that “[e]very person has the right to enjoy his or her human rights without discrimination.” Furthermore, clause 23(2) of the draft Bill provides that “[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and to equal and effective protection against discrimination.” Clause 4(1) of the draft Bill provides that “‘discrimination’ means discrimination on a ground referred to in the *Equal Opportunity Act 1984*”. Clause 4(2) further clarifies that “[a]ny measure taken for the purpose of assisting or advancing people or groups of people who are disadvantaged because of discrimination does not constitute discrimination for this Act.”

A number of submissions argued that the current definition of “discrimination” in the draft Bill was inappropriate because it was linked to the grounds set out in the *Equal Opportunity Act 1984* (WA) and these were unduly narrow and/or incomplete. The *Equal Opportunity Act* presently prohibits discrimination in various contexts, such as employment and education, on the grounds of sex, marital status, pregnancy, gender history, family responsibilities, family status, sexual orientation, race, religious or political convictions, impairment and age.

¹⁶³ Citing S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Case Materials and Commentary*, 2nd Edition, 2004, 680, para [23.01].

¹⁶⁴ Page 44. Emphasis in original.

In particular, it was submitted to us that the *Equal Opportunity Act 1984*:

- Fails to protect intersex and androgynous people from discrimination.¹⁶⁵
- Limits its provisions dealing with discrimination based on gender history to individuals who have received documentation from the State's Gender Reassignment Board.¹⁶⁶
- Fails to protect homeless people from discrimination.¹⁶⁷
- Applies unfairly to people suffering from disabilities because of its "comparability requirement" which requires people to demonstrate that they have received less favourable treatment than others in similar situations.¹⁶⁸

These submissions argued that the current definition of "discrimination" in clause 4 of the draft Bill should be deleted or replaced with a broader definition.¹⁶⁹ A similar plea was consistently made during the devolved consultation with the disadvantaged.¹⁷⁰

We note that the definition of "discrimination" in clause 4(1) of the draft Bill is similar to the definition of "discrimination" in section 3 of the Victorian Charter, which is also limited to discrimination on the basis of an attribute set out in the *Equal Opportunity Act 1995 (Vic)*. In contrast, the ACT Act does not define "discrimination" for the purposes of the right in section 8(2) of the ACT Act. That subsection provides for a right to enjoy human rights "without distinction or discrimination of any kind".

The right in Article 2 of the ICCPR, (on which clause 19 of the draft Bill is based) acknowledges that all persons are entitled to enjoy the rights set out in the ICCPR "without distinction of any kind". Article 2 then goes on to give examples of the kind of discrimination which is prohibited, namely "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Notwithstanding the reference to these examples, the intention behind Article 2 of the ICCPR appears to be to ensure the widest possible protection for individuals from discrimination in the enjoyment of their human rights. The grounds on which discrimination is prohibited under the *Equal Opportunity Act 1984* do not include all of the grounds of discrimination listed by way of example in clause 2 of the ICCPR. By limiting the grounds of prohibited discrimination in a WA Human Rights Act to those set out in the *Equal Opportunity Act 1984*, the wide protection from discrimination in the enjoyment of human rights envisaged by the ICCPR would not be achieved.

It was submitted to us that defining "discrimination" by reference to the grounds prohibited under the *Equal Opportunity Act 1984* was inappropriate having regard to the purpose of a WA Human Rights Act. The position in New Zealand was referred to in support of this submission:

The prohibition on a wide range of discrimination is a fundamental principle that underpins human rights law.

Section 4 of the draft Bill fails to implement this principle by adopting the (inadequate) framework for discrimination contained within the *Equal Opportunity Act 1984*. However, the purpose of the *Equal Opportunity Act 1984 (WA)* and the draft Bill are not wholly identical. It is instructive to consider the experience in New Zealand in this regard. *The Human Rights Act 1993 (NZ)* is principally limited

¹⁶⁵ Submission 125: Chris Somers xxy.

¹⁶⁶ Submission 270: Gay and Lesbian Equality (WA).

¹⁶⁷ Submission 321: Western Australian Homeless Persons' Legal Advice Clinic (WA) Steering Committee Inc.

¹⁶⁸ Submission 38: Geoff Bridger.

¹⁶⁹ For example: submission 374: Office of Multicultural Interests, Department for Communities; submission 372: Southern Communities Advocacy Legal and Education Service Inc; submission 354: IHRIL Working Group.

¹⁷⁰ Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 44 (see Appendix F).



to the right against discrimination, and applies to both the public and private sector. Like the Western Australian *Equal Opportunity Act*, the New Zealand *Human Rights Act* does not prohibit discrimination as such. Rather, it prohibits the mere treatment of a person *differently by reason* or one or more prohibited grounds of discrimination. By contrast, s19 of the *New Zealand Bill of Rights Act [1990]* affirms a general right to freedom from discrimination in respect of human rights and prohibits discrimination by the government and public actors in all contexts, not only in employment, accommodation and so on as identified by the *Human Rights Act*. In 2001, the *Human Rights Act Amendment Act* was passed in New Zealand to affirm decisively that discrimination in respect to human rights is to be assessed against the *Bill of Rights Act* standard, not the *Human Rights Act* standard.¹⁷¹

There does not appear to be any compelling reason for limiting the grounds of discrimination in the right in clause 19 of the draft Bill to those set out in the *Equal Opportunity Act 1984*. There may be some benefit in achieving consistency between the prohibited grounds of discrimination in the *Equal Opportunity Act 1984* and those in a WA Human Rights Act. However, given that the prohibition on discrimination in a WA Human Rights Act (under clause 19 of the draft Bill) applies to the enjoyment of human rights and is not confined in its operation to the contexts in which discrimination is prohibited by the *Equal Opportunity Act 1984* (such as employment and education) the consistency between the two pieces of legislation would necessarily be limited in any event. We are unable to envisage any legal or practical difficulty if the definition of “discrimination” in clause 4(1) of the draft Bill were to be deleted.

The deletion of the definition of “discrimination” in clause 4(1) of the draft Bill would positively enlarge the human right in clause 19 of the Bill to the benefit of those individuals who may otherwise have been discriminated against in their enjoyment of their human rights on grounds beyond those in the *Equal Opportunity Act 1984*. Deleting the definition of “discrimination” would ensure that the right in clause 19 of the draft Bill reflects the right in article 2 of the ICCPR.

For the sake of completeness, we confirm that, although the definition of “discrimination” in clause 4(1) of the draft Bill should be deleted, in our view clause 4(2) of the draft Bill should remain in place. That clause makes it clear that measures taken for the purpose of assisting or advancing people or groups of people who are disadvantaged because of discrimination do not constitute discrimination for the purposes of a WA Human Rights Act. It would be regrettable if positive measures implemented to help those facing discrimination were themselves held to be incompatible with the right in clause 19 of the draft Bill.

¹⁷¹ Submission 354: IHRL Working Group.

4.5.5 Indigenous rights

While there was significant engagement by individual Aboriginal people in our public forums in rural and remote areas, the Committee realised that it may not obtain a representative view through those forums. We approached ALSWA as an organisation with wide engagement across the State and relevant experience with human rights issues, to confirm the involvement of its networks in developing a submission. ALSWA has a WA Aboriginal Executive Committee comprising executive members elected by Aboriginal and Torres Strait Islander peoples from their local regions to speak for them on law and justice issues. In the event, ALSWA made a detailed written submission on behalf of Indigenous people across the State.

We also received written submissions relating to Indigenous concerns from numerous other people and organisations, including the Special Adviser to the Western Australian Government on Indigenous Affairs, Lt General John Sanderson AC, the Lingiari Foundation (Inc), the Goldfields Land and Sea Council Aboriginal Corporation, the Irra Wangga – Geraldton Language Programme, Carolyn Tan, the Department for Child Protection and Legal Aid Western Australia Inc.

Unsurprisingly, these submissions drew our attention to historic and continuing failures to protect and respect Indigenous rights. They generally supported the idea of a WA Human Rights Act, but wanted the draft Bill strengthened. In this regard, they were consistent with the views of the majority of supporters that a WA Human Rights Act should include ESC rights and should ensure that breaches of human rights by government agencies have consequences. These and other general matters raised in the submissions are addressed elsewhere in this Report.

Clause 20(2) of the draft Bill currently provides that Aboriginal people have distinct cultural rights and must not be denied the right to (a) enjoy their identity and culture; (b) maintain and use their language; and (c) maintain their kinship ties. Many of the submissions recommended that a WA Human Rights Act incorporate additional specific rights for Aboriginal and Torres Strait Islander people, including the:

- right to self-determination;¹⁷²
- right to cultural security;¹⁷³
- right to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs;¹⁷⁴ and
- freedom to establish, maintain, protect and access places of worship and religious or spiritual significance and a freedom from desecration or damage to such places.¹⁷⁵

The first and last of these rights were recognised as extending beyond Aboriginal and Torres Strait Islander people, but as being particularly relevant to such people.

The Committee considers that these matters, particularly the inclusion of a right to self-determination in a WA Human Rights Act, require longer and more detailed consideration and discussion than our consultation process permitted.

¹⁷² This was raised in at least 25 submissions.

¹⁷³ For example, submission 176: Department of Child Protection.

¹⁷⁴ For example, submission 223: Legal Aid Western Australia Inc; submission 80: Carolyn Tan; submission 299: ALHR.

¹⁷⁵ Submission 80: Carolyn Tan.



The right to self-determination is included in the ICCPR¹⁷⁶ and the ICESCR,¹⁷⁷ both of which provide:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The proposal that a WA Human Rights Act should affirm the right to self-determination of Indigenous peoples raises complex issues, including what that right means in the context of being within the Australian nation. These complexities were succinctly illustrated by the Tasmania Law Reform Institute in its report entitled *A Charter of Rights for Tasmania*:

The right to self-determination is a complex right, consisting of both internal self-determination and external self-determination. As an external right, it has been understood to mean the right of a State to be free from external domination or the right of peoples to alter territorial boundaries and possibly to secede from the dominion of a colonising power. As an internal right, it has come to mean, the right of peoples within a State to participate fully in the political process.¹⁷⁸

We note also that different approaches to the inclusion of a right to self-determination have been taken in the ACT, Victoria, and most recently in the report prepared by the Tasmania Law Reform Institute.

The ACT Consultative Committee concluded that the general ICCPR and ICESCR rights protected by an ACT Human Rights Act could be interpreted to respond to the concerns of the ACT Indigenous communities.¹⁷⁹ For this reason, although the Committee recommended that a right to self-determination be included in the ACT Act, it did not recommend that this right be specifically applied to Indigenous people. The Committee did, however, recommend that a review of the ACT Act after five years “should give particular emphasis to its effectiveness in recognising and protecting the rights of Indigenous Australians. At that time the question of the inclusion of specific Indigenous rights in the legislation should be revisited.”¹⁸⁰

In its recent report, the Tasmania Law Reform Institute agreed with the approach of the ACT Consultative Committee and recommended that a right to self-determination, which was of general application, should be included in a Tasmanian Charter of Human Rights. It was, however, recognised that the inclusion of this general right would have special significance for Tasmanian Indigenous communities, and that the inclusion of this right would accord with aspirations for reconciliation between Aboriginal and non-Aboriginal Tasmanians.¹⁸¹

In contrast, the Victorian Consultation Committee recommended against the inclusion of a right to self-determination in the Victorian Charter. In its report, the Victorian Consultation Committee supported the inclusion of specific cultural rights for Indigenous peoples but recommended that the Charter not include a right to self-determination because:

The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities’ understanding

¹⁷⁶ Article 1(1).

¹⁷⁷ Article 1(1).

¹⁷⁸ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 133, para [4.16.43].

¹⁷⁹ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 104, para [5.62].

¹⁸⁰ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 105, para [5.64].

¹⁸¹ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 134, para [4.16.47].

of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.¹⁸²

Instead, the Victorian Consultation Committee recommended that the question of the inclusion of a right to self-determination be considered in the course of reviews of the Charter.¹⁸³

The right to self-determination for Indigenous people is an issue requiring much wider and more cross-communities discussion than our process could provide. It needs discussion and clarification within Indigenous communities, between the Government and Indigenous people and within the wider community. In so far as it was submitted to us that a WA Human Rights Act should recognise the right to self-determination, we agree with the spirit of the submission of Lt General Sanderson, who stated:

...the potential impact of the operation of this legislation on Indigenous people is probably greater than any other group in Western Australia and thus warrants a sophisticated affirmative action process, which in effect should be greater than the standard consultation process based on the Government's preferred model.¹⁸⁴

For this reason, and in the absence of a uniform position on this issue in other Australian jurisdictions which have enacted human rights legislation, or are considering doing so, we believe that the question of whether a right to self-determination for Indigenous people should be included in a WA Human Rights Act is a matter for longer term consideration. Accordingly, we recommend that a WA Human Rights Act not include a right to self-determination at this time, but that the requirement for reviews of the Act, set out in clause 43 of the draft Bill, should expressly require consideration of the inclusion of this right. Similarly, we recommend that the other specific rights for Aboriginal and Torres Strait Islander people listed above be specifically referred to as matters for review in clause 43.

We do, however, consider that the draft Bill could incorporate some other specific suggestions that were made to us without the need for further more extensive consultation. In his submission, Lt General Sanderson suggested that a WA Human Rights Act could include a right for Indigenous Western Australians to work in partnership with the Government in setting priorities for, and in the development, implementation and review of, policies, programs and services as they impact on Indigenous people. In the Committee's view, such a right would reflect a commitment to work in partnership with Indigenous people that has already been embraced by all levels of government in Australia. We recommend that it be included.

The Committee also considers that clause 20(2) of the draft Bill could be amended to reflect the wording of article 31(1) of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, as recommended by ALSWA. Article 31(1) provides that:

Aboriginal peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

¹⁸² G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 39.

¹⁸³ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 137.

¹⁸⁴ Submission 300.

While the second sentence of this right would potentially create difficulty if included in a WA Human Rights Act (because intellectual property is a matter which has been exhaustively regulated by the Commonwealth Parliament), we recommend that the first sentence be used instead of the current clause 20(2) of the draft Bill.

We also embrace the point made by a number of people and organisations, including ALSWA, that “Aboriginal and Torres Strait Islander peoples, although a minority, are also First Nations Peoples of Australia. This position should not be undermined by the inclusion of Aboriginal rights with all other minority rights”.¹⁸⁵

Accordingly, we recommend that clause 20(2) of the draft Bill (which is to be amended as suggested above) be moved into an entirely new clause headed “Indigenous rights” together with the new right to work in partnership with the Government recommended by Lt General Sanderson. This new clause should also make specific reference to Torres Strait Islander people. That is, the new clause should read “Aboriginal and Torres Strait Islander people have the right to maintain, control, protect and develop their cultural heritage...”. In the Committee’s view, these changes would help to ensure greater protection of Aboriginal and Torres Strait Islander people residing in Western Australia and recognise their distinct status and identity.

4.5.6 Specific rights for children and people with disabilities

During our consultations, a number of people expressed particular concern about the need to protect the rights of children and people with disabilities. It was generally recognised that, while these two groups are entitled to all of the general rights set out in the draft Bill, they are particularly vulnerable to having their rights infringed and may therefore require special protection.

The draft Bill already contains some specific protection for children. For example, clause 17(1) provides that every child “has the right, without discrimination, to such protection as he or she needs because of being a child.” It was suggested, however, that some or all of the rights in the *United Nations Convention on the Rights of the Child* should also be included in the draft Bill. For example, ALSWA recommended that the rights set out in articles 3 and 5 of the Convention be included.¹⁸⁶ These rights are, respectively, as follows:

- “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration”; and
- “the State shall respect the responsibilities, rights and duties of parents, or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”.

The Social Justice Board of the Uniting Church of Australia Synod of Western Australia, on the other hand, recommended that the draft Bill include a provision based on section 28 of the South African Bill of Rights, which appears to collect together various rights relating to children from the ICCPR, the ICESCR and the *United Nations Convention on the Rights of the Child*.¹⁸⁷

¹⁸⁵ Submission 312.

¹⁸⁶ Submission 312.

¹⁸⁷ Submission 243.

With respect to people with disabilities, it was pointed out to us that the draft Bill does not currently make any specific provision for their protection. A number of submissions argued that some or all of the rights in the *Convention on the Rights of Persons with Disabilities* should be included.¹⁸⁸ The Mental Health Law Centre (WA) Inc was particularly concerned about the rights of those with mental health problems and recommended that the draft Bill include a number of rights based on the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.

The Office of the Public Advocate, however, took a slightly different approach. Rather than argue for the inclusion of additional rights based on United Nations instruments, the Office recommended that the draft Bill include a specific right for people with decision-making disabilities that would mirror the right conferred on children in clause 17:

It is an interesting exercise to consider the types and level of protection and services that are available to children who are at threat of having their human rights breached, compared with those that are available to adults with decision-making disabilities. Both of these groups are particularly vulnerable, can have impaired or under-developed communication skills, cognition or expression difficulties and rely heavily on others to advocate on their behalf. It is widely accepted that children require specific and dedicated protection. However, this specific protection is less forthcoming for adults with decision-making disabilities despite their similar level of vulnerability to children and their need for assistance.¹⁸⁹

...WERE IMPRESSED BY THE SUGGESTION FROM THE OFFICE OF THE PUBLIC ADVOCATE REGARDING A SPECIFIC RIGHT FOR PEOPLE WITH DISABILITIES TO MIRROR THE RIGHTS OF CHILDREN...

Although the draft Bill does not currently contain specific rights for people with disabilities, the Committee notes that State legislation such as the *Disability Services Act 1993* and the *Guardianship and Administration Act 1990* provides them with some specific protection. Similarly, legislation such as the *Children and Community Services Act 2004* provides children with some specific protection, which appears to be consistent with the rights set out in articles 3 and 5 of the *United Nations Convention on the Rights of the Child*.

Nevertheless, we consider that the issues of whether specific rights for children and people with disabilities should be included in a WA Human Rights Act warrant further consideration. In particular, we were impressed by the suggestion from the Office of the Public Advocate regarding a specific right for people with disabilities to mirror the rights of children in clause 17 of the draft Bill. While such further consideration was beyond the scope of our consultation process, we recommend that these issues be expressly included as matters for consideration in the review provision of the draft Bill (clause 43(2)).

4.5.7 Legal process rights

Clauses 23 and 24 of the draft Bill currently set out a number of rights for those involved in civil and criminal legal proceedings. During the Committee's consultations a number of people recommended amendments to these provisions and/or the addition of further legal process rights.

A number of these amendments and additional rights were very specific and in our view, unnecessary in light of the existing provisions of the draft Bill. For example, it was suggested that the draft Bill should contain a freedom from unreasonable search and seizures¹⁹⁰ and a right to refuse to consent to any form

¹⁸⁸ For example, submission 183: Ethnic Disability Advocacy Centre.

¹⁸⁹ Submission 86.

¹⁹⁰ For example, submission 299: ALHR; submission 92: Tony O'Donnell.

of forensic procedure.¹⁹¹ Such rights are likely to be covered by the more general right to privacy set out in clause 11 of the draft Bill.

Two rights which are only partly covered by the draft Bill, however, are the privilege against self-incrimination and the broader “right to silence”. In his submission to the Committee, Dr Jeremy Gans of the University of Melbourne pointed out that the privilege against self-incrimination and the right to silence were not recognised in the ICCPR because the Covenant “had to straddle” a number of different legal systems”,¹⁹² some of which did not recognise these rights. They are, nevertheless, core values of the Australian legal system and fundamental human rights which should be included in a WA Human Rights Act. Dr Gans noted that while the draft Bill had partially filled the gap in the ICCPR with clause 24(2)(k), which contains a right not to confess guilt or to be compelled to testify against oneself, this right only applies to persons charged with an offence. He suggested that the draft Bill should go further.

The Committee considers that the privilege against self-incrimination is a fundamental right which should be included in a WA Human Rights Act. We therefore recommend that clause 23 of the draft Bill be amended to include a more general right for every person not to be compelled to provide incriminating evidence against themselves, except in accordance with law. This right should also provide that if a person is compelled to provide incriminating evidence, such evidence cannot be subsequently used against them in criminal or civil proceedings. We appreciate the circularity of expressing the privilege against self-incrimination to be “except in accordance with law” but we consider the inclusion of these words is appropriate to make it clear from the outset that there are situations in which existing State laws permit the right to be limited. For example, as noted in the submission we received from the Corruption and Crime Commission of Western Australia:

It has been the judgment of a number of Australian legislatures, including that of Western Australia, that the public interest in detecting and eradicating corruption should outweigh the common law privilege against self-incrimination.

Whilst the public interest in this way has been accorded priority, individual civil rights have not been completely overridden. Exposure to criminal liability by legislative abrogation of the privilege against self-incrimination and the giving of compelled evidence to a commission of inquiry may be offset, if not prevented, by a counter-balancing legislative protection. That protection is commonly in the form of a provision to the effect that the evidence cannot be subsequently used in criminal or civil proceedings ...¹⁹³

The Committee also received a number of suggestions for amendments to clauses 23 and 24 which were based on a desire to ensure that all participants in legal proceedings, including victims and other witnesses, are treated respectfully. In a number of our public forums and other meetings people expressed concern over the lack of protection for victims in the draft Bill as compared to the relatively long list of protections for accused persons. Some people felt that victims did not have a sufficient right to be heard in proceedings, while others were concerned that victims and other witnesses were treated in a demeaning fashion in court. A participant in one of our Geraldton forums suggested that “victims should have a right to be recognised, to be heard and to be treated with dignity ... clause 24 of the Bill could include something about this.”

¹⁹¹ Submission 299: ALHR.

¹⁹² Submission 4.

¹⁹³ Submission 338.

Dr Gans, on the other hand, suggested that the right to a fair hearing in clause 23(3) of the draft Bill should be amended so that it is not confined to an accused in criminal proceedings and to parties in civil proceedings. In his view, the right to a fair hearing should be expressed more broadly, as:

...others, including victims and the wider public have an interest in the correct outcome of such proceedings that ought to be regarded as a human right. (It may be that not all these people will be able to personally enforce this right in a legal proceeding, but that is a separate matter from whether courts and other parts of the Western Australian government should be promoting or considering their rights.)¹⁹⁴

The Committee considers that, while the protections for accused persons currently contained in the draft Bill are important and necessary, it is also important that other people involved in legal proceedings are treated with dignity and respect. We note that there is existing State legislation which is designed to provide protection to victims of crime (for example, the *Witness Protection (Western Australia) Act 1996*). We also note that the *Sentencing Act 1995* affords victims the opportunity to be heard in proceedings through the use of victim impact statements. We consider, however, that it would be appropriate for a WA Human Rights Act to recognise in a broad way the interests of all people involved in legal proceedings, including victims and other witnesses, to be treated with respect. Accordingly, we recommend that clause 23 of the draft Bill be amended to include an additional right for every person involved in legal proceedings to be treated with dignity and respect.

4.5.8 Environmental rights

Approximately 7% of written submissions dealing with the issue of what rights should be protected in a WA Human Rights Act argued for the inclusion of environmental rights. A few participants in the public forums also supported their inclusion. A number of people suggested that the draft Bill include a range of environmental rights, whereas others focused on more specific rights, such as the right to clean air¹⁹⁵ or the right to food free from chemicals and genetically modified organisms.¹⁹⁶ Some wrote to the Committee expressing specific concerns about the use of chemicals in their neighbourhoods and the harmful effects of such chemicals on human health.¹⁹⁷

In a joint submission to the Committee, the Environmental Defender's Office Western Australia (Inc) and the Conservation Council of Western Australia provided the following justification for the inclusion of environmental rights:

The successful protection of human rights is dependent upon the sustained health of the natural environment. Without this foundation, there would be no society in which to ensure rights. Recent developments in international human rights law illustrate the increasing recognition of the indivisibility of all human rights, which include those related to the environment. In WA, pressing environmental challenges such as climate change, water shortage and environmental degradation directly affect the operation of fundamental civil and political rights (known as 'primary rights') because of the potential threat that they pose to ongoing human health and liberty ... integration of [environment related rights] ... would be in line with international jurisprudence that increasingly reflects the indivisibility and interdependence of all rights.¹⁹⁸

¹⁹⁴ Submission 4.

¹⁹⁵ For example, submission 55: Anonymous; submission 170: Dennis Grimwood; submission 203: S Levy; submission 346: Stella Hondros.

¹⁹⁶ For example, submission 55: Anonymous; submission 15: Anonymous; submission 346: Stella Hondros.

¹⁹⁷ For example, submission 371: Alexandra Jones.

¹⁹⁸ Submission 232.

They pointed to section 24 of the South African Bill of Rights as a good example of protection for environmental rights. This section provides that:

Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

In the submission of the Environmental Defender's Office and the Conservation Council, a WA Human Rights Act could simply focus on certain key environmental rights such as the right to water and the right to a clean natural environment. The Greens (WA) also suggested that the Act could include the right to a clean and healthy environment.¹⁹⁹

Alternatively, it was suggested that environment related rights could be recognised within basic civil and political rights already included in the Bill, such as the right to life and the right to privacy. However, in this regard the Environmental Defender's Office and Conservation Council noted that "European examples have shown that this ancillary recognition falls short of ensuring satisfactory protection of environment related rights, as courts will have a wide discretion where rights are not specifically codified."²⁰⁰

As a last preference, the Environmental Defender's Office and the Conservation Council submitted that if "environmental related human rights are not specifically codified in the Human Rights Act, the Bill should be amended to require that any review of the Act (once in force) by the Minister includes consideration of environment related human rights."²⁰¹

We are not persuaded that environmental rights should be included in a WA Human Rights Act at this stage. Several considerations have led us to that view. First, environmental rights are not included in the ICESCR. Secondly, the protection of environmental rights is not a consistent feature of the human rights legislation of the major jurisdictions we have examined. Although section 24 of the South African Bill of Rights does include environmental rights, the human rights legislation in the UK, Canada and New Zealand does not include environmental rights. Thirdly, environmental rights are not included in the ACT Act or the Victorian Charter, although we note that more recently, the Tasmania Law Reform Institute recommended that a right to environmental protection, modelled on section 24 of the South African Bill of Rights, be included in a Tasmanian Charter of Rights.²⁰² Fourthly, the submissions we received did not consistently support a particular environmental right, but rather advocated a variety of different rights related to the environment or to the protection of the environment. Finally, we are conscious of the fact that we have recommended that some ESC rights be included in a WA Human Rights Act, and in that sense our recommendations go beyond the Government's preferred position in relation to the rights which should be recognised.

However, given the concern expressed to us about the need to protect the environment, we recommend that a WA Human Rights Act expressly require that the protection of environmental rights be included in the list of matters to be considered in future reviews of a WA Human Rights Act.

¹⁹⁹ Submission 305.

²⁰⁰ Submission 232.

²⁰¹ Submission 232.

²⁰² Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 136 – 137, paras [4.16.57 – 4.16.58].



4.6 Limitations on rights

4.6.1 Should a WA Human Rights Act permit human rights to be limited?

A great deal of discussion at the Committee's public forums focused on the need to balance rights against one another and against competing public interests. Concern over this issue was also reflected in many of the written submissions. For example, Don and Barbara Wilkie asked:

Should people be permitted or encouraged to exercise their rights even if doing so impinges on the rights of others? Freedom of religion is a specified 'right' but what about religious proselytisers, or worse, fanatics whose religion demands that they destroy people who do not agree with them? Does the general public not have the right to be protected from such people?²⁰³

Similarly, Bruce Phillips asked "[w]hat happens to the girl born in Western Australia within a group whose culture includes female circumcision of children? Does the girl's right of protection as a child stand up against the parent's right to freedom of religion or belief?"²⁰⁴

Very few rights are, or could ever be, considered absolute, and international jurisprudence recognises that limitations on some rights may be justifiable. For example, article 19 of the ICCPR specifically provides that special duties and responsibilities are attached to the right to freedom of expression, which may be subject to certain restrictions imposed by law that are necessary.

In his submission to the Committee, the Commissioner of Police expressed concern that the draft Bill "does not address what will happen when two human rights are in conflict."²⁰⁵ He stated that "[i]f the Bill does not make it clear how conflicts are to be resolved, how can government agencies ensure that their actions and decisions are compatible with human rights?"²⁰⁶

The Committee notes that the draft Bill deals with the issue of how rights are to be balanced against one another. Clause 34(4) of the draft Bill provides some guidance as to how it may be determined whether a law is compatible with the human rights set out in the draft Bill. Clause 34(4) provides:

A written law of this State that limits a human rights is not incompatible with the right if the limitation is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom after 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

²⁰³ Submission 186.

²⁰⁴ Submission 289.

²⁰⁵ Submission 301.

²⁰⁶ Submission 301.



- (d) the relationship between the limitation and its purpose
- (e) any less restrictive means that are reasonably available to achieve the purpose of the limitation.

It is apparent from clause 34(4) that the draft Bill contemplates that human rights may be subject to limitations, although the impression which may be created by clause 34(4) is that the only limitations which are permissible are those imposed by law (as opposed to those which may result from the actions or decisions of government agencies). We discuss this issue further in Chapter 6.

A clause which makes clear that some limitations on human rights are permissible is clearly essential in a WA Human Rights Act. Without such a clause, arguments will arise that all of the rights in a WA Human Rights Act are absolute, and that no limitations on those rights are possible. For that reason, we recommend that a WA Human Rights Act should include a provision which makes it clear that human rights may be subject to some limitations.

That conclusion gives rise to the issue of what criteria should be adopted for determining permissible limitations on human rights. A number of the submissions received by the Committee expressly approved of the test adopted in clause 34(4). For example, in their joint submission to the Committee, Greg McIntyre QC, Dr Johannes Schoombee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey referred to and endorsed the Law Society of Western Australia’s 2006 position paper entitled *Is a Human Rights Act a Good Idea for WA?* This paper specifically recommended that a WA Human Rights Act include “a provision that anticipates reasonable limits may be placed on the enjoyment of human rights provided those limits are demonstrably justified taking into account relevant factors.”²⁰⁷

...WE RECOMMEND THAT A WA HUMAN RIGHTS ACT SHOULD INCLUDE A PROVISION WHICH MAKES IT CLEAR THAT HUMAN RIGHTS MAY BE SUBJECT TO SOME LIMITATIONS.

Other people suggested a slightly different formulation of words for clause 34(4),²⁰⁸ while a number of submissions argued in favour of a higher “test” or “threshold” for permissible limitations on rights. For example, after acknowledging that “rights, sometimes, will have to give way to the greater good of the community”, the Sussex Street Community Law Service took issue with the phrase “reasonably and demonstrably justifiable” in clause 34(4). The Service observed that:

Arguably any limitation with political will behind it will be reasonable and demonstrably justifiable; otherwise the legislation concerned would not have been passed by Parliament. If a human right can be limited by Parliament so easily, then it defeats the point of enacting human rights legislation. The threshold test for a breach of human rights used in the Bill is weak and should be given more strength. It would be preferable to use the test of necessity, such as is used in the *Human Rights Act 1998 (UK)*.²⁰⁹

The test set out in clause 34(4) of the draft Bill - “the limitation is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom after taking into account all relevant factors” - is broadly similar to that found in general limitations clauses within the Canadian Charter and the New Zealand Bill of Rights Act, and in section 28 of the ACT Act and section 7(2) of the Victorian Charter.

²⁰⁷ The Law Society of Western Australia, *Is a Human Rights Act a Good Idea for Western Australia? Report of the Human Rights Committee of the Law Society of Western Australia*, September 2006, 19.

²⁰⁸ For example, submission 272: Public Interest Advocacy Centre Ltd.

²⁰⁹ Submission 192.

In our view, the test set out in clause 34(4) of the draft Bill and the requirement to consider all relevant factors, including those set out in clause 34(4), in applying that test, import a degree of rigour into the analysis of whether a limitation will be permissible. For example, the requirements to consider the nature and extent of the limitation (in clause 34(4)(c)) and to consider any less restrictive means that are reasonably available to achieve the purpose of the limitation (clause 34(4)(e)) would ensure that the limitation did not apply to human rights unrelated to the purpose of the limitation. That is, even if it were able to be established that a limitation on one human right for a particular purpose was reasonable and justifiable in a free and democratic society, that would not mean that other human rights could be ignored or limited.

We therefore do not accept that a higher threshold for permissible limitations should be used. We also note that the structure of the draft Bill is such that the question whether a limitation on a human right is permissible - either in a proposed law or in a law which is the subject of a declaration of incompatibility - is one which rests with elected representatives in the Parliament.

We note that unlike section 28 of the ACT Act, section 7(2) of the Victorian Charter sets out the factors which should be taken into account in applying the permissible limitation test. The Victorian Consultation Committee explained its decision to include specific factors in the following way:

In considering what is most appropriate for Victoria, the Committee found useful the comments of New Zealand practitioners ... who said that the unstructured New Zealand provision (and by implication the ACT and Canadian provisions) can be difficult to interpret and apply on a day-to-day basis.

The Committee wants to make sure that the Charter, which will more often be interpreted within government than by the courts, is as easy as possible to apply. As such, a more certain form of guidance about the limitations on rights is needed. The South African Bill of Rights 1996 specifically sets out the matters to be taken into account in deciding if a limitation is reasonable and justifiable.²¹⁰

Clause 34(4)(a) – (e) of the draft Bill adopts the approach taken in section 7(2) of the Victorian Charter. We agree with the Victorian Consultation Committee that the permissible limitations clause should be as clear and as easy as possible to apply, and we therefore endorse the factors set out in clause 34(4).

4.6.2 The location for a permissible limitations clause in a WA Human Rights Act

Another issue of concern in some of the written submissions was the placement of clause 34(4) in the draft Bill. Clause 34 is generally designed to provide guidance as to when legislation should be interpreted in a way that is compatible with human rights. Clause 34(4) indicates that a law is not to be regarded as incompatible with human rights if it limits a right in a way that is permissible in accordance with the test in that clause. In other human rights legislation, the general limitations provision is found in that part of the legislation which lists what people's rights are (for example, section 7(2) of the Victorian Charter). The relocation of the general limitations clause in the draft Bill appeared to induce a misapprehension by a number of people that the draft Bill did not contain *any* limitations clause. It also provoked a strong reaction from a number of people. For example, Dr Julie Debeljak argued:

²¹⁰ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 47.

It is most unusual for a general limitations power to be contained in the enforcement/remedial provisions Part, rather than in the protection of rights Part. The power to justifiably limit protected rights is intimately connected with the right, not the remedy. Indeed, in all comparative instruments, the justifiable limitation power is connected to the statement of the rights, rather than the remedial provisions. ... It is my strong opinion that s34(4) should be removed from Part 5 altogether and inserted in Part 2.²¹¹

Similarly, ALHR argued that:

...rights may be reasonably limited not only in the interpretation of a statute but in other important circumstances such as the acts of a government agency. Section 7(2) of the Victorian Charter applies across the Charter as a whole and is not limited to the interpretation of statutes. ... More properly [clause 34(4)] should be included in Part 2 of the draft Bill perhaps immediately before s7. By inserting the provision at s34(4) it has no impact upon the requirement for a government agency to act compatibly with human rights at s40(3). That is a government agency may not act in a way which limits a human right even where the limit is justifiable in a free and democratic society. This is an unworkable restraint on the executive and is not in keeping with the scheme of legislative protection of human rights found in the ACT and Victoria.²¹²

The point made by ALHR was picked up by the submission from the Department of Child Protection, which suggested that:

Further legislative guidance could be provided as to what has to be taken into account when a court is considering whether a 'government agency could not have reasonably acted differently' due to the law. Some factors listed under clause 34(4) may be relevant to this question.²¹³

The Department also suggested that the draft Bill expressly provide for the test in clause 34(4) to be applied during the preparation of statements of compatibility for new Bills being introduced into Parliament:

No criteria are provided in [the Part of the Bill dealing with statements of compatibility] to assist the Attorney General to determine whether a Bill is compatible with human rights. ... if it is appropriate to take [the factors in clause 34(4)] into account when determining the compatibility of unclear laws, these same factors should apply to determine whether new legislation compatible with human rights.²¹⁴

The Victorian Solicitor General, Pamela Tate QC, noted that the inclusion of the permissible limitations clause in Part 2 of the Victorian Charter made clear that the human rights in Part 2 of the Victorian Charter were not absolute but may be subject to limitations and eliminated the possibility of an argument that a permissible limitations clause only applied to those rights already subject to an internal limitation.²¹⁵

Wherever a permissible limitations provision is located within a WA Human Rights Act, it is essential that that clause makes it clear that it applies to all of the rights within the WA Human Rights Act. For that reason, there is some merit in the view that the test in clause 34(4) should be relocated into Part 2 of a WA Human Rights Act, so that it sits side by side with the rights themselves. We therefore recommend

²¹¹ Submission 267.

²¹² Submission 299.

²¹³ Submission 176.

²¹⁴ Submission 176.

²¹⁵ Meeting with Ms Tate QC, Solicitor General for Victoria, on 23 August 2007.

that the permissible limitations test be taken out of clause 34 of the draft Bill and relocated into Part 2 of the draft Bill.

It is desirable that all those who read a WA Human Rights Act understand how the permissible limitations clause impacts upon the other provisions in the Act relating to statements of compatibility, the interpretive obligation and the obligation on government agencies to act compatibly with human rights. For that reason, we support the tenor of clause 34(4) in so far as it seeks to explain the impact of the permissible limitations test in the context of the obligation to interpret legislation compatibly with human rights. If the permissible limitations test is relocated into Part 2 of the draft Bill, in our view it is appropriate that there be retained within Part 5 of the draft Bill a provision which makes clear that a law will not be incompatible with a human right if it meets the permissible limitation test.

We also agree with the suggestion that a provision to similar effect be included within Part 6 of the Bill (preferably in section 40(3)) to make clear that a government agency will not act incompatibly with a human right if its action or decision limits that human right in a manner which meets the requirements of the permissible limitations test.

For the same reason, we agree that a similar “signpost” provision should be included in Part 4 of the draft Bill so that it is apparent to those drafting and reading statements of compatibility that a Bill will not be incompatible with a human right if it meets the requirements of the permissible limitations test. That provision should require the compatibility statement to be explicit that the proposed Bill is only compatible because it is within the permissible limitations test.

4.6.3 Absolute rights?

A number of submissions were critical of the draft Bill because it did not draw any distinction “between absolute, relative rights and limited rights”.²¹⁶ In its submission to the Committee, Amnesty International Australia stated that it was “very concerned that the proposed draft Act does not differentiate between derogable and non-derogable rights”,²¹⁷ while Dr Ben Saul stated:

It is ... recommended that a general limitation clause be included in the Bill. However, not all rights should be subject to the same general limitations clause. For instance, under international human rights law, freedom from torture is an absolute right which cannot be limited in any circumstances, even in a public emergency or for counter-terrorism purposes. It is very unfortunate that the Victorian Charter permits freedom from torture to be limited in the same way as other rights. Not only is this unprecedented, it is contrary to Australia’s international human rights obligations and finds no support in public policy considerations. There are very strong legal, ethical and political reasons for absolutely prohibiting torture.²¹⁸

A number of submissions made suggestions as to which rights should be regarded as absolute and, therefore, not subject to the general limitations clause within the draft Bill. Some people suggested that the draft Bill follow the terms of the ICCPR and the ICESCR (to the extent that ESC rights were incorporated into the Bill) in terms of what rights should be regarded as absolute.²¹⁹ Sussex Street Community Law Service recommended that those rights set out in Division 2 of Part 2 of the draft Bill be regarded as absolute and treated separately from the other rights set out in Part 2.²²⁰ In this regard, the Service commented that:

²¹⁶ Submission 153: L J Goody Bioethics Centre.

²¹⁷ Submission 311.

²¹⁸ Submission 2.

²¹⁹ Submission 311: Amnesty International Australia.

²²⁰ Submission 192.

There are very few circumstances in which it is arguable that the right to life should be lawfully taken away. One example may be in times of war and emergency, when Governments can lawfully deprive humans of life, another contentious example may be euthanasia or abortion. Arguably there is no other circumstance in which it is lawful to arbitrarily deprive a person of life. This is in contrast to the right to freedom of expression which is regularly limited by our lawmakers for the purpose of protecting the common good; eg, censorship laws or regulations regarding noise levels.²²¹

One submission to the Committee suggested that only the right to vote be regarded as absolute,²²² while other submissions recommended more extensive lists of rights. For example, the HRLRC stated that, in addition to those rights set out in Division 2 of Part 2 of the draft Bill, other rights in the Bill which ought to be considered absolute included:

- the right not to be imprisoned for a contractual debt;
- freedom from retrospective criminal punishment;
- the right to recognition as a person before the law;
- freedom of thought, conscience and religion; and
- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.²²³

The Committee discussed the issue of a permissible limitations clause with the Victorian Solicitor General, Ms Pamela Tate QC, in the course of our Victorian consultations. Ms Tate advised us that the decision to include a general permissible limitations provision, which was applicable to all of the human rights in the Victorian Charter, reflected the more modern practice to have an umbrella qualification which indicates that all rights may be subject to limitations. However, Ms Tate acknowledged that the decision to permit (at least in theory) limitations on all of the rights in the Victorian Charter, including those rights traditionally regarded as absolute rights, had been a controversial one. At the same time, however, Ms Tate noted that the “absolute” status of particular rights at international law was required to be considered as part of the permissible limitations test in section 7(2) of the Victorian Charter, by virtue of the consideration of “the nature of the right” which that subsection requires.²²⁴

The application of the permissible limitations test to all of the human rights in a WA Human Rights Act is consistent with the underlying theme of parliamentary sovereignty which is evident in the provisions of the draft Bill, and which we endorse. We also note that admitting the possibility that limitations may be placed on human rights which are traditionally regarded as absolute is unlikely to result in frequent incursions on such rights. In our view, the political reality is likely to be that the Government and the Parliament will be reluctant to be seen to impose limitations on human rights without a sound justification for doing so. That having been said, there may be some cases in which a permissible limitation may be imposed on a human right which is ordinarily regarded as absolute. We note that even the right to life – which is traditionally regarded as an absolute right – may be seen as subject to limitations under the law in Western Australian law, for example in so far as complete defences exist to the offences of wilful murder and murder under the *Criminal Code*.

²²¹ Submission 192.

²²² Submission 213: Matthew Keogh.

²²³ Submission 72. The National Children’s and Youth Law Centre (submission 199) supported the general intent of the submission of the Human Rights Law Resource Centre.

²²⁴ Meeting with Ms Tate QC, Solicitor General for Victoria, on 23 August 2007.

We agree with the view expressed by Ms Tate QC that the requirement in the permissible limitations test to consider the nature of the right which is subject to a limitation will encompass consideration of the fact that some rights are regarded as absolute and inviolable. In order to justify imposing a limitation on a human right of a kind ordinarily regarded as absolute, we would expect that the purpose of the limitation would need to be of the highest importance, and the least restrictive means to achieve that purpose would need to be used, before the limitation would be regarded as a permissible limitation.

For these reasons, we have reached the view that the permissible limitations test should apply to all of the human rights in a WA Human Rights Act.

4.6.4 Specific and general limitations?

Another issue of concern to a number of people writing submissions was whether there was a need for some of the individual rights in the draft Bill to be subject to specific limitations as well the general limitations clause in clause 34(4). For example, in his submission to the Committee, George Sulc observed that the “rights in the draft contain too many conditions and explanations. For a bill of rights to have any meaning to the majority of citizens of Australia the rights must be simply worded ... with few, if any, qualifications.”²²⁵

THE DRAFT BILL ALSO ADDS SOME EXPRESS LIMITATIONS TO SPECIFIC HUMAN RIGHTS WHICH ARE NOT SUBJECT TO EXCEPTIONS IN THE ICCPR.

A number of the ICCPR rights which have been incorporated into the draft Bill have specific limitations built into them. While a number of these specific limitations have not been reflected in the draft Bill (for example, article 18(3) of the ICCPR), others have been incorporated. For example, the right to privacy in article 17 of the ICCPR (clause 11(a) of the draft Bill) is expressed as a right not to have privacy “unlawfully or arbitrarily” interfered with.

In a couple of instances, specific limitations applying to ICCPR rights have not simply been “translated” into the draft Bill – they have been modified, apparently so as to take account of Western Australian conditions.

For example, article 10(2) of the ICCPR provides that “[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons...”, while clause 22(3) of the draft Bill provides for segregation “except where it is not reasonably practicable to do so”.

The draft Bill also adds some express limitations to specific human rights which are not subject to exceptions in the ICCPR. For example, the right of a criminal accused to be present at his or her trial is qualified in the draft Bill by the words “unless the law permits him or her to be excluded”, which are not found in the ICCPR.

The Committee received a number of detailed submissions on the related issues of whether a WA Human Rights Act should modify the language of the ICCPR and whether it should include specific limitations in addition to a general limitations provision.²²⁶

We are somewhat concerned that the inclusion of specific modifications or additional limitations may “water down” the human rights in a WA Human Rights Act. However, we have decided not to recommend that they be removed for two reasons. First, the position, with which we agree, is that parliamentary sovereignty is maintained in respect of the human rights in the draft Bill. The Parliament must remain free to legislate to modify or limit the human rights in the Bill and to justify why it considers

²²⁵ Submission 131.

²²⁶ For example, submission 314: Ministerial Advisory Council on Disability; submission 311: Amnesty International Australia; submission 299: ALHR; submission 245: Community Vision Inc; submission 4: Dr Jeremy Gans; submission 354: IHRL Working Group.



those modifications or limitations to be appropriate. The inclusion of specific modifications or limitations within individual human rights in the draft Bill makes it clear from the outset that, in enacting the draft Bill, the Parliament considers that the content of those human rights should be defined in a particular way. There is much to be said for that openness of approach, irrespective of the merits of the particular limitations or modifications of the right in question.

Secondly, the inclusion of specific modifications or limitations of individual human rights appears to have been designed to accommodate existing Western Australian laws or local conditions. The modifications or limitations which have been included in individual rights are modifications of substance. They include, for example, the entitlement of a person charged with an offence to a lawyer being restricted to whatever eligibility the person has under the *Legal Aid Commission Act 1976*.

Another example is that a person who is detained, but not serving a sentence of imprisonment, must be segregated from convicted persons except where it is “not reasonably practical to do so”. In the Committee’s understanding this reflects the lack of facilities to enable the segregation of convicted and non-convicted persons in some parts of this State. On balance and bearing in mind the need to allay concerns that a WA Human Rights Act would have an unreasonable immediate impact on the operations of government, we do not recommend any changes to these provisions in the draft Bill.

We do recommend, however, that future reviews of a WA Human Rights Act should specifically consider whether internal limitations on the human rights in that Act can or should be removed.

4.7 Who should enjoy human rights?

As set out in its *Statement of Intent*, the Government’s preferred position is that “the human rights set out in a WA Human Rights Act only apply to individual members of the community and not to corporations. Again, this is the approach which has been adopted in Victoria and the ACT.”

Consistent with this preferred position, clause 5 of the draft Bill provides that only “natural persons” have human rights. Relatively speaking, the issue of who should enjoy human rights was not often canvassed during the Committee’s public forums, and only 49 submissions dealt with the question. Of those, 67% indicated that individuals should have human rights, and that corporations and/or other bodies should not.



In his submission to the Committee, Peter Lochore stated that he opposed “the provision of rights to corporations, principally on the basis of the Canadian experience cited in the discussion paper, but also on the basis that no good reason has been given for the extension of rights to bodies corporate.”²²⁷

ALHR suggested that extending human rights protections to corporations “risks diluting the focus of the government, courts and the community on the need to protect the rights of individual human beings.”²²⁸ Furthermore, the IHRL Working Group argued:

Logically, human rights exist to protect what is fundamentally human – innate characteristics such as dignity, morality and autonomy. While corporations may legitimately pursue interests that *resemble* human rights, those interests are in fact qualitatively different from human rights. For instance, we submit that it is wrong to equate the legitimate interest of a corporation to protect its sensitive commercial information, such as trade secrets, with a human right to privacy.²²⁹

Only three submissions suggested that corporations or other bodies should enjoy human rights and in this regard only one of them provided reasons. Greg McIntyre QC, Dr Johannes Schoombe, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey noted that:

...human rights may be infringed by actions directed at incorporated associations which individuals may join. Fundamental freedoms or minority rights may be curtailed through actions aimed at such associations. The concern about rights such as the right to freedom of speech being used by corporations such as tobacco corporations to argue for freedom to advertise are balanced by the limitation in the HRB [Human Rights Bill], such as the limitation in HRB cl 13(3)(b).²³⁰

In terms of the application of a WA Human Rights Act to individuals, a number of people were concerned to ensure that the Act would apply to everyone in Western Australia regardless of their status as a citizen or permanent resident. Amnesty International Australia stated that it “would be concerned about any definition of ‘Western Australian’ that could have the effect of excluding certain individuals from protections of the Bill, such as holders of Temporary Protection Visas.”²³¹

In the case of a small number of participants in the public forums and contributors of submissions there were strong expressions of views that some elements of the community did not warrant equal consideration and that human rights should be the preserve of those regarded as worthy.²³² This was a reminder that support for human rights is easily afforded to those with whom we identify but can become contentious when it involves the “other”.

The draft Bill does not limit the enjoyment of human rights to citizens, or to Western Australian residents. Instead, it is clear from clause 5 of the draft Bill that the human rights recognised in the draft Bill are intended to be enjoyed by all persons. We endorse that view. We also note that any future limitations on the enjoyment of particular human rights, based on criteria such as citizenship or residency, would need to be justified by reference to the permissible limitations test.

²²⁷ Submission 32.

²²⁸ Submission 299.

²²⁹ Submission 354.

²³⁰ Submission 358.

²³¹ Submission 311.

²³² For example, submission 7: Brian Hills; submission 33: Janet Maguire.



Although there was broad support among those dealing with the issue for human rights to be limited to individuals, a number of people making submissions and several attendees at the public forums expressed concern or confusion over the use of the “natural person” in clause 5 of the draft Bill. For example, Jamie Dimmack noted the expression “natural person” and asked “[w]hat do you mean by natural, does it mean naturally born, that gay people aren’t natural, that caesarean born children aren’t born natural. What do you mean?”²³³

The reference in clause 5 of the draft Bill to “natural persons” appears to have been used in preference to the term “person” because in the absence of a specific definition of “person” in the draft Bill, the definition of “person” in the *Interpretation Act 1984* would have applied. That definition provides that the term “person” includes public bodies, companies, and associations or bodies of persons whether or not incorporated. As the Government’s preferred position was that only human beings should enjoy human rights, use of the term “person” with its broader meaning would have been inappropriate.

Given the confusion which appears to have arisen from the use of the term “natural person” and in order to promote clarity about the meaning of a WA Human Rights Act, we recommend that clause 5 of the draft Bill be amended to provide that only “human beings” have human rights.

4.8 Effect on rights not included in the Act

One reason given by several people who objected to a WA Human Rights Act was a concern that the recognition of human rights in a WA Human Rights Act would undermine any rights which are otherwise enjoyed in Western Australia, but which are not specified in a WA Human Rights Act.

This concern does not take into account the effect of clause 6 of the draft Bill. That clause makes it clear that any entitlement, right or freedom that arises or is recognised under international law, the common law, the *Commonwealth Constitution*, or any Commonwealth or Western Australian statute, but which is not also included (or is not fully included) in the list of human rights in Part 2 of the WA Human Rights Act, is not abrogated or limited only by virtue of the fact that it is not included in the list of human rights set out in the WA Human Rights Act.

We endorse the inclusion in a WA Human Rights Act of a provision in the terms of clause 6 of the draft Bill, so as to foreclose any argument that the enactment of a WA Human Rights Act would impact adversely on the enjoyment of rights not set out in the WA Human Rights Act.

²³³ Submission 248: Jamie Dimmack.

4.9 Responsibilities as well as rights?

Where there are rights there are always responsibilities.

Participant in Mandurah public forum

As discussed in Chapter 3, there was some discussion of the interrelationship between rights and responsibilities at most of the public forums, and this notion also filtered through the written submissions. A number of submissions suggested that instead of introducing a WA Human Rights Act, Western Australia should focus more on people's responsibilities. Other people, however, argued that a WA Human Rights Act could include responsibilities as well as rights. In her submission to the Committee, Carol Adams said:

Any Human Rights Bill should enumerate individual responsibilities with their rights and should, in fact, be called a Human Rights and Responsibilities Bill. Society is not something separate from the individual. It is made up of other human beings who collectively and individually have rights too. The individual does not have the right to enjoy his (or her) rights at the expense of his fellow man or the greater community of which they are a part. ...Please let's give equal weight to our responsibilities.²³⁴

A participant in one of our Busselton public forums stated that:

...vulnerable people need other people to be responsible for them. We need to balance rights with responsibilities. Eg, children and the elderly. Rather than just have a statement of their rights, there needs to be recognition of the responsibility that the community has for these people.

Another Busselton forum participant argued that it would not be "it would be any more difficult to prescribe responsibilities than rights. They are both complex areas with lots of ins and outs."

Two submissions received by the Committee, however, expressly argued against the inclusion of responsibilities in any WA Human Rights Act. One of those was from Dr Ben Saul who observed:

It is unnecessary to 'balance' a Western Australian Human Rights Act with a 'Charter of Responsibilities'. Human rights law already implies correlative duties or obligations owed towards other individuals and to the community ... The concept and practice of 'human responsibilities' has proven open to abuse and manipulation, and is frequently deployed to unjustifiably repress legitimate rights claims. Human 'duties' or 'responsibilities' are already well integrated into codes of public morality. Legal codification of 'responsibilities' would unnecessarily interfere in, stagnate or ossify concepts which are better left to be regulated by social morality and public ethics.²³⁵

In addition to those arguing for and against the substantive inclusion of responsibilities within the body of a WA Human Rights Act, there were a few submissions, such as that of the Office of the Public Advocate, which recognised the "inextricable link" between rights and responsibilities but recommended as follows:

The Victorian Government recognised this interrelated nature of human rights and responsibilities and chose to reflect it – albeit symbolically – in the title of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The Public Advocate recommends that approach be followed.²³⁶

²³⁴ Submission 355. Ms Adams also had a similar letter to the editor published in *The West Australian*, 30 August 2007, 22.

²³⁵ Submission 2.

²³⁶ Submission 86.

We have discussed the issue of responsibilities, and the inextricable link between rights and responsibilities, in Chapter 3 of this Report. Rather than set out a list of individual responsibilities in the draft Bill, we would prefer to see the concept of responsibilities incorporated into the Preamble of a WA Human Rights Act. We discuss this further in Chapter 5 of this Report.

4.10 Miscellaneous proposed amendments to Part 2 of the draft Bill

During our consultations we received a number of additional suggestions for amendments to Parts 1 and 2 of the draft Bill, which we considered should be adopted. However, the nature of those proposed amendments was such that they did not warrant detailed discussion in the body of this Report. The merit of some of the amendments is such that no explanation is required as to why we support them. In other cases, a brief explanation is all that is required to indicate why we consider the amendment to be desirable. The additional amendments to Part 2 of the draft Bill, which we recommend be included in a WA Human Rights Act, are set out below.

- It was submitted by a number of people that clause 8(c) of the draft Bill should be amended so that it refers to medical and scientific “treatment” as well as “experimentation”. We agree. The ACT Act and the Victorian Charter both refer to medical or scientific experimentation or treatment.²³⁷ However, some Western Australian legislation permits a person who is unable to give consent to be given urgent medical treatment by a doctor, or permits consent to be given by a person other than the patient if the patient is unable to give consent.²³⁸ In order to avoid arguments about whether this legislation, which is in the public interest, constitutes a permissible limitation on the right in clause 8(c), the words “unless this is otherwise authorised by law” should be included in clause 8(c).
- It was submitted that the clauses in the draft Bill setting out human rights should be amended to ensure that whenever the term “his or her” is used, language that recognises intersex persons (persons born biologically neither male nor female or persons who choose to identify as neither male nor female) is inserted instead (eg “the individual” or “the person” or “the child” or “their”, depending on the context).²³⁹ We agree. The difficulties facing intersex persons were raised with us during our consultations. It is appropriate that a WA Human Rights Act use gender neutral language in the expression of human rights.
- It was drawn to our attention that clause 18(a) appears to contain a typographical error in that it refers to “freely chosen elections”. The word “representatives” should be substituted for the word “elections”.²⁴⁰ We note that the ACT Act and the Victorian Charter each refer to “freely chosen representatives”.²⁴¹
- It was submitted that clause 20(1) of the draft Bill should be amended to insert the words “practise and” before the words “enjoy his or her culture”.²⁴² The inclusion of these words would avoid any argument that the right referred to does not involve actively participating in one’s culture.
- It was submitted that the right in clause 24(1) of the draft Bill should be amended so that it refers to a right on behalf of persons accused of criminal charges to be presumed innocent until proven guilty *beyond reasonable doubt* as opposed to proven guilty *according to law*.²⁴³ It is a fundamental

²³⁷ Subsection 10(2) of the ACT Act and section 10(c) of the Victorian Charter.

²³⁸ For example, section 119 of the *Guardianship and Administration Act 1990*.

²³⁹ Submission 270: Gay and Lesbian Equality (WA) Inc.

²⁴⁰ Submission 4: Dr Jeremy Gans.

²⁴¹ Subsection 17(1) of the ACT Act and section 18(1) of the Victorian Charter.

²⁴² Submission 176: Department for Child Protection.

²⁴³ Submission 4: Dr Jeremy Gans.

principle of our criminal justice system that the standard of proof in a criminal prosecution is proof of guilt beyond a reasonable doubt. In our view this should be reflected expressly in clause 24(1).

- Legal Aid Western Australia Inc submitted that clause 24(2)(b) should be amended to provide “communicate with his or her lawyer or advisor” instead of “with a lawyer or advisor chosen by him or her”. This would reflect the fact that, under legal aid arrangements, attempts are made to provide accused persons with the lawyer of their choice, but this is not always possible. Section 38 of the Legal Aid Commission Act 1976 (WA) provides that Legal Aid has authority to determine who will be appointed as the lawyer for a Legal Aid client.²⁴⁴ We support the proposed amendment.
- It was submitted that the rights in clauses 24(2)(i) and 24(2)(j) should not only apply to witnesses, but should also apply to “documents or other evidence”.²⁴⁵ We understand that the intention behind these clauses (and behind article 14(3)(e) of the ICCPR) is to ensure that an accused person has the opportunity, on the same terms as the prosecution, to present evidence to the court in support of his or her case. That requires that the accused person be able to secure the attendance of witnesses. No less important is the ability of an accused person to secure the production of documents which would assist his or her defence. We agree that clause 24(2)(j) of the draft Bill should be amended to indicate that a person charged with an offence is entitled to obtain the production of documents or other evidence, as well as to obtain the attendance and examination of witnesses, under the same conditions as the prosecution.
- Legal Aid Western Australia Inc submitted that clause 24(2)(h) of the draft Bill needs to be amended to delete the words “without payment by him or her” as under the *Legal Aid Commission Act 1976* Legal Aid is permitted to seek contributions to the cost of legal services provided.²⁴⁶ We support the proposed amendment.
- It was submitted that an additional right be added to the rights in clause 25 of the draft Bill, to provide that a child who is arrested for, or charged with, an offence has the right to have a parent or guardian informed of, and involved in, the criminal process.²⁴⁷ In our view, this amendment would be entirely consistent with the tenor of clause 25(1) of the draft Bill, and would ensure that a child had the assistance of a parent or guardian from the outset in a criminal proceeding. However, in our view, the additional right should provide that a parent or guardian should be promptly informed that the child has been arrested for or charged with an offence, and that the parent or guardian should be informed promptly and in detail, in a manner that he or she understands, of the nature and reason for the charge against the child. In this respect, the right would reflect, and supplement, the child’s existing right under clause 24(2)(a) of the draft Bill.

²⁴⁴ Submission 223.

²⁴⁵ Submission 4: Dr Jeremy Gans; submission 299: ALHR.

²⁴⁶ Submission 223.

²⁴⁷ Submission 226: Gail Gifford.

RECOMMENDATIONS

- A WA Human Rights Act should recognise and protect the following economic, social and cultural rights, in addition to those economic, social and cultural rights already included in the draft Bill:
 - (a) The right of everyone to the highest attainable standard of physical and mental health.
 - (b) The right to an education.
 - (c) The right to have access to adequate housing.
 - (d) The right to take part in cultural life.
 - (e) The right not to be deprived of property other than in accordance with the law and on “just terms” (as that phrase is understood in section 51(xxxi) of the *Commonwealth Constitution*).
(*Recommendation 7*)
- Economic, social and cultural rights should be implemented in a WA Human Rights Act in the following way:
 - (a) Economic, social and cultural rights should be treated in the same way as civil and political rights in a WA Human Rights Act;
 - (b) In the alternative:
 - (i) economic, social and cultural rights should be treated in the same way as civil and political rights, except in relation to the remedies available for a breach of those rights (set out in Part 6 of the draft Bill). A breach of an economic, social or cultural right should not be able to be the subject of a remedy in the courts. However, complaints about a breach of these rights should be addressed through the internal complaint process of a government agency or contractor, or by conciliation.
 - (ii) a WA Human Rights Act should expressly include a statement to the effect that economic, social and cultural rights are to be progressively implemented. This should be assessed by reference to all relevant circumstances of the particular case, including the nature of the benefit or detriment likely to accrue or be suffered by any person concerned, and the financial circumstances and the estimated amount of expenditure required to be made by a government agency to act in a manner compatible with the economic, social or cultural right in question
(*Rec 7*)
- Clause 7 of the draft Bill should be amended to remove the words “after he or she is born” so that it could not be said that the Human Rights Act gives any “signal” as to how issues such as abortion should be dealt with in the context of the right to life. (*Rec 11*)
- A WA Human Rights Act should expressly recognise that it is not applicable to existing laws in relation to abortion. (*Rec 12*)
- The definition of “discrimination” in clause 4(1) of the draft Bill should be deleted, but clause 4(2) of the draft Bill should remain in place. (*Rec 9*)
- Clause 20(2) of the draft Bill should be amended to reflect the first sentence of article 31(1) of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*. Accordingly, clause 20(2) of the draft Bill should provide:

Aboriginal peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

(Rec 17)

- Clause 20(2) should also make specific reference to Torres Strait Islander people. That is, it should read “Aboriginal and Torres Strait Islander people have the right to maintain, control, protect and develop their cultural heritage...”. *(Rec 18)*
- Clause 20(2) of the draft Bill (as amended) should be moved into a new clause headed “Indigenous rights”. *(Rec 19)*
- The new clause headed “Indigenous rights” should be amended to include an express right for Indigenous Western Australians to work in partnership with the Government in setting priorities for, and in the development, implementation and review of, policies, programs and services as they impact on Indigenous people. *(Rec 20)*
- Clause 23 of the draft Bill should be amended to include a right for every person not to be compelled to provide incriminating evidence against themselves, except in accordance with law. This right should also provide that if a person is compelled to provide incriminating evidence against themselves, such evidence cannot be subsequently used against them in criminal or civil proceedings. *(Rec 21)*
- Clause 23 of the draft Bill should be amended to include an additional right for all people involved in legal proceedings (and not just defendants) to be treated with dignity and respect. *(Rec 22)*
- A WA Human Rights Act should include a provision which makes it clear that human rights may be subject to some limitations (the permissible limitations clause). The permissible limitations clause should incorporate the factors set out in clause 34(4) of the draft Bill. *(Rec 28)*
- The permissible limitations clause should apply to all of the human rights in a WA Human Rights Act. *(Rec 29)*
- The permissible limitations clause should be taken out of clause 34 of the draft Bill and relocated into that Part of a WA Human Rights Act which sets out the human rights recognised by the Act (Part 2 of the draft Bill). *(Rec 30)*
- If the permissible limitations clause is relocated, there should be retained within that Part of a WA Human Rights Act which deals with the interpretation of written laws (Part 5 of the draft Bill) a provision which makes clear that a law will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. *(Rec 31)*
- There should be included in that Part of a WA Human Rights Act which deals with the duties of government agencies (Part 6 of the draft Bill) a provision which makes clear that an act or decision of a government agency will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. This provision should be included within clause 40(3) of the draft Bill. *(Rec 32)*

- There should be included in that Part of a WA Human Rights Act which deals with the compatibility of written laws with human rights (Part 4 of the draft Bill) a provision which makes clear that a Bill for an Act will not be incompatible with a human right if it meets the criteria in the permissible limitations clause. *(Rec 33)*
- Clause 31 of the draft Bill should be amended to require that if a Bill for an Act imposes a limitation on a human right, but is nevertheless considered to be compatible with human rights, the statement of compatibility should expressly state that the Bill is considered to meet the criteria in the permissible limitations clause. *(Rec 34)*
- Clause 5 of the draft Bill should be amended to provide that only “human beings” have human rights. *(Rec 10)*
- Clause 8(c) of the draft Bill should be amended so that it refers to medical and scientific “treatment” as well as “experimentation” and the words “unless this is otherwise authorised by law” should be included in clause 8(c). *(Rec 13)*
- The clauses in the draft Bill which set out human rights should be amended to use gender neutral language which recognises intersex persons (persons born biologically neither male nor female or persons who choose to identify as neither male nor female) is inserted instead (eg “the individual” or “the person” or “the child” or “their”, rather than “him or her”). *(Rec 14)*
- Clause 18(a) of the draft Bill should be amended to substitute the word “representatives” for the word “elections”. *(Rec 15)*
- Clause 20(1) of the draft Bill should be amended to insert the words “practise and” before the words “enjoy his or her culture”. *(Rec 16)*
- Clause 24(1) of the draft Bill should be amended so that it refers to a right of a person charged with an offence to be presumed innocent until proven guilty beyond reasonable doubt as opposed to proven guilty *according to law*. *(Rec 23)*
- Clause 24(2)(b) of the draft Bill should be amended to provide “communicate with his or her lawyer or advisor” instead of “with a lawyer or advisor chosen by him or her”. *(Rec 24)*
- Clause 24(2)(j) of the draft Bill should be amended to indicate that a person charged with an offence is entitled to obtain the production of documents or other evidence, as well as to obtain the attendance and examination of witnesses, under the same conditions as the prosecution. *(Rec 25)*
- Clause 24(2)(h) of the draft Bill should be amended to delete the words “without payment by him or her”. *(Rec 26)*
- Clause 25 of the draft Bill should be amended to provide that in the case of a child who is arrested for, or charged with, an offence, the child’s parent or guardian should be promptly informed that the child has been arrested for, or charged with, an offence, and the parent or guardian should be informed promptly and in detail, in a manner that he or she understands, of the nature and reason for the charge against the child. *(Rec 27)*

- If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):
 - (a) Whether economic, social or cultural rights, or additional economic, social or cultural rights, should be included in the Act.
 - (b) Whether a right to self-determination for Indigenous people should be included in the Act.
 - (c) Whether a right to cultural security for Indigenous people should be included in the Act.
 - (d) Whether a right for Indigenous people to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs should be included in the Act.
 - (e) Whether a freedom to establish, maintain, protect and access places of worship and religious or spiritual significance and a freedom from desecration or damage to such places should be included in the Act.
 - (f) Whether specific rights for children and people with disabilities should be included in the Act.
 - (g) Whether rights to environmental protection should be included in the Act.
 - (h) Whether internal limitations on human rights in the Act can or should be removed.
- (Recs 89, 90)*



CHAPTER 5: WHAT FORM SHOULD A WA HUMAN RIGHTS ACT TAKE?

5.1 The Government's position

The Government's preferred position, as set out in its *Statement of Intent* and reflected in the draft Bill is that:

a WA Human Rights Act should take the form of an ordinary Act of Parliament rather than a constitutionally entrenched bill of rights such as the one in the US. This would preserve parliamentary sovereignty, which is a key feature of the Westminster system of government in Western Australia. The human rights laws in the UK, New Zealand, Victoria and the ACT all take the form of an ordinary Act of Parliament. Despite the fundamental importance of human rights, there may be situations in which Parliament believes it is necessary or appropriate in the public interest to make laws which restrict the human rights recognised in a WA Human Rights Act or to make changes directly to the Act itself. It is up to democratically elected politicians, rather than the courts, to make these decisions. Ultimately, the Government will be accountable to the public through the ballot box for any restrictions or changes it introduces.

5.2 An ordinary Act of Parliament or an entrenched model?

During the course of our community consultations, the Committee was presented with a range of views regarding the issue of what form a WA Human Rights Act should take.

The majority of people attending our public forums were generally in favour of a WA Human Rights Act taking the form of an ordinary Act of Parliament. Of those written submissions addressing the issue, more people were in favour of an ordinary Act than any other form. Some people, however, were strongly of the view that any statement of human rights should be constitutionally entrenched. Others suggested that, rather than be included in Western Australia's "Constitution", a WA Human Rights Act should take the form of a separate Act with special procedures for amendment making it harder to change than an ordinary law (such as a requirement for a two thirds majority vote in each House of Parliament).

Several people indicated that a WA Human Rights Act should be “flexible” without being any more particular as to form. In his submission to the Committee, Geoff Bridger stated that the Bill should be “able to adapt to changing circumstances and situations as they arise. ... Human rights are an evolving area and will always be that way.”¹ While some people supported flexibility in a general sense, others suggested that the Act should be easy to change to increase the protection of human rights, but difficult for Parliament to change in order to abrogate rights. For example, the Western Australian Aboriginal Education and Training Council stated:

Human rights are not fashion accessories. If there were changed circumstances the Human Rights Act debated here must be developed with a clear and appropriately worded scope that protects it from downgrading or erosive change but that will allow relevant additions to be inserted.²

Within the range of views outlined above there were also permeations. Some people believed that constitutional protection of rights was “the only way”. The Geraldton Resource Centre Inc stated:

We believe that having a Human Rights Act that is no harder to change than an ordinary law and doesn't bind Parliament is worse than having no Human Rights Act, as it gives the community a false sense of security and is doing nothing more than offering 'lip service' to the concept of human rights.³

Other people who supported constitutionally entrenched human rights, however, were prepared to accept an ordinary Act of Parliament as “better than nothing” or as an important step in a “graduated approach” to the protection of human rights. For example, Australian Lawyers for Human Rights (ALHR) noted that, while there was significant support for constitutional entrenchment within their membership:

Many people do not properly understand the nature of human rights and how a democracy may properly operate within a human rights framework. That causes those people to, understandably, be cautious and in some circumstances to oppose even legislative protection of human rights. It is for this reason that ALHR recognises that at this stage human rights are best protected by a legislative instrument rather than constitutional entrenchment.⁴

Indeed, a number of people who supported a WA Human Rights Act in the form of an ordinary Act suggested that consideration should be given to constitutionally entrenching it later on.⁵ In this regard, the Community and Public Sector Union/Civil Service Association stated:

We encourage the Committee to review the Canadian experience. We are advised that Canada originally enacted human rights legislation through an ordinary Act of Parliament. After a period of twenty (20) years it enshrined the rights within a constitutionally entrenched charter. If this has occurred without undermining the sovereignty of Parliament it may be an option worth further consideration. The model could promote human rights to the higher level of permanency/security.⁶

Some of those in favour of entrenching human rights in Western Australia's *Constitution Act 1889* considered that this would “send a very important message about the fundamental importance of

¹ Submission 38.

² Submission 224.

³ Submission 281.

⁴ Submission 299.

⁵ For example, submission 302: Rajiv Singh; submission 136: Ray Redner; submission 312: Aboriginal Legal Service of Western Australia Inc.

⁶ Submission 282.



human rights to the community”⁷ and would reflect the fact that “human rights are distinct from other rights such as those recognised in statute.”⁸ Others considered that constitutional entrenchment was necessary to ensure that human rights could not easily be changed or whittled away by Parliament. For example, Ray Redner noted that:

...if Western Australia’s future human right law is to be enacted purely as a piece of legislation then it can be influenced and modified as Parliament wishes. This also includes the removal of previously enshrined rights from the Act. The removal of human rights has been the modus operandi of tyrannical nations, whilst this is not currently the position in Western Australia, the future is not so stable, nor is it predictable.⁹

A participant in one of our Geraldton public forums further observed:

What is the point if Parliament can still do what it wants at the end of the day? I think arguments based on political pressure are just lip-service. If Parliament ignores human rights, it is three years until the next election. We can’t really do anything about it ... The Bill does not protect human rights. It raises awareness, but it doesn’t actually do anything ... I would like to see a constitutional bill of rights. I think this is the only way.

On the other hand, many of those people in favour of an ordinary Act of Parliament noted that the “problem with taking the constitutional route is that it does not provide a flexible approach to enshrining the State’s human rights laws”.¹⁰ They argued that an ordinary Act of Parliament does, however, retain flexibility and has the advantage of:

- creating a dialogue between the courts, the Government and the Parliament about human rights protection;
- fostering a culture of human rights in the law and policy making process in the broader community;
- creating a greater level of public transparency and debate about the role of Parliament in protecting rights; and
- preserving parliamentary sovereignty by making sure that Parliament has the “last say” about whether legislation represents a permissible limitation on human rights.¹¹

Indeed, the need to preserve the sovereignty of Parliament and avoid the perceived pitfalls of the Bill of Rights in the *Constitution of the United States of America* was a strong theme throughout the Committee’s public consultations.

Many of the submissions which suggested that human rights should be enacted in an Act which was subject to special requirements for amendment argued that this would ensure that “the integrity of human rights will be raised above ordinary legislation, while preserving the right of future Parliaments to make legislative change.”¹²

The question whether a WA Human Rights Act should be enacted as an ordinary Act of Parliament or should be legislatively entrenched so as to make its amendment or repeal more difficult, involves two issues. First, whether it is legally possible to do so and, secondly, whether it is desirable to do so.

⁷ Submission 302: Rajiv Singh. Also, submission 223: Legal Aid Western Australia Inc.

⁸ Submission 299: ALHR.

⁹ Submission 136.

¹⁰ Submission 136: Ray Redner.

¹¹ For example, submission 309: Commonwealth Human Rights and Equal Opportunity Commission.

¹² Submission 21: Democratic Audit of Australia.

It is far from clear whether it would be legally possible for the Western Australian Parliament to entrench human rights legislation by enacting what is known as a “manner and form” provision. A manner and form provision requires special procedures to be complied with for the repeal or amendment of legislation.

This is a matter of some complexity. The Committee’s understanding is as follows:

- The Parliament of Western Australia has full power to make laws for the peace, order and good government of the State.¹³ That power includes the power to repeal or amend any legislation enacted by a previous Western Australian Parliament. This reflects the fundamental principle of Westminster government that one Parliament cannot bind its successors.
- Sometimes the Parliament will enact a law which provides that any amendment or repeal of the law must comply with a legislative procedure different from that ordinarily complied with by the Parliament when enacting legislation. For example, the law may require that any amending or repealing Act be passed by a special majority of the Houses of Parliament, or be confirmed at a referendum. The power to use such manner and form provisions now derives from section 6 of the *Australia Act 1986* (Cth). This section is in fairly narrow terms. It provides that a law respecting the “constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament”. While there have been cases in other jurisdictions¹⁴ which suggest that compliance with manner and form provisions may be required in other circumstances, that question has not been resolved by the High Court.¹⁵
- If a WA Human Rights Act included a provision requiring a special legislative procedure for its amendment or repeal, an Act which sought to amend or repeal the WA Human Rights Act in the future would only need to comply with that manner and form requirement if that later Act could be said to be a law respecting the “constitution, powers or procedure of the Parliament of the State”. A law which amended or repealed a WA Human Rights Act might not necessarily meet that description.¹⁶

Some of the submissions suggested that human rights should be included in the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899* (the Western Australian Constitution). This suggestion may have arisen from a misconception that an amendment or repeal of the Western Australian Constitution would require compliance with a manner and form provision, making that amendment or repeal more difficult. However, unlike the Commonwealth Constitution, the Western Australian Constitution may, generally speaking,¹⁷ be amended or repealed without compliance with any special legislative procedures.

It is unnecessary for present purposes to resolve the question of whether attempting to entrench a WA Human Rights Act by including in it a manner and form provision would be legally effective. In any event, this Committee could only offer an opinion which would not settle the matter. It suffices to say that there appears to be real doubt about whether a WA Human Rights Act could be effectively entrenched in this way.

¹³ Subsection 2(1) of the *Constitution Act 1889*.

¹⁴ Notably *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197 (Privy Council).

¹⁵ *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, 251 [80].

¹⁶ See A. Twomey, *The Constitution of New South Wales*, 2004, Chapter 5 for a discussion of manner and form provisions.

¹⁷ Section 73 of the *Constitution Act 1889* requires compliance with special legislative procedures in certain circumstances, none of which appear likely to be of any relevance.

The legal uncertainty as to whether it would be possible to do anything other than include human rights in an ordinary Act of Parliament was adverted to in the discussion paper published by the Committee prior to the commencement of its consultation. Our decision to consult with the public about what form a WA Human Rights Act should take, despite this uncertainty, was the subject of some criticism:

...the Discussion Paper states (p20-21) that there are legal questions/uncertainties about whether it is possible to have a constitutionally entrenched bill of rights in WA. These legal uncertainties are not further elaborated on in the discussion paper.

Unless the Government can examine and answer these ‘questions’ and ‘uncertainties’, Question 3 [what form should a WA Human Rights Act take?] would appear to be unanswerable in any valid way. There is clearly a ‘non-choice’ being offered to West Australians. The issues over a constitutionally entrenched bill of rights should be opened to examination and possible resolution before the Government proceeds as the form of this Act is a crucial factor with long term implications.¹⁸

Notwithstanding the legal uncertainty over whether it would be possible to entrench a WA Human Rights Act, we considered that it was appropriate to consult the community about the form that a WA Human Rights Act should take. The Government’s preference for using an ordinary Act of Parliament was, according to its *Statement of Intent*, based on the view that it was necessary to preserve parliamentary sovereignty and to ensure that the Parliament could amend a WA Human Rights Act if it considered it necessary to do so. We considered that it was important to ascertain whether the community agreed with this view.

Turning to that question, the submissions which suggested that a WA Human Rights Act should be entrenched appeared to rely upon two primary arguments. First, that entrenchment of the Act was necessary to signal the fundamental importance of the human rights in the Act, and, secondly, that entrenchment was necessary to ensure that Parliament could not easily restrict those rights in the future. The fact that human rights have been constitutionally entrenched in countries such as Canada and South Africa, was sometimes referred to in support of these views. However, as the submission from ALHR pointed out, different considerations were behind the decision to constitutionally entrench human rights in those countries:

...a distinction needs to be made between the position in Australia and the evolution of constitutional entrenchment in South Africa [and] in Canada. The ravages and ultimate collapse of the apartheid regime in South Africa meant that there was an overwhelming need for the maximum protection of human rights to ensure the structural integrity and continuation of South Africa as a nation. In Canada human rights have been protected by statute since the 1960s beginning in a form substantially weaker than the ACT Human Rights Act or the Victorian Charter. Canadians were far more attuned to the concept and application of human rights by the time Prime Minister Trudeau proposed the incorporation of human rights into the Canadian Constitution in the late 1970s and its incorporation in 1982. ...Neither of those situations applies in Australia or, for that matter, in WA.¹⁹

The concern that Parliament may seek to amend a WA Human Rights Act so as to “whittle away” the rights set out in the Act seems to us to overlook the very real possibility that a WA Human Rights Act might, over time, assume such a fundamental political importance that repeal or substantial amendment of the Act would only occur after careful and detailed parliamentary consideration.

¹⁸ Submission 226: Gail Gifford.

¹⁹ Submission 299.

The argument that it is necessary or appropriate to ensure that Parliament cannot readily amend a WA Human Rights Act also overlooks the potential advantages in being able to amend such an Act. A number of submissions observed that perceptions of human rights may change over time.²⁰ This may be illustrated by reference to the list of values which a recent Commonwealth Government publication on citizenship has suggested are important in modern Australia, as providing the common reference points for our society. The values referred to (which are broadly similar to a number of the human rights set out in the draft Bill) are:

- respect for the equal worth, dignity and freedom of the individual;
- freedom of speech;
- freedom of religion and secular government;
- freedom of association;
- support for parliamentary democracy and the rule of law;
- equality under the law;
- equality of men and women;
- equality of opportunity;
- peacefulness; and
- tolerance, mutual respect and compassion for those in need.²¹

While these values are undoubtedly important in modern Australia, it has not always been the case that they have all been accepted in Australian society. The equality of men and women, and the appropriateness of secular government, are two values that gradually came to be accepted over the course of our post-settlement history. Similarly, the values set out in this list are markedly different from those underscoring the “White Australia Policy”, which was widely accepted in Australia until as recently as the 1950s.

A NUMBER OF SUBMISSIONS OBSERVED THAT PERCEPTIONS OF HUMAN RIGHTS MAY CHANGE OVER TIME.

If a WA Human Rights Act could not be readily amended, then there would be a risk that over time the relevance of the rights in that Act would be eroded. In addition, by enacting a WA Human Rights Act as an ordinary statute, maximum flexibility would be retained to expand the scope or operation of the statute in the future, should this be considered appropriate. In this respect, we note that neither the *Human Rights Act 2004 (ACT)* (ACT Act) nor the *Charter of Rights and Responsibilities 2006 (Vic)* (Victorian Charter) currently incorporate rights from the *International Covenant on Economic Social and Cultural Rights*, however, both Acts provide for periodic reviews during which the inclusion of these rights may be considered. Clause 43 of the draft Bill also contains a requirement that a WA Human Rights Act be reviewed periodically, and in this Report we have recommended that those reviews consider a number of specific issues. If the reviews reveal that changes to a WA Human Rights Act are necessary or appropriate, the ability to amend the Act to implement those changes would be a considerable advantage.

²⁰ Submission 102: M. McPhee; submission 103: P Farley; submission 106: S MacFarlane; submission 112: R Foden.

²¹ Commonwealth of Australia, *Becoming an Australian Citizen. Citizenship – Your Commitment to Australia*, September 2007, available from: www.citizenship.gov.au/test/resource-booklet/citz-booklet-full-ver.pdf

Accordingly, we are of the view that human rights legislation in Western Australia should take the form of an ordinary Act of the Parliament, rather than an Act of Parliament which is entrenched so as to require special legislative procedures to be followed for its amendment or repeal.

5.3 Should a WA Human Rights Act have a preamble?

The Bill should have a preamble that people can embrace. These things filter through into society and the consciousness of Western Australians.

Participant in Kununurra public forum

The Government's draft Bill does not currently contain a preamble. One theme which emerged from the Committee's public forums was that people considered that a preamble could serve as an important educational tool. While only 10% of written submissions addressed this issue, all of those submissions favoured the inclusion of a preamble in a WA Human Rights Act.

It was argued that it is "essential to have a statement at the beginning of the Act that sets out the values and principles underlying the Act and/or its purpose or purposes"²² and that a preamble would help to "set the context in which people would read the Human Rights Act".²³ Uffe Geysner developed this argument further, stating that:

In some ways a well written preamble is an executive summary of what the Act is about. It should be an open window to the values and the object of the Act. It should always reflect the thoughts and ideas behind the Act. ... it should always be reflected upon as a base understanding of a law and why it was given.²⁴

A number of people argued that a preamble would still be useful even though it may have limited legal effect.²⁵ It was suggested that, in terms of general accessibility, a preamble would be the one part of the Act "for the people". A participant in one of our Northam public forum noted that "the inclusion of a preamble is a good idea, as we aren't all lawyers." Similarly, the Office of the Public Advocate stated that:

A preamble would provide clarity about the overarching principles and aims of a WA Human Rights Act. The preamble's plain language, unencumbered by the complexities of legal structure found in other parts of the Act, could be valuable in educating Western Australians about why the Act is important and what it strives to achieve. It can be used to facilitate a language and idea of rights that have a dynamic life in the community, outside the courtroom.²⁶

Many people who argued for the inclusion of a preamble made specific suggestions as to its contents and three written submissions included some draft wording for the Committee to consider.²⁷ Some of the specific suggestions were that the Preamble should:

- Set out the values and principles underlying the Act and these should include equality, dignity, freedom, respect, justice, fairness and the shared human condition.²⁸

²² Submission 284: St Vincent de Paul Society (WA). Also, submission 136: Ray Redner.

²³ Participant in Bunbury public forum.

²⁴ Submission 273.

²⁵ For example submission 273: Uffe Geysner; submission 267: Dr Julie Debeljak.

²⁶ Submission 86.

²⁷ Submission 43: Emeritus Professor Laksiri Jayasuriya AM; submission 92: Tony O'Connell; submission 223: Legal Aid Western Australia Inc.

²⁸ Submission 245: Community Vision Inc. Also, submission 299: ALHR. A participant in one of our Busselton public forums also suggested that there was a need to highlight the concepts of respect and dignity.



- Highlight that human rights are essential in a democratic and inclusive society that respects the rule of law and that human rights belong to all people without discrimination.²⁹
- Highlight that rights come with responsibilities and must be exercised in ways that respect the human rights of others.³⁰
- Contain “an indication of alliance with international treaties”.³¹
- Acknowledge that economic, social and cultural rights and civil and political rights are indivisible.³²
- Explicitly acknowledge the special importance of human rights for Aboriginal people in Western Australia, the special place of Aboriginal people as the first inhabitants of Australia, and their diverse spiritual, social, cultural and economic relationship with their traditional land and waters.³³
- Refer to the *WA Charter of Multiculturalism* and the principles enshrined within it³⁴ or reflect society’s commitment to multiculturalism in some other way.³⁵
- Explicitly acknowledge that a WA Human Rights Act is intended to be educative and is founded on an aspiration that human rights be respected.³⁶
- Adopt some or all parts of the preambles in the Victorian Charter and the ACT Act.³⁷

In its submission to the Committee, Community Vision Inc suggested that the values to be stated in the Preamble should “emerge from a full discussion with a wide range of people with different perspectives”.³⁸ Similarly, the Catholic Women’s League of Western Australia suggested that there should be consultation with the community and that the Government should run a competition for the purposes of developing a preamble.³⁹ The need for particular consultation with Aboriginal Western Australians was recognised by Lt General John Sanderson AC, Special Advisor on Indigenous Affairs within the Department of the Premier and Cabinet, who recommended that a preamble be developed after the legislation was passed to “enable the State Government to undertake a proper partnership with Indigenous peoples in its development.”⁴⁰

²⁹ Submission 223: Legal Aid Western Australia Inc; submission 243: Uniting Church in Australia Synod of Western Australia, Social Justice Board.

³⁰ Participant in Bunbury public forum; submission 223: Legal Aid Western Australia Inc.

³¹ Submission 314: Ministerial Advisory Committee on Disability.

³² Submission 243: Uniting Church in Australia Synod of Western Australia, Social Justice Board.

³³ For example, submission 323: Multicultural Services Centre of WA; submission 223: Legal Aid Western Australia Inc; submission 299: ALHR; submission 243: Uniting Church in Australia Synod of Western Australia, Social Justice Board; submission 369: Association for Services to Torture and Trauma Survivors Inc; submission 243: Uniting Church in Australia Synod of Western Australia, Social Justice Board.

³⁴ Submission 43: Emeritus Professor Laksiri Jayasuriya AM; submission 374: Office of Multicultural Interests, Department of Communities; submission 243: Uniting Church in Australia Synod of Western Australia, Social Justice Board.

³⁵ Submission 323: Multicultural Services Centre of WA.

³⁶ Submission 358: Greg McIntyre SC, Dr Johannes Schoombbee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey.

³⁷ Submission 358: Greg McIntyre SC, Dr Johannes Schoombbee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey; submission 223: Legal Aid Western Australia Inc; submission 309: Commonwealth Human Rights and Equal Opportunity Commission.

³⁸ Submission 245.

³⁹ Submission 246.

⁴⁰ Submission 300.

We are persuaded by the submissions we have received in support of the inclusion of a preamble in a WA Human Rights Act. We note that both the ACT Act and the Victorian Charter each contain a preamble. While these preambles are different in their terms and style, they nevertheless encapsulate the spirit of each Act in a way which has a powerful impact.

In our view, the inclusion of a preamble in a WA Human Rights Act could serve a number of important purposes, which would be integral in achieving a human rights culture in Western Australia. First, a preamble could assist to tell the “story” of a WA Human Rights Act, by conveying the intentions and aspirations behind its enactment. As part of this “story”, a preamble could acknowledge the special status of Indigenous Western Australians. It could also acknowledge the responsibility that rests on all individuals, by virtue of being members of the Western Australian community, to respect the human rights of others and to participate in creating a culture of respect for human rights in this State.

Secondly, a preamble would be extremely important in ensuring that the key elements of a WA Human Rights Act were accessible to, and understood by, the entire community. We received a number of submissions which emphasised that a WA Human Rights Act should be in ordinary, plain language and suggested that the draft Bill did not meet this criterion. For example, George Sulc stated that the draft Bill “is far too long, complex and wordy and would not be read or understood by many Australians. It must be brief, concise and readable to all!”⁴¹ Some of the concepts in the draft Bill are complex, and are necessarily expressed in technical legal language. For that reason, a preamble could serve the important purpose of distilling the main values and principles of a WA Human Rights Act into a clear and succinct statement.

A related purpose which a preamble could serve is that of educating the community about a WA Human Rights Act. A preamble could be of assistance as an educative tool, for example in classroom discussions, for publication in public documents and in advertising campaigns about human rights. The feedback we received from our Victorian consultations was that the Preamble to the Victorian Charter had been an important element in the community education programme about the Charter, particularly within schools.

We therefore recommend that a preamble be included in a WA Human Rights Act.

We have attempted to encapsulate what might be considered the key elements of a WA Human Rights Act in a draft Preamble, which is attached to this Report in Appendix G. The draft Preamble has a narrative section and also sets out a number of underlying principles and values which we have selected from the preambles in the Victorian Charter and the ACT Act as being the most relevant to Western Australia.

Given the significance of a preamble to the understanding of what a WA Human Rights Act is seeking to achieve, we recommend that the Government give careful consideration to its wording. In our view it is important that the Preamble fully capture the Government’s aspirations of promoting a culture of human rights in Western Australia and the relevance of such a culture to the long term wellbeing of the people of this State.

⁴¹ Submission 131.

5.4 What should human rights legislation for Western Australia be called?

While the Committee's consultation documents, including its discussion paper, used the term "WA Human Rights Act", this was for the sake of convenience and was not intended to pre-empt other suggestions as to what human rights legislation in this State should be called.

This issue did not really arise during the Committee's public forums, although a number of written submissions expressed views as to the title of the legislation. Some of these noted that the appropriate title would depend on what general form the legislation took. For example, Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University stated that:

The answer to this question depends on what model is largely adopted. If a model based on the *Canadian Charter* is adopted, I would suggest calling the Western Australian instrument a *Charter*. If a model based on the *UK HRA* [UK Human Rights Act] is adopted, I would suggest calling the Western Australian instrument a *Human Rights Act*.⁴²

As it turned out, the most popular title among the written submissions was "WA Human Rights Act" or "Human Rights Act of WA". The Australian Church Women – Western Australia Unit stated that "the terms Charter and Bill are too vague and potentially confusing, and [we] prefer Human Rights Act".⁴³ Dr Jeremy Gans of the University of Melbourne observed that "the name *Human Rights Act* appropriately recognises the statute-based nature of the regime proposed in Western Australia. The term 'charter' is inappropriate, given the wide gap between the proposed statute and Canada's entrenched Charter."⁴⁴

AS IT TURNED OUT, THE MOST POPULAR TITLE AMONG THE WRITTEN SUBMISSIONS WAS "WA HUMAN RIGHTS ACT" OR "HUMAN RIGHTS ACT OF WA".

Some people, however, did prefer the name "Charter of Human Rights" as they felt that it would recognise the importance of the new law and help to "distinguish it from other legislation."⁴⁵

One submission suggested that "...if the law protects only civil and political rights it should be renamed *WA Civil and Political Rights Act* to reflect the actual content...I believe it is misleading and disrespectful to name an Act something it is not."⁴⁶

Four submissions suggested that the title of the legislation contain a reference to responsibilities as well as rights. For example Uffe Geysner noted that:

If you turn the Human Rights principle around or look at it from the other side, it becomes an Act of Responsibility pertaining to the Government and its agencies. It does not necessarily in its present form reflect responsibilities of the individual, but it certainly becomes an Act of Responsibilities and Human Rights, so can I propose we name it the **Western Australian Responsibilities and Human Rights Act**. I believe the inclusion of the word "responsibilities" will reflect what most of us would like to see and maybe somehow we could include some part of the individual's duty of care to fellow Western Australians in this Act.⁴⁷

⁴² Submission 267.

⁴³ Submission 253.

⁴⁴ Submission 4.

⁴⁵ For example, submission 270: Gay and Lesbian Equality (WA) Inc.

⁴⁶ Submission 187: Diane Smith.

⁴⁷ Submission 273: Uffe Geysner. Emphasis in original.

On the other hand, a number of submissions expressly argued that the title of the Act should not include any reference to responsibilities. For example, Legal Aid Western Australia Inc stated that:

We would be concerned, however, if the Government were to incorporate in any Act title the word ‘responsibilities’, as in Victoria. Inherent in human rights are responsibilities, particularly those on governments to ensure the rights of [their] constituents are protected and promoted through the actions of government.⁴⁸

Similarly, Dr Gans commented that:

Victoria’s *Charter of Human Rights and Responsibilities* would have to be the most depressingly named fundamental rights document in history. The reference to responsibilities has a disturbingly Orwellian ring and is misleading, given the limited legal effect of Victoria’s Charter. I implore you not to follow this lousy precedent.⁴⁹

On balance, we consider that human rights legislation in Western Australia should be called a “Human Rights Act”. This title would reflect the content and focus of the Act, and avoid the potential for confusion which may arise from using terms such as “Charter” or “Bill of Rights”. We do not consider that the title of the Act should refer to the nature of the human rights recognised in the Act, in light of our recommendation that some economic, social and cultural rights be included in addition to civil and political rights, and because future reviews of the Act could result in additional rights being included.

We are also unconvinced that the title of the Act should contain any reference to “responsibilities”. A reference to that word in the title of the Act might convey the impression that human rights are conditional on compliance with certain responsibilities, whereas the recognition of the human rights in the Act flows from the dignity of every human being and is not conditional on acceptance of, or compliance with, any responsibilities. In addition, use of the term “responsibilities” in the title of the Act may create confusion as the Act does not recognise or impose “responsibilities” in any legal sense (although it does impose a number of obligations or duties⁵⁰). In our view, it will be sufficient to refer in the Preamble to the role of responsibilities in achieving a human rights culture in Western Australia.

RECOMMENDATIONS

- A WA Human Rights Act should take the form of an ordinary Act of the Parliament.
(*Recommendation 2*)
- That Act should be called a “Human Rights Act”. (*Rec 3*)
- A preamble should be included in a WA Human Rights Act. A draft Preamble is attached to this Report in Appendix G. (*Rec 4*)
- The Government should give careful consideration to the wording of a draft Preamble to ensure that it fully captures the Government’s aspirations of promoting a culture of human rights in Western Australia and the relevance of such a culture to the long term wellbeing of the people of this State.
(*Rec 5*)

⁴⁸ Submission 223.

⁴⁹ Submission 4. Emphasis in original.

⁵⁰ For example, in the requirement that a Minister provide a statement of compatibility to the Parliament in relation to a Bill, and in the prohibition on government agencies acting incompatibly with human rights.



CHAPTER 6: HOW SHOULD A WA HUMAN RIGHTS ACT PROTECT HUMAN RIGHTS?

6.1 The Government's position

The Government's preferred approach, as set out in general terms in its Statement of Intent and reflected in Parts 4, 5 and 6 of the draft Bill is to create a dialogue about human rights between the three different arms of government as follows:

The Government believes that an important step in establishing a human rights culture in Western Australia is to encourage greater awareness and discussion of human rights when laws are being made. A WA Human Rights Act should require the Government to consider the impact on human rights of any new law that it submits to Parliament and explain and justify any proposed law that is incompatible with human rights. In turn, the Parliament should be required to consider the impact on human rights of any new law which it makes and, where possible, should ensure that written laws are not incompatible with human rights.

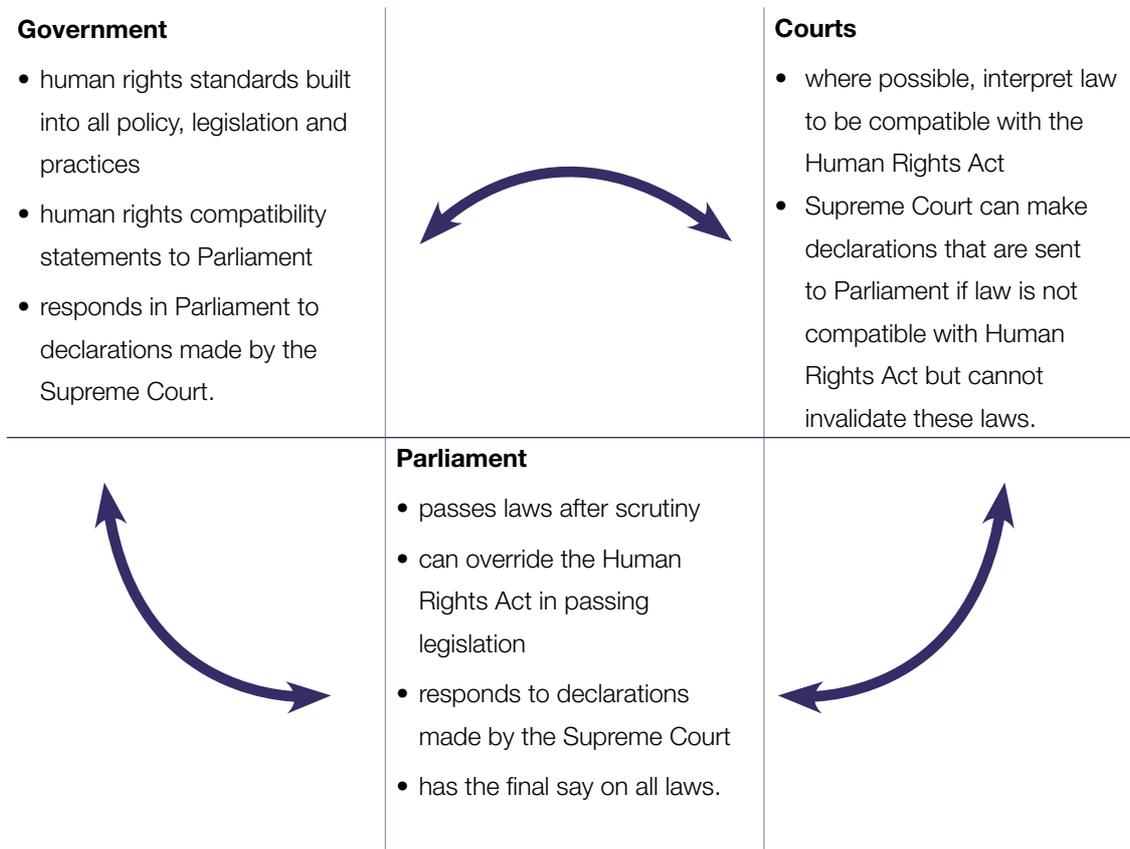
...Further, the Government's view is that government departments and agencies should be required to comply with the human rights recognised in a WA Human Rights Act in their actions and decision-making. This will mean that government departments and agencies must respect the human rights of the people with whom they deal.

...The courts have an important role to play in interpreting the law and determining how laws affect human rights. In the Government's view, one way to ensure that human rights are respected and protected is therefore to require the courts to interpret all laws, where possible, consistently with human rights.

The Government's preferred approach is that the Supreme Court should also contribute by identifying written laws that are incompatible with human rights, and by alerting the Government and the Parliament to the existence of the incompatibility so that they may consider whether the laws should be changed. Under this approach the Supreme Court would not be able to declare that a law is invalid because it is incompatible with human rights. Rather, it would be up to the democratically elected Parliament to decide what should happen to the law.

The Government’s preferred position can be summarised in diagrammatical form as follows:

The human rights dialogue between the institutions of government



The Committee notes that this dialogue approach to the protection of human rights reflects the general approach taken in the *Human Rights Act 1998* (UK) (UK Act), the *New Zealand Bill of Rights Act 1990* (New Zealand Bill of Rights) the *Human Rights Act 2004* (ACT) (ACT Act) and the *Charter of Rights and Responsibilities 2006* (Vic) (Victorian Charter).

6.2 General dialogue approach

The executive, judiciary and also Parliament should be bound to protect human rights. Human rights need to be taken into account when making laws and when implementing laws. The courts should interpret laws in compliance with human rights and make an incompatibility statement for Parliament to address as soon as practicable.

Submission 275: Loftus Community Centre

The Committee was presented with a range of views as to how a WA Human Rights Act should protect human rights. Broadly speaking, the majority of people consulted supported the idea that all three arms of government should have a role to play in the protection of human rights. Many of these people supported the three-way “dialogue” approach taken in the draft Bill and depicted in the above diagram in particular. A participant in one of our Geraldton public forums said “this Act will at least put human rights on the agenda. It will promote a dialogue - conversations will happen and even if you don’t like what you hear, it is still a good thing.”

Some people expressly supported one or more “parts” of the dialogue approach taken in the draft Bill while not commenting on others. For example, a number of people focused on the benefits of requiring Parliament to consider human rights when making laws, or on the benefits of requiring government agencies to act compatibly with human rights. Ben Wyatt MLA commented in his written submission that “any legislation that forces Parliament, and governments, to consider, in a formal way, the implications of their actions on their citizens can only be a good contribution to democracy.”¹

Other people supported the general tenor of the dialogue approach, but had concerns about particular aspects of it and suggested amendments to the draft Bill. These are discussed further below where we examine the dialogue model in more detail.

The people who did not support the approach taken in the draft Bill generally preferred a model that would not allow Parliament to pass legislation which was incompatible with human rights or would restrict the Parliament’s ability to do so. For example, the Aboriginal Legal Service of Western Australia Inc (ALSWA) stated that there is “no point in having an Act protecting Western Australians’ human rights when these can be legislated away by government”.² The Australian Church Women - Western Australian Unit recommended that Parliament only be allowed to introduce laws that would restrict human rights in “special/emergency situations” and also submitted that such laws should be subject to a sunset clause.³ The idea of a sunset clause was also popular among those consulted as part of the devolved consultation with the disadvantaged.⁴

Most of the people who wanted to limit Parliament’s power to enact incompatible legislation suggested that the courts should be empowered to strike down incompatible legislation.

Uffe Geysner told the Committee in his submission that “the three-tiered system is more a system to make it possible for government to disregard the courts than being serious about human rights”.⁵

Similarly, Matthew Keogh argued:

...where legislation cannot be interpreted consistently with the HRA [Human Rights Act] it should be declared invalid. If legislation that is incompatible with the HRA were not invalidated then the HRA would be a toothless tiger, providing no reason for human rights to be observed by the Government or Parliament.⁶

A small group of written submissions argued for a “compromise” approach such as that adopted in the *Canadian Charter of Rights and Freedoms 1982* (Canadian Charter).⁷ Under the Canadian Charter (which is a constitutional document), the courts are empowered to invalidate legislation that is incompatible with human rights, however Parliament may still enact legislation notwithstanding the provisions of the Charter. This means that, if the courts invalidate a law, Parliament can respond by re-enacting the law notwithstanding the Charter, if it wishes to do so.

The above suggestions would involve the adoption of a fundamentally different model for the protection of human rights than that preferred by the Government and by the majority of people we consulted. That model would be similar to the one taken in the Bill of Rights in the *Constitution of the United States of America*, which allows the courts to “have the last say” about rights. In contrast, most of the people we

¹ Submission 325: Ben Wyatt MLA.

² Submission 312.

³ Submission 253.

⁴ Human Rights Solutions, *Human Rights ‘at the Margins’*, August 2007, 69 (see Appendix F)

⁵ Submission 273.

⁶ Submission 213.

⁷ For example, submission 267: Dr Julie Debeljak.

spoke to were keen to preserve parliamentary sovereignty and avoid the perceived deficiencies of the United States model.

We believe that each arm of government has a significant role to play in the protection of human rights and that no single arm of government should have a monopoly on that protection. For this reason, we believe that the dialogue approach reflected in the draft Bill is the most appropriate model for a WA Human Rights Act. In line with our views discussed in Chapter 5, we support this approach over the model in the Canadian Charter as it encourages institutional dialogue without affecting the constitutional balance between the three arms of government and without placing too much emphasis on the courts.

Many of the benefits of the dialogue model have already been canvassed in this Report. They include:

- Ensuring that all three arms of government have an important and identifiable role to play in protecting human rights (discussed in Chapter 3).
- Preserving parliamentary sovereignty and not allowing the courts to “overrule” Parliament (discussed in Chapters 3 and 5).
- Helping to create a culture of greater awareness of, and respect for, human rights, particularly within the Government itself and throughout the broader community (discussed in Chapter 3).
- Limiting what government agencies can do in their dealings with individuals and helping to keep government accountable (discussed in Chapter 3).
- Ensuring that human rights are more closely considered during the development of legislation and policy (discussed in Chapter 3).
- Providing a legislative model that would allow economic, social and cultural rights to be included in a workable way (discussed in Chapter 4).

We therefore do not propose any fundamental changes to the basic approach to the protection of rights taken in the draft Bill. However, we believe that the desired dialogue between the three arms of government could be significantly improved by some changes and additions to particular aspects of the draft Bill. These are discussed in the course of this Chapter and in Chapter 8.

6.3 Role of the Government

Much of the general discussion about human rights legislation (particularly in the media) focuses on the role of Parliament and the role of the courts. As David Kinley of the University of Sydney recently observed, however, it is the Government that plays the most significant role under such legislation.⁸

The Government is “the seat of power” and is much greater in terms of size and functional scope than either Parliament or the courts. The Human Rights Law Resource Centre Ltd (HRLRC) pointed out in its submission to the Committee that:

The primary point of contact between government and the public lies in the development and delivery of policy, services and programs by the executive arm of government. That primary point of contact is where the Human Rights Act will have its most fundamental impact.⁹

⁸ David Kinley, “Executives and Bills of Rights: Not just Steak-Knives...but Icebergs” (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007), powerpoint presentation available from:

<http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.

⁹ Submission 72.



The Government also plays a dominant role in the law-making process – from the inception of legislation, to its promotion and passage in Parliament, through to its implementation and enforcement.¹⁰

In addition, while both Parliament and the courts can provide important oversight of the Government's actions, the oversight provided by Parliament is "thinly systematic", while the oversight provided by the courts is "thickly sporadic".¹¹ That is, the courts are involved in the resolution of relatively few issues, but where they are involved it is in great depth. Parliament on the other hand purports to scrutinise the whole of the Government's activities but has limited capacity to do so. In those circumstances, how government agencies regulate themselves is important. The Government is not merely a "steak knives add-on" in terms of protecting human rights, it is the bulk of the iceberg hidden from view beneath the surface of the water.¹²

6.3.1 Obligation to act compatibly with human rights

By encouraging a culture within the executive in which human rights are explicitly taken into account from the earliest stages of policy-making through to the day-to-day interactions between public authority staff and the public, effective obligations on the executive have both practical and symbolic human rights benefits.

Submission 72: HRLRC

Clause 40 of the draft Bill requires government agencies to act compatibly with human rights and give proper consideration to relevant human rights when making decisions unless they are prevented from doing so by a written law of the State or Commonwealth or the common law.

As was recognised in a number of submissions, this obligation would, generally speaking, require government agencies to identify which of their existing powers, discretions, policies and practices impinge upon human rights and develop strategies for bringing them into compliance with human rights (where legally possible and appropriate to do so). It would also require government agencies to take human rights into account when developing new policies.

¹⁰ David Kinley, "Executives and Bills of Rights: Not just Steak-Knives...but Icebergs" (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007), powerpoint presentation available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.

¹¹ David Kinley, "Executives and Bills of Rights: Not just Steak-Knives...but Icebergs" (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007), powerpoint presentation available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.

¹² David Kinley, "Executives and Bills of Rights: Not just Steak-Knives...but Icebergs" (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007), powerpoint presentation available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>.



Some people who made submissions expressed concern that this obligation would unduly burden government agencies.¹³ As noted in Chapter 3, one of these people was the Commissioner of Police.¹⁴ It is unnecessary to repeat our response to his concerns here. It is sufficient to say that, while we accept that the impact of a WA Human Rights Act on government agencies would be significant, on the information presently available to us, we have no grounds for concluding that that impact would be out of proportion to the potential benefits.

Human rights (and balances between competing rights) are already taken into account, implicitly if not explicitly, in the formulation of a great deal of Western Australian legislation and policy. For example:

- The Department of Child Protection has developed a *Charter of Rights for Children in Care*, compliance with which is supported by the work of the Advocate for Children in Care. The rights in the Charter are consistent with those in the draft Bill.¹⁵
- The Department of Health has developed the *Aboriginal Health Impact Statement and Guidelines*, in recognition of the Department's particular responsibility to ensure equality of health care and treatment for Aboriginal people. The Statement and Guidelines aim to ensure that the health needs and interests of Aboriginal people in WA are integrated into any new policy, program and strategy development process.¹⁶
- The Disability Services Commission complies with a set of standards which are designed, among other things, to “empower consumers by clearly defining what standards they should expect when accessing disability services” and to “provide a basis for service providers and consumers to jointly improve service quality”. In 2004 and 2005, a “ninth standard”, namely “protection of human rights and freedom from abuse and neglect” was developed and implemented.¹⁷
- As discussed in Chapter 3, the Western Australian Police have introduced a range of policies and measures designed to ensure that policing services are accessible, culturally appropriate and equally responsive to all communities of Western Australia's population.

Although human rights are already taken into account in a number of areas, a WA Human Rights Act would provide some structure to the existing ad hoc consideration of human rights in policy and legislative processes.¹⁸ As the Social Responsibilities Commission of the Anglican Province of Western Australia observed in its submission to the Committee, a WA Human Rights Act would provide a “scaffold or framework” for other legislation. Similarly, the HRLRC noted that such an Act would “enhance government decision-making by providing a defined set of rights as a point of reference”.¹⁹ George Sulc commented that it was important to make it mandatory that human rights be taken into account by government agencies.²⁰

We also note that the experience in other jurisdictions has been that human rights legislation has had a positive impact on the development of government policy. For example, after the first five years of the UK Act the UK Department of Constitutional Affairs reported:

¹³ For example, submission 32: Peter Lochore.

¹⁴ Submission 301.

¹⁵ Submission 176.

¹⁶ Submission 353.

¹⁷ Participant in Merredin public forum.

¹⁸ Dr Simon Evans, “What difference will the Charter of Rights and responsibilities make to the Victorian Public Service?” (paper presented at Clayton Utz, Melbourne, 13 June 2006) 3.

¹⁹ Submission 72.

²⁰ Submission 131.

The Human Rights Act has had a significant, but beneficial, effect upon the development of policy by central Government. ... The Human Rights Act leads to better policy outcomes by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.²¹

An important element in achieving this impact on the Government appears to be the inclusion in human rights legislation of a provision which expressly requires government agencies to comply with human rights. Feedback we received from the ACT supported this view. The ACT does not contain any provision requiring compliance with the human rights in that Act by any person or body. In their joint submission, Professor Andrew Byrnes of the University of New South Wales and Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham of the Australian National University advised us:

The lack of a clear provision has created some uncertainty in the ACT as to whether the government is specifically bound by the Act in the exercise of executive powers which are not directly governed by legislation. The Department of Justice and Community Safety has advised other departments that the Act does create an obligation on public officials to act consistently with human rights. However the lack of clarity in this area may lead to conflicting views being taken by different departments and may require the issue to be ultimately settled by the Supreme Court.²²

The Committee supports the inclusion of clause 40 in the draft Bill which imposes an obligation on government agencies to take human rights into account in their actions and decision-making. As canvassed in Chapter 3 of this Report, it is likely that such an obligation would be an important element in generating a human rights culture within government agencies and would provide standards against which individuals could measure the actions of government agencies and hold them to account.

At the same time, however, we are conscious of the fact that before becoming obliged to comply with human rights in their actions and decision-making, government agencies would need time to educate their staff about human rights. They would also need time to review their existing practices and policies, to ensure that their actions or decision-making processes were compliant with human rights unless otherwise required by existing legislation. We have recommended below (in Chapter 9) that a WA Human Rights Act not be proclaimed to commence operation for at least one, and preferably two, years after its enactment.

6.3.2 Human rights action plans

A few written submissions suggested that government agencies should be specifically required to develop plans setting out the positive measures they will implement in order to respect, promote and protect human rights. For example, Geoff Bridger recommended that government agencies be required to submit a "Human Rights Recognition Plan" similar to the "Disability Services Plan" required under the *Disability Services Act 1992* (Cth)²³ and the Public Interest Advocacy Centre Ltd argued that they should be required to:

Develop a Statement of Commitments as a compact between the public authority and its stakeholders, including members of the community. A Statement of Commitments should reflect how the public authority plans to respect, protect, promote and fulfil relevant human rights standards.²⁴

²¹ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, 1.

²² Submission 320.

²³ Submission 38.

²⁴ Submission 272.

Similarly, the HRLRC stated that it:

...supports the inclusion of a mandatory provision in a Human Rights Act requiring public authorities to develop a plan for the implementation, measurement, progress and accountability of human rights. This approach has been effective in New Zealand, where the New Zealand Human Rights Commission has developed the New Zealand Action Plan for Human Rights.²⁵

According to the HRLRC, such action plans should include annual targets and time frames for the realisation of human rights, indicators of how targets are set and their success measured and strategies to promote and protect human rights, particularly amongst the target section of the public that each agency deals with.²⁶

We note that a requirement for human rights action plans was also recommended to the Victorian Human Rights Consultation Committee (Victorian Consultation Committee) and, more recently, the Tasmania Law Reform Institute, as part of inquiries into human rights legislation for their states. Both of these bodies recommended against the inclusion of such a legislative requirement and no such requirement was included in the Victorian Charter.²⁷

If the draft Bill is passed, the Committee suggests that government agencies make plans about how they will meet their obligations under clause 40. We would also suggest that, over time, government agencies look beyond simply incorporating human rights into existing policy-making processes, and that they create policies designed to highlight human rights problems and actively seek out opportunities to promote human rights.²⁸ However, while we agree that government agencies should be encouraged to develop and implement action plans as part of a methodical approach to the consideration of human rights, we believe that this should be dealt with administratively, and should not be mandated in a WA Human Rights Act.

Such an approach would allow greater flexibility for individual government agencies to implement a WA Human Rights Act in a manner that best suits their work and organisational structure.

WOULD ALLOW GREATER FLEXIBILITY FOR INDIVIDUAL GOVERNMENT AGENCIES TO IMPLEMENT A WA HUMAN RIGHTS ACT IN A MANNER THAT BEST SUITS THEIR WORK AND ORGANISATIONAL STRUCTURE.

6.3.3 Human rights impact statements

The Office of the Public Advocate suggested to the Committee that a WA Human Rights Act should require government agencies to submit a “human rights impact statement” whenever they send a new policy or legislative proposal to Cabinet for consideration.²⁹ A similar suggestion was made by Lt General John Sanderson AC (Retd), Special Adviser on Indigenous Affairs within the Department of Premier and Cabinet, who submitted that all public sector policies and programs should be issued with a “certificate of compliance” with a WA Human Rights Act.³⁰

In so far as legislation is concerned, the requirement in the draft Bill for statements of compatibility to be submitted to Parliament (discussed further below) is designed to encourage government agencies to consider the impact of proposed legislation on human rights when they are drafting and developing

²⁵ Submission 72.

²⁶ Submission 72. This content would be in line with the recommendations of the Office of the United Nations High Commissioner for Human Rights.

²⁷ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 111-112; Tasmania Law Reform Institute, *A Charter of Rights For Tasmania*, Report No 10, October 2007, 109.

²⁸ David Kinley, “Executives and Bills of Rights: Not just Steak-Knives...but Icebergs” (paper presented at 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007), powerpoint presentation available from: <http://cccs.law.unimelb.edu.au/index.cfm?objectid=8CBE15D9-1422-207C-BACDCBB595F4481B&flushcache=1&showdraft=1>

²⁹ Submission 86.

³⁰ Submission 300.

such legislation. However, it was suggested to us that more could be done to ensure that human rights were taken into account earlier in the development of legislation and policy:

By the time a Bill gets to Parliament ... most of the background policy has already been decided so there is a risk that statements of compatibility will become a rubber stamp much too late in the process. In order for human rights values to permeate government policy they need to be considered in the formulation stages of policy, not just in the final presentation.³¹

Requiring the inclusion of human rights impact statements in Cabinet submissions would be one way of ensuring that government agencies considered human rights during the early stages of their policy and legislation development processes, and that Cabinet considered the impact on human rights of any decision which it proposed to make.

The submissions received by the Committee did not address the content of these proposed human rights impact statements. However, we note that Dr Simon Evans and Dr Carolyn Evans of the University of Melbourne suggested to the Victorian Consultation Committee that such statements should:

- identify the problem or issues which may give rise to the need for action;
- identify the desired objectives of the action;
- identify the policy instruments that might be employed to achieve the desired objectives;
- include an assessment of the human rights impact of each option;
- identify the extent of the consultation with those who would be affected by the proposed action and summarise their views;
- identify and give reasons supporting a recommended option; and
- describe a strategy to implement and review the recommended option.³²

The Victorian Consultation Committee did not recommend that a requirement for human rights impact statements be included within the Victorian Charter. Rather, it recommended that such a requirement be included in the Cabinet Handbook dealing with such matters.³³ The Tasmania Law Reform Institute recently made a similar recommendation.³⁴

We are persuaded that requiring all Cabinet submissions to contain a human rights impact statement would have a beneficial impact on the extent to which human rights are taken into account in the early stages of the development of legislation and policy. This would, in turn, assist government agencies to comply with their obligation to make decisions and act compatibly with human rights or to carefully assess whether a proposed limitation on human rights could be justified as a permissible limitation. It would not, however, be appropriate for this requirement to be included in a WA Human Rights Act. Instead, it would be more appropriate for Cabinet to implement administratively a requirement that all Cabinet submissions contain a human rights impact statement.

³¹ Submission 86: Office of the Public Advocate.

³² G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 70.

³³ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 71.

³⁴ Tasmania Law Reform Institute, *A Charter of Rights For Tasmania, Report No 10*, October 2007, 109.

6.3.4 Pre-legislative scrutiny and statements of compatibility

...requiring Bills to be accompanied by a human rights compatibility statement will increase parliamentary accountability and transparency in relation to human rights issues and assist in the development of a robust culture of human rights compliance at all levels of government.

Submission 309: Commonwealth Human Rights and Equal Opportunity Commission

Clause 31 of the draft Bill requires that a Bill presented to Parliament must be accompanied by a “statement of compatibility”. In the case of legislation proposed by the Government the draft Bill requires the statement of compatibility to be made by the Attorney General, while in the case of a private member’s Bill, the draft Bill requires the statement of compatibility to be presented by the member of Parliament proposing the legislation. Clause 31 requires the statement of compatibility to state whether the proposed legislation is compatible with human rights. If it is not compatible with human rights, the statement must explain the nature and extent of the incompatibility and why the proposed legislation should nevertheless be considered by Parliament.

The purpose of a statement of compatibility is two-fold. First, it is designed to ensure that a proponent of new legislation assesses, and takes responsibility for, its impact on human rights. Secondly, the statement of compatibility is designed to provide information to the Parliament about the impact on human rights of the proposed legislation in order to help inform its deliberations.³⁵

(i) Information to be provided in statements of compatibility

While many people making submissions to the Committee generally supported the statement of compatibility process, a number of them had suggestions for improvements to this aspect of the draft Bill.

One suggestion was that statements of compatibility should contain reasons regardless of whether the proposed legislation is compatible or incompatible with human rights. While the draft Bill currently requires an explanation and reasons to be included in a statement of compatibility when a Bill is considered to be incompatible with human rights, it does not contain the same requirement for a Bill which is considered to be compatible with human rights. In such cases, the statement of compatibility need contain no more than a statement such as “I have examined the [ABC] Bill and, in my opinion, it is compatible with the human rights set out in Part 2 of the Human Rights Act”. This is the form of statement usually adopted in the ACT (where there is no requirement for reasons to be included in a statement of compatibility when a Bill is considered compatible with human rights). This was also the form of statements of compatibility previously adopted in the UK.³⁶

The Commonwealth Human Rights and Equal Opportunity Commission (HREOC) told us that “it is important that the maker of the statement [of compatibility] be required to provide reasons that justify his or her opinion that [a] Bill is compatible with human rights.”³⁷ Similarly, the HRLRC noted that “...the experience in the UK and the ACT has been that without a requirement for *reasoned* statements of compatibility, the likely or potential human rights repercussions of proposed legislation may receive inadequate consideration”.³⁸ The argument for requiring reasoned statements of compatibility in all

³⁵ Dr Simon Evans, “What difference will the Charter of Rights and responsibilities make to the Victorian Public Service?” (paper presented at Clayton Utz, Melbourne, 13 June 2006) 4.

³⁶ Dr Simon Evans, “What difference will the Charter of Rights and responsibilities make to the Victorian Public Service?” (paper presented at Clayton Utz, Melbourne, 13 June 2006) 5.

³⁷ Submission 309.

³⁸ Submission 72. Emphasis in original.

cases was also put by Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University:

Pre-legislative scrutiny ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated ... rights. Such assessments by the policy-driven arm of government are a vital contribution to the institutional dialogue about ... rights. ... Overall, the value of pre-legislative scrutiny comes from disclosure of the reasoning behind the assessment of proposed legislation, as it discloses the executive's perspective on the definition and scope of ... rights, whether a proposed law limits the ... rights so conceived, and the justifications for such limitations. ... [the failure of clause 31 of the draft Bill to require reasoned statements of compatibility in all cases] will undermine the benefits that could flow from pre-legislative human rights scrutiny.³⁹

A further reason why it would be desirable to require that reasons be given in all statements of compatibility whether or not the Bill in question is considered compatible or incompatible with human rights, is that it would not always be clear-cut whether the provisions of a Bill were compatible with human rights. This may be so especially in the case of a Bill that imposes a limitation on human rights, which is considered to constitute a permissible limitation. In our view, the Government's assessment of why a Bill is compatible with human rights, and why any limitation on human rights imposed by a Bill is a permissible limitation, needs to be transparent and readily able to be understood by the Parliament, the courts and the community.

In our discussions with officers in Victoria and the ACT, there emerged a clear endorsement of the benefits of requiring reasons to be given in statements of compatibility in relation to all Bills.

The Victorian Charter requires a Minister who introduces a Bill to explain how the Bill is compatible with human rights, and if the Bill is not considered compatible with human rights, to explain the nature and extent of the incompatibility.⁴⁰ Part 3 of the Victorian Charter, which contains this obligation, commenced operation on 1 January 2007, so there has been some opportunity to assess the impact of this provision over the course of this year. Although the requirement to give reasons has been a significant obligation on the Victorian Government, which has required considerable training for policy makers within the public service, the Victorian officers with whom the Committee spoke were of the view that the requirement for reasoned statements of compatibility would result in better, and more considered, policy making.⁴¹ They also felt that the requirement to give reasons was useful for assisting policy makers to develop an understanding of the impact of the Victorian Charter.⁴²

In contrast, the ACT Act only requires that a Ministerial compatibility statement contain reasons in order to explain how a Bill is not consistent with human rights.⁴³ The Committee was informed, however, that ACT Government policy requires the views of the responsible department, as to whether a Bill is compatible with human rights, to be included within the Explanatory Memorandum for each Bill.⁴⁴ There was strong support for the view that it would be preferable for such reasons to be given in statements of compatibility: "reasons for compatibility would serve an educative role for the Legislative Assembly and the broader community, and would enable a more meaningful 'dialogue' on human rights issues".⁴⁵

³⁹ Submission 267.

⁴⁰ Subsection 28(3) of the Victorian Charter.

⁴¹ Discussions with Ms Pamela Tate QC, Solicitor General for Victoria on 23 August 2007; Discussions with Ms Padma Raman, Ms Anna Forsyth and Ms Michelle Burrill of the Victorian Equal Opportunity and Human Rights Commissioner and the Victorian Law Reform Commission on 23 August 2007.

⁴² Discussions with Ms Padma Raman, Ms Anna Forsyth and Ms Michelle Burrill of the Victorian Equal Opportunity and Human Rights Commissioner and the Victorian Law Reform Commission on 23 August 2007.

⁴³ See section 37(3) of the ACT Act.

⁴⁴ Discussions with Ms Gabrielle McKinnon, Director of the ACT Human Rights Research Project, Centre for International Governance and Justice, Regnet, ANU on 24 August 2007; Discussions with representatives of the Department of Justice and Community Services on 24 August 2007.

⁴⁵ Discussions with Ms Gabrielle McKinnon, Director of the ACT Human Rights Research Project, Centre for International Governance and Justice, Regnet, ANU on 24 August 2007.



It was suggested to us that, if reasons were required to be given only in relation to a Bill which was incompatible with human rights, then given the reluctance of governments to propose legislation which is acknowledged to be incompatible with human rights, reasoned Ministerial statements may become “the exception rather than the rule”.⁴⁶ This view was borne out by the fact that since the ACT Act became operative, reasons have been included in Ministerial statements given in relation to only two Bills before the ACT Legislative Assembly.⁴⁷

The Committee accepts that a requirement for reasoned statements of compatibility in relation to Bills which are compatible with human rights, as well as Bills which are incompatible with human rights, would “be useful in ensuring that statements are able to promote dialogue within Parliament and the community as intended.”⁴⁸ Accordingly, we recommend that clause 31(4) of the draft Bill be amended to require that reasons be given for why a Bill is considered to be compatible with human rights.

One final suggestion we received, which relates to the content of statements of compatibility was from Legal Aid Western Australia Inc which submitted that:

...there should be a process for the government or member introducing legislation to receive legal advice on whether the proposed legislation breaches human rights legislation from an independent body such as the Solicitor General. To promote transparency and accountability, this advice should be tabled in Parliament and made publicly available.⁴⁹

The ALSWA expressly endorsed this aspect of Legal Aid’s submission.⁵⁰

We note that in the UK, the guidelines published to assist government departments in preparing statements of compatibility instruct that legal advice should not be disclosed in a statement of compatibility.⁵¹ In contrast, in New Zealand, the legal advice on which the Attorney General relies in determining whether Bills are consistent with the New Zealand Bill of Rights is published. Neither the ACT Act nor the Victorian Charter address this issue.

If a WA Human Rights Act was introduced, it could be expected that, in some cases a department preparing a statement of compatibility for a Minister would wish to obtain legal advice as to whether a Bill was compatible with human rights. Similarly, a non-Government member of Parliament proposing

⁴⁶ Discussions with Ms Gabrielle McKinnon, Director of the ACT Human Rights Research Project, Centre for International Governance and Justice, Regnet, ANU on 24 August 2007.

⁴⁷ Discussions with Ms Gabrielle McKinnon, Director of the ACT Human Rights Research Project, Centre for International Governance and Justice, Regnet, ANU on 24 August 2007. The Bills in question concerned terrorism, and the use of electro convulsive therapy for mental health patients.

⁴⁸ Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham.

⁴⁹ Submission 223.

⁵⁰ Submission 312.

⁵¹ See Revised Guidance for Departments available at www.dca.gov.uk/hract/guidance.guide-updated.htm.

to introduce a Bill may wish to obtain legal advice about whether the Bill was compatible with human rights. However, it may not be necessary for legal advice to be obtained in relation to all Bills. It could be expected that, over time, departmental officers would develop expertise in relation to human rights issues. In addition, in respect of some Bills, such as budget Bills, it may be quite clear that the Bill has no impact on human rights. It would be undesirable to include a provision in a WA Human Rights Act requiring that legal advice be obtained in respect of the compatibility of all Bills with human rights.

To require any legal advice which was obtained to be tabled in the Parliament would be contrary to the well established common law principle of legal professional privilege. This serves the interests of justice by ensuring that people are able to seek and obtain legal advice without fear that their communications with a lawyer would be required to be disclosed to others. Although consideration of a legal opinion concerning the compatibility of a Bill with human rights might assist the Parliament to understand the views of the Minister or Member of Parliament introducing the Bill, those views could be adequately explained in the statement of compatibility itself, without the production of the legal advice. Further, the legal opinion would not determine the issue of compatibility, and it would be open to the Parliament to take a different view. For these reasons, we do not agree that a WA Human Rights Act should require any legal advice obtained in relation to whether a Bill is compatible with human rights to be tabled before the Parliament.

(ii) Who should prepare statements of compatibility?

Another suggested improvement in relation to clause 31 of the draft Bill was that in the case of Government Bills, the Minister responsible for a Bill should be required to make the statement of compatibility, rather than the Attorney General in all cases. The draft Bill adopts the approach taken in the ACT Act and the New Zealand Bill of Rights, which requires the Attorney General to present the statement of compatibility for each Bill.⁵²

In contrast, under the Victorian Charter, the obligation to prepare and present a statement of compatibility to the Parliament falls on the member of Parliament responsible for the Bill (or another member acting on his or her behalf, when the Bill is introduced into the other House).⁵³ The UK Act also requires that the Minister of the Crown in charge of a Bill in either House provides the statement of compatibility.⁵⁴

Australian Lawyers for Human Rights (ALHR) submitted that the “centralisation of the drafting of such statements in the ... Attorney General’s Department is a cause for concern.”⁵⁵ In their view, the assessment of the impact of legislation on human rights would only properly be integrated into the legislative development process if “all departments developing legislation take responsibility for drafting the statement of compatibility”. Similarly, the International Human Rights Lawyers’ Working Group (IHRL Working Group) noted that:

The Human Rights Act 2004 (ACT) requires the ACT Attorney General to prepare a compatibility statement for each ministerial Bill, which has the advantage of increasing consistency in evaluation and adding

⁵² Subsection 37(2) of the ACT Act. In New Zealand, the Attorney General is required to present the statement of compatibility in respect of all Bills, including non-Government Bills. In the case of Government Bills, the statement is to be provided on the introduction of the Bill, whereas in the case of non-Government Bills, the statement is to be provided as soon as practicable after the introduction of the Bill: section 7 of the New Zealand Bill of Rights.

⁵³ Section 28 of the Victorian Charter.

⁵⁴ Section 19 of the UK Act.

⁵⁵ Submission 299.



another level of self-scrutiny. However, ministerial responsibility for compatibility statements is preferable because it is more likely to have the effect of producing a culture of respect for rights that permeates through government departments.

Ministerial reporting serves three significant aims. First, it enables departments to fully appreciate the implications that proposed initiatives may have on rights, and requires them to justify those initiatives on the basis of their compatibility with rights. Secondly, it stimulates debate about whether or not Bills are compatible with rights, from the initial formulation of policy to its passage through Parliament. Thirdly, it enhances the accountability of the government to the Parliament and the public.

Also, this mechanism is instrumental in providing the impetus to comply with human rights standards as it provides an incentive to departments to be rights conscious when preparing a Bill's drafting instructions and undertaking an examination of a draft Bill.⁵⁶

We are persuaded by the view that statements of compatibility should be presented to each House of Parliament by the Minister in charge of the Bill in that House. We consider that this requirement would ensure that policy officers in all departments would become familiar with the human rights in a WA Human Rights Act, and be alert to the impact on those human rights of any new legislation they propose. We therefore recommend that clause 31(3) of the draft Bill be amended to require that in respect of Government Bills, statements of compatibility should be presented to each House of Parliament by the Minister in charge of the Bill in the House. In any other case, clause 31(3) should remain the same in requiring the member of Parliament introducing the Bill to present the statement.

At the same time, there appears to us to be considerable merit in also requiring all statements of compatibility for Government Bills to pass through a central government agency (such as the Department of the Attorney General), which may develop particular expertise in relation to the law concerning human rights. The purpose of requiring a central agency to review all statements of compatibility would be two-fold. First, the central agency would develop expertise in relation to human rights and could act as an important check on the conclusions reached by the drafting agency about the compatibility or otherwise of a Bill. The checking to be done by this central agency should therefore improve the accuracy, consistency and, consequently, the quality of statements of compatibility presented to the Parliament. Secondly, establishing one agency as the "lead" agency in relation to human rights, and requiring all statements of compatibility to be considered by that agency would be likely to encourage other government agencies to engage in discussions with the lead agency about any human rights issues which arise when they are drafting legislation. That would add to the dialogue concerning human rights taking place within the Government.

It was suggested to us that a Human Rights Unit or a Human Rights Office should be established to take up this role as the lead government agency on human rights. For example, the Public Interest Advocacy Centre proposed the creation of an Office of Human Rights which "would be charged with ensuring a co-ordinated, whole-of-government approach to rights protection and to foster human rights capacity within the Government."⁵⁷ We note that the Victorian Consultation Committee recommended that a Department of Justice Human Rights Unit be created, with responsibility for:

⁵⁶ Submission 354.

⁵⁷ Submission 272.

- Issuing guidance to government departments and agencies to ensure increased awareness of and compliance with the Charter.
- The vetting of policy and legislative proposals to ensure compliance with the Charter.
- Providing assistance to government departments in their preparation of the Human Rights Impact Statements to be provided to Cabinet with policy and other proposals.
- Providing assistance to the Attorney General in the preparation of Statements of Compatibility for new legislation.⁵⁸

Although we agree with the view that a central government agency should be given the role of the lead agency within Government in relation to human rights, we do not consider it necessary or appropriate to include in the draft Bill a requirement that all statements of compatibility be examined by this agency prior to their presentation to the Parliament. Further, although the Department of the Attorney General appears to be the most logical choice for this lead agency, the designation of one agency as the lead agency on human rights issues, and the manner in which that role is carried out, is a matter for the Government, and can be implemented administratively. It is not a matter upon which we consider it necessary or appropriate for us to make specific recommendations.

(iii) Effect of the absence of a statement of compatibility

Clause 31 of the draft Bill currently provides that, if a law is enacted without a statement of compatibility, it is still a valid law. A number of people making submissions to the Committee argued that this was inappropriate. For example, Community Vision Inc stated that the “suggestion that the absence of a statement should not affect the validity of the law is not acceptable ... all new laws should have a statement of compatibility”,⁵⁹ while Legal Aid Western Australia suggested that the lack of consequences for the absence of a statement of compatibility “substantially weakened” the whole process.⁶⁰

In the Committee’s discussion paper, *Human Rights for WA*, we noted that there may be occasions, for example situations of urgency, where it would not be possible to provide a statement of compatibility in relation to a proposed law. A number of people argued, however, that even in situations of urgency a statement of compatibility could and should be provided. Uffe Geysner argued in his submission that:

efficiency not excuses about urgency is the key-word. Ban tea-cups (and coffee cups and visits to the water fountain) from outside normal breaks and the public service might work fast enough without having to bypass Human Rights in the name of expediency and urgency.⁶¹

Legal Aid Western Australia submitted that:

even in relation to urgent legislation, Legal Aid cannot see why the statement of compatibility process should not be followed. To provide otherwise would allow any government to obviate the process under the guise of ‘urgency’. Based on past experience, it is exactly those pieces of legislation that may be described as ‘urgent’ (for example, anti-terrorist laws) that may have the most far-reaching impacts on human rights.⁶²

⁵⁸ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee, 2005, 111.

⁵⁹ Submission 245.

⁶⁰ Submission 223.

⁶¹ Submission 273.

⁶² Submission 223.

Other submissions took a slightly different view and suggested that any legislation passed without a statement of compatibility should be subject to an automatic two year sunset clause. In the view of HREOC, this “would prevent Governments being able to circumvent the parliamentary scrutiny provisions and ensure that the legislation’s compatibility with the HRA [Human Rights Act] is scrutinised at some point.”⁶³

Clause 31(5) of the draft Bill reflects the principle of the sovereignty of Parliament, which is a cornerstone of the Government’s preferred model for human rights legislation in this State. Further, clause 31(5) does no more than set out the legal position which would apply in any event. As we understand it, the legal position is that whether or not clause 31(5) was included in a WA Human Rights Act, the Parliament could at any time pass a law for which no statement of compatibility had been provided, and that law would be valid. Both in the interests of clarity of comprehension about the operation of the requirement to provide statements of compatibility, and as a reflection of the sovereignty of Parliament, we support the inclusion of clause 31(5) in a WA Human Rights Act.

We appreciate the concern that clause 31(5) might be relied upon to justify non-compliance with the requirement to provide a statement of compatibility. However, while it is a matter for the Parliament as to whether it passes a Bill for which no statement of compatibility has been presented, it seems to us that the political reality is likely to be that resort to clause 31(5) to justify a failure to provide a statement of compatibility would be the exception rather than the rule.

(iv) Statements of Compatibility for subsidiary legislation

Some people suggested that the statement of compatibility process should also apply in relation to subsidiary legislation.⁶⁴ One consideration which militates against this suggestion, however, is that subsidiary legislation must be authorised by an Act of Parliament. If a WA Human Rights Act was introduced, proposed legislation considered after its commencement would be accompanied by a statement of compatibility when considered by Parliament. That statement should indicate whether the proposed legislation authorises the making of subsidiary legislation which is, or is likely to be, incompatible with human rights. We also accept that the preparation of statements of compatibility for subsidiary legislation would require additional resources to be devoted to their preparation.

In all of the circumstances, we have reached the view that, to begin with, it is preferable to require statements of compatibility only in respect of Bills. Once government agencies have become familiar with the operation of that requirement, consideration could be given to whether it should also be applied to subsidiary legislation. In that respect, we recommend that clause 43(2) of the draft Bill be amended to include this issue in the list of matters to be considered in future reviews of a WA Human Rights Act.

6.3.5 Reporting obligations

A number of people recommended that government agencies should be required to undertake an annual audit of their human rights compliance and include that information in their annual reports or in separate annual reports to be lodged with Parliament or an authority responsible for the oversight and enforcement of a WA Human Rights Act. Some people suggested that this requirement be included within the WA Human Rights Act itself, while others saw it more as a practical requirement that could be implemented as a matter of policy. The Committee notes that those advocating this requirement

⁶³ Submission 309.

⁶⁴ Submission 300: Lt General John Sanderson AC.

included the Department for Child Protection⁶⁵ and the Office of Multicultural Interests within the Department for Communities.⁶⁶

In support of the argument that a requirement for annual audits and reports should be included within a WA Human Rights Act, the HRLRC noted that:

In the UK, in circumstances where public authorities have had inadequate (if any) auditing procedures in place, the implementation and incorporation of human rights into policy and service delivery has stalled. Particularly significant was the finding by the Audit Commission that where human rights complaints were unsuccessful, the relevant public authority tended to conclude that they were complying with the UK Act.

It is critical to the effective implementation of a Human Rights Act that any shortcomings in public authorities' compliance with and understanding of their obligations are quickly identified. Further training, education and assistance can then be provided where necessary.⁶⁷

...A REPORTING REQUIREMENT OF THIS KIND MAY ALSO BE OF ASSISTANCE TO THE COMMISSIONER FOR EQUAL OPPORTUNITY

There is considerable merit in this proposal, not just as another means of ascertaining whether agencies are adequately complying with human rights, but also to ensure that agencies regularly consider what they are doing to comply with human rights, and what more they could do. A reporting requirement of this kind may also be of assistance to the Commissioner for Equal Opportunity if, as is recommended later in this Report, the Commissioner is given a role in monitoring compliance with a WA Human Rights Act.

We note that the “accountable officer” for each government agency within the definition of “agency”⁶⁸ in the *Financial Management Act 2006* (WA) is required to prepare an annual report for that agency.⁶⁹ These annual reports are required to be tabled in Parliament by the Minister responsible for each agency.⁷⁰ In our view, for reasons of convenience, these annual reports should also contain information concerning the agency’s compliance with a WA Human Rights Act. We therefore recommend that a WA Human Rights Act require all government agencies which are “agencies” under the *Financial Management Act 2006* to include in their annual reports a human rights compliance report addressing the following matters:

- details of any cases before courts or tribunals in which a WA Human Rights Act has been relied upon to support a cause or action against the agency, or in which a court or tribunal has concluded that a provision in a law administered by the agency is incompatible with human rights;
- details of any measures implemented by the agency to ensure its practices and procedures are compatible with the requirements of a WA Human Rights Act; and
- any training or education undertaken by staff during the year in relation to human rights.

We discuss later in Chapter 8, additional matters which should be addressed in the human rights compliance reports prepared by agencies, such as the number of complaints received by the agency during the year in relation to breaches of human rights, and the manner in which those complaints were resolved.

⁶⁵ Submission 176.

⁶⁶ Submission 374.

⁶⁷ Submission 72.

⁶⁸ Section 3 of the Financial Management Act 2006.

⁶⁹ Section 61 of the Financial Management Act 2006.

⁷⁰ Section 64 of the Financial Management Act 2006.

If there are any government agencies which would not be covered by the requirement to prepare an annual report in the *Financial Management Act 2006*, we recommend that a WA Human Rights Act contain a provision requiring those government agencies to provide a human rights compliance report to the Commissioner for Equal Opportunity on an annual basis. The Commissioner should be required to table these reports in the Parliament.

6.4 Role of the Parliament

I am very much in favour of forcing Parliament to consider the human rights effect of new laws explicitly.

Participant in Busselton public forum

Parliament is the democratically elected arm of government responsible for making laws in Western Australia. As discussed in Chapters 3 and 5, the dialogue approach to the protection of rights is designed to preserve the sovereignty of Parliament to pass laws that it considers appropriate, including those which may be incompatible with human rights. However, it is also designed to ensure that before Parliament passes legislation it is at least aware of any impact the legislation may have on human rights so that it can consider whether there are alternative ways to achieve the objects of the legislation without infringing human rights. That is, the draft Bill is designed to ensure that when rights are limited this is done “consciously”.

6.4.1 Scrutiny of proposed legislation by a parliamentary committee

Committee review is a meaningful addition to the statement of compatibility.

Submission 354: IHRL Working Group

While statements of compatibility are a means of providing Parliament with information to help inform its deliberations on proposed legislation, numerous people suggested to us that a WA Human Rights Act should also empower an independent parliamentary committee to scrutinise proposed legislation for its compatibility with human rights and report its findings to Parliament. For example, the Chamber of Commerce and Industry Western Australia observed that:

During the passage of Bills, when parliamentary timetables are tight and members’ attention is often focused simultaneously on multiple issues and pieces of legislation, a statement of compatibility may not be enough to ensure the recognition and/or protection of human rights values. The protection of human rights could arguably be better achieved through the establishment of a standing parliamentary committee which scrutinises all legislation to check for human rights or civil liberties implications.⁷¹

Another limitation of the statement of compatibility process, identified by The Greens (WA) Inc, was that it “entrusts the responsibility for detecting breaches to the same Executive that is trying to introduce the legislation”.⁷² The Greens (WA) submitted that requiring an independent body to examine proposed legislation for its compatibility with human rights would help to remedy this problem.⁷³

The Western Australian Council of Social Service identified a further benefit of pre-legislative scrutiny by a parliamentary committee, namely, that it would “provide an opportunity for community and expert

⁷¹ Submission 339.

⁷² Submission 305.

⁷³ Submission 305.

concern to be directly incorporated into the parliamentary process – thus serving to further human rights awareness in Western Australia.”⁷⁴

The draft Bill does not contain a requirement that a parliamentary committee scrutinise legislation for its compatibility with human rights. In this respect, the draft Bill adopts an approach quite different from that in the ACT Act and the Victorian Charter.

Section 38 of the ACT Act provides:

38 Consideration of bills by standing committee of Assembly

(1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

(2) In this section:

relevant standing committee means—

(a) the standing committee of the Legislative Assembly nominated by the Speaker for this section; or

(b) if no nomination under paragraph (a) is in effect—the standing committee of the Legislative Assembly responsible for the consideration of legal issues.

The Committee charged with performing this function is the Scrutiny of Bills Committee of the ACT Legislative Assembly.

A similar provision is contained in the Victorian Charter, section 30 of which provides:

30. Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the **Subordinate Legislation Act 1994**.

In our discussions with officers in the ACT and Victoria, we heard that these parliamentary committees have had a considerable impact in stimulating discussion and debate about the compatibility of proposed legislation with human rights.⁷⁵ Drawing on the experience of the ACT, Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham, observed:

Although the HRA [Human Rights Act] has not had a large impact in the courts, it has had a positive impact on the scrutiny of new legislation. Under HRA s38, a standing committee must report to the Legislative Assembly about human rights issues raised in legislation presented to the Assembly. The Scrutiny Committee has been robust in analysing proposed legislation for breaches of the HRA and its reports and the respective government responses have often been referred to in Legislative Assembly debate by all parties.⁷⁶

⁷⁴ Submission 315.

⁷⁵ Discussions with Ms Pamela Tate QC, Solicitor General for Victoria on 23 August 2007, Discussions with representatives of the ACT Department of Justice and Community Services on 24 August 2007.

⁷⁶ Submission 320.

The potential for debate about the impact of proposed legislation on human rights, and the role of parliamentary committees in stimulating discussion about these issues, was illustrated by two opinions given by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament earlier this year, in relation to the *Infertility Treatment Amendment Bill 2007* and the *Superannuation Legislation Amendment Bill 2007*. In both of these cases, the Scrutiny of Acts and Regulations Committee reached a different view from that set out in the Ministerial statement of compatibility relating to each Bill. In turn, the Committee's views prompted each of the Ministers concerned to provide a written response to the Committee.⁷⁷ These two examples highlight that, although minds may differ over whether a Bill is compatible with human rights, an opinion given by a parliamentary committee may encourage informed debate about these issues, and so facilitate the dialogue between the Government and the Parliament in relation to the impact of proposed legislation on human rights.

We also note that the Joint Committee on Human Rights of the UK Parliament has had an important role in scrutinising legislation for compatibility with the UK Act.⁷⁸ The Joint Committee conducts a preliminary "sifting" examination of all Bills, and then identifies particular Bills which it wishes to more closely scrutinise. A perusal of the Joint Committee's website⁷⁹ contains links to responses provided on behalf of the UK Government in relation to concerns raised by the Joint Committee. Clearly the Joint Committee's scrutiny role has stimulated a dialogue between the Parliament and the Government in relation to the human rights impacts of proposed legislation. For this reason, a number of submissions referred to the Joint Parliamentary Committee on Human Rights in the UK as a good example of how scrutiny of proposed legislation by a parliamentary committee can contribute "towards a new culture of human rights".⁸⁰ For example, Dr Julie Debeljak observed:

The Parliamentary Committee has made a significant difference to the level of debate and scrutiny of legislation within Parliament, although it has not necessarily resulted in major changes to legislative proposals. Reports of the Parliamentary Committee are 'often relied on extensively in debate on the Bill to which the report relates.' ... Examples of this constructive debate are the Criminal Justice and Police Bill 2001 (UK) and the Anti-Terrorism, Crime and Security Bill. The Parliamentary Committee 'reports helped to generate pressure ... which yielded some gains ... in the form of additional safeguards for rights' for both Bills.

Overall, the Parliamentary Committee is considered 'a key component of the legislative process' which has 'strengthened the role of Parliament in scrutinising legislative proposals and administrative practices against [human rights] standards.' This is not only vital for Parliament in fulfilling its constitutional roles of legislative scrutineer and law-maker; it is also vital in terms of making robust, considered, and educative contributions to the institutional dialogue about rights and justifiable limits on rights.⁸¹

A further advantage of giving a parliamentary committee a role in scrutinising proposed legislation for compatibility with human rights, would be the openness and transparency of that process and of the views of such a committee.⁸² This would be particularly important in the event that a Ministerial statement of compatibility did not contain reasons as to why proposed legislation was considered compatible with human rights (as presently allowed under the draft Bill).

⁷⁷ Scrutiny of Acts and Regulations Committee, *Alert Digest No. 9 of 2007*, 17 July 2007, 7 – 10.

⁷⁸ Discussions with Ms Pamela Tate QC, Solicitor General for Victoria on 23 August 2007.

⁷⁹ See www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm.

⁸⁰ Anthony Lester, "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 *Victoria University of Wellington Law Review* 1, 432, as cited in submission 354.

⁸¹ Submission 267, internal references omitted.

⁸² Discussions with representatives of the ACT Department of Justice and Community Services on 24 August 2007.



In our view, these considerations strongly support the conclusion that a WA Human Rights Act should give a parliamentary committee a role in scrutinising proposed legislation for its compatibility with human rights.

The question which then arises is how this should be achieved. Some of the submissions suggested that a new parliamentary committee be established to specifically take on the role of reviewing proposed legislation for its compatibility with human rights. For example, HREOC stated:

The committee should be dedicated to considering human rights issues. HREOC considers that this is preferable to expanding the role of existing legislative scrutiny committees in WA, because it enables a permanent committee to build expertise in analysing human rights issues.⁸³

Most submissions addressing the issue, however, recommended giving a human rights scrutiny function to one or more of the existing parliamentary committees such as the Joint Standing Committee on Delegated Legislation.

There was, however, some agreement among the submissions that the committee should be a Joint Committee, comprising members from both Houses of Parliament. HREOC noted that this would “minimise partisanship and increase legitimacy”.⁸⁴ The IHRL Working Group observed that if its membership was drawn from a spectrum of political parties, it would engage “a broader section of Parliament in the human rights debate”, which would “[lend] greater independence and credibility to its conclusions”.⁸⁵

One difficulty in implementing a requirement for a parliamentary committee to scrutinise the human rights impact of all proposed legislation in Western Australia is that there is no existing Standing Committee of the Parliament which has the function of scrutinising legislation. Unlike the position in other States and Territories (including the ACT and Victoria), in the Western Australian Parliament the function of scrutinising legislation is divided between the Joint Standing Committee on Delegated Legislation (scrutiny of subsidiary legislation), the Legislative Council Standing Committee on Uniform Legislation and Statutes Review (scrutiny of uniform legislation), and the Legislative Council Standing Committee on Legislation (scrutiny of primary legislation).

The Legislative Council’s Standing Committee on Legislation has the function of considering and reporting on any Bill referred by the Legislative Council. Most Bills can be referred by the Legislative Council to its committees, the general exceptions being appropriation, taxation and loan Bills. The Committee is able to consider Bills in more detail than would be possible in the limited



⁸³ Submission 309.

⁸⁴ Submission 309.

⁸⁵ Submission 354.

time available in the Legislative Council itself, and to report its findings to the Legislative Council. The Committee will often recommend amendments or further review of particular matters in its report to the Legislative Council. The Committee's inquiries focus on the feasibility, clarity and technical competence of a Bill rather than its policy.

The Uniform Legislation and Statutes Reform Committee examines legislation which ratifies or gives effect to bilateral or multilateral intergovernmental agreements to which the State Government is a party or which introduces a uniform scheme or uniform laws throughout Australia. Its functions also include reviewing the form and content of the Western Australian statute book, scrutinising Bills that seek to revise statute law by repealing spent, unnecessary or superseded Acts, and by making miscellaneous minor amendments to various Acts and inquiring into and reporting on any law reform proposal that may be referred by the House or a Minister.

The Joint Standing Committee on Delegated Legislation is an all-party eight-member committee, comprising equal membership from the Legislative Assembly and Legislative Council. Its terms of reference enable it to consider and report to Parliament on any "subsidiary legislation" as defined by section 5 of the *Interpretation Act 1984*. The functions and powers of the Committee are, so far as is presently relevant, described in Schedule 1 of the Legislative Council Standing Orders as follows:

- 3.1 *A Joint Standing Committee on Delegated Legislation is established.*
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
 - (a) is authorised or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause –

“adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment.

In our view, it would be appropriate for a Joint Standing Committee of the Parliament to take on the role of scrutinising legislation for its compatibility with human rights. The only Joint Standing Committee in existence which presently has a legislative scrutiny role is the Joint Standing Committee on Delegated Legislation. The role of that Committee in assessing whether subsidiary legislation has an adverse impact on existing rights is clearly very similar in nature to the role of scrutinising Bills to determine their

compatibility with a WA Human Rights Act. Accordingly, the Joint Standing Committee could well be expected to have some expertise in dealing with issues of the kind likely to arise in relation to a WA Human Rights Act.

A few submissions suggested that the parliamentary committee given the role of scrutinising the human rights compatibility of Bills should also be able to scrutinise the human rights compatibility of subsidiary legislation.⁸⁶ We agree with that suggestion. This is another reason why it would be appropriate for the Joint Standing Committee on Delegated Legislation to take on the role.

As the role of the Delegated Legislation Committee is presently confined to examining subsidiary legislation, that Committee could not undertake the task of scrutinising Bills for compatibility with a WA Human Rights Act unless its Terms of Reference were amended, or it was given that function by an Act of the Parliament.

Some precedent exists in Western Australia for establishing a Joint Parliamentary Committee under an Act of Parliament. The Joint Committee on the Corruption and Crime Commission was established by the *Corruption and Crime Commission Act 2003*. Greater precedent exists at the Commonwealth level for establishing a Joint Parliamentary Committee of the Commonwealth Parliament pursuant to an Act of the Commonwealth Parliament.⁸⁷

In light of all of the above, we recommend that a WA Human Rights Act should give a parliamentary committee a role in scrutinising all Bills and subsidiary legislation for their compatibility with human rights. We recommend that this role be given to the Joint Standing Committee on Delegated Legislation, and that the Terms of Reference for this Committee be amended accordingly. The extension of this Committee's role could be achieved by including a provision in a WA Human Rights Act, or alternatively, could be achieved by the Parliament through its Standing Orders. We do not express a preference for either approach.

Finally, we note that there was a level of consensus among the submissions which addressed this issue that any parliamentary committee given the function of scrutinising proposed legislation for its compatibility with human rights, should be properly resourced to perform that role.⁸⁸ There can be no dispute that the successful operation of a parliamentary committee in facilitating informed debate about a Bill's compatibility with human rights would depend upon the experience, knowledge and resources on which the committee was able to draw when undertaking its scrutiny function. We understand that there are many demands made on members of Parliament and that their available time is not unlimited. The existence of parliamentary committees is testament to the fact that members of Parliament do want to undertake significant legislative scrutiny tasks. If a further layer of responsibility was added to the existing responsibilities of members of Parliament, without adequate resources, it could be beyond their capacities to deal with it.

⁸⁶ Submission 72: HRLRC.

⁸⁷ For example, the Joint Committee on the Australian Commission for Law Enforcement Integrity is established by Part 14 of the Law Enforcement Integrity Commissioner Act 2006, the Joint Committee on the Australian Crime Commission was established by the National Crime Authority Act 1984 (now the Australian Crime Commission Act 2002), the Joint Committee on Corporations and Financial Services is established by the Australian Securities and Investments Commission Act 2001, the Joint Standing Committee on the Broadcasting of Parliamentary Proceedings is established by section 5 of the Parliamentary Proceedings Broadcasting Act 1946, the Joint Committee on Intelligence and Security is established under section 28 of the Intelligence Services Act 2001, the Joint Committee of Public Accounts and Audit is established by the Public Accounts and Audit Committee Act 1951 and the Joint Standing Committee on Public Works is established by the Public Works Committee Act 1969.

⁸⁸ For example, submission 339: Chamber of Commerce and Industry Western Australia; submission 309: HREOC; submission 72: HRLRC.

We therefore recommend that a parliamentary committee should only be given the function of scrutinising Bills and subsidiary legislation for compatibility with human rights if Parliament is willing to ensure that the committee is adequately resourced to carry out that function. It may be necessary, for example, for the committee to obtain opinions from legal counsel or academics in relation to the content of human rights which are relevant to a particular Bill or subsidiary legislation. The Committee may also need additional staff to enable it to perform this function in a timely manner.

6.4.2 Override declarations

Clause 30 of the draft Bill provides that a written law may state that it, or any part of it, operates despite being incompatible with one or more human rights. Clause 30 further provides that if a written law includes such a statement (commonly referred to in other jurisdictions as an “override declaration”), then the proposed WA Human Rights Act will not apply to the written law to the extent provided for in the override declaration.

Clause 30 caused some confusion among people making written submissions. A number of them perceived it to be the only source of Parliament’s power to pass legislation which is incompatible with human rights. As we discussed earlier in Chapter 5, the Parliament’s power to pass legislation which is incompatible with human rights would exist irrespective of a provision in the terms of clause 30 of the draft Bill. This is because the draft Bill proposes a WA Human Rights Act in the form of ordinary legislation and nothing in the draft Bill prohibits Parliament from passing legislation which is incompatible with human rights, or permits the courts to invalidate legislation which is incompatible with human rights.

Clause 30 allows Parliament to expressly exempt legislation (either in whole or in part) from the operation of the draft Bill, including, most relevantly, Parts 5 and 6. Some of the consequences of such an exemption were discussed in the submission of the Western Australian Equal Opportunity Commission as follows:

In such instances, the only remaining obligation is on the Attorney General or relevant minister to provide a statement of compatibility in accordance with the Bill. The effect of this override provision is to side-step the protections that might otherwise be available under the Bill to prevent a government agency, acting pursuant to the written law in question, from breaching a person’s human rights. ... if an override provision is included in an Act, and is passed by Parliament, there would be no right to have the Supreme Court interpret the Act, and no duty on the government agency to act in accordance with human rights.⁸⁹

While some people were supportive of clause 30 of the draft Bill, a number of people argued that it should be removed. For example, the Social Responsibilities Commission of the Anglican Province of Western Australia stated that it “appears that the section grants Parliament the power to negate the force of the Bill. If this is the case, this section is unacceptable.”⁹⁰ The HRLRC also noted that it “strongly oppose[d] the inclusion of an override provision in the Human Rights Act”⁹¹ because it would mean that the ordinary processes of the Act could be bypassed. The Centre suggested that the override power was unnecessary because, under the statutory dialogue model of human rights legislation, “parliamentary sovereignty is retained as any subsequent legislation that is inconsistent with the Human Rights Act will prevail.”⁹²

⁸⁹ Submission 337.

⁹⁰ Submission 283.

⁹¹ Submission 72.

⁹² Submission 72.

THE POWER TO INSERT AN
OVERRIDE DECLARATION
INTO LEGISLATION
SHOULD BE LIMITED
TO EXCEPTIONAL
CIRCUMSTANCES

Other people were prepared to “tolerate” clause 30 but argued strongly that the power to insert an override declaration into legislation should be limited to exceptional circumstances and/or that any legislation which contained such a declaration should be subject to a sunset clause. For example, the

Southern Communities Advocacy Legal & Education Service Inc (SCALES) stated that, “if it is necessary it should only be permitted in exceptional circumstances, such as public emergency or threats to security”.⁹³ The Western Australian Equal Opportunity Commission submitted that a WA Human Rights Act should follow the Victorian Charter which only allows override declarations to be made in exceptional circumstances and which, in section 31(7), provides that the “Act or provision protected by the override expires on the fifth anniversary of the date it came into operation, or such earlier date as may be specified.”⁹⁴

ALHR were concerned that unless the power to insert override declarations into legislation was limited to exceptional circumstances, it would become a constant temptation for the Government when drafting laws:

consistent with the doctrine of parliamentary sovereignty on which Australia's legal system is based, Parliament will have the right to pass laws that are inconsistent with human rights. The unfettered nature of the provision in s.30 of the Draft Bill is of concern because the danger is that the Executive will all too readily resort to its use even where it is not necessary. ... The experience in Victoria is that a few government officials have expressed a wish to avoid the perceived complexity of a human rights impact assessment and resort to use of the override provision. However, the Victorian Charter requires that the override provision only be used in ‘exceptional circumstances’. ALHR supports the inclusion of a similar protection in a WA Human Rights Act.⁹⁵

ALHR further argued that it would be appropriate for a WA Human Rights Act to define the term “exceptional circumstances” for the following reasons:

It is certainly understandable that a Human Rights Act would make provision for emergency situations, however history is replete with examples of such excuses being used simply to gain extra powers of governance where there is no emergency. Warning of the over-zealous use of such a provision is provided by a Canadian case where a local government declared a public emergency to enable them to use their emergency powers to regulate dog-control! This demonstrates that any ‘emergency’ or ‘exceptional circumstances’ power should be very carefully circumscribed.

In addition to the Victorian Charter, a power to insert an override declaration is included in the Canadian Charter. As the Tasmania Law Reform Institute has noted:

the use of an override clause was originally conceived and implemented in Canada. In that jurisdiction where the judiciary has the power to invalidate legislation for inconsistency with Charter rights, the power to enact override declarations is necessary to preserve parliamentary sovereignty.⁹⁶

Clearly the same necessity for an override clause does not exist in Western Australia, because nothing in the draft Bill limits the Parliament’s power to enact legislation which is incompatible with human rights, or permits the courts to declare legislation to be invalid because it is incompatible with human rights.

⁹³ Submission 372.

⁹⁴ Submission 337.

⁹⁵ Submission 299.

⁹⁶ Tasmania Law Reform Institute, A Charter of Rights for Tasmania, Report No. 10, October 2007, 88, para [4.10.21].

Why then include an override clause in a WA Human Rights Act? Three considerations appear to us to support the inclusion of such a clause. First, the making of an override declaration would assist the Parliament, when it enacts legislation, to clearly indicate whether the provisions of a WA Human Rights Act are intended to apply to that legislation.

Secondly, the use of an override declaration in an Act would ensure that Parliament's intention in relation to the Act – namely that that Act was to operate incompatibly with human rights - would not be undermined. Under the draft Bill, all legislation enacted by Parliament (whether or not that legislation is compatible with human rights) would ordinarily be subject to the provisions of Parts 5 and 6 of the draft Bill. That is, courts and tribunals would be required to interpret the legislation compatibly with human rights where possible to do so within the limits of the interpretation provision (discussed later in this Chapter). In addition, the Supreme Court would be able to issue a non-binding declaration of incompatibility (also discussed later) in respect of legislation which was incompatible with human rights. Further, government agencies making decisions or performing functions under the legislation would be required to act compatibly with human rights, where legally possible to do so.

Thirdly, permitting the Parliament to make an override declaration is, to some extent, consistent with the terms of the *International Covenant on Civil and Political Rights* (ICCPR) itself. Article 4(1) of the ICCPR permits a derogation from some of the rights in the ICCPR “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”. Those derogations are to be “strictly required by the exigencies of the situation”, are not to be inconsistent with the obligations of the State parties to the ICCPR under other international law, and are not to involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

We therefore support the inclusion in a WA Human Rights Act of an override declarations clause of the kind contained in clause 30 of the draft Bill. In doing so, we note that the inclusion of an override declaration in an Act would mean that some or all of the Act would not be subject to a WA Human Rights Act once it was passed. That would not eliminate the requirement for the Government to provide the Parliament with a statement of compatibility in respect of the Act when it was first introduced as a Bill into the Parliament. That statement of compatibility would need to set out the reasons why the Bill should be passed notwithstanding that it was not compatible with human rights. Requiring the Government to justify the enactment of an Act containing an override declaration is an important aspect of the dialogue model for human rights legislation which would not be excluded by the making of an override declaration.

Having concluded that a WA Human Rights Act should permit override declarations to be made, two issues raised with us in the submissions were: first, whether an override declarations provision should limit or define the circumstances in which override declarations may be made, for example to “exceptional circumstances”. The second issue was whether a WA Human Rights Act should provide that override declarations would operate only for a limited period (ie that they should be subject to a “sunset clause”).

It was submitted to us that permitting override declarations to be made only in exceptional circumstances would be consistent with article 4(1) of the ICCPR.⁹⁷ However, this was a matter about which there were differences of opinion. It was also submitted to us that the requirement for “exceptional circumstances” in section 31(4) of the Victorian Charter imposes a lesser threshold for override

⁹⁷ Submission 299: ALHR.

declarations than the criteria set out in article 4(1) of the ICCPR.⁹⁸ It is, nevertheless, clear that article 4(1) of the ICCPR releases States Parties from their obligations under the ICCPR only in very limited circumstances. Permitting override declarations to be made in “exceptional circumstances” would be broadly consistent with that approach.

We accept that Parliament would have the power to make an override declaration in an Act in circumstances which could not be described as “exceptional”. However, we view the importance of a limitation of this kind as lying in its political, rather than legal, effect. That is, permitting override declarations to be made only in “exceptional circumstances” may assist to counter any temptation which might otherwise arise for Parliament to include override declarations in legislation on a regular basis.

For these reasons, we are of the view that clause 30 of the draft Bill should be amended to expressly provide that an override declaration may only be made in exceptional circumstances. We do not think that an attempt should be made to define what constitute “exceptional circumstances”. The Explanatory Memorandum for the Victorian Charter set out some examples of “exceptional circumstances” for the purposes of clause 31 of the Victorian Charter, namely “threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria”. While these examples illustrate the narrow confines of “exceptional circumstances”, what constitutes “exceptional circumstances” will be a political judgment, which is best left to the Parliament.

We are also of the view that it would be undesirable for clause 31 of the Bill to provide that any override declaration made would operate only for a finite period. This would introduce an additional level of complexity to the operation of a WA Human Rights Act, and to the interpretation and operation of those Acts containing an override declaration, which at this stage would be undesirable. There is much to be said for endeavouring to ensure that the terms of a WA Human Rights Act are as simple as possible, so that it can be readily understood by everyone in the community. However, the operation of override declarations, and the question whether a sunset clause for those declarations is necessary or desirable, are issues which we consider should be monitored on an ongoing basis. For this reason, we recommend that clause 43(2) of the draft Bill be amended to include the operation of override declarations, and whether override declarations should be subject to a sunset clause, as issues to be considered in the future reviews of a WA Human Rights Act.

⁹⁸ Submission 267: Dr Julie Debeljak.



6.5 Role of the courts

The courts have an integral role in upholding the rights of the citizens of this state.

Submission 253: Ray Redner

Many submissions to the Committee recognised that, as the independent third arm of government, the courts have an important role to play in the protection and development of human rights. While the draft Bill does not empower the courts to invalidate legislation which is incompatible with human rights, they nevertheless have a significant role to play:

- in interpreting and applying legislation that may impact on human rights;
- in the case of the Supreme Court, by contributing to a human rights “dialogue” with the Government and the Parliament by issuing non-binding declarations of incompatibility in respect of legislation; and
- in holding government agencies to account when actions are brought before the courts challenging the actions or decisions of agencies, on grounds including that the actions or decisions were incompatible with human rights.

This latter aspect of the courts’ role is discussed further in Chapter 8 (which deals with what should happen when human rights are breached). The other aspects of the courts’ role under the draft Bill are discussed below.

6.5.1 Interpreting legislation

(i) General interpretation provision

Clause 34(3) of the draft Bill requires all courts to interpret legislation compatibly with human rights where possible to do so consistently with the purpose of the legislation and where the meaning of the legislation is “ambiguous or obscure” or “leads to a result that is manifestly absurd or is unreasonable”.⁹⁹ This interpretation provision applies to both primary and subsidiary legislation.

Many of the people we consulted agreed that the courts should be required to interpret legislation compatibly with human rights unless this would disturb the purpose of the legislation.

⁹⁹ The interpretation obligation in clause 34(3) of the draft Bill is not only directed at the courts. It applies to everyone who works with legislation, including government agencies.

The submissions we received in relation to the interpretive obligation in the draft Bill, however, criticised various aspects of the terms of clause 34(3). These criticisms all proceeded from the view that clause 34(3) unduly narrowed the potential (and desirable) role for courts under a WA Human Rights Act.

For example, a number of submissions commented that clause 34(3) of the draft Bill appeared to be no more than a restatement of the common law. HREOC noted that the clause:

appears to be a mere codification of the common law principle that rights, freedoms and immunities recognised as fundamental will not be taken to be abolished, suspended or adversely affected in the absence of ‘a clear expression of an unmistakable and unambiguous intention’.¹⁰⁰

Similarly, the HRLRC stated that:

This appears to be a mere codification of the common law principle that where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party.¹⁰¹

Others submitted that the criteria in clause 34(3) were unnecessary. For example, SCALES submitted that the requirement for ambiguity, obscurity, manifest absurdity or unreasonableness was unnecessary given that any human rights interpretation had to be consistent with the underlying purpose of the law.¹⁰²

A number of submissions directly drew our attention to the fact that the draft Bill imports a high threshold which must be met before courts and tribunals may interpret legislation compatibly with human rights. Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham considered the interpretation provision in the draft Bill to be “unduly narrow”. In their view, if the WA Government is “serious in its commitment to improving adherence to human rights, then we believe that it is important that the voice of the court is heard in the dialogue, and not stifled by overly restrictive provisions in the charter.”¹⁰³

Dr Julie Debeljak also criticised the narrow scope of clause 34(3):

There are numerous problems with s34 as currently drafted. First, to require ambiguity, obscurity, or a manifestly absurd or unreasonable result before the interpretative obligation operates significantly weakens the main remedial provision of the instrument. Given that parliamentary sovereignty is retained, and in the absence of any free-standing remedy for breach of a human right, a strong interpretative power is vital to provide human rights remedies for potential violations. From a human rights perspective, to undermine s34 so dramatically weakens the instrument to the extent that it brings the entire document into question.

...this change to the interpretative obligation has no equivalent under any other human rights instrument. There is no guidance from comparative jurisdictions as to how this should operate. This alone, increases the uncertainty surrounding the adoption of the *WA Human Rights Act*.¹⁰⁴

ALHR indicated that they regarded the interpretation provision as a fundamental aspect of the proposed WA Human Rights Act and urged us to recommend that the draft Bill follow the Victorian model.¹⁰⁵

¹⁰⁰ Submission 309.

¹⁰¹ Submission 72.

¹⁰² Submission 372.

¹⁰³ Submission 320.

¹⁰⁴ Submission 267.

¹⁰⁵ Submission 299.



The formulation of the interpretive obligation clause in a WA Human Rights Act would have a significant impact on the respective roles of the Parliament and the courts in making judgments about human rights issues. The same issue was aptly encapsulated, albeit in the context of a discussion of the ACT Act, in the following observation:

It is arguable that if the balance is tilted too far in the direction of interpretation, the voice of the legislature could be silenced by that of the court, which could re-write legislation in accordance with its own assessment of human rights. This would leave the courts vulnerable to criticism of judicial activism and defeating the will of the people's elected representatives. However if the courts are too timid in their approach to interpretation the *Human Rights Act* may have little impact in improving the quality and application of legislation from a human rights standpoint ...¹⁰⁶

We acknowledge that the criteria in clause 34(3) of the draft Bill constitute a high threshold which would have to be met before the courts could interpret legislation compatibly with human rights. Clause 34(3) makes it clear that, unless there is some doubt about the meaning of the words used by the Parliament, a provision is to be given the meaning conveyed by the words used, the legislative context, and the purpose or object of the law in question, and not in a manner which is compatible with human rights. However, that is entirely consistent with the respect afforded to parliamentary sovereignty throughout the draft Bill. As was acknowledged by Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham in their submission, "there may be concerns that a very broad interpretation power might be seen to undermine the principle of parliamentary sovereignty, if it allows the courts to override the clear meaning of legislation as intended by parliament".¹⁰⁷ Clause 34(3) appears to have been drafted with this concern in mind.

At the same time, we do not consider that clause 34(3) sets the bar too high. It was submitted to us by Dr Julie Debeljak that whether a meaning is ambiguous, obscure, manifestly absurd or unreasonable is a contentious question in respect of which "different people and judges will have differing views."¹⁰⁸ The existence of differing views about the meaning of a provision would suggest a sufficient uncertainty about the meaning of the provision to warrant the application of the interpretive obligation in clause 34(3).

Having said that, we are not concerned that in some cases there would be no room for the application of clause 34(3) by a court because the criteria for its application had not been met. In such cases, the court would be required to give the written law the meaning conveyed by the words used, rather than to give those words a meaning compatible with human rights. In some cases, this may mean that a court would conclude that a provision was incompatible with the human rights in a WA Human Rights Act. In a case before the Supreme Court, a conclusion of this kind may warrant the making of a declaration of incompatibility. The consequence of adopting a narrow interpretive obligation clause could therefore be greater dialogue between the courts and the Government and the Parliament in relation to legislation which was considered to be incompatible with human rights. The decision would then fall to the Government and the Parliament as to whether that incompatibility should be remedied by an amendment of the legislation. In our view, that outcome is preferable to giving the courts greater scope to avoid such incompatibility by adopting a meaning of a written law which was compatible with human rights, but inconsistent with the meaning intended by the Parliament or the purpose of the written law.

¹⁰⁶ G. McKinnon, "Comment on SI bhnf CC v KS bhnf IS [2005] ACTSC 125", Working Paper No. 2, May 2006, Regulatory Institutions Network, ANU, published at <http://acthra.anu.edu.au/articles/McKinnon%20SI%20bhnf%20CC%20v%20KS%20bhnf%20IS.pdf>

¹⁰⁷ Submission 320.

¹⁰⁸ Submission 267.

We therefore endorse the inclusion of an interpretive obligation clause in a WA Human Rights Act in the terms set out in clause 34(3) of the draft Bill.

There are, however, two minor typographical and consistency issues relating to clause 34. First, there appears to be a typographical error in clause 34(3)(c), which provides “in a way that is compatible with human rights in so far as it possible to do so”. The word “is” should be inserted after the word “it”.

Secondly we note that clause 34(3) refers to a “written law”, whereas clause 34(4) refers to a “written law of this State”. It does not appear that any different meaning is intended. The term “written law” refers to all Western Australian Acts and subsidiary legislation in force.¹⁰⁹ We recommend this inconsistency be addressed by deleting the words “of this State” in clause 34(4).¹¹⁰

(ii) Consideration of international jurisprudence

When Western Australian courts are interpreting human rights, the draft Bill expressly permits them to consider any international jurisprudence that is relevant. In this regard, the draft Bill defines “international jurisprudence” to include:

- the ICCPR;
- any treaty or other international agreement about the rights of people to which Australia is a party;
- international law;
- any judgment of a foreign or international court or tribunal;
- general comments and views of the United Nations bodies that monitor treaties about the rights of people; and
- declarations and standards adopted by the United Nations General Assembly that are relevant to the rights of people.

This aspect of the draft Bill appeared to create a division of opinion among those people who considered it. A few people thought it was inappropriate for courts in this State to look to international jurisprudence generally or United Nations documents in particular.¹¹¹

In our view, concerns about the implications of recourse to international jurisprudence were fully answered by submissions we received which supported the inclusion of clause 33(1) in the draft Bill. A number of people noted that foreign judgments often contain valuable accounts of the decisions of international tribunals on relevant human rights issues. Uffe Geysner further noted that we have always taken “foreign materials” into account in our legal system: “we have used a lot of British common law examples in our judgments, our state tendency to use statute law [has] brought in a system related to the old Roman system of law. Law has become international, but with a local flavour.”¹¹² Similarly, the Western Australian Director of Public Prosecutions noted in his submission that Western Australian courts are conversant with international human rights law and already take it into account in their decision making.¹¹³

¹⁰⁹ Section 5 of the Interpretation Act 1984.

¹¹⁰ This was pointed out to us in submission 254: Family Court of Western Australia.

¹¹¹ Submission 34: Festival of Light; submission 292: Steve Gadsby; submission 262: Rivers Christian Life Centre; submission 135: Michael Warren.

¹¹² Submission 273.

¹¹³ Submission 296.

Nothing in clause 33(1) requires a court or tribunal to have regard to international jurisprudence in relation to the meaning of a particular human right, or to give it weight in reaching a decision about the meaning or application of a human right in a particular context. This is made very clear by clause 33(4) of the draft Bill, which requires a variety of factors to be taken into account in determining whether international jurisprudence should be taken into account, or what weight should be given to it. We note that these factors include the desirability of being able to interpret a human right by reference to the ordinary meaning of its text and the purpose of a WA Human Rights Act.¹¹⁴

Finally, we note that even in the absence of clause 33(1) of the draft Bill, courts and tribunals would be permitted (under existing legal principles) to have regard to the decisions of courts and tribunals in other jurisdictions, such as the UK. Those decisions often refer to the broader international jurisprudence set out in clause 33(1). In this sense clause 33(1) does no more than expressly permit regard to be had to international jurisprudence of the kind which is often referred to in the body of case law which courts and tribunals are presently permitted to take into account.

Some of those people in favour of clause 33(1) of the draft Bill argued that it should be broader in scope. The HRLRC suggested that it should also specify declarations and standards adopted by the United Nations Human Rights Council and the United Nations Economic and Social Council that are relevant to the rights of people; standards adopted and recommended by the Special Procedures of the United Nations Human Rights Council; and the views of other human rights experts and academics. The ALSWA argued that:

SOME OF THOSE PEOPLE
IN FAVOUR OF CLAUSE
33(1) OF THE DRAFT BILL
ARGUED THAT IT SHOULD
BE BROADER IN SCOPE.

the term 'international jurisprudence' should also include the *Declaration of the Rights of Indigenous People*. It is recognised that this declaration is still to be passed by the United Nations General Assembly, although it has been passed by the Human Rights Council and is currently the most appropriate reference in dealing with rights and Indigenous people.¹¹⁵

In this respect, we note that section 32(2) of the Victorian Charter permits reference to "international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right" without seeking to define what is meant by "international law". Section 31(1) of the ACT Act is in similar terms, but the ACT Act defines "international law" by reference to various materials included within that term.

We are not persuaded that clause 33(1) should expressly permit consideration of a broader range of international jurisprudence. At the end of the day, the question is one of finding a balance between the vast range of materials which may be of some assistance in ascertaining the meaning of a human right, and the likely relevance of, and assistance which might be provided by, those materials. We consider that the list of sources of jurisprudence in clause 33(1) strikes an appropriate balance between these considerations. We note, however, that the definition in clause 33(1) is not an exhaustive one. The definition lists various materials which are included within the term "international jurisprudence". It would always be open to a party to endeavour to persuade a court or tribunal to have regard to material other than that set out in clause 33(1), bearing in mind the factors set out in clause 33(4).

¹¹⁴ Clause 33(4)(a).

¹¹⁵ Submission 312.

There is one qualification to our conclusion that clause 33(1) should not be amended to permit consideration to a broader range of materials. As we have recommended above that a WA Human Rights Act contain some economic, social and cultural rights drawn from the *International Covenant on Economic, Social and Cultural Rights*, clause 33(1) should be amended to include a specific reference to that Covenant.

Finally, two submissions expressed concern about clause 33(4) of the draft Bill. The ALSWA submitted that “such matters should be left to the discretion of the Supreme Court”,¹¹⁶ while HREOC suggested that clause 33(4) “unduly fetters the power of the Court to take into account relevant international human rights principles”.¹¹⁷ We do not share these concerns. Permitting recourse to any or all international jurisprudence in relation to human rights, either as of right, or without limits, could prove oppressive to courts and tribunals, and to litigants, and could work an injustice to litigants unable to locate or access this material.

6.5.2 Declarations of incompatibility

(i) Who should be able to make a declaration?

Under the draft Bill only the Supreme Court is empowered to make a declaration of incompatibility. While some people agreed that this was appropriate, many people considered that the power to issue a declaration should be extended more broadly.

The Women’s Council for Domestic and Family Violence Services (WA) argued that all courts and tribunals should be able to make declarations of incompatibility. It noted that if the power to make declarations rests only with the Supreme Court and Court of Appeal “it can be limiting, particularly in cases where community members can not afford this option thereby resulting in inequity in the system and before the law.”¹¹⁸

Greg McIntyre SC, Dr Johannes Schoombée, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey recommended in their joint submission that the power to make a declaration of incompatibility should be extended to “the President and/or senior members of the State Administrative Tribunal who have a jurisdiction to deal with equal opportunity matters, because it is they who are likely most often to be presented with circumstances of incompatibility.”¹¹⁹ Similarly, the Western Australian Equal Opportunity Commission noted that:

Whilst [restricting the power to issue declarations to the Supreme Court] would enable human rights to be examined in proceedings involving more serious offences, or in complex and expensive civil litigation the experience of most West Australians involved in the justice system is not with the Supreme Court, but with the lower courts or the SAT. Inevitably, claims that a government agency has breached one or more human rights are more likely [to] be made in these jurisdictions simply, because they deal with more cases overall.¹²⁰

In its submission to the Committee, the Department for Child Protection also observed that:

There are very few cases each year where persons affected by Departmental actions pursue remedies in the Supreme Court. Most of the legal action the Department is involved in takes place

¹¹⁶ Submission 312.
¹¹⁷ Submission 309.
¹¹⁸ Submission 341.
¹¹⁹ Submission 258.
¹²⁰ Submission 337.

in the Children's Court under the *Children and Community Services Act 2004*, the Family Court of Western Australia under the *Adoption Act 1994* or the State Administrative Tribunal (SAT) under the *Working with Children (Criminal Record Checking) Act 2004* or the *Children and Community Services Act 2004*. Although persons may have rights of review from the decisions of these bodies to the Supreme Court, many persons pursuing legal action against the Department are unlikely to have adequate financial resources to pursue legal action all the way to the Supreme Court, even if there is an available right of review.

The *Human Rights Bill* appears unfair in this respect because limiting access to these provisions to cases which are pursued to the Supreme Court effectively denies a significant group affected by government decisions the opportunity to trigger the higher level of accountability for laws which may be incompatible with human rights.¹²¹

Despite these views, we are not persuaded to recommend that other courts or tribunals, in addition to the Supreme Court, should be permitted to make a declaration of incompatibility. In reaching this view, we have relied on three primary considerations.

First, the inability of courts and tribunals (apart from the Supreme Court) to make a declaration of incompatibility would not mean that those courts and tribunals would be unable to consider whether legislation relevant to a matter before them was compatible with human rights. If a court or tribunal examined legislation and concluded that that legislation was not compatible with human rights, no order could be made to that effect, nor could the court declare the legislation invalid. However, there would be nothing to prevent the court or tribunal from including in its judgment the reasoning behind its conclusion that the legislation was not compatible with human rights. The likely political significance of such a conclusion (even if not expressed as a declaration of incompatibility) should not be ignored. In this sense, the inability to make a declaration of incompatibility would not preclude a court or tribunal from participating in a "dialogue" about the compatibility of legislation with human rights.

Secondly, it would not be appropriate to empower all courts and tribunals to make declarations of incompatibility. The following factors led us to conclude that the power to make a declaration of incompatibility should not be extended beyond the Supreme Court:

- A declaration of incompatibility has significant consequences. It requires a response to the Parliament by the Minister responsible for the legislation, and could be expected to prompt careful consideration within the Government and the Parliament as to whether the legislation should be amended so that it is compatible with human rights. Given these consequences, the question of whether a declaration of incompatibility should be made will warrant careful consideration by a court (possibly after submissions from the Attorney General, in addition to the parties). The workload of some courts is such that devoting the necessary resources to declarations of incompatibility could have adverse consequences in other areas (such as delays in the hearing of other matters). In contrast, the Supreme Court has adequate resources to deal with arguments of the kind likely to be raised in relation to declarations of incompatibility. It already deals with legal arguments of the kind likely to arise in relation to declarations of incompatibility.
- Questions about the incompatibility of legislation with human rights are likely to arise most often in the criminal context where statutes imposing limitations on human rights are common. Criminal matters are dealt with by the Magistrate's Court, the Children's Court and the District Court. However,

¹²¹ Submission 176.

requiring these courts to deal with declarations of incompatibility may be undesirable having regard to the workload of those courts and the undesirability of adding to any delay in the resolution of criminal charges.

Third, we note that under the ACT Act, a declaration of incompatibility may be made only by the Supreme Court,¹²² while only the Supreme Court and Court of Appeal may make a declaration of inconsistent interpretation under the Victorian Charter.¹²³

Some people suggested that instead of empowering other courts and tribunals to issue declarations of incompatibility, they should be empowered to refer compatibility issues to the Supreme Court. Uffe Geysner argued that:

If lower courts and tribunals can't refer questions regarding compatibility of laws with human rights to the Supreme Court, then we have lost a major value of any human rights legislation. Yes, the rising cost factor will be a major concern, but it is really up to our government and the legal fraternity to come up with some solutions to this problem, and a solution that is not just one of feeding the pockets of those who are already getting their fair share of the cake.¹²⁴

SCALES also expressed concern about the absence of any power of referral:

The Act does envisage that human rights questions will arise in cases before the lower courts or tribunals. ...however, we are concerned that if a lower court deals with a human rights issue there is no mechanism to have this issue brought before the Supreme Court, or have a declaration of incompatibility made.

The result of this arrangement could be an informal recognition by a lower court or tribunal that a law is incompatible with human rights, but no practical solution would be available, either for the individual complaint or to require the incompatibility to be remedied going forward.¹²⁵

Additionally, in its submission to the Committee, the State Administrative Tribunal of Western Australia specifically suggested that "where in proceedings in the Tribunal an incompatibility issue were to arise, then it might be considered appropriate that the Tribunal (and indeed other inferior court) have the power to refer the matter to the Supreme Court for resolution".¹²⁶

We do not agree that a WA Human Rights Act should permit all courts and tribunals to refer questions of compatibility about legislation to the Supreme Court. As discussed above, under a WA Human Rights Act, the obligation on courts and tribunals to interpret legislation in accordance with ordinary rules of statutory construction would not be disturbed, unless the criteria for the interpretive obligation were met. In that case, courts and tribunals would be required to interpret legislation compatibly with human rights. If a provision was unable to be construed compatibly with a human right, then the court or tribunal in question would reach a conclusion about the proper interpretation of the legislation, and apply the provision, as so construed, to the issues in the proceedings. If the court or tribunal erred in its construction of the legislation that error could be the subject of an appeal to a higher court. From this perspective, questions of compatibility of legislation with human rights are no different from any other question of statutory interpretation, for which no special referral procedure exists.

¹²² Section 32 of the ACT Act.

¹²³ Section 36 of the Victorian Charter.

¹²⁴ Submission 273.

¹²⁵ Submission 372. Also, submission 299: ALHR.

¹²⁶ Submission 177.

Furthermore, in order to resolve questions about the compatibility of legislation with human rights, it seems very likely that it would be necessary for findings to be made about the factual context in which the questions arise. Those findings would necessarily need to be made by the court or tribunal after a hearing. Referring questions to the Supreme Court in the absence of all of the factual findings in a proceeding would in many cases be undesirable. To hear some or all of the evidence in a proceeding, and then to refer a question to the Supreme Court, would result in the fragmentation of litigation, which, generally speaking, is undesirable. Either way, referring questions of compatibility to the Supreme Court would result in delays in the resolution of civil and criminal litigation, and that may also be an undesirable outcome.

(ii) When should a declaration be made?

Under the draft Bill, a declaration of incompatibility can only be made in the course of existing proceedings. That is, there is no right for a person to commence proceedings in the Supreme Court solely for the purpose of obtaining a declaration. A number of people were critical of this aspect of the draft Bill. For example, the Community and Public Sector Union/Civil Service Association stated that it did not accept “that declarations should only be available in existing proceedings. Important matters of principle should not need to wait for existing proceedings.”¹²⁷

Greg McIntyre SC, Dr Johannes Schoombee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey argued that:

The HRB [Human Rights Bill] places a very substantial limitation upon the operation of the legislation in clause 36(1) where it provides that proceedings cannot be commenced to seek only a declaration of incompatibility. Such declarations will only arise as an incidental event to some other cause of action giving rise to a remedy independent of any human rights issues. The Government’s argument that declarations of incompatibility should not be allowed in isolation because they would result in the determination of a hypothetical question rather than particular rights does not appear to survive the test of logic if the proceedings were commenced, as one would expect to usually be, in order to seek a declaration of incompatibility in relation to particular rights.¹²⁸

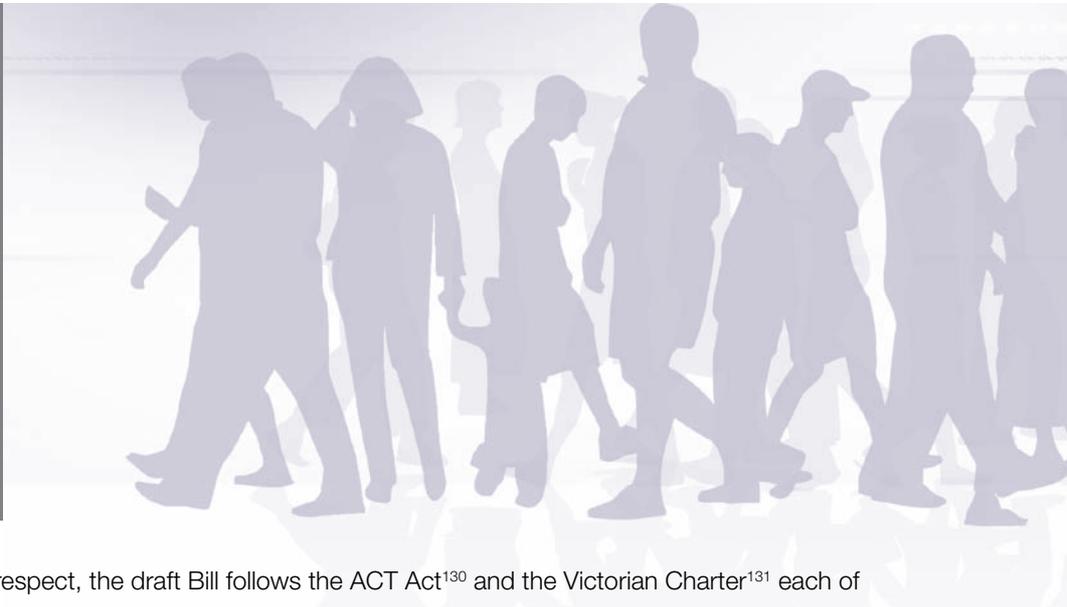
In relation to the issue of hypothetical questions, ALHR also observed that:

if the purpose of s36(1) is to stop hypothetical questions of compatibility coming before the Supreme Court then it is too widely drafted. As currently drafted the provision applies also to a specific situation where, for example, there is a clear and specific breach of a human right but the breach is permitted because of legislative authority. A person so affected could not legitimately seek a declaration of illegality because such an application to the Supreme Court would not have reasonable prospects of success. The person would be prevented from achieving a declaration highlighting that a particular power has been exercised which had negatively impacted upon his or her human right(s). There is already a disincentive to applying solely for a declaration of incompatibility because it achieves no remedy which has a practical outcome for the applicant. ALHR suggests that it be removed.¹²⁹

¹²⁷ Submission 282.

¹²⁸ Submission 358.

¹²⁹ Submission 299.



We note that in this respect, the draft Bill follows the ACT Act¹³⁰ and the Victorian Charter¹³¹ each of which permit the Supreme Court to make a declaration of incompatibility only when the court is already dealing with a proceeding.

We are not persuaded that a different approach is warranted. Questions concerning whether a legislative provision is incompatible with human rights will ordinarily arise where the legislative provision imposes a limitation on human rights. Assessing whether that limitation renders the provision incompatible with human rights would require a consideration of the factors in the permissible limitations provision of a WA Human Act (currently set out in clause 34(4) of the draft Bill). In many cases, that would require a consideration of the factual context in which the legislation operates (so that, eg, it could be assessed whether there were any alternative, less restrictive means of achieving the purpose of the limitation). One way to ensure that the factual context for the resolution of compatibility issues exists is to permit a declaration of incompatibility to be made only in proceedings which are already on foot in the Supreme Court, and in which the interpretation and application of the legislative provision is in issue.

In addition, given that a declaration of incompatibility would not affect the validity of the legislative provision to which it applied, it is difficult to see how there would be any immediate benefit for a litigant in being able to seek a declaration of incompatibility in the absence of any other remedy relating to the application of the provision. We doubt whether there would be many litigants who would wish to incur the legal costs of pursuing a declaration of incompatibility in the Supreme Court when, even if a declaration was made, there would be no direct benefit to them.

Finally, we note that in so far as the draft Bill does not permit proceedings to be commenced that seek only a declaration of incompatibility, this is entirely consistent with the tenor of Part 6 of the draft Bill which does not permit a remedy to be sought for the unlawfulness of a government action or decision solely on the ground that that action or decision was incompatible with human rights.¹³²

(iii) Who should be able to intervene before a declaration is made?

The draft Bill provides that whenever a “human rights question” arises in a case in a court or tribunal, the Attorney General is entitled to make submissions to the court or tribunal about the question and become a party to the case. It also provides that the Supreme Court cannot make a declaration of incompatibility in a particular case unless the Attorney General has had a reasonable opportunity to make submissions about the human rights question involved and any declaration of incompatibility that the court might make. The draft Bill contains provisions allowing for notice to be given to the Attorney General for these purposes.

¹³⁰ Section 32(1) of the ACT Act.

¹³¹ Section 36(1) of the Victorian Charter.

¹³² See clause 41(1) of the draft Bill.

One written submission expressed concern about the Attorney General being given the opportunity to be heard before a declaration of incompatibility was made (on the basis that this would undermine the independence of the judiciary).¹³³ Most of the people who addressed this issue, however, were concerned to ensure that, in addition to the Attorney General, someone else independent of the Government was allowed to intervene in cases raising human rights questions where declarations of incompatibility may be made. Many people suggested that the Commissioner for Equal Opportunity (who might perhaps be renamed the Human Rights and Equal Opportunity Commissioner) should perform this role. Others suggested the Ombudsman or a new Human Rights Commissioner (who would be separate from the Commissioner for Equal Opportunity).

In the Committee's discussion paper, *Human Rights for WA*, we set out our understanding of the reasons behind the Government's decision not to make provision for independent intervention in the draft Bill. These arguments were picked up and addressed by the Western Australian Equal Opportunity Commission, which argued strongly in favour of independent intervention:

The government's view is that the Commissioner should not become involved in legal proceedings, as the Attorney General is in a position to ensure that the court's attention is drawn to any relevant principles or cases to which the parties to the proceedings have not already referred. In addition, it is suggested that allowing the Commissioner to intervene would lead to a duplication of work between the Attorney General and the Commissioner when preparing submissions, and an unnecessary expense if the Commissioner engages a lawyer.

With respect, this assumes that the Commissioner and the Attorney General will always have the same view about human rights questions that are raised in the courts. However, there may be occasions when the Commissioner will have a different view to the Attorney General about a human rights issue. Human rights are fundamental rights; it is important that many voices are heard on how they are to be interpreted and applied. If only the Attorney General is entitled to intervene in court proceedings, then the court is less likely to have the opportunity to consider a point of view other than that of the government, yet it may be the conduct of a government agency that is being questioned. There is a real risk that intervention by counsel for the Attorney General may create a conflict of interest for the government in seeking to defend one of its agencies at the same time that it makes submissions to the court in relation to human rights.¹³⁴

We are persuaded that there would be merit in enabling a court or tribunal to hear from another person or body, independent of the parties to a case, and perhaps with expertise in human rights issues, about a human rights question which was raised in particular proceedings. This may be of assistance to the court or tribunal in identifying any relevant jurisprudence in relation to the meaning of the human right in question, particularly in a case where the litigants were not legally represented, or not sufficiently resourced to put relevant material before the court or tribunal. Further, although on some occasions intervention by the Attorney General would suffice to ensure that any relevant material or arguments were put before the court, on other occasions, the Attorney's submissions may support one of the parties (eg if a government agency was a party to the litigation). In that event, the court or tribunal might be assisted by hearing from an independent party in relation to the human rights question.

Some courts and tribunals already have power to hear submissions from persons or bodies other than the parties to the proceedings. However, it would be preferable for a WA Human Rights Act to include

¹³³ Submission 315: Western Australian Council of Social Service.

¹³⁴ Submission 337.

an express provision permitting a court or tribunal dealing with a human rights question to grant leave to any person or body to intervene in the proceedings to make submissions in relation to the human rights question. The appropriate place for such a provision appears to be in clause 35(1).

We have considered whether such a provision should expressly permit, or limit, this intervention to particular parties, such as the Commissioner for Equal Opportunity or the Ombudsman. There exist many bodies with independence from government which have expertise in human rights. In our view, it is preferable to give courts and tribunals a wide discretion to grant leave to appear to any party which the court or tribunal considers may be able to assist it in the resolution of the human rights question.

(iv) Effect of a declaration

Although under the Draft Bill the courts do not have the power to invalidate legislation that is incompatible with human rights, the requirement to publicly respond to a declaration of incompatibility will expose the government and Parliament to additional scrutiny by members of the public, given that a judicial officer has declared that one of Parliament's laws violates a fundamental right. This ensures that parliamentary sovereignty remains intact, but a public dialogue in relation to the protection of human rights will nonetheless take place.

Submission 299: ALHR

Under the draft Bill the Supreme Court is required to give the Attorney General a copy of any declaration of incompatibility within seven days of making it.¹³⁵ The making of a declaration also triggers a notification requirement to the Parliament. The Attorney General must give a copy of the declaration to the Minister responsible for administering the legislation to which it relates.¹³⁶ The Minister is then responsible for preparing a written response to the declaration, which must be laid before each House of Parliament together with the declaration within six months.¹³⁷ The declaration of incompatibility and the Minister's response must also be published in the *Government Gazette*.

These aspects of the draft Bill were not discussed in any detail during the Committee's public forums and only a few written submissions dealt with them. A couple of people suggested that the Minister should be required to respond to a declaration within three months instead of six.¹³⁸ ALHR considered that the draft Bill could go further than it already does by requiring the Minister to "investigate and report on ways in which the relevant law's objectives could be achieved without breaching human rights. This would be a more specific obligation than simply requiring the Minister to respond to the declaration of incompatibility."¹³⁹

It was also suggested by a couple of people that, once a Minister has tabled his or her response to a declaration of incompatibility before Parliament, Parliament might also be required to respond to the declaration within a specified period, for example, three months.¹⁴⁰

We are not persuaded that it is necessary to take up these suggestions in a WA Human Rights Act. It is not necessary to be more prescriptive about the Minister's response to a declaration of incompatibility. The Minister's response could be expected to include an indication of whether the Government

¹³⁵ Clause 36(4) of the draft Bill.

¹³⁶ Clause 37(3).

¹³⁷ Clause 37(4).

¹³⁸ For example, submission 354: IHRL Working Group.

¹³⁹ Submission 299.

¹⁴⁰ For example, submission 305: The Greens (WA).



considered that the legislation the subject of the declaration of incompatibility should be amended, and if not, why not. If a legislative amendment was proposed, the Parliament would be advised of its detail in the ordinary course of the passage of the amending Bill.

The time frame in clause 37(4) of the draft Bill is appropriate and of sufficient duration to permit the Government to consider its response to a declaration of incompatibility. Such a response may, if it involves legislative amendment, require careful policy development. A time frame of less than 6 months would not be appropriate in those circumstances. It is not appropriate to set out a time frame in which the Parliament is to respond to the Minister's response.

RECOMMENDATIONS

- The dialogue approach reflected in the draft Bill is the most appropriate model for a WA Human Rights Act and no fundamental changes are needed to the basic approach to the protection of rights taken in the draft Bill. (*Recommendation 6*)
- If a WA Human Rights Act is enacted, government agencies should be encouraged to develop and implement action plans about how they will meet their obligations under the provision set out in clause 40 of the draft Bill. The development of such action plans should be implemented administratively, and should not be mandated in a WA Human Rights Act. (*Rec 41*)
- If a WA Human Rights Act is enacted, all Cabinet submissions should contain a human rights impact statement. This requirement should be implemented administratively, and should not be mandated in a WA Human Rights Act. (*Rec 42*)
- Clause 31(4) of the draft Bill should be amended to require that reasons be given for why a Bill is considered to be compatible with human rights. (*Rec 35*)
- Clause 31(3) of the draft Bill should be amended to require that in respect of Government Bills, statements of compatibility should be presented to each House of Parliament by the Minister in charge of the Bill in the House. In any other case, clause 31(3) should require the member of Parliament introducing the Bill to present the statement. (*Rec 36*)
- If a WA Human Rights Act is enacted, a central government agency should be given the role of the lead agency within Government in relation to human rights. The role of this agency should be determined administratively, and should not be specified in a WA Human Rights Act. (*Rec 43*)

- A WA Human Rights Act should include a provision in the terms set out in clause 31(5) of the draft Bill. (Rec 37)
- A WA Human Rights Act should require all government agencies which are “agencies” under the *Financial Management Act 2006* to include in their annual reports a human rights compliance report addressing the following matters:
 - (a) Details of any cases before courts or tribunals in which a WA Human Rights Act has been relied upon to support a cause or action against the agency, or in which a court or tribunal has concluded that a provision in a law administered by the agency is incompatible with human rights.
 - (b) Details of any measures implemented by the agency to ensure its practices and procedures are compatible with the requirements of a WA Human Rights Act.
 - (c) Any training or education undertaken by staff during the year in relation to human rights. (Rec 91)
- If any government agency under a WA Human Rights Act would not be covered by the requirement to prepare an annual report in the *Financial Management Act 2006* a WA Human Rights Act should require that government agency to provide a human rights compliance report to the Commissioner for Equal Opportunity on an annual basis. The Commissioner should be required to table any such reports in the Parliament. (Rec 92)
- A WA Human Rights Act should give a parliamentary committee a role in scrutinising all Bills and subsidiary legislation for their compatibility with human rights. This role should be given to the Joint Standing Committee on Delegated Legislation, and the Terms of Reference for this Committee should be amended accordingly. The extension of this Committee’s role should be achieved either by including a provision in a WA Human Rights Act, or alternatively, by the Parliament through its Standing Orders. (Rec 38)
- A parliamentary committee should only be given the function of scrutinising Bills and subsidiary legislation for compatibility with human rights if that Committee is adequately resourced to carry out that function. (Rec 39)
- A WA Human Rights Act should include an override declarations clause in the terms set out in clause 30 of the draft Bill, but clause 30 of the draft Bill should be amended to expressly provide that an override declaration may only be made in exceptional circumstances. “Exceptional circumstances” should not be defined. (Rec 40)
- A WA Human Rights Act should include an interpretive obligation clause in the terms set out in clause 34(3) of the draft Bill. However, clause 34(3)(c) should be amended by inserting the word “is” after the word “it” to correct what appears to be a typographical error. (Rec 45)
- The words “of this State” should be deleted from the opening words of clause 34(4) of the draft Bill. (Rec 46)
- If economic, social and cultural rights are included in a WA Human Rights, clause 33(1) of the draft Bill should be amended to include a specific reference to the *International Covenant on Economic, Social and Cultural Rights*. Clause 33(1) should otherwise not be amended to expressly permit consideration of a broader range of international jurisprudence. (Rec 44)

- A WA Human Rights Act should include a provision in the terms of clause 35(2) of the draft Bill, to the effect that only the Supreme Court may make a declaration of incompatibility. *(Rec 48)*
- A WA Human Rights Act should include a provision in the terms of clause 36(1) of the draft Bill, to the effect that proceedings cannot be commenced in the Supreme Court that seek only a declaration of incompatibility. *(Rec 49)*
- A WA Human Rights Act should include an express provision permitting a court or tribunal dealing with a human rights question to grant leave to any person or body to intervene in the proceedings to make submissions in relation to the human rights question. The appropriate place for such a provision appears to be in clause 35(1). *(Rec 47)*
- If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):
 - (a) whether statements of compatibility should be required for subsidiary legislation
 - (b) the operation of override declarations, and whether override declarations should be subject to a sunset clause.*(Rec 90)*



Chairman introduces first public forum at the Constitutional Centre of Western Australia.



CHAPTER 7: WHO SHOULD HAVE TO COMPLY WITH A WA HUMAN RIGHTS ACT?

7.1 The Government's position

The Government's preferred approach, which is set out in its *Statement of Intent* and Parts 3 and 6 of the draft Bill is that only government agencies should be required to comply with the human rights recognised in a WA Human Rights Act.

7.2 Government agencies only or broader compliance?

There was a high level of agreement among public forum attendees and among those written submissions addressing the issue that government agencies (either generally or certain ones specifically) should be required to act compatibly with human rights. Similarly, there was strong support for this proposition among those consulted during the devolved consultation with the disadvantaged. The results of the public opinion survey further indicated that 91% of respondents believed that government departments and agencies should be required by law to respect people's human rights. The potential benefits of government compliance have been canvassed in Chapters 3 and 6 of this Report and are not repeated here.

A significant number of people, however, suggested that the obligation to act compatibly with human rights should have a broader application, namely that everyone – government agencies, individuals and private sector organisations - should have to comply with a WA Human Rights Act. The Shire of Derby/West Kimberley noted that it is “unacceptable for human rights breaches to occur regardless of who performs them.”¹ Erin Statz argued that:

What is the point in protecting human rights if it is only in certain arenas? Why have rights in relation to gov't when it is not applied in the larger sphere? ... If the purpose for this proposed Act is to shift people's perceptions to actually believe in human rights, then it needs to be adopted and enforced across all aspects of people's lives.²

¹ Submission 37.

² Submission 25.

Similarly, Dr Ben Saul of the University of Sydney commented:

If the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. The criminal law and civil law remedies will not always provide sufficient redress for the violation of rights by public actors...³

Interestingly, the public opinion survey produced quite different results. 80% of respondents did not believe that individuals should be required by law to respect people's human rights, 7% believed that they should, while 13% had "mixed feelings" or did not know.

Some of the people consulted by the Committee were not so much concerned with compliance by individuals as they were with compliance by private organisations and corporations in particular. A councillor from the Busselton Shire told the Committee that he would like to see the draft Bill extend to corporations as they "have such a huge effect on people's lives", while a participant in the Bateman public forum commented that the "biggest bureaucracies we now have are no longer run by governments." This concern was echoed by Dr Jennifer Binns of the University of Western Australia, who observed that corporations today "often have more power to ensure that rights are protected and are just as likely as governments to infringe rights."⁴ UnionsWA expressed concern about the exclusion of corporations in the draft Bill as "their influence arises as the supplier of major services (including essential services, media and telecommunications), they employ the vast majority of the WA workforce and they control significant portions of the State's wealth".⁵

There was also strong support for requiring corporations to comply with human rights during the devolved consultation with the disadvantaged and the public opinion survey. The results of the survey indicated that 93% of respondents believed that businesses and corporations should be required by law to respect people's human rights.

Some submissions provided examples of areas in which corporations have breached rights. For example, one of the anonymous submissions we received referred to:

the situation in Yarloop where a foreign multinational has infringed on the right of the residents to a healthy and safe place to live, as outlined by the UNEP. The Government has done NOTHING to support the rights of the taxpayers/residents there, but instead has supported the industry. The health of the residents matters less than profits of the company."⁶

A participant in one of our Geraldton forums pointed out that it is "not such a big leap to make corporations have to comply with the Human Rights Act. They are already bound by discrimination legislation."

A few people who were in favour of extending the obligation to act compatibly with human rights, however, acknowledged that there was some merit in starting with government and examining the question of broader compliance later on. For example, the Mental Health Law Centre (WA) Inc noted that, depending on the success of the operation of a WA Human Rights Act, "the persons or bodies required to comply could be extended at a later time upon review of the legislation."⁷ Similarly, the Western Australian Equal Opportunity Commission suggested that the question of whether individuals

³ Submission 2.

⁴ Submission 84.

⁵ Submission 303.

⁶ Submission 15: Anonymous. Emphasis in original.

⁷ Submission 268.

and private sector bodies should have to comply could be considered later once “the community becomes familiar with human rights”.⁸ The Centre for Human Rights Education at Curtin University pointed to “anti-smoking legislation as an example of phased introduction, beginning with smoking bans in government workplaces and expanding to include government contractors, private companies and now all workplaces.”⁹

In weighing up these competing views about the approach which should be taken in a WA Human Rights Act, it is instructive to consider the different approaches which have been taken in other jurisdictions in relation to the obligation to comply with human rights. The Bill of Rights in the 1996 *Constitution of the Republic of South Africa* (South African Bill of Rights) requires all persons to comply with each of the rights it contains “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.¹⁰

The *New Zealand Bill of Rights Act 1990* (New Zealand Bill of Rights) applies to persons or bodies in the performance of any public function, power or duty conferred or imposed by or pursuant to law.¹¹ Under the *Human Rights Act 1998* (UK) (UK Act) the obligation to comply is confined to “public authorities”.¹² The same approach is taken under the *Charter of Rights and Responsibilities 2006* (Vic) (Victorian Charter).¹³ The Victorian Human Rights Consultation Committee (Victorian Consultation Committee) did not consider whether existing rights between individuals or between individuals and companies should be changed, but instead looked only at the idea of establishing rights between government and the people.¹⁴

The ACT Bill of Rights Consultative Committee (ACT Consultative Committee) considered whether the obligation to comply with human rights should be extended beyond government, so as to require corporations to comply with human rights. The ACT Consultative Committee noted in its report that:

4.55 Traditionally, human rights law has focused on how the actions of governments have affected the lives of individual people – and, to a lesser extent, groups of people. The task of guaranteeing human rights has been seen as a task for government, and by and large the activities of corporations have been deemed beyond the scope of human rights law.

4.56 This conventional approach is changing – but slowly. Evidence of human rights abuses by corporations in relation to labour practices ... health, welfare and privacy ... have encouraged consideration of whether corporations ought to be bound by human rights guarantees in the same way as governments are bound.

4.57 This is particularly pertinent in societies such as ours, where large-scale outsourcing has meant that private corporations are increasingly performing work that was once the sole province of governments – up to and including administering government programmes.¹⁵

Nevertheless, the ACT Consultative Committee recommended that “a more minimalist approach should be taken in the ACT in the first instance” so that the *Human Rights Act 2004* (ACT) (ACT Act) would

⁸ Submission 337.

⁹ Submission 304.

¹⁰ Section 8 of the *South African Bill of Rights*.

¹¹ Section 3(b) of the *New Zealand Bill of Rights*.

¹² Subsection 6(1) of the UK Act.

¹³ Subsection 38(1) of the Victorian Charter.

¹⁴ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 53.

¹⁵ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 73.

bind only government, and “those private companies acting as direct agencies of government”.¹⁶ The ACT Consultative Committee also recommended that the review of the ACT Act should include the question of whether corporations and other private actors ought to be specifically bound by the Act.¹⁷ Despite the ACT Consultative Committee’s recommendations, no provisions were included in the ACT Act expressly indicating which bodies or persons would be required to comply with the human rights set out in that Act. We are not, however, aware that there is any suggestion that in practice, the ACT Act requires compliance with the human rights set out in that Act by persons or bodies outside government. We note also that the Twelve Month Review of the ACT Act concluded that:

there is a very strong case for introducing an express duty on government officers or public authorities to comply with the human rights in [the ACT Act]. ... The proposal is consistent with the approach of the Consultative Committee. It is consistent with the expectations built in the introduction of the Human Rights Bill. And it is consistent with current understanding and practice throughout the ACT.¹⁸

Finally, we note that the Tasmania Law Reform Institute, in its report *A Charter of Rights for Tasmania*, observed that “most modern human rights instruments focus upon the conduct of governments and governments’ relationship to the community” and that “to extend the reach of a Tasmanian Charter beyond this ambit from the outset would have extensive educational, resource and enforcement implications, which may render it unacceptable and its implementation unfeasible for the Tasmanian Government.”¹⁹ For that reason, the Institute recommended that an initially conservative approach should be adopted so that a Tasmanian Charter would bind only “public authorities but not private individuals, corporations or community organisations that are not engaged in work for the government or the performance of public functions”.²⁰

Given the Government’s preferred position of implementing rights from the *International Covenant on Civil and Political Rights* (ICCPR) in a WA Human Rights Act, the starting point when considering the question of who should be bound to comply with those human rights is the ICCPR itself. The obligation to comply with the rights set out in the ICCPR lies with the governments of the nation States which are parties to the Covenant. That consideration supports the view that only the Western Australian government should be required to comply with a WA Human Rights Act.

There seems to us to be two primary reasons which support the view that the obligation to comply with human rights should extend beyond government. The first is that, if the objective of a WA Human Rights Act is to achieve a culture of respect for human rights in Western Australia, then that culture would be achieved, to the greatest extent, if all individuals, corporations, and government entities in our community were required to comply with the human rights set out in the Act. The second reason for extending the obligation to comply with human rights beyond government is, that although the actions of government may have significant impacts on the human rights of people in our community, so too do the actions of other people and bodies, particularly large corporations.

On the other hand, imposing the obligation to comply with human rights more widely would have other consequences. The costs of compliance with human rights may well add (or, at least, be argued to add)

¹⁶ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 73, para [4.59].

¹⁷ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 73, para [4.59].

¹⁸ ACT Department of Justice and Community Safety, *Human Rights Act 2004*. Twelve-Month Review Report, June 2006, 32.

¹⁹ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 69, para [4.5.9].

²⁰ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 70, para [4.5.12].



to business costs, and difficult questions would need to be determined in relation to the remedies which should be available for a breach of human rights by a person or body outside government.

At the same time, it should be borne in mind that, even if a WA Human Rights Act did not require people or corporations to comply with the human rights set out in that Act, the possibility exists that over time a WA Human Rights Act would nevertheless have an impact on the private sector. There are several ways in which this could occur. First, the development of a greater culture of human rights in Western Australia would encourage all people and bodies in the community to act in ways that respect the human rights of others.

Secondly, the provision for increased parliamentary consideration of the human rights impact of legislation could result in the enactment of legislation - whether applicable to individuals or corporations - which would be compatible with human rights. Finally, the requirement that all legislation (not just legislation applicable to government) be interpreted, so far as is possible, in a way that is compatible with human rights may have a positive impact on legislation which applies to individual members of the community and to corporations.²¹

Having regard to the different views put to us in the consultations, and to the considerations discussed above, we have concluded that the preferable approach is that a WA Human Rights Act should, at least initially, focus on requiring compliance by the Western Australian government with the human rights recognised in the Act. We do not agree that other people in the community, or corporations, should at this stage be required to comply with the rights set out in a WA Human Rights Act.

There is one qualification to this view, namely the question whether people who, and bodies which, perform services for government under contract should be required to comply with these human rights. We discuss this issue in the next section of this Chapter.

In confining the obligation to comply with human rights to the Western Australian Government, the approach taken in a WA Human Rights Act in this State would be consistent with the approach taken in New Zealand, the UK and Victoria, and with the understanding of, and expectations relating to, the operation of the ACT Act.

Clearly, however, this issue is one which warrants further consideration in the future. For that reason, we recommend that clause 43 of the draft Bill, which deals with future reviews of a WA Human Rights Act, expressly provide for those reviews to consider whether additional persons should be required to act compatibly with human rights.



²¹ This has been described elsewhere as the "horizontal effect" of human rights legislation of the kind proposed for Western Australia. See, for example, M. Hunt "The 'Horizontal Effect' of the Human Rights Act" [1998] PL 423; Lord Buxton "The Human Rights Act and Private Law" (2000) 116 Law Quarterly Review 48; Antony Lester and D. Pannick "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 Law Quarterly Review 380.

Our attention was also drawn to the potential confusion which might arise from the present drafting of clauses 38 and 39 of the draft Bill.²² Clause 38 provides that in Part 6, the term “government agency” means “a person that is a government agency under section 39”. Clause 39 defines “government agency”²³ and provides that that definition applies for the purposes of Part 6.²⁴ Clause 38 appears to be unnecessary in view of clause 39(1) of the draft Bill. Further, the statement in clause 38 that “government agency” means “a person” that is a government agency has the potential to cause confusion. The simplest way to avoid these difficulties is to delete clause 38 of the draft Bill, and we recommend accordingly.

7.3 Private organisations that perform public functions on behalf of government

Having determined that a WA Human Rights Act should require only the Western Australian Government to act compatibly with human rights, it is necessary to consider how that should be achieved within the text of a WA Human Rights Act. The approach taken in the draft Bill is to require compliance by a “government agency”.²⁵ That term is defined in clause 39 of the draft Bill to include a number of statutory and administrative entities, such as departments of the public service, local governments, bodies established by a Minister and bodies established for a public purpose under a written law.

The definition of “government agency” does not include private organisations (both for-profit organisations and non-profit or community-based organisations) that perform public functions on behalf of government under contract (“contractors”). During the course of the Committee’s community consultations and the devolved consultation with the disadvantaged, numerous people argued that such contractors should be required to act compatibly with human rights. For example, in its submission the Equal Opportunity Commission observed that:

The reality of modern government is that many of its functions are carried out by contracted or statutorily authorised entities, whether they be individuals or corporations. In many situations, a person’s only experience of a particular government function will be with a contracted entity, rather than a government official. It makes sense therefore, and it is only reasonable, that entities that are authorised by government to carry out its functions, should be included in the definition of a government agency, and be subject to the Bill’s provisions.²⁶

A number of submissions argued that the exclusion of contractors from the draft Bill would enable “core” government agencies to avoid their human rights obligations by outsourcing the delivery of their public services.²⁷ That is, it could “legitimise the outsourcing [of] the abuse of human rights.”²⁸ This could lead to the anomalous situation where a single service area was subject to different standards – one for government providers and one for contractors. In this regard, the Western Australian Inspector of Custodial Services, Professor Richard Harding, noted:

An obvious example to highlight this point is that the State’s largest prison, Acacia, is privately managed by Serco Ltd. The prisoners remain prisoners of the State, and the State cannot contract out of its overall responsibility for their treatment – for example, in its liability for negligence or for

²² Submission 263: Chief Justice of Western Australia.

²³ Clause 39(2) of the draft Bill.

²⁴ Clause 39(1) of the draft Bill.

²⁵ Clause 40 of the draft Bill.

²⁶ Submission 337.

²⁷ For example, submission 213: Matthew Keogh, and submission 267: Dr Julie Debeljak.

²⁸ Submission 213: Matthew Keogh.

occupational health and safety matters. This should likewise be the case with Human Rights Act provisions.²⁹

The Community and Public Sector Union/Civil Service Association was also concerned that a WA Human Rights Act in the form of the draft Bill would encourage contracting out because of the costs likely to be associated with compliance with a WA Human Rights Act. In their view, the private sector should not “receive a competitive advantage through non compliance with the Act”.³⁰

Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University argued that the exclusion of contractors was inappropriate as it “is the substance of what is being delivered, not the vehicle chosen for delivery, which should regulate which bodies have rights obligations under the WA *Human Rights Act*”.³¹ She further argued that:

If the WA government is concerned about ‘mainstreaming’ a human rights culture throughout the government and the community, including hybrid/functional public authorities is vital. The more individuals are required to contemplate their human rights obligations in their work, the more human rights will enter the psyche and behaviour of these individuals, and the greater the acceptance of human rights norms.³²

While many of the people concerned about the exclusion of government contractors suggested that the definition of “government agency” in clause 39 of the draft Bill be amended to include them, some acknowledged that this could create difficulties. Matthew Keogh pointed out that “[w]here the correct place to draw the line of applicability between the State and the private sector is difficult to determine”.³³ For example, while it may be appropriate for the contractors running the State’s private prison to be subject to the WA Human Rights Act, the questions arises as to whether those non-government organisations and Aboriginal communities which are contracted by the Department of Corrective Services to provide certain supervision and support services also be required to comply?

Some submissions noted that even if contractors were not covered directly by the terms of a WA Human Rights Act itself, this would make little practical difference as they would inevitably be required to comply with the Act under the terms of their government contracts. In this regard, the Western Australian Council of Social Service (WACOSS) observed that:

the community sector has a considerable role in the delivery of government services under contracted arrangements. As such, we anticipate that many non government agencies will also be expected to comply with a WA Human Rights Act.³⁴

The tenor of the submissions we received was that having human rights observed in the provision of services should not be a benefit which is lost to the consumers of those services simply because government agencies contract the provision of those services to the private sector.

In our view, two considerations support the conclusion that, while a WA Human Rights Act should not require all persons or bodies in the private sector to comply with human rights, it may nevertheless be appropriate to extend the requirement to comply with human rights to the private sector in certain circumstances, namely when government services are performed by contractors.

²⁹ Submission 113.

³⁰ Submission 282.

³¹ Submission 267.

³² Submission 267.

³³ Submission 213.

³⁴ Submission 315.

First, in recent years, the performance of a wide range of services previously performed by government (and in some cases considered “core” government functions) has been contracted to the private sector, including in the areas of prison management, court security, law and order, welfare services and health care. These are areas in which there is a need for particular vigilance against breaches of human rights.

Secondly, assuming that a government agency which contracted the performance of a service to the private sector would retain some liability for compliance with human rights in the performance of that service (a matter which we discuss further, below), the remedies available for a breach of human rights in the performance of that service would likely be very limited.

A person whose human rights were breached by the contractor would not have any remedy under the draft Bill against the contractor, and the principles of contract law would mean that that person would have no remedy in contract against the contractor either. Any remedy against the government agency which contracted out the service would depend on whether there could be established a separate cause of action against that government agency for an unlawful decision or action which related in some way to the breach of human rights.

Even if a breach of human rights by the contractor constituted a breach of its contract with the government agency, the imposition of a sanction would depend on the government agency’s willingness to pursue a remedy for breach of contract against the contractor. Even if such a remedy were pursued, it would be unlikely to have any direct benefit for the person whose human rights had been breached.

A PERSON WHOSE HUMAN RIGHTS WERE BREACHED BY THE CONTRACTOR WOULD NOT HAVE ANY REMEDY UNDER THE DRAFT BILL AGAINST THE CONTRACTOR,

While we support imposing an obligation to comply with human rights on contractors, this raises a number of issues:

- (i) What would be the resource implications and costs of requiring contractors to comply with human rights, and would they be outweighed by the benefits which would flow from requiring contractors to comply with human rights?
- (ii) How should a WA Human Rights Act identify those contractors to which it applies?
- (iii) Should government agencies retain some liability for compliance with human rights by contractors?
- (iv) Would the existing remedies available under the draft Bill be adequate if contractors were required to comply with human rights?
- (v) Would it be appropriate to require all contractors, particularly religious bodies, to comply with human rights?

We discuss each of these issues below.

(i) The cost and resource implications of requiring contractors to comply with human rights

Requiring contractors to comply with human rights in their performance of services under contract with government would necessarily have resource and cost implications, in the same way that requiring government agencies to comply with human rights would have resource and cost implications. Those resources and costs implications would arise during the initial implementation of a WA Human Rights Act (such as in reviewing the manner in which services are provided to ensure service delivery is

compatible with human rights), in providing education for staff, and in ensuring ongoing compliance with human rights.

The impact on contractors of such additional costs is a significant consideration, particularly in relation to non-profit organisations which are often engaged to provide community and welfare services. The issue was encapsulated by Matthew Keogh in his submission:

a requirement on non-profit NGOs providing community services funded by the Government to be in compliance with all the rights protected by the HRA may create an ‘unfunded mandate’ that could never be complied with by such organisations without a large increase in capital and recurrent funding by the Government.³⁵

Submissions made to us by contractors in the welfare services area very strongly made the point that Government would need to accept that contractors would need to pass on these increased costs. For example, WACOSS submitted:

The community sector will ... require resources for education and training to manage these new contract requirements. That is, the Government must recognise that the unit cost of service delivery will increase.³⁶

Similarly, the Chamber of Commerce and Industry Western Australia submitted that “the contracting agency must be required to renegotiate and incorporate compliance mechanisms on commercial terms”.³⁷

The Committee is of the view that the cost implications of imposing an obligation on contractors to comply with human rights would not be such as to warrant refraining from imposing such an obligation. However, while (for the reasons below) we recommend extending the obligation to comply with human rights to contractors, we do so expressly in the expectation that the increased costs for contractors in complying with a WA Human Rights Act would be passed on to the Government in the form of increased costs for the provision of services. If the Government is not willing to accommodate an increase in the cost of the provision of such services in return for compliance with a WA Human Rights Act, it should not extend the obligation to comply to contractors.

(ii) How should a WA Human Rights Act identify those contractors to which it applies?

Some submissions acknowledged that it is difficult to define in clear and precise language which private organisations can be said to be performing “public functions”.³⁸ There are two ways in which this can be done: by reference to the nature of the bodies which are to be covered, or by reference to the functions performed by those bodies. The New Zealand Bill of Rights adopts the latter approach, in imposing obligations on “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”.³⁹

Similarly, the obligation to comply with human rights under section 6 of the UK Act rests on a “public authority”, which is defined to encompass “any person certain of whose functions are functions of a public nature”.⁴⁰ On its face, this definition would encompass the private acts of persons or bodies which also exercise functions of a public nature. Accordingly, section 6 of the UK Act also provides that,

³⁵ Submission 213.

³⁶ Submission 315.

³⁷ Submission 339.

³⁸ Submission 72: Human Rights Law Resource Centre Ltd.

³⁹ Section 3(b).

⁴⁰ Paragraph 6(3)(b) of the UK Act.

“in relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private”.⁴¹ A variety of different factors have been identified by the courts in the UK as relevant to determining whether a function is of a public nature for the purposes of this definition. These include (but are not limited to):

- the nature of the function in question;
- the role and responsibility of the state in relation to the subject matter in question;
- the nature and extent of any statutory power or duty in relation to the function in question;
- the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question; and
- whether the state pays for the function.⁴²

The approach taken in the Victorian Charter also focuses on the nature of the function exercised. The definition of “public authority” in section 4(1) of the Victorian Charter includes “an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under a contract or otherwise). However, an attempt has been made to provide greater clarity in determining whether an entity’s functions are public in nature by including a list of factors that may be taken into account in making that determination. These include:

- that the function is conferred on the entity by or under a statutory provision;
- that the function is connected to or generally identified with functions of government;
- that the function is of a regulatory nature;
- that the entity is publicly funded to perform the function; and
- that the entity that performs the function is a company all the shares in which are held by or on behalf of the State.⁴³

Notably, these factors are not exhaustive and the fact that one or more of the factors is present in relation to a function of a body “does not necessarily result in the function being of a public nature”.⁴⁴

The Tasmania Law Reform Institute recently recommended that a Tasmanian Charter of Human Rights should adopt a definition of “public authority” similar to that used in the Victorian Charter, and using the same terms as provided in section 4(2) of the Victorian Charter. The Tasmania Law Reform Institute also recommended that in addition, a Tasmanian Charter should include a non-exhaustive list of functions considered to be of a public nature.⁴⁵

The inclusion of a list of functions considered to be of a public nature was suggested to us in a submission from the Human Rights Law Resource Centre Ltd (HRLRC) as a means of making it as clear as possible which organisations could be said to be performing “public functions”.⁴⁶ The HRLRC recommended including a list of functions which are considered, on their face, to be “of a public nature”,

⁴¹ Subsection 6(5) of the UK Act.

⁴² See the discussion in *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Ors* [2007] UKHL 27, paras [5] – [12] (Lord Bingham of Cornhill).

⁴³ Subsection 4(2) of the Victorian Charter.

⁴⁴ Subsection 6(3) of the Victorian Charter. See also sections 6(4) and section 6(5) of the Victorian Charter.

⁴⁵ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 71 – 73 and 80, paras [4.6.1] – [4.6.9] and at Recommendation 8.

⁴⁶ Submission 72.

for example, the provision of healthcare services, the provision of educational services, the provision of public housing and the provision of correctional facilities. In recognition of the fact that perceptions are likely to change over time about which functions are “generally identifiable with government”, the HRLRC also recommended that a WA Human Rights Act contain a provision enabling an entity to be declared by regulation not to fall within the ambit of the Act.

There would be considerable scope for uncertainty in the application of a definition which focused on the “public” nature of the functions exercised by an entity. Even if additional lists of functions considered “public” in nature were specified, there would always remain the potential for argument about bodies which did not exercise functions set out in that list, but which nevertheless exercised functions which could be considered “public” in nature.

This potential for uncertainty is illustrated by the recent split decision of the House of Lords in *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Ors*.⁴⁷ In this case it was decided that a nursing home was not a “public authority” even though it carried out what had previously been considered a government function by providing care for publicly funded residents. We would not wish to see a WA Human Rights Act create such uncertainty on the fundamental issue of the bodies to which it applied.

We consider that there would be merit in endeavouring to identify as clearly as possible which bodies are subject to the obligation to comply with the human rights in the draft Bill. Clarity in this respect would be of assistance not only to the bodies which would be subject to the obligation, but also to members of the public.

The draft Bill takes an approach to identifying the bodies which are subject to the obligation to comply with human rights which is different from that taken in New Zealand, the UK and Victoria. Clause 39 of the draft Bill focuses on the nature or status of the body in question, rather than on the functions exercised by that body. In this respect, clause 39 bears some similarity to definitions used to identify government bodies or agencies in existing Western Australian legislation such as the *Freedom of Information Act 1992*.

Rather than focusing on whether the services performed by persons or bodies in the private sector are public in nature, an alternative approach would be to require contractors to act compatibly with human rights to the extent that they perform services under contract with a government agency. The adoption of this approach would be consistent with the focus on the nature or status of the body which is used in the definition of “government agency” in the draft Bill.

Other Western Australian legislation presently imposes duties and obligations on “contractors” which perform services for government agencies under contract. By way of example, the *Information Privacy Bill 2007* which is presently before the Parliament requires public organisations, including “contractors” to comply with the Information Privacy Principles set out in Schedule 3 to that Bill in respect of the handling of personal information. “Contractor” is defined to mean:

- (a) a person or body (other than a person or body referred to in Schedule 1 [which sets out the public organisations subject to the Bill]) to the extent that the person or body handles personal information under a contract –
 - i) between the person or body and a person, body or office referred to in Schedule 1; and

⁴⁷ [2007] UKHL 27.



(ii) entered into after the commencement of Part 2; or

(b) a subcontractor to a person or body to whom or which paragraph (a) applies to the extent that the subcontractor handles personal information referred to in that paragraph.⁴⁸

The use of a definition of this kind would have the advantage of greater clarity by comparison with the definition of “public authority” in the Victorian Charter, which relies on a variety of factors, none of which are individually conclusive, to determine whether a body exercises functions of a “public” nature. On the other hand, extending the obligation to all “contractors” would mean that contractors which perform services which are not ordinarily understood as being particularly “public” or “governmental” in nature (such as contracts for cleaning services, or for the provision of information technology services) would be required to comply with a WA Human Rights Act to the extent that they performed those services. However, the situation would be no different if the government agency performed those services itself.

We note for completeness that the approach we have suggested bears some similarity to the approach recommended by the ACT Consultative Committee. Having taken the view that the ACT Act ought to bind only those private companies acting as direct agents of government,⁴⁹ the ACT Consultative Committee proposed a definition of “public authority” which included “a person or entity exercising functions for or on behalf of the Territory”.⁵⁰ Ultimately, however, this issue was not addressed in the ACT Act, which does not expressly require compliance with the human rights it specifies.

(iii) Should government agencies retain some liability for compliance with human rights by contractors?

In his submission, the Inspector of Custodial Services identified an alternative option to directly requiring contractors to comply with a WA Human Rights Act. He recommended that an additional clause be added to the draft Bill in the following terms:

Wherever a Government agency has out-sourced, with or without consideration, an activity that would otherwise be subject to the provisions of this Act, the agency remains responsible for that activity to be carried out compatibly with the provisions of this Act.⁵¹

⁴⁸ Clause 4(1) of the Information Privacy Bill 2007.

⁴⁹ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 73, para [4.59].

⁵⁰ Clause 6(3) of the draft Human Rights Bill prepared by the ACT Consultative Committee: H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, Appendix 4, 5.

⁵¹ Submission 113. The HRLRC similarly recommended that a WA Human Rights Act should state that where a government agency outsources its public functions it is not relieved of its obligations under the Act: submission 72.

In the Inspector's view, this approach would be "preferable to that of extending the reach of the Act directly to a myriad of corporations and NGO's, most of whom would only fall within the provisions of the Act for some of their activities some of the time."⁵² Furthermore, the Inspector submitted:

this approach, putting the State in the first line of responsibility, accords with the general philosophy underpinning the proposed legislation. In practical terms, it will mean that the State in contracting out its services will have to be mindful of the integrity of the providers that it selects, for their failures to meet *Human Rights Act* standards will in law be the State's own failures.⁵³

In our view, there is an argument that under the terms of the draft Bill, a government agency would be required to comply with human rights in its decision to enter into a contract with a contractor for the performance of services and in relation to the terms of that contract. From that perspective, the effectiveness of the terms of the contract in ensuring that the contractor observed the human rights set out in a WA Human Rights Act might well be open to scrutiny. The proposal by the Inspector of Custodial Services would extend that obligation to make the government agency liable for any failure by the contractor to comply with human rights.

The proposal has merit even if (as we have recommended) contractors were themselves obliged under a WA Human Rights Act to comply with human rights in the performance of a contract to provide services for government. A government agency which contracts with a contractor for the provision of services is likely to have a considerable degree of influence in ensuring that the contractor complies with its obligations under a WA Human Rights Act. For example, if a contractor fails to comply with its human rights obligations, questions may arise as to whether that contractor is a suitable person or body to be awarded a contract to perform services for government in the future. If a government agency were to remain liable for the contractor's compliance with human rights, there would be impetus for the government agency to actively ensure that the contractor was complying with human rights in the provision of services under its contract.

We therefore recommend that a WA Human Rights Act contain a provision which makes it clear that a government agency is under an obligation to ensure that services provided by a contractor pursuant to a contract with that government agency are carried out in a manner which is compatible with the human rights in the WA Human Rights Act.

(iv) Would the existing remedies available under the draft Bill be adequate if contractors are required to comply with human rights?

Under clause 41 of the draft Bill, the remedy for a breach of human rights by a government agency depends upon the existence of another action against the government agency for the unlawfulness of their conduct. If such a separate cause of action exists, the aggrieved person may rely on the breach of his or her human rights as an additional ground to demonstrate the unlawfulness of the government agency's conduct.⁵⁴

If a WA Human Rights Act provided that it was unlawful for a contractor to breach human rights (ie act in a way, or make a decision, which was incompatible with human rights), the existence of a remedy for a breach

⁵² Submission 113.

⁵³ Submission 113.

⁵⁴ Subclause 41(1) of the draft Bill.



of human rights by the contractor would depend on whether there existed an action against the contractor for the unlawfulness of their act or decision.

While there may be some cases in which it could be argued that a contractor's actions or decisions were amenable to review by the courts, in many other cases such review may not be open. The end result could be that there would be little scope for pursuing an action against a contractor, which would mean that there would be no effective remedy for a breach of human rights by a contractor. In our view, therefore, the existing remedies under the draft Bill would be inadequate to deal with a breach of human rights by a contractor.

We note that the UK Act creates a new cause of action against public authorities for actions or proposed actions which are unlawful because they are incompatible with human rights.⁵⁵ Accordingly, legal action may be commenced against any public authority for a breach of human rights. In those circumstances, the remedy is the same in respect of a government department which is a public authority and in respect of a private body exercising a function of a public nature under contract with a government department.

The ACT Consultative Committee recommended that the ACT Act permit a person whose human rights had been breached by a public authority to commence an action in the Supreme Court. It also recommended that the Supreme Court should be able to order whatever remedy was open to it and seemed just and equitable in the circumstances.⁵⁶ As noted earlier however, the ACT Act as enacted does not contain any provision requiring compliance with human rights or any remedies provision for a failure to do so.

The Tasmania Law Reform Institute also recommended that an approach to remedies similar to that adopted in the UK Act be adopted in Tasmania. That is, it recommended that a Tasmanian Charter of Human Rights should permit a person to bring proceedings in the Supreme Court against any public authority which failed to act compatibly with human rights.⁵⁷

The Victorian Charter does not create a new cause of action for a breach of human rights. Rather, it permits a breach of human rights by a public authority to be relied upon as a ground of unlawfulness in any cause of action which a person may have in respect of unlawful conduct by that public authority. The Victorian Charter does not provide for any additional or different remedies against private bodies which fall within the definition of public authorities and which act unlawfully by breaching human rights. The issue of whether an additional or different remedy should be available in the case of a private body which was a "public authority" was not explored by the Victorian Consultation Committee in its report.

As we discuss in further detail in Chapter 8, we endorse the Government's preferred position that a WA Human Rights Act should not encourage litigation. For that reason, we do not consider that a WA Human Rights Act should create a new cause of action against a contractor for breaching human rights.

However, as we also discuss later in Chapter 8, we consider that a range of informal complaints processes (quite apart from litigation) should be available under a WA Human Rights Act to deal with breaches of human rights. We consider that these informal processes should also be available against contractors which are subject to the obligation to comply with human rights. That would permit a person

⁵⁵ Subsection 7(1) of the UK Act.

⁵⁶ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 80, para [4.74].

⁵⁷ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 142, para [4.18.10].

whose human rights had been breached by a contractor to take action in relation to the breach without recourse to litigation.

(v) Should all contractors, particularly religious bodies, be required to comply with human rights?

A number of people were concerned about the effect that the draft Bill would have on freedom of religion as it currently exists in Western Australia. Generally, concerns related to the impact the draft Bill may have on the ability of religious schools and organisations only to employ people who share their values and beliefs,⁵⁸ the ability of schools to teach religious curricula,⁵⁹ and the ability of religious organisations or individuals of a particular faith to express their religious views and speak out against other religions. John and Patricia May, for example, submitted that:

Freedom of religion - being able to share, teach, debate and talk about one's beliefs openly and in public without fear of litigation because someone's feelings get hurt, is a basic human right which would be jeopardised if such a Bill or Act were to be introduced in WA.⁶⁰

On the other hand, other people were concerned about the ability of religious organisations to discriminate against certain people. For example, Gay and Lesbian Equality (WA) Inc stated:

we have grave concerns about the possibility of corporations, religious bodies and institutions not respecting the human rights of people with diverse sexualities or gender identities in the provision of essential community services like emergency accommodation, food relief, youth shelters, drug and alcohol rehabilitation programs, employment services, etc.⁶¹

If, as we have recommended, a WA Human Rights Act required contractors to comply with human rights in the performance of services for government under contract, then many religious bodies and organisations would be required to comply with human rights. Government currently contracts with religious bodies and organisations to provide services in a wide range of areas, such as in the provision of health care, welfare services, education, and in the operation of nursing homes.

Some of these contractors perform services for government only in a manner consistent with their religious beliefs. Consequently, the manner in which they provide services may involve restrictions on the human rights of the people to whom the services are provided or those people employed by the religious organisation to provide them. It is possible that not all of these limitations would be "permissible limitations" for the purposes of a WA Human Rights Act.

That possibility may deter religious bodies and organisations from contracting with government to provide services. At the same time there is considerable public interest in the performance of services by religious bodies which are contractors. The question therefore arises as to whether religious bodies or organisations which are contractors should be exempted from compliance with the human rights set out in a WA Human Rights Act.

It might seem anomalous that religious bodies should be exempted from compliance with a WA Human Rights Act. After all, it is religious bodies that might be expected to support the concept of human rights, and even be in the forefront of movements designed to secure and promote human rights and respect for the individual in the community. In some circumstances, however, there may be a conflict

⁵⁸ For example, submission 178: Jim Cabrera.

⁵⁹ For example, submission 178: Jim Cabrera; submission 328: Noeline Jensen.

⁶⁰ Submission 260.

⁶¹ Submission 270.

between putting into practice one's religious beliefs and the rights of others, such as the right not to be discriminated against. For example, a school with a religious foundation may seek to employ a person as a role model with a specific commitment to the faith and values of the school, for the purposes of building a faith community as the religious context for the whole educational process. In our view, this could hardly be regarded as inappropriately discriminatory. In circumstances such as these, the exemption of religious bodies from discrimination laws is necessary in order to secure their freedom to pursue the practice and teaching of their own religious tradition. It is for this reason that the *Equal Opportunity Act 1984* contains exemptions for religious bodies and organisations in certain contexts.⁶²

We are of the view that these considerations also support the conclusion that a WA Human Rights Act should contain an express exemption for religious bodies and organisations which are contractors. That exemption should be in similar terms to the text of section 38(4) of the Victorian Charter, which provides:

(4) Subsection (1) 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 (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

We also recommend that a WA Human Rights Act define the term “religious body” in a similar way to the definition in section 38(5) of the Victorian Charter, which provides:

(5) In this section “religious body” means—
(a) a body established for a religious purpose; or
(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

7.4 The issue of Parliament

During the Committee's community consultations, a few people expressed concern or confusion over Parliament being excluded from the definition of “government agency” in clause 39(3)(b) of the draft Bill. As we understand it, the purpose of the exclusion of Parliament from the definition of “government agency” is to ensure that the sovereignty of Parliament is preserved. If the Parliament was included within the definition of “government agency” arguments might arise as to whether the Parliament was in some way restricted in enacting legislation which was incompatible with the human rights set out in a WA Human Rights Act. Clause 39(3)(b) would confirm the legal position, which is that the Parliament is not restricted in this way.

A similar approach has been taken elsewhere. The UK Act provides that the term “public authority” does not include “either House of Parliament or a person exercising functions in connection with proceedings in Parliament”.⁶³ The Victorian Consultation Committee recommended that the Victorian Parliament be excluded from the definition of “public authority” in the Victorian Charter, “to ensure that [the Charter] reflects the continuing sovereignty of the Victorian Parliament”.⁶⁴ This recommendation was adopted in the Victorian Charter.⁶⁵ The ACT Consultative Committee also recommended that the ACT Legislative

⁶² See section 72 of the Equal Opportunity Act 1984.

⁶³ See section 6(3) of the UK Act.

⁶⁴ G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 57.

⁶⁵ See section 4(1)(i) of the Victorian Charter.

Assembly be excluded from its proposed definition of “public authority” for the ACT Act, on the basis that “the Assembly retains the power to act inconsistently with human rights”.⁶⁶

The Tasmania Law Reform Institute recently made similar recommendations. It recommended a limited exclusion of the Parliament from the obligation to comply with a Tasmanian Charter of Human Rights, so as to preserve parliamentary sovereignty.⁶⁷ The Institute also recommended, however, that the Tasmanian Parliament should be bound by a Tasmanian Charter of Human Rights when performing non-legislative functions, such as when judging whether a person is guilty of contempt of the Parliament, or when the President or Speaker of the Houses is considering whether to issue an order for a person’s arrest under the *Parliamentary Privilege Act 1858* (Tas).⁶⁸

In our view, it is unnecessary to introduce a qualification of the latter kind into a WA Human Rights Act. To do so would add a degree of complexity which we do not consider to be necessary. For the same reason, we do not agree with the submission from the HRLRC that parliamentary committees and their members, when acting in an administrative capacity, should be part of the definition of “government agency” in clause 39 of the draft Bill.⁶⁹

7.5 The issue of the courts

Everyone should have to comply with human rights, including the courts.

Participant in Perth public forum

Clause 39(3)(c) of the draft Bill currently provides that a court or tribunal is not a government agency when performing its judicial functions. Furthermore, clause 39(3)(d) provides that a person holding a judicial or other office pertaining to a court or tribunal, being an office established by the written law that establishes the court or tribunal, is not a government agency.

During the course of our community consultations, the Committee heard from a number of people that the courts should have to act compatibly with human rights. One person making an anonymous submission stated that the Act should apply “especially [to] the Court system, which frequently breaches a person’s right to natural justice. In particular, the Magistrate’s Court is abusive in this way especially in the VRO Court.”⁷⁰

The International Human Rights Lawyers’ Working Group observed:

No reasoning is set out in the Discussion Paper for the exclusion of the courts and tribunals, despite this forming a very significant policy decision. Courts and tribunals are included in the definition of ‘public authority’ in a wide range of comparative jurisdictions, given their significant role in performing a check on the exercise of government power and also giving effect to a number of fundamental human rights in their own regard, such as the equality before the law and right to a fair trial. For these reasons, we urge the Consultation Committee to give further consideration to including courts and tribunals within the scope of a WA Human Rights Act.⁷¹

⁶⁶ H. Charlesworth, L. Behrendt, E. Kelly and P. Layland, *Towards an ACT Human Rights Act – Report of the ACT Bill of Rights Consultative Committee*, 2003, 72, para [4.53].

⁶⁷ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 66 para [4.4.2].

⁶⁸ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 66, para [4.4.3].

⁶⁹ Submission 72.

⁷⁰ Submission 40: Name withheld by request.

⁷¹ Submission 354.



We note that courts and tribunals are not included within the definition of “government agency” in clause 39 of the draft Bill only in so far as they are performing their judicial functions. The reason for this appears to be concerns that it would be unconstitutional to require courts and tribunals to make decisions, and act, compatibly with human rights under a WA Human Rights Act when performing their judicial functions. The same approach was taken in the Victorian Charter.⁷²

Concerns of this kind were explained by the Tasmania Law Reform Institute as follows:

4.7.3 ...This possibility [ie that the provision would be unconstitutional] arises, it was argued, because of the doctrine of the unity of the common law.

4.7.4 What is the doctrine of the unity of the common law? High Court decisions like *Lipohar v The Queen*⁷³ and *Esso Australia Resources Limited v The Commissioner of Taxation*,⁷⁴ appear to have established that there is one unified body of common law applicable throughout Australia whose ultimate statement rests with the High Court by virtue of s73 of the Australian Constitution. Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State, but is not itself the creature of any State. Because no State can have a separate and unique common law it may not be possible for State legislatures to direct the courts to develop the common law in any one State according to different principles to those that apply elsewhere in Australia. While State Parliaments may directly modify or abrogate the common law, they cannot indirectly influence its development in the courts. Accordingly, it is thought that it might be unconstitutional for State Parliaments to direct State courts to develop the common law in accordance with a State Charter of Human Rights. To do so would be to require the courts to develop a separate common law for a particular State, distinct from that applying elsewhere.⁷⁵

A number of submissions we received criticised this line of reasoning for the exclusion of courts and tribunals. For example, the HRLRC argued that a view expressed in a paper by Justice John Perry was preferable to the view that the inclusion of the courts would be inconsistent with the principles that Australia has one unified common law. Justice Perry has argued:

The fact that there is one body of common law applicable throughout Australia does not mean that the individual States may not modify or displace the common law applicable in a particular State or Territory. To deny that obvious fact is to deny the sovereignty of State and Territory parliaments.⁷⁶

⁷² See section 4(1)(i) of the Victorian Charter and see also G. Williams, R. Galbally AO, A. Gaze and Hon H. Storey QC, *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee*, 2005, 59.

⁷³ (1999) 200 CLR 485.

⁷⁴ (1999) 201 CLR 49.

⁷⁵ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 74.

⁷⁶ Justice John Perry, “International human rights and domestic advocacy” (paper presented to HRLRC seminar, Melbourne, 7 August 2006) available from: www.hrlrc.org.au/html/s09_search/default.asp?s=perry&dsa=232 - 12, cited in submission 72: HRLRC.

Similarly, Dr Jeremy Gans of the University of Melbourne criticised this rationale for the exclusion of the courts:

I assume that the rationale is the same ‘constitutional’ rationale given by the Victorian Consultative Committee (at p59.) ... I believe that these constitutional concerns are overstated and the resulting exemption is inadequately justified and much more extreme than any constitutional restraint demands. More importantly I believe that the exemption – however justified – will dramatically increase the prospect of highly technical legal arguments about the operation of the Act and greatly restrict the promotion of procedural rights (especially those pertaining specifically in courts) in Western Australia. The enactment of this exemption in Victoria’s Charter was, I believe, a grievous error. WA should not follow the Victorian precedent.⁷⁷

Even if it were to be accepted that the courts could not, for constitutional reasons, be required to act compatibly with a WA Human Rights Act when applying the common law, Dr Gans further argued that:

developing and applying the common law is only one of many judicial functions that courts and tribunals exercise. ... courts and tribunals must apply other rules of interpretation and make collateral legal and factual findings relevant to determining whether a statute is in force and applicable. More importantly, courts routinely exercise discretions and powers granted by statutes and common law, many of which, on any view, are extremely broad. Moreover, much judicial work is expended in interlocutory or procedural matters, where courts are simply exercising their inherent power to manage their own business.

Why shouldn’t a ... court doing these things – none of which impinge on Australia’s unified common law – be obliged to act compatibly with and take account of human rights? The exemption of courts from the Charter’s obligations regime seems to be a case of an esoteric bit of human rights theory gone awry. ... Indeed, many of the rights in Part Two – notably fair hearings, rights in criminal proceedings, children in criminal process, deprivation of liberty and constraints on punishment – are essentially rights to have the courts act or make decisions in a particular way. To oblige other public authorities to conform to these rights but to exempt courts in their judicial function from them is simply perverse.⁷⁸

It is not possible for us to reconcile these competing views. There appears to us to be a legitimate concern that it would be unconstitutional to require courts and tribunals, when exercising their judicial functions (or more particularly, when applying the common law), to make decisions, and to act, compatibly with the human rights in a WA Human Rights Act. It is not possible for us to dismiss that concern, notwithstanding that there are arguments which suggest that the concern is overstated or ill-founded.

We note that as the ACT Act does not address the question of compliance by public authorities with the rights in that Act, it does not address the question of compliance by the courts with those rights. The approach adopted in the Victorian Charter, however, is the same as the approach currently adopted in the draft Bill, namely, to exclude courts and tribunals exercising judicial functions. We consider this to be the preferable approach. If the constitutional



⁷⁷ Submission 4.

⁷⁸ Submission 4.

questions referred to above were ultimately resolved, the issue of whether courts and tribunals should be required to comply with human rights could be revisited.

Furthermore, there appears to us to be other reasons why some caution should be exercised in considering whether courts and tribunals should be required to make decisions, and act, compatibly with human rights in the performance of their judicial functions (or at least in the application of the common law). To require courts and tribunals to comply with human rights in this way would potentially extend the recognition and protection of human rights far beyond the scope intended by the Parliament if it enacted a WA Human Rights Act in the terms of the draft Bill. This concern was expressed by the Chamber of Commerce and Industry Western Australia in the following way:

The courts should not be required to consider and comply with the Human Rights Act when adjudicating disputes between private citizens and/or companies. Imposing this requirement on courts would indirectly make human rights enforceable between private entities.⁷⁹

An obligation on courts and tribunals to comply with human rights in the performance of their judicial functions would also require them to consider human rights in every case. This obligation would arise quite independently of any request to do so by the parties (and quite possibly notwithstanding the views of the parties as to the appropriate resolution of the case). This may result in unpredictable outcomes in litigation.

Having said that, we accept that difficulties may arise when attempting to distinguish between the judicial functions of courts and tribunals on the one hand, and their administrative functions on the other. This was an issue drawn to our attention by the Chief Justice of Western Australia. He suggested that an alternative might be to provide greater definition in a WA Human Rights Act to delineate between the judicial and non-judicial functions of courts and tribunals.⁸⁰

While we considered this course, we decided against it, on the basis that attempting to define, with clarity, what functions are judicial and what functions are administrative could create more problems than it would solve. We note that, in other legislation, a distinction is drawn between judicial and administrative functions without further definition or elaboration. In the interests of consistency with the approach taken in the Victorian Charter, however, and in an attempt to minimise confusion, we suggest that clause 39(3)(c) of the draft Bill should be amended to exclude courts and tribunals “except when they are acting in an administrative capacity”. We note that a similar basis for distinction is used under the *Freedom of Information Act 1992* in relation to the documents of courts or tribunals.

...WE ACCEPT THAT DIFFICULTIES MAY ARISE WHEN ATTEMPTING TO DISTINGUISH BETWEEN THE JUDICIAL FUNCTIONS OF COURTS AND TRIBUNALS ON THE ONE HAND, AND THEIR ADMINISTRATIVE FUNCTIONS ON THE OTHER.

The Chief Justice alternatively suggested that we should entirely exclude courts and tribunals from the definition of “government agency” in the draft Bill.⁸¹ This is a suggestion with some attraction, given that most of the functions performed by courts and tribunals in Western Australia are judicial in nature. Again, while we considered this approach, we ultimately decided against it on the basis that government agencies should, to the greatest extent possible, be required to act compatibly with human rights. We decided that the approach currently reflected in the draft Bill was the preferable one to take.

⁷⁹ Submission 339.

⁸⁰ Submission 263.

⁸¹ Submission 263.

We note that some anomalies could arise if courts and tribunals were not required to make decisions, or act, compatibly with human rights in the performance of their judicial functions. Many of the rights in the draft Bill which pertain to legal proceedings, and particularly to criminal proceedings, appear to contemplate that the courts will play an important (if not decisive) role in achieving compliance with these rights.

For example, the right in clause 23(3) of the draft Bill to have civil and criminal proceedings decided by a competent independent and impartial court or tribunal after a fair and public hearing contemplates that courts and tribunals will ensure that litigants are given a fair hearing which is conducted in public. Clause 23(3) clearly “speaks” directly to courts and tribunals. No doubt there would be arguments in the courts questioning how rights such as this could be implemented if courts and tribunals were not required to comply with human rights when exercising their judicial functions. One answer could be that the exclusion of courts and tribunals in the performance of their judicial functions, from the definition of a “government agency” would simply mean that none of the remedies available under a WA Human Rights Act would be available in respect of a failure to comply.

It is unnecessary for us to resolve these questions. It suffices to observe that some of these issues could well be resolved in the jurisprudence which would develop in relation to a WA Human Rights Act. Failing that, the question of whether courts and tribunals should be included within the definition of “government agency” when performing their judicial functions could be examined as part of the periodic reviews of a WA Human Rights Act provided for in clause 43(2)(c) of the draft Bill.

7.6 Local Government

The definition of “government agency” in clause 39 of the draft Bill expressly includes “a local government”. The Western Australian Local Government Association submitted that “local governments are concerned with the proposed imposition of additional obligations on local government in addition to those within the governing framework outlined within the *Local Government Act 1995*.”⁸² However, we also met with many representatives of local governments during our consultations, particularly in the course of our regional consultations. In the main, those representatives did not express concern to us about the prospect that local governments would be required to comply with the rights set out in the draft Bill.

In our view, it is appropriate that local governments be included within the definition of “government agency” and required to comply with the human rights set out in a WA Human Rights Act. Local governments are empowered to make decisions, and take action, which can have a significant impact on the lives of people working and living within their jurisdiction. Requiring compliance with human rights by local governments would be an important element in creating a culture of human rights in Western Australia.

To the extent that compliance with human rights would impose an additional administrative burden on local governments, they would not be in a different position to other government agencies required to comply with a WA Human Rights Act. We also note that the conduct of council members and employees is already required to conform to standards which reflect, or are consistent with, a number of the human rights set out in the draft Bill.

⁸² Submission 375.

For example, under section 5.103 of the *Local Government Act 1995 (WA)*, each local government is required to adopt a Code of Conduct governing the conduct of council members, committee members and employees. Similarly, the *Local Government (Rules of Conduct) Regulations 2007* set out general principles to guide the behaviour of council members. These principles include that council members should act with honesty and integrity, be open and accountable to the public, base decisions on relevant and factually correct information, and treat others with respect and fairness.⁸³

In these circumstances, we do not consider that the administrative burden on local governments in complying with human rights is such as to justify their exclusion from the obligation to comply with the human rights set out in a WA Human Rights Act.

RECOMMENDATIONS

- A WA Human Rights Act should, at least initially, focus on requiring compliance by the Western Australian government with the human rights recognised in the Act. Other people in the community, and corporations, should not be required to comply with the rights set out in a WA Human Rights Act at this stage. *(Recommendation 50)*
- Clause 38 of the draft Bill is unnecessary and liable to cause confusion and should not be included in a WA Human Rights Act. *(Rec 51)*
- A WA Human Rights Act should contain a definition of “government agency” in the terms set out in clause 39(2) of the draft Bill. *(Rec 52)*
- A WA Human Rights Act should extend the requirement to comply with human rights (presently contained in Part 6 of the draft Bill) to the private sector in certain circumstances, namely to persons or bodies (contractors) in so far as they perform services under contract with a government agency. *(Rec 53)*
- If the Government is not willing to accommodate an increase in the cost of the provision of services by contractors in light of their requirement to comply with a WA Human Rights Act, it should not extend the obligation to comply to contractors. *(Rec 54)*
- A WA Human Rights Act should contain a provision which makes it clear that a government agency is under an obligation to ensure that services provided by a contractor pursuant to a contract with that government agency are carried out in a manner which is compatible with the human rights in the WA Human Rights Act. *(Rec 55)*
- A WA Human Rights Act should not create a new cause of action against a contractor for a breach of human rights. *(Rec 56)*
- A WA Human Rights Act should provide that a complaint about a breach of a human right by a contractor should be able to be addressed through the internal complaint process of the contractor, or through conciliation. *(Rec 57)*

⁸³ Regulation 3(1).

- A WA Human Rights Act should contain an express exemption for religious bodies and organisations which are contractors. That exemption should be in similar terms to the text of section 38(4) of the Victorian Charter, which provides:

4) Subsection (1) 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 (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

(Rec 58)

- A WA Human Rights Act defines the term “religious body” in a similar way to the definition in section 38(5) of the Victorian Charter, which provides:

(5) In this section “religious body” means—

(c) a body established for a religious purpose; or

(d) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

(Rec 59)

- Clause 39(3)(c) of the draft Bill should be amended to provide that courts and tribunals are not “government agencies” for the purposes of a WA Human Rights Act “except when they are acting in an administrative capacity”. *(Rec 60)*

- If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):

(a) whether courts and tribunals should be included within the definition of “government agency” when performing their judicial functions.

(Rec 90)



Among the hundreds of participants in the 39 public forums conducted throughout metropolitan and regional Western Australia.



CHAPTER 8: WHAT SHOULD HAPPEN IF A PERSON'S HUMAN RIGHTS ARE BREACHED?

8.1 The Government's position

The Government's preferred position, as set out in its Statement of Intent, is as follows:

The Government wants a WA Human Rights Act to focus on preventing breaches of human rights rather than compensation-based litigation. Accordingly, the Government's preferred approach is for a WA Human Rights Act not to provide for compensation, but to allow the courts to examine the actions and decisions of government departments and agencies which are incompatible with human rights and, where necessary, "correct" those actions and decisions.

Consistently with its *Statement of Intent*, clause 41 of the Government's draft Bill provides as follows:

41. Breach of s. 40, consequences of

(1) If –

(a) a person may ask a court or tribunal for any remedy in respect of an act or decision of a government agency on the ground that the act or decision is unlawful; and

(b) the unlawfulness of the act or decision is not because of section 40,

the person may ask for the remedy on grounds that may include any unlawfulness of the act or decision that is because of section 40.

(2) A person is not entitled to damages or any other pecuniary remedy in respect of any injury or loss suffered as a result of an act or decision of a government agency that is unlawful because of section 40.

(3) Subsection (2) does not affect a person's entitlement to any remedy in respect of an act or decision of a government agency that is unlawful otherwise than because of section 40.

The operation of clause 41 of the draft Bill is discussed below.

8.2 Breaches of human rights must have consequences

I want human rights legislation with ‘teeth’. ... The promulgation of any legislation without enforcement capacity and sanctions for non-compliance is a waste of paper, in my opinion.

Submission 154: Dot Price

One of the strongest themes to emerge from the Committee’s community consultations and the devolved consultation with the disadvantaged was the almost universal consensus that breaches of human rights by government agencies must have consequences. A number of people went so far as to state that they would only support a WA Human Rights Act if it had “teeth”, while others told us that the best way for a WA Human Rights Act to protect human rights would be to create enforceable consequences for breaches of human rights.

Robin Faulkner submitted that a WA Human Rights Act “needs sanctions or it is just a ‘talk fest’ with no real outcomes as we have now.”¹ Similarly, Jan Currie stated that “[w]ithout any complaints or monitoring agency to consider remedies for breaches ... the HR Act will not be effective.”² In the view of Australian Lawyers for Human Rights, the “enforcement of the Human Rights Act, and the efficacy of its remedies, are critical. Conferring a right without conferring a means to enforce that right is of little value.”³ The Public Interest Advocacy Centre Ltd also observed that:

To provide a right without a remedy would mean that the Government was claiming to be a champion of human rights protection without being subject to an important measure to keep it true to its human rights commitments, namely, an individual right of action for an effective remedy. The provision of an accessible and effective remedy is itself a basic principle of human rights law.⁴

Indeed, a number of the submissions that we received pointed out that under article 2(3)(a) of the *International Covenant on Civil and Political Rights* (ICCPR) there is an obligation to ensure that people whose rights have been violated have “an effective remedy”.⁵

Consistently with these views, the results of the public opinion survey showed that 80% of respondents disagreed or strongly disagreed with the proposition that a person whose rights has been infringed would have no right of action or other form of recourse available to them.⁶

8.3 Overview of the community’s views on how breaches of human rights should be dealt with

While there was general consensus that breaches of rights must attract consequences, we were presented with a wide range of views as to what those consequences should be and, in particular, what process or processes for dealing with breaches should be adopted.

The draft Bill provides a limited right for people to take legal action in courts and tribunals when their human rights are breached. Some people agreed that the courts were the appropriate institution to enforce human rights and hold government agencies accountable.⁷

¹ Submission 158.

² Submission 39.

³ Submission 299.

⁴ Submission 272.

⁵ For example, submission 282: Community and Public Sector Union/Civil Service Association, submission 72: Human Rights Law Resource Centre, submission 311: Amnesty International Australia.

⁶ Patterson Market Research, Flashpoll Assessment of Community Support For Human Rights Legislation, August 2007, 8 (see Appendix E).

⁷ For example, submission 6: Stephanie Nazer, submission 13: Allan Payne, submission 28: Peter Evans.



While not expressing a view about the appropriate process for dealing with breaches of human rights under a WA Human Rights Act specifically, Dr Peter Johnston of the University of Western Australia observed more generally that:

One way of vindicating a person's rights is certainly by having them recognised and protected through judicial process. Even if, on the other hand, the outcome is unsuccessful, a court ruling may draw attention to some deficiency in our legal regime that requires redress ... even if litigating a human rights issue fails to achieve an immediate or short term resolution, one should nevertheless have regard to the long-term political and legislative results.⁸

The results of the public opinion survey showed that 71% of respondents agreed, or strongly agreed, that a person whose rights have been infringed should be able to take legal action.⁹

A number of those who thought that the courts have an important role to play were concerned about the restrictions on the right to complain to the courts found in clause 41 of the draft Bill. They argued that people should not have to “piggy-back” a human rights complaint onto an existing action against a government agency. Instead, they thought that there should be a freestanding right to take action against a government agency for a breach of human rights. For example, the Homeless Persons’ Legal Advice Clinic (WA) Steering Committee Inc submitted that “a human rights claim should be a right of action on its own and not reliant on being tied to another claim”.¹⁰ Sussex Street Community Law Service Inc argued as follows:

At Sussex Street, we can foresee a situation where we must advise clients that, although we can see a potential breach of the human rights in their case, there is no legal course of action available to them. We can imagine this causing intense frustration and disillusionment amongst our clients. For a Human Rights Act to have any real impact in the day to day lives of Western Australians it must be enforceable in Court. We strongly submit that a breach of the Human Rights Act should be a cause of action in itself.¹¹

At the same time, a large number of people were opposed to a system which restricted people to taking action in courts or tribunals in order to enforce their human rights. This opposition reflected a general desire to ensure that the process for dealing with breaches of human rights would be as accessible, inexpensive, and speedy as possible. The St Vincent de Paul Society (WA) captured the views of many people when it stated that it did “not favour a Human Rights Act that allows people to take action in the Courts as this ... marginalises ... people ... who are unable to afford to take such action.”¹²

Similarly, a number of people complained of the general inaccessibility of the courts, especially for those who are disadvantaged or marginalised and who may be expected to be at increased risk of having their human rights infringed. For example, Geoff Bridger submitted:

I am very much against a judicial form of redress as this is the most unfair and unbalanced way for minority groups to find a solution...[For example, a] person who is the victim of ... discrimination ... often com[es] from a position of great disadvantage and unequal power. This is very much the case when making a complaint against a Minister and government policy. The Minister has the State Solicitors Office, or an almost unending list of legal people to provide advice... The complainant

⁸ Submission 45.

⁹ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 7 (see Appendix E).

¹⁰ Submission 321.

¹¹ Submission 192.

¹² Submission 284.

has his or her own knowledge of the situation and law, minimal or no resources, and facing the undeniably overbearing legal system. How on earth is that possibly fair and equitable for a person who is disabled or has little grasp of the English language or the court system. And it is enormously expensive, which again is not an issue for government or a Minister.¹³

Unsurprisingly, the idea of an alternative, more informal, process to litigation was also consistently put forward during the devolved consultations with the disadvantaged.¹⁴

The Centre for Human Rights Education at Curtin University strongly advocated “dialogue and mediation as a preferable method of resolving disputes and breaches of human rights rather than expensive, lengthy and complicated legal action through courts.”¹⁵ A participant in one of our Busselton public forums also suggested that:

Perhaps there could be some sort of arbitration or mediation system with an independent person involved. Things get endlessly argued in court. Ordinary people need to move on in their lives. They need a process that enables swift action so they can get things resolved practically and quickly.

There was also a desire to ensure that the process for dealing with breaches of human rights would not be too legalistic. For example, one of the anonymous submissions we received recommended that breaches of human rights should be dealt with by “a tribunal specifically set up to hear human rights breaches No lawyers, but a group of human rights activists should sit on the tribunal. Lawyers mess everything up and make it adversarial, which can be very damaging.”¹⁶

Other suggestions included giving an independent Human Rights Commission the power to hear and determine disputes about human rights¹⁷ and giving a Human Rights Ombudsman/Commissioner the power to hold an inquiry or investigation into complaints, which would culminate in a public report containing recommendations.¹⁸ The idea that an aggrieved person should be able to take a human rights complaint to an “independent umpire” was also supported by 90% of respondents participating in the public opinion survey.¹⁹

A significant number of submissions and people attending the Committee’s public forums recognised that the various processes for dealing with a breach of human rights were not mutually exclusive and could be combined as part of a tiered or multi-layered enforcement system. A wide variety of different models of enforcement were drawn to our attention. Some were based on a two-layered system for dealing with breaches of human rights, the first layer involving alternative dispute resolution (such as conciliation or mediation) with an independent agency and the second layer involving action in the courts or in the State Administrative Tribunal (SAT).²⁰ Other people presented a three-layered system which was similar to the two-layered system just described, with the addition of a preliminary layer involving internal processes within government agencies themselves for trying to deal with complaints.

While the various models put forward differed in a number of important respects, they were all based on the idea that a multi-layered approach would promote a culture of human rights by increasing the ability of people to seek some remedy for a breach of their human rights, without resort to litigation.²¹

¹³ Submission 38.

¹⁴ Human Rights Solutions, *Human Rights ‘at the Margins’*, August 2007, 70 and 76 (see Appendix F).

¹⁵ Submission 304.

¹⁶ Submission 40.

¹⁷ For example, submission 270: Gay and Lesbian Equality (WA) Inc.

¹⁸ For example, submission 69: Isla Sharp; submission 268: Mental Health Law Centre (WA) Inc.

¹⁹ Patterson Market Research, *Flashpoll Assessment of Community Support For Human Rights Legislation*, August 2007, 6 (see Appendix E).

²⁰ For example, submission 312: Aboriginal Legal Service of Western Australia Inc; submission 223: Legal Aid Western Australia Inc.

²¹ For example, submission 246: Catholic Women’s League of Western Australia.

8.4 Overview of Committee's conclusion about the system for dealing with breaches of human rights

The Committee accepts the general idea that when a government agency or contractor makes a decision or takes an action which is incompatible with the human rights set out in a WA Human Rights Act ("a breach of human rights"), that must attract consequences. A WA Human Rights Act which did not provide any means of redressing a breach of human rights would be unlikely to achieve its goal of creating a human rights culture throughout government and the broader community. Instead it would be likely to engender cynicism within the community that the Act was merely a token gesture.

We accept that there are benefits to permitting legal actions to be pursued in courts and tribunals for a breach of human rights. However, it is also important that there be avenues for complaint that do not involve litigation in order to prevent a WA Human Rights Act from becoming "inaccessible and largely irrelevant" to the majority of Western Australians.²² Confining the remedies which may be pursued in respect of a breach of human rights to litigation in courts and tribunals (whether or not through a discrete cause of action) would effectively deny a human rights remedy to a large number of people in our community. Many people cannot afford to pursue an action against a government agency in a court or tribunal. Even if funding was available, many people, and particularly the disadvantaged, do not have the knowledge, confidence, capacity or time to pursue litigation to vindicate their human rights, important as those rights may be.

EVEN IF FUNDING WAS AVAILABLE, MANY PEOPLE, AND PARTICULARLY THE DISADVANTAGED, DO NOT HAVE THE KNOWLEDGE, CONFIDENCE, CAPACITY OR TIME TO PURSUE LITIGATION

For these reasons, we recommend the adoption of a multi-layered system for dealing with breaches of human rights under a WA Human Rights Act. The layers within that system should ensure that dealing with breaches of human rights should be as accessible, inexpensive, and speedy as possible, and should not result in increased litigation. In our view, this multi-layered system should consist of the following layers, namely:

- (a) internal processes within government agencies and contractors for trying to resolve human rights complaints;
- (b) a conciliation process run by an independent agency; and
- (c) limited rights to take legal action against government agencies in courts and tribunals for a breach of human rights.

In addition, a WA Human Rights Act should provide for other means through which compliance with human rights by government agencies may be monitored and enforced. These are discussed below.

Under the multi-layered enforcement system which we propose, formal, court-based complaints processes, and informal complaints processes outside the courts, would be complementary. As noted by the Human Rights Law Resource Centre in its submission:

it is important that people have legal redress where their rights have been breached, but in many cases a non-judicial response ... will be appropriate. (For example, an aggrieved person may be satisfied with a formal apology.) The availability of both judicial and non-judicial responses provides the legal redress identified as essential in the ICCPR, but also allows people to seek a resolution of their complaint without having to resort to litigation.²³

²² Submission 86: Office of the Public Advocate.

²³ Submission 72.

The multi-layered approach which we endorse would not fracture the existing remedies system provided for in the draft Bill but would add to it in a complementary way that could be expected to have the effect of reducing the number of human rights complaints pursued in courts and tribunals.

If it is alleged that a government agency or a contractor has breached a civil and political right, then that breach should be subject to each of the three layers of the enforcement system outlined above. However, given our recommendations in Chapter 4 in relation to the inclusion of economic, social and cultural rights (ESC rights) in a WA Human Rights Act, and the different manners in which that could be done, the complaint processes available in respect of a breach of ESC rights may need to be modified. If additional ESC rights were implemented in a WA Human Rights Act in the same way as civil and political rights (our preferred option), then a breach of any of the rights in a WA Human Rights Act should be subject to each of the three layers of the enforcement system outlined above. On the other hand, if additional ESC rights were included in a WA Human Rights Act, but those rights were implemented using the alternative model we proposed, then those additional ESC rights (together with the ESC rights in clause 20 of the Bill) should be subject to the informal complaint processes outlined (1) and (2) above, but should not be able to be pursued through litigation (as outlined in (3) above).

The three different layers of the multi-layered enforcement system which we propose are discussed in greater detail below.

8.5 A multi-layered system for dealing with breaches

8.5.1 The first layer: internal complaints processes

It is better to go to the source. If it can't be resolved there, you should then go elsewhere. The person committing the breach needs to be told that they have breached. This is part of the education process.

Participant in Bunbury public forum

A number of the people we consulted thought that the most logical and efficient thing for a person to do when their human rights had been breached was to try to resolve their complaint directly with the particular government agency involved. For example, a participant in one of our Bunbury public forums stated that the “most obvious thing to me is to go where the breach has occurred and then go one up in the chain. The further away from the source these things get, the bigger they get.”

The Office of the Public Advocate also pointed out that a breach of human rights “will not always require legal intervention. Depending on the nature of the breach, for some victims an apology, recognition of the wrong, or a commitment to a change in policy or practice may be adequate.”²⁴

Consistent with these views, a number of people suggested that government agencies should be required to establish internal processes for dealing with human rights complaints or adjust whatever existing complaints-handling processes they may have to cover such complaints.²⁵ Matthew Keogh stated:

Governmental bodies and agencies should provide internal mechanisms for disputes regarding breaches of human rights to be resolved. Such internal mechanisms should operate in a similar way to the review of administrative decisions. If such internal mechanisms do not resolve the dispute

²⁴ Submission 86. Also, submission 207: David Jack.

²⁵ For example, submission 322: Women's Electoral Lobby (WA) Inc; submission 305: The Greens (WA) Inc.

the matter can then be appealed... and follow the same process as current government decision making and action disputes.²⁶

Geoff Bridger suggested that each government agency should have at least one officer who was specifically trained in the operation of the Human Rights Act and how the rights set out in it relate to the agency's areas of operation.²⁷ Denis Cosgrove made a similar suggestion and recommended that there should be time limits within which issues should be required to be resolved.²⁸

Two main considerations support the inclusion of internal complaints processes as the first layer in a multi-layered enforcement system. First, in our experience, many disputes about breaches of human rights could be resolved if government agencies or contractors responded to a complaint immediately. In some cases, a government agency or contractor may not be aware that its decisions or actions are incompatible with a person's human rights. If this incompatibility was brought to the attention of the government agency or contractor, they may well be happy to rectify the situation, apologise, make a different decision or take a different action. The operation of the *Human Rights Act 1998* (UK) (UK Act) has demonstrated that informal mechanisms for raising human rights issues are often effective. The report of the British Institute for Human Rights entitled *The Human Rights Act – Changing Lives* provides many examples of how, as a result of training in human rights, public authorities have been more receptive to complaints about breaches of human rights, and have been more willing to take steps to resolve those complaints, without any need for litigation.²⁹

Secondly, internal complaints processes represent a simple, speedy and cost free means by which complaints about human rights can be pursued. As a result, internal complaints processes would be accessible to all members of the community.

We therefore recommend that a WA Human Rights Act should require each government agency and contractor to establish internal systems for receiving, considering and responding to, complaints about human rights. We do not consider that a WA Human Rights Act would need to be excessively prescriptive about such complaints systems. Some flexibility should be permitted to cater for the different sizes, status and resources of the various government agencies and contractors. However, in our view, a WA Human Rights Act should require that an agency's or contractor's informal complaints system incorporate the following elements as a minimum:

- It should identify one or more designated officers to whom complaints can be made that a decision or action of the agency or contractor was incompatible with human rights.
- It should make provision for that officer to receive written complaints, both in paper and electronic form and, where reasonably practicable, to receive complaints in alternative forms (for example, orally, for complainants who are visually impaired, or have language or literacy difficulties).
- No fees should be permitted in relation to complaints.
- The designated officer should be required to provide the complainant with a response to the complaint on behalf of the government agency or organisation as soon as practicable, and in any event within 14 days of receiving the complaint.

²⁶ Submission 213.

²⁷ Submission 38.

²⁸ Submission 62.

²⁹ The British Institute of Human Rights, *The Human Rights Act – Changing Lives*, 2006, available from: http://www.bihhr.org/downloads/bihr_hra_changing_lives.pdf



- The government agency or contractor should be required to make widely available a statement explaining its informal complaints system, which sets out how to make a complaint, and the time frame in which complaints will be addressed.

It was drawn to our attention that in many cases, people may be reluctant to make a complaint because of a lack of confidence to do so, or because of a concern that there may be adverse consequences for them if they make a complaint. In the case of prisoners, for example, the Western Australian Inspector of Custodial Services, Professor Richard Harding, noted that there are “many barriers – financial, practical and psychological – to their commencing litigation for breaches of ordinary tort law, for example, particularly whilst they are still imprisoned”.³⁰ In order to address this problem, we recommend that a WA Human Rights Act also require that the informal complaints system established by a government agency or a contractor should:

- permit a complaint to be made by an individual whose human rights have been breached, or by a person on behalf of that individual. In the latter case, a WA Human Rights Act should permit complaints to be made without identifying the person whose rights have been breached where it is practicable to do so having regard to the nature of the complaint; and
- indicate that in any communications between the agency or contractor and the complainant, the complainant is entitled to receive the assistance of another individual.

In order for such informal complaints systems to operate successfully, it would be essential that officers designated to receive and respond to complaints have adequate education in relation to human rights. As we have noted on a number of occasions earlier in this Report, and as we discuss in more detail in Chapter 9, it would be essential for agencies to be adequately resourced to provide their staff with the education and training they need to comply with a WA Human Rights Act if such an Act was introduced.

8.5.2 The second layer: conciliation

...as it stands, if our clients’ human rights are breached in some way, there is no place to seek... conciliation or mediation with the alleged perpetrating agency. This is a significant weakness of this model: its limited power for action contradicts in many ways the very powerful reasons for having it in the first place.

Submission 86: Office of the Public Advocate

The conciliation model we envisage involves an independent third party attempting to facilitate an agreed resolution to a dispute concerning a breach of human rights, having regard to relevant legal

³⁰ Submission 113.

principles (such as the provisions of a WA Human Rights Act).³¹ The benefits of including a process of conciliation in order to try to resolve human rights complaints were comprehensively set out by the Honourable Wayne Martin, Chief Justice of Western Australia, in his submission to the Committee:

The Bill makes no specific provision for alternative dispute resolution, and in particular no provision for mediation and conciliation. While the mediation processes of the Court would be available once a proceeding is within our jurisdiction, there is I think much to be said for the proposition that processes of alternative dispute resolution should be available before the jurisdiction of the Court has been invoked.

While alternative dispute resolution is generally recognised as having a virtue of its own, there are I think potentially four specific advantages that might be derived from the provision of specific mechanisms for alternative dispute resolution in the human rights area.

The first is that disputes which invoke the concept of human rights, are, of their nature, likely to be quite emotive. Alternative dispute resolution has a therapeutic potential in relation to disputes of that kind.

Second, mediated or conciliated outcomes might achieve results which are beyond the jurisdiction of the Court under the draft Bill. Because the Court's powers are limited to the grant of a declaration, the Court would not have any role in relation to practical arrangements that might resolve the particular complaint.

Third, many of the people who might seek to invoke the rights provided by the Bill are likely to be from disadvantaged social groups, such as low income earners or people from non-English speaking backgrounds. The low cost and accessibility of alternative dispute mechanisms would increase the possibility that such individuals might be able to achieve satisfactory solutions without the need to engage in costly and potentially complicated litigation.

Finally, the provision of alternative dispute resolution processes outside the jurisdiction of the Court, to be invoked prior to the invocation of the jurisdiction of the Court, might assist in ensuring that limited judicial resources are only consumed in appropriate cases.³²

A number of submissions saw conciliation as the logical “next step” for resolving human rights complaints which were not able to be resolved through the internal complaints-handling processes of government agencies and contractors.³³ Many people viewed conciliation as an alternative means of avoiding litigation and achieving desired outcomes such as the recognition of a wrongful action, an apology, or a change to practice where necessary.

In our view there are three main considerations which support the inclusion of conciliation in a multi-layered enforcement system under a WA Human Rights Act. First, the involvement of an independent third party may assist each party to the dispute to understand the position of the other party. For example, a conciliator may be able to assist a government agency or contractor to see how their actions have breached a person's rights. Equally, a conciliator may assist a complainant to understand that, while an action or decision of a government agency may have imposed a limitation on a human right, the limitation was reasonable and demonstrably justifiable. Secondly, the involvement of an independent third party with skills in conciliation may assist the parties to identify possible ways to resolve their

³¹ P Nygh and P Butt (eds), *Butterworths Concise Australian Legal Dictionary*, 1997.

³² Submission 263.

³³ For example: submission 223: Legal Aid Western Australia Inc.

dispute which they may not otherwise have identified. Thirdly, a conciliation process is a simple, speedy and low cost means by which complaints about human rights can be pursued. As a result, conciliation would be a dispute resolution process which would be widely accessible.

There was a range of views amongst the people we consulted as to which independent agency should be responsible for conciliating human rights disputes. Some people thought that this function should be given to the existing Commissioner for Equal Opportunity (whose office should be renamed the Commissioner for Human Rights and Equal Opportunity). For example, the Aboriginal Legal Service of Western Australia Inc recognised that the Commissioner for Equal Opportunity already has responsibility for trying to resolve discrimination complaints by conciliation and adding human rights complaints to her functions would be in line with the model of the Commonwealth Human Rights and Equal Opportunity Commission.³⁴

Other people saw it as desirable to give the conciliation function to an existing agency such as the Commissioner for Equal Opportunity in order to avoid creating a completely new government agency to perform this function. A participant in one of our Bunbury public forums pleaded that we “not have another body! Seriously, we are bodied-out! Every new body established means more taxpayers money. Surely, we could add two more staff members to an existing body or something like that instead.”

On the other hand, the Committee received submissions arguing in favour of the creation of a new agency. For example, the Office of the Public Advocate submitted that:

the range and importance of human rights justifies, and necessitates, the establishment of an independent body or an independent section of an existing body. ... A Human Rights Ombudsman, or a new arm of the Equal Opportunities Commission, would be the appropriate agency for this task.³⁵

Furthermore, Southern Communities Advocacy Legal & Education Service Inc stressed the importance of establishing a new Human Rights Commissioner, rather than investing the existing Commissioner for Equal Opportunity with additional dispute resolution functions because:

the EOC [Equal Opportunity Commission] has a highly developed expertise in the investigation and mediation of complaints concerning specific and legislatively narrow areas of discrimination law. This expertise may well be counter-productive in comprehensively applying the Human Rights Act in a way that fully embraces its potential to develop and foster a culture of Human Rights in Western Australia.³⁶

We are persuaded that the conciliation function we propose should be vested in the Commissioner for Equal Opportunity, who is already given some limited functions under the draft Bill. The Commissioner for Equal Opportunity has knowledge of human rights, is familiar with dealing with disputes concerning one human right, namely freedom from discrimination, in certain contexts, and already performs conciliation functions under the *Equal Opportunity Act 1984*. We discuss the role of the Commissioner for Equal Opportunity in greater detail later in this Chapter.

We recommend that a WA Human Rights Act should permit an individual who claims that their human rights have been breached (or someone else on behalf of the individual), to request that the Commissioner for Equal Opportunity endeavour to conciliate their complaint against the relevant

³⁴ Submission 312.

³⁵ Submission 86.

³⁶ Submission 372.

government agency or contractor. We emphasise that the role we propose is one of conciliation. We do not recommend that the Commissioner for Equal Opportunity should have power to make any binding determination or to order that a dispute be resolved in a particular way. Instead, the Commissioner's role in relation to conciliation should be limited to facilitating a discussion between the parties to a complaint, with a view to enabling them to reach their own agreement about the resolution of their dispute.

For the reasons discussed above, we also recommend that a WA Human Rights Act should provide that a complainant be entitled to be accompanied during the conciliation by a third party. However, we are of the view that no party should be permitted to be legally represented during a conciliation, unless the complainant agrees to this course of action. This will address, at least in part, the resources imbalance which is likely to exist between an individual complainant and a government agency or contractor which is the subject of a complaint about a breach of human rights.

We recommend that a WA Human Rights Act should expressly provide that no application fee or other fees or charges should apply to conciliations, lest that deter complainants from pursuing a complaint about a breach of their human rights.

We also recommend that a WA Human Rights Act should expressly provide that nothing said by a party in a conciliation may be used in any proceedings in a court or tribunal. A provision of this kind is necessary to facilitate a full discussion of all options to resolve a complaint, without concern that admissions by either party might be later used against them if the conciliation is unsuccessful.

In order to encourage a complainant to seek to resolve a complaint through an agency's or contractor's informal complaints process, we recommend that a WA Human Rights Act provide that a person cannot apply for conciliation by the Commissioner for Equal Opportunity unless they have first tried to resolve their complaint through the internal complaints process of the agency or contractor the subject of the complaint.

If a human rights complaint could not be resolved through these internal complaints processes or by conciliation, then complainants should still be able to pursue their remedies under clause 41 of the draft Bill. Some people submitted that the conciliation process should be a "prerequisite" for being able to take court action for a breach of human rights under a WA Human Rights Act.³⁷ As we explain below, we support the approach presently taken in the draft Bill in relation to court action for a breach of human rights. That is, the draft Bill requires that a breach of a human right may be relied upon as a ground in support of an existing cause of action which challenges the lawfulness of a decision or action. The existing cause of action envisaged by clause 41 is one which would be available to a complainant quite independently of a breach of their human rights (that is, because the decision or action in question was unlawful for some reason unrelated to a breach of human rights). In our view, it is undesirable to further complicate that court-based remedy by requiring that conciliation be attempted before litigation can be pursued.

However, if a complaint was resolved through an agency's internal complaint processes or through conciliation, it would be inappropriate for a complainant to be able to pursue a remedy for the same breach of human rights via an action in court. For that reason, we recommend that clause 41 of the draft Bill be amended to indicate that a person may not pursue a remedy for a breach of their human rights through a court action if that breach has been resolved to the satisfaction of both parties, through an internal complaint process or by conciliation.

³⁷ For example submission 305: The Greens (WA).

8.5.3 The third layer: taking action in courts and tribunals

While many people were keen to ensure that there were options for dealing with human rights complaints other than taking action in the courts, they also considered that it was important for a WA Human Rights Act to enable people to pursue an action in a court or tribunal. Some people saw this as particularly important in cases involving serious human rights infringements or where other less formal processes for resolving their complaints had not succeeded.³⁸

(i) Circumstances in which action can be taken

As noted above, a number of people were concerned about the current formulation of clause 41 of the draft Bill which places limitations on the circumstances in which people can bring human rights actions before the courts. The text of clause 41 of the draft Bill is set out at the beginning of this Chapter.

There were two primary concerns raised with us in relation to clause 41 of the draft Bill. First, some people thought that clause 41 was too complex. On this point, the Committee was provided with

...A NUMBER OF PEOPLE WERE CONCERNED ABOUT THE CURRENT FORMULATION OF CLAUSE 41 OF THE DRAFT BILL...

anecdotal evidence from Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University, who has been involved in training various entities on the operation of the *Charter of Rights and Responsibilities 2006* (Vic) (Victorian Charter). Dr Debeljak told us that the Victorian equivalent of clause 41 has created “a great deal of anxiety and concern about its actual meaning, scope and application.”³⁹ In her view, this was inconsistent with the intention to promote “dialogue, education, discussion and good practice rather than litigation”.⁴⁰

A slightly different, but related, point was made by a group of lawyers who proposed that clause 41 should be amended to make clear that “unlawful” in clause 41 involves invalidity in a judicial review context.⁴¹

Clause 41 would not create an independent cause of action for a breach of human rights. Although clause 41 is written in rather complex language, we understand it to provide that a person may only complain to a court or tribunal that an act or decision of a government agency was incompatible with human rights if they have an existing cause of action against the government agency for the unlawfulness of the act or decision in question. Clause 41 permits the human rights complaint to “piggy-back” onto the grounds for unlawfulness in that other challenge.

Our understanding is that clause 41 would not interfere with the other challenge to the act or decision of the government agency on the grounds of unlawfulness, other than to permit an additional ground (namely breach of clause 40 of the draft Bill) to be used in support of that challenge. If a person succeeded in establishing other grounds for unlawfulness of the act or decision of the government agency (ie apart from incompatibility with human rights) it is clear from clause 41(3) that any of the remedies able to be awarded for that unlawfulness would still be able to be awarded (including an award of damages or a pecuniary remedy).

³⁸ For example, submission 38: Geoff Bridger; submission 312: Aboriginal Legal Service of Western Australia Inc.

³⁹ Submission 267.

⁴⁰ Submission 267.

⁴¹ Submission 358: Greg McIntyre QC, Dr Johannes Schoombbee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey.

It seems to us that the complexity in clause 41 is probably an inevitable consequence of trying to express the inter-relationship of an existing right to challenge an unlawful act or decision of a government agency, and an additional ground for that challenge which may be supplied by a breach of clause 40 of the draft Bill.

The second concern raised in relation to clause 41 concerned a more fundamental aspect of its operation. As we noted earlier in this Chapter, a number of submissions argued that people should not have to “piggy-back” a human rights complaint onto an existing action against a government agency. Instead, they argued that a WA Human Rights Act should create a new cause of action for a breach of human rights.⁴² Some relied upon section 7 of the UK Act as a precedent for this approach.⁴³

We are also aware that the Tasmania Law Reform Institute recently recommended that a Tasmanian Charter of Human Rights should expressly provide that:

Where a public authority has acted in a way or proposes to act in a way that is made unlawful by the Charter, a person who is or would be the victim of that unlawful act may bring proceedings against the authority in the Supreme Court of Tasmania or may rely on the Charter rights in any legal proceedings.

The Tasmanian Charter should state that the Supreme Court may grant such remedy or relief or make such order as it considers just and appropriate in the circumstances in relation to any act or proposed act of a public authority which it finds is or would be unlawful under the Tasmanian Charter.⁴⁴

Notwithstanding these views, we agree with the Government’s preference that a WA Human Rights Act should focus on preventing breaches of human rights, and not on compensation-based litigation. To permit a breach of human rights to be the subject of a new cause of action would encourage the view that human rights complaints should be resolved through litigation. Litigation is an expensive and slow means to resolve disputes, which encourages parties to adopt an antagonistic, combative position, rather than to listen to legitimate complaints and to remedy problems where they exist. The approach adopted in clause 41, particularly if adopted in the context of the multi-layered approach to enforcement which we have proposed, would be an effective way of ensuring that litigation is not seen as the primary or preferable means of resolving a complaint about breaches of human rights. At the same time this approach would ensure that it would still be possible to ask a court or tribunal to review an act or decision of a government agency which was unlawful by virtue of its incompatibility with human rights. The approach adopted in clause 41 has the virtue that it should encourage government agencies to see the requirement to act, or make decisions, compatibly with human rights as another facet of their obligation to act lawfully, rather than as an additional burden on their operations. Accordingly, we do not agree that a breach of the obligation in clause 40 of the draft Bill should be able to be pursued as a separate legal action.

In so far as clause 41 seeks to ensure that a breach of human rights may only be pursued through a challenge to the act or decision of a government agency for unlawfulness on some other grounds, we consider this a sensible limit. Acts or decisions of a government agency which are incompatible with human rights are unlawful by virtue of clause 40 of the draft Bill. It makes sense to limit the pursuit of a remedy for that unlawfulness to existing remedies for unlawfulness in respect of the act or decision.

⁴² Submission 321: Homeless Persons’ Legal Advice Clinic (WA) Steering Committee Inc; Submission 192: Sussex Street Community Law Service Inc.

⁴³ For example, submission 309: Human Rights and Equal Opportunity Commission; submission 72: Human Rights Law Resource Centre.

⁴⁴ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, 142 (Recommendation 19).

Some of the submissions suggested that people should be able to take complaints about breaches of human rights to SAT. SAT plays an important role in ensuring good government decision making. If a WA Human Rights Act is enacted, an important aspect of good government decision making would lie in the compatibility of those decisions with human rights. SAT should therefore have a role in ensuring that the acts or decisions of government agencies are compatible with human rights.

In Western Australia, many (if not most) reviews of the acts or decisions of government agencies are conducted by SAT. In some instances in its original jurisdiction, SAT examines the legality of an act or decision of a government agency (for instance, in relation to applications under the *Equal Opportunity Act 1984* where it is alleged that an agency has discriminated against a person contrary to that Act). In its review jurisdiction, SAT's role in reviewing the merits of a government agency's act or decision is to produce the correct and preferable decision.⁴⁵ In reaching the correct and preferable decision, SAT would be required to take into account the obligation on the government agency to act compatibly with human rights. For that reason, the Committee does not consider that it is necessary to amend clause 41 in order to ensure that SAT will be able to consider breaches of human rights.

One final amendment may be required to clause 41. For the reasons set out in Chapter 4, our preferred position is that ESC rights should be dealt with in the same way as civil and political rights. However, should our alternative recommendation be adopted (ie that ESC rights should not be able to be the subject of litigation) then a WA Human Rights Act would need to make clear that clause 41 does not apply to breaches of ESC rights.

(ii) Complaints against individual officers of government agencies

Under the draft Bill, the definition of "government agency" refers to the agency itself, but does not expressly include the officers of the agency. As the actions and decisions of government agencies are necessarily made by the officers of those agencies, we understand that the obligation in clause 40(3) would require an agency to ensure that its officers, when making decisions, and taking actions, in their capacity as officers of the agency, do so in a way that is compatible with human rights. The remedy contemplated by clause 41 of the draft Bill is therefore a remedy against the agency itself, and not against an individual officer of an agency.

One question that arises is whether the multi-layered enforcement system which we have recommended in respect of a breach of human rights should include some avenue for pursuing a complaint against an individual officer of an agency. A few people suggested to us that human rights should be incorporated into public sector standards and codes of practice (either as an alternative, or an addition, to the obligation on government agencies under clause 40 of the draft Bill).⁴⁶ The intention behind this suggestion was that this would enable remedies to be obtained against individual officers (via the disciplinary procedures presently available in respect of public sector standards and codes of conduct under the *Public Sector Management Act 1994*).

Although the possibility of individual sanctions may well be a powerful incentive for individual officers of agencies to comply with human rights, making them available could give rise to a number of difficulties. First, the focus of the draft Bill is on ensuring compliance with human rights by agencies as a whole, and in changing government behaviour. Making individual officers personally liable for breaches of human

⁴⁵ Section 27 of the *State Administrative Tribunal Act 2004*.

⁴⁶ Submission 26: Diane Niyati, submission 71: Owen Loneragan, submission 62: Denis Cosgrove.



rights, and permitting remedies to be pursued against them, could potentially detract from this whole-of-agency approach.

Secondly, requiring compliance by officers of government agencies could engender a culture of blame within an agency in the event that an agency's actions or decisions were found to be incompatible with human rights. In turn, this could discourage government agencies from pursuing positive strategies designed to encourage staff to become familiar with human rights and with the requirements of a WA Human Rights Act, and to resort instead to negative strategies designed to deter staff from breaches of human rights.

Thirdly, officers of government agencies could be placed in a difficult position if the application of an agency policy in a particular case required a decision to be made, or conduct, which would be incompatible with human rights.

Accordingly, we do not recommend that a WA Human Rights Act include provisions permitting complaints about breaches of human rights to be made against officers of agencies.

(iii) Protection from liability

In its submission to the Committee, the Department of Child Protection stated as follows:

The draft Human Rights Act does not contain a protection from liability clause. The Department considers that persons carrying out duties as public servants where acting in good faith, should be protected from personal liability associated with actions against a government agency including where a breach of human rights is alleged. If ... protection from liability under existing laws would not provide protection in these circumstances, the Department recommends that a clause to this effect be included in the Act.⁴⁷

Aside from protecting individual public servants from civil liability, the Community and Public Sector Union/Civil Service Association was keen to ensure that a WA Human Rights Act would explicitly provide that individual employees of government agencies who might breach a WA Human Rights Act by complying with the directions or policies of their employer would not "face disciplinary or performance management consequences".⁴⁸ This was in fact the "flipside" of the suggestion put to us by a number of other people that a breach of human rights should have disciplinary consequences for individual public servants.⁴⁹

⁴⁷ Submission 176.

⁴⁸ Submission 282.

⁴⁹ For example, submission 195: Joan Hodson.

In light of our recommendation that actions for breaches of human rights should not be able to be pursued against individual officers of government agencies, we do not consider that there is any need for an indemnity clause of the kind proposed. Furthermore, because we endorse the approach to litigation for breaches of human rights in clause 41 of the draft Bill, (which permits breaches of human rights to be relied upon only in support of existing causes of action against a government agency), we do not consider it appropriate that a WA Human Rights Act include an indemnity provision for individual officers. The creation of an indemnity for one aspect of the action or decision of a government agency (namely the breach of human rights occasioned by the conduct or decision of an officer of that agency) when other aspects of that action or decision were not subject to the same indemnity would be difficult to achieve and likely to be confusing.

(iv) Who may bring an action?

A number of submissions suggested that a WA Human Rights Act should broaden ordinary standing requirements to enable human rights complaints to be brought before the courts by organisations or persons other than the victims themselves. For example, the Human Rights Law Resource Centre argued that:

standing under the Human Rights Act should be broad and permissive to ensure that the interests of the most vulnerable Western Australians can be protected by enabling third parties to initiate ... human rights proceedings. Where a person, or group, whose Protected Rights have been breached, or are at risk of being breached, are unable to bring a complaint on their own behalf, third parties should have standing to act on their behalf. Section 38 of the *South African Bill of Rights 1996* is a useful guide in this regard ...⁵⁰

Similarly, the International Human Rights Lawyers' Working Group recommended that a WA Human Rights Act allow "interest groups to litigate on behalf of documented human rights violation survivors who have consented to this."⁵¹

A related, yet slightly different, suggestion put forward to the Committee was that a WA Human Rights Act should expressly permit class actions or representative claims to be brought in cases of systemic human rights abuse.⁵²

We have recommended above that a WA Human Rights Act should permit a complainant to pursue a complaint through the internal complaints process of a government agency or contractor, or to seek conciliation of a complaint by the Commissioner for Equal Opportunity. In each case we have recommended that a WA Human Rights Act should permit a complaint to be made by the individual whose human rights have been breached, or by a person on behalf of that individual.

However, because we have endorsed the approach to litigation for breaches of human rights in clause 41 of the draft Bill, (which permits breaches of human rights to be relied upon only in support of existing causes of action against a government agency), we are unable to recommend that special provision be made for standing in relation to those actions. The question of standing to bring such other actions will be governed by the existing legal principles relevant to those actions. It would not be appropriate to interfere with those existing principles.

⁵⁰ Submission 72. Also submission 243: Uniting Church in Australia, Synod of Western Australia – Social Justice Board.

⁵¹ Submission 354.

⁵² For example, submission 354: International Human Rights Lawyers' Working Group.

(v) Intervention by third parties in actions

In Chapter 6 we recommended that a WA Human Rights Act expressly give a court or tribunal dealing with a “human rights question” discretion to permit any person or body to intervene in the proceedings to make submissions in relation to the human rights question. We also received submissions that interventions by independent persons or bodies should be possible in actions in which a breach of human rights by a government agency was relied upon as a ground for unlawfulness of a government agency’s decision or action. For the reasons outlined in Chapter 6 in support of our recommendation for the amendment of clause 35 of the draft Bill, we agree that it would be appropriate for a court or tribunal dealing with a matter of the kind contemplated in clause 41 of the draft Bill to be able to permit an intervention by a third party in relation to the human rights aspect of that matter.

This intervention would be expressly permissible under clause 35 of the draft Bill if the definition of “human rights question” in clause 32 of the draft Bill was amended to include proceedings of the kind contemplated in clause 41 of the draft Bill, at least in so far as they involved an alleged breach of clause 40 by a government agency. We recommend that clause 32 be amended in this way.

As we noted earlier in Chapter 6, many people suggested that the Commissioner for Equal Opportunity (who might perhaps be renamed the Commissioner for Human Rights and Equal Opportunity) should be specified as the third party who could be permitted to intervene in relation to “human rights questions” before courts and tribunals. Others suggested that the Ombudsman or a newly created Human Rights Commissioner (who would be separate from the Commissioner for Equal Opportunity) should be specified in clause 35 as the person permitted to intervene.

Under section 36 of the *Human Rights Act 2004 (ACT)* (ACT Act), the ACT Human Rights Commissioner is permitted to intervene, with the leave of the court, in a proceeding before a court that involves the application of the ACT Act. Similarly, under section 40 of the Victorian Charter, the Victorian Equal Opportunity and Human Rights Commission is permitted to intervene in, and be joined as a party to, any proceeding in which a question of law arises that relates to the application of the Charter, or in which a question arises with respect to the interpretation of a statutory provision in accordance with the Charter.

We recommended earlier that a WA Human Rights Act should permit a party to apply for the Commissioner for Equal Opportunity to conciliate a complaint about a breach of human rights. If that recommendation is accepted it would not be appropriate to give the Commissioner for Equal Opportunity a right to intervene in all cases involving human rights questions under a WA Human Rights Act. It would not be appropriate for the Commissioner to intervene in a proceeding concerning a human rights question in relation to which he or she had earlier attempted to conciliate. Intervention in such a case may create a perception that the Commissioner was not independent in the conduct of the conciliation, or alternatively, in the submissions put to the court. On the other hand, there would be other cases in which the Commissioner for Equal Opportunity had no previous involvement and in which the court or tribunal might consider that it would be assisted by hearing from the Commissioner.

In addition, as we noted in Chapter 6, there exist many bodies with independence from government which have expertise in human rights. It would not be appropriate to limit intervention to one particular body.

We consider that the appropriate course is as we outlined in Chapter 6. That is, a WA Human Rights Act should include a provision permitting a court or tribunal dealing with a human rights question to permit any person or body to intervene in the proceedings to make submissions in relation to the human rights question.

(vi) Remedies available

Clause 41 of the draft Bill does not presently spell out what remedies a court or tribunal may order in respect of a breach of human rights, other than to specify that compensation may not be awarded. A few submissions suggested that it was desirable for a WA Human Rights Act to be more specific in terms of remedies. For example, the Department of Local Government and Regional Development stated that the remedies available to the applicant “could be set out explicitly in the Act rather than waiting for the Courts to decide upon them.”⁵³ Similarly, Legal Aid Western Australia Inc observed that clause 42 of the draft Bill “is vague and it is unclear what the remedies are for a breach of a person’s human rights. Legal Aid believes that it is preferable that the *Draft Bill* clearly states what the available remedies are for any breach of human rights.”⁵⁴

There was a wide range of views as to what remedies should be available in respect of a breach of human rights. Many people were of the view that courts and tribunals should be able to make whatever orders are necessary to “correct” breaches. Erin Statz stated that there should be “action to change the situation to provide respect in relation to human rights”.⁵⁵ Similarly, Isla Sharp submitted that there should be, so far as possible “active reversal of any adverse situation resulting for the injured party as a result of the breach of their rights”.⁵⁶

A number of submissions suggested that a WA Human Rights Act should empower the courts to order a range of remedies to “correct” government action such as declarations, injunctions, orders which set aside unlawful conduct or decisions, and orders which compel a government agency to take certain action or not take certain action or to remake a certain decision.⁵⁷ For example, in his submission to the Committee, Matthew Keogh made the following suggestion:

In order to alleviate the creation of a culture of litigation around human rights the remedies available to those who have their rights infringed should be limited to more equitable type remedies, such as injunctive relief. Such remedies could prohibit the government from taking or continuing a particular action or require the government to take a particular action or both.⁵⁸

A few people thought that a WA Human Rights Act should provide for the imposition of penalties on government agencies for breaching their obligations under the Act. For example, the Aboriginal Legal Service of Western Australia suggested that in cases of “serious breach there should also be penalties”,⁵⁹ while the Mental Health Law Centre (WA) Inc recommended that “there should be included in the Bill some provision for the imposition of sanctions against any government body, agency or employee or agent who **repeatedly** breaches the Act.”⁶⁰

⁵³ Submission 340.

⁵⁴ Submission 223.

⁵⁵ Submission 25.

⁵⁶ Submission 69.

⁵⁷ For example: submission 282: Community and Public Sector Union/Civil Service Association; submission 123: Ben Caradoc-Davies; submission 72: Human Rights Law Resource Centre; submission 272: Public Interest Advocacy Centre Ltd.

⁵⁸ Submission 213.

⁵⁹ Submission 312.

⁶⁰ Submission 268. Emphasis in original.

Some submissions suggested that in addition to, or instead of, specifying particular remedies, a WA Human Rights Act could simply allow courts and tribunals to award such remedies as were “just and appropriate” in the circumstances.⁶¹ It was pointed out that this is the position under the UK Act and the *Canadian Charter of Rights and Freedoms 1982*.⁶²

There was a division of opinion across the people we consulted as to whether or not a WA Human Rights Act should provide for compensation to be awarded for breaches of human rights. A number of people were strongly against the idea of compensation being an available remedy as they were concerned that it would encourage litigation⁶³ and perpetuate society’s increasing focus on money. A participant in one of our Bunbury public forum’s stated that:

I would be concerned with including compensation. There is something wrong with our society being so focused on money and getting compensation. Let’s get away from this. Money doesn’t replace the things you have lost. We don’t want to be Americans-in-training.

A large number of people, however, were strongly of the view that compensation should be an available remedy. Many people thought that it was only logical that if “there is a breach of the Act and you suffer loss or injury as a result, you should be able to get compensation”.⁶⁴ Others thought that a failure to allow for compensation could prevent a WA Human Rights Act from creating a human rights culture:

We are of the view that excluding the power to recover damages for violations of human rights is antithetical to the creation of a culture of human rights because it places breaches of human rights in a legal hierarchy below other actions, including tortious and contractual claims, where damages are available. Symbolically, this would send a clear signal that breaches of human rights are not considered as important as other causes of action.⁶⁵

It was argued by a number of people that the obligation in article 2(3)(a) of the ICCPR to ensure that people whose rights have been violated have “an effective remedy” meant that there was an obligation to allow for compensation to be awarded. They noted that the United Nations High Commissioner for Human Rights has defined the right to an “effective remedy” as including “reparations” such as restitution.⁶⁶

Some people who were in favour of allowing courts and tribunals to award compensation did not think that the power to do so should be unlimited. It was suggested that compensation should only be available in specific circumstances, such as deliberate breaches of human rights⁶⁷ or that the amount of compensation payable should be capped.⁶⁸ Another suggestion was that compensation should only be available where there had been a financial or economic loss resulting from a breach of human rights. In this regard, Legal Aid Western Australia Inc stated:

Legal Aid favours the ability to award compensation where there has been financial or economic loss. ... However, Legal Aid is more circumspect on the ability to award financial compensation beyond economic loss. Experience in other jurisdictions has shown that a system where there

⁶¹ For example, submission 13: Allan Payne; submission 315: Western Australian Council of Social Service; submission 72: Human Rights Law Resource Centre Ltd; submission 358: Greg McIntyre QC, Dr Johannes Schoombee, David Goodman, Elizabeth Needham, Carolyn Tan and Lisa Tovey.

⁶² For example, submission 267: Dr Julie Debeljak.

⁶³ For example, submission 246: Catholic Women’s League of Western Australia.

⁶⁴ Participant in Bunbury public forum.

⁶⁵ Submission 354: International Human Rights Lawyers’ Working Group.

⁶⁶ UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [16] as cited in submission 72: Human Rights Law Resource Centre.

⁶⁷ Submission 276: Bilingual Families Perth.

⁶⁸ Submission 314: Ministerial Advisory Council on Disability.

is potential for large claims of damages, can sometimes lead to agencies taking a defensive and legalistic approach to compliance issues.⁶⁹

Others, such as the Commonwealth Human Rights and Equal Opportunity Commission, suggested that compensation only be available where no other remedy would be effective:

While HREOC recognises concerns about the possible financial implications of awarding damages, in some circumstances the award of damages may be the only effective remedy for a breach of human rights. HREOC notes that it may be possible to allay concerns about the financial implications of awarding damages by confining the award of damages to such circumstances in which damages are the only effective remedy.⁷⁰

THE REMEDIES WHICH WOULD BE AVAILABLE WOULD DEPEND UPON THE LEGAL CHALLENGE WITHIN WHICH THE BREACH OF CLAUSE 40 OF THE DRAFT BILL WAS INCLUDED.

The Commission noted that the UK Act allows damages to be awarded in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction. It also noted that only three awards of damages had been made under the Act when the UK Department of Constitutional Affairs published its five year review in 2006.⁷¹ Similarly, Dr Julie Debeljak pointed to the position in the UK and noted that compensation payments in that jurisdiction had tended to be modest.⁷²

We do not agree with the suggestion that a WA Human Rights Act should specify the full range of remedies which would be available if a government agency breached clause 40 by acting in a way, or making a decision, which was incompatible with human rights. The remedies which would be available would depend upon the legal challenge within which the breach of clause 40 of the draft Bill was included. A variety of remedies would potentially be available. It would be undesirable to try to comprehensively list the range of remedies which might be available (as this would not include any future remedies which might become available for the unlawfulness of a government agency's action or decision). In addition, depending on the nature of the proceedings, not all of these remedies would be available in every case, and to endeavour to make this clear would add an unnecessary layer of complexity.

In relation to the question of compensation for a breach of human rights, although we appreciate that there was strong support for allowing compensation to be awarded, we do not recommend that it be provided for in a WA Human Rights Act. To permit awards of compensation would encourage litigation about breaches of human rights, and would be likely to encourage the antagonistic, combative response from parties which we alluded to earlier as a concern we hold about litigation generally.

In view of the strong support for awards of compensation which emerged during our consultations, however, the preferable course appears to be to include the question of whether compensation should be awarded for a breach of human rights in the list of issues to be considered in future reviews of a WA Human Rights Act. We note that clause 43(2)(c) of the draft Bill already requires a consideration of whether the Act should be amended "to provide additional remedies for any failure to act compatibly with human rights". However, so that the issue is squarely raised, we recommend that clause 43(2)(c) be amended to include reference to whether compensation should be payable for a failure to act compatibly with human rights.

⁶⁹ Submission 223.

⁷⁰ Submission 309.

⁷¹ Submission 309.

⁷² Submission 267.

8.6 Monitoring compliance by government agencies

Shining light on human rights problems is the best way of stopping them from happening again.

Participant in Bateman public forum

8.6.1 Monitoring role for the Commissioner for Equal Opportunity

The draft Bill does not establish the office of a Human Rights Commissioner, but rather it amends the *Equal Opportunity Act 1984* (WA) to give to the Commissioner for Equal Opportunity (whose office is established under the *Equal Opportunity Act 1984*) what appears intended to be a narrow function of promoting public knowledge of and respect for human rights in a WA Human Rights Act and doing anything conducive or incidental to performing that function.⁷³

Earlier in this Chapter we recommended that the Commissioner for Equal Opportunity be given responsibility for trying to conciliate complaints concerning a breach of human rights. Many people also submitted that an independent agency such as the Western Australian Equal Opportunity Commission should perform a more general role in monitoring compliance with a WA Human Rights Act.

A number of people submitted that it was important for there to be an independent “watchdog agency”⁷⁴ to perform a monitoring role or, as Allan Payne put in his submission, to “issue a report card on how the government and society [are] respecting, and/or breaching”.⁷⁵ The Women’s Council for Domestic and Family Violence Services (WA) saw this role as enabling Western Australia to “gauge if and when change has taken place”.⁷⁶ The idea of an independent body having responsibility for reviewing a WA Human Rights Act and monitoring compliance with it was also embraced by approximately one third of those participating in the survey conducted as part of the devolved consultation with the disadvantaged.⁷⁷

The Committee was presented with a range of views as to who should perform such a monitoring role and what precisely the role should entail, such as:

- “To ensure that the protection of human rights established by a WA Human Rights Act is maintained, it is necessary to have a body outside government to ensure its effective operation. The office of a Human Rights Commissioner should report annually to the Parliament about the operation of a WA Human Rights Act including levels of compliance. The office should also be responsible for reviewing and reporting on the effect of laws on human rights with particular focus on suggesting changes to laws that have been identified as incompatible with human rights. ... The EOC [Equal Opportunity Commission] is already responsible for investigating discrimination and harassment in WA and would most likely be severely stretched if also made responsible for human rights. Moreover, the EOC’s corporate history and focus on anti-discrimination and access is a model not entirely suited for the depth and breadth of human rights.”⁷⁸
- “It is important that the proposed Bill empowers a Human Rights Commissioner (either joined with the current Commissioner for Equal Opportunity or in a separate agency) to monitor the Bill and suggest amendments to it.”⁷⁹

⁷³ Clause 45 of the draft Bill.

⁷⁴ Submission 15: Anonymous.

⁷⁵ Submission 13.

⁷⁶ Submission 341.

⁷⁷ Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 77-78 (see Appendix F).

⁷⁸ Submission 315: Western Australian Council of Social Service.

⁷⁹ Submission 84: Dr Jennifer Binns.



- “I suggest a separate Commission or body to administer and enforce the Act ... The ... Equal Opportunity Commission could perhaps be easily expanded for this purpose, whilst limiting the potential to have too many organisations dealing with the same issues.”⁸⁰
- “Part of the Commission’s role should be to identify agencies and institutions where violation of human rights is entrenched in defined policy and procedure, as well as the culture of the agency. Examples of such agencies are the police and Homeswest. The report’s recommendations should be implemented as a legislative requirement.”⁸¹
- “The Victorian Commission ... has responsibility for reporting to the Attorney General on human rights matters, may review legislation and determine if an authority’s programs and practices are compatible with human rights upon request. It is submitted that the WA EOC should also have a similar role in taking responsibility for reviewing and reporting on human rights in Western Australia. ... If the WA EOC becomes aware of a systemic problem in relation to a government department or agency’s compliance with a human right then it should have the power to investigate the matter and provide a report to the relevant agency...”⁸²
- “The Association supports an expansion in the role of the Equal Opportunity Commission to create a WA Human Rights and Equal Opportunity Commission. The Association is in favour of the Human Rights and Equal Opportunity Commissioner publishing an annual report on the State Government’s performance in relation to [the] Act.”⁸³

The Western Australian Equal Opportunity Commission also specifically addressed this issue in its submission to the Committee, which stated that:

The government’s view ... is that the Commissioner should not be given other functions, such as monitoring compliance with the Act and reporting to the Attorney General ... It is not clear why the government holds this view. Given that the Commissions in the ACT and Victoria have substantial functions in respect to monitoring and reporting on human rights, it would be appropriate for the WA Commission to have an equivalent role. The Commission is in a position to make a valuable contribution to the effective implementation of a human rights culture in WA, and consideration should be given to expanding its role so that it is consistent with the ACT and Victoria.⁸⁴

The role of a Human Rights Commissioner was discussed in the course of our consultations with officers in the ACT and Victoria. In the ACT and Victoria, the Human Rights Commissioner and the Equal Opportunity and Human Rights Commissioner respectively,



⁸⁰ Submission 211: Name withheld by request.
⁸¹ Submission 312: Aboriginal Legal Service Western Australia Inc.
⁸² Submission 223: Legal Aid Western Australia Inc.
⁸³ Submission 221: Community Legal Centres Association (WA) Inc.
⁸⁴ Submission 337.

and their Commissions, have far more extensive functions relating to human rights than the functions given to the Commissioner for Equal Opportunity under the draft Bill.

Under the ACT Act, the functions of the Human Rights Commission, and of the ACT Human Rights Commissioner, include:

- providing education about human rights and the ACT Act;
- advising the Attorney General in relation to the operation of the ACT Act;⁸⁵
- reviewing (or “auditing”) the effect of ACT laws, including the common law, on human rights and reporting to the Attorney General on the results of such reviews;⁸⁶ and
- intervening, with the leave of the court, in a proceeding before a court that involves the application of the ACT Act.⁸⁷

Since the commencement of the ACT Act, the ACT Human Rights Commissioner has focused on community education by conducting regular public forums about the ACT Act, has intervened in a major case in the Supreme Court involving the ACT Act,⁸⁸ and has conducted two human rights audits of government agencies concerned with the provision of correctional facilities.⁸⁹

Under the Victorian Charter, the functions of the Equal Opportunity and Human Rights Commission⁹⁰ include:

- to present to the Attorney General an annual report that examines the operation of the Charter, including its interaction with other statutory provisions and the common law, all declarations of inconsistent interpretation made during the year, and all override declarations made during the year;⁹¹
- when requested by the Attorney General, to review the effect of statutory provisions and the common law on human rights and report on the results of that review;⁹²
- when requested by a public authority, to review that authority’s programs and practices to determine their compatibility with human rights;⁹³
- to provide education about human rights and the Charter;⁹⁴
- to assist the Attorney General in the review of the Charter;⁹⁵
- to advise the Attorney General on anything relevant to the operation of the Charter;⁹⁶ and
- to intervene in any proceeding in which a question of law arises that relates to the application of the Charter, or in a proceeding in which a question arises with respect to the interpretation of a statutory provision in accordance with the Charter.⁹⁷

⁸⁵ Section 27(2) of the *Human Rights Commission Act 2005* (ACT).

⁸⁶ Section 41(1) of the ACT Act.

⁸⁷ Section 36 of the ACT Act.

⁸⁸ *SI bhmf CC v KS bhmf IS* [2005] ACTSC 125.

⁸⁹ The first of these was an examination of “Quamby”, a juvenile detention facility, in June 2005, and the second of these was an examination of the operation of ACT Correctional Facilities operating under Corrections Legislation, in July 2007.

⁹⁰ The Victorian Equal Opportunity and Human Rights Commission was previously the Victorian Equal Opportunity Commission. Its name was changed by an amendment to the Equal Opportunity Act 1995, effected by the Victorian Charter: see clause 1 of the Schedule to the Victorian Charter.

⁹¹ Section 41(a) of the Victorian Charter.

⁹² Section 41(b) of the Victorian Charter.

⁹³ Section 41(c) of the Victorian Charter.

⁹⁴ Section 41(d) of the Victorian Charter.

⁹⁵ Section 41(e) of the Victorian Charter.

⁹⁶ Section 41(f) of the Victorian Charter.

⁹⁷ Section 40(1) of the Victorian Charter.

A number of the submissions we received were keen to ensure that there would be mechanisms for dealing with systemic human rights problems in a WA Human Rights Act. For example, the Public Interest Advocacy Centre stated in its submission:

Where a complaint identifies a systemic barrier to the protection and promotion of recognised rights, there should be mechanisms to address the systemic aspects of the individual's complaint ...⁹⁸

Similarly, the Ethnic Disability Advocacy Centre stated:

in a **constructive systemic advocacy** sense, any human rights complaint, or class of such complaints, should also be investigated to seek opportunities to improve positive proactive promotional initiatives to alleviate the grounds for the appearance of such complaints and turn the situation around to a valued positive outcome, and not just for those directly involved but also for all others in society who could be potentially affected.⁹⁹

The multi-layered enforcement system we have proposed above would deal with individual complaints about breaches of human rights. That multi-layered enforcement system would not permit any assessment of the extent to which individual government agencies, or government agencies generally, were ensuring that their actions and decisions were compatible with human rights, or any assessment of whether existing legislation (as opposed to legislation enacted after the commencement of a WA Human Rights Act) was compatible with human rights. An assessment of these issues would be necessary in order to gauge the extent to which a WA Human Rights Act was actually assisting to create a culture of respect for human rights within the government.

While the periodic reviews of a WA Human Rights Act, which are contemplated in clause 43 of the draft Bill would permit some assessment of some of these issues, it seems unlikely that it would be practicable for such a review to encompass any detailed analysis of the performance of government agencies in dealing with human rights issues on a day to day basis. Further, an important part of the focus of the periodic reviews required under clause 43 of the draft Bill would be likely to be whether the scope of a WA Human Rights Act should be extended in the future.¹⁰⁰ In our view, if an independent body was given the function of monitoring compliance with a WA Human Rights Act on an ongoing basis, the reports of that body may well provide a useful source of information for the periodic reviews of that Act, in so far as they would be required to address the operation and effectiveness of that Act.¹⁰¹

An independent body could also perform other functions which would assist to develop a human rights culture in Western Australia. Such a body could be given power to examine an agency's practices and procedures and to make recommendations about any deficiencies, from a human rights perspective. That would assist to educate agencies in relation to human rights, and to ensure that agencies complied with human rights. Similarly, an independent body could be given particular human rights projects, such as the review of specific existing legislation, to determine its compatibility with human rights.

We therefore recommend that functions additional to those set out in clause 45 of the draft Bill be given to an independent body, for the reason that the performance of such additional functions could make a significant contribution to the establishment of a human rights culture in Western Australia. Given the Government's willingness to give some functions of this kind to the Commissioner for Equal

⁹⁸ Submission 272.

⁹⁹ Submission 183. Emphasis in original.

¹⁰⁰ See clause 43(2) of the draft Bill.

¹⁰¹ See clause 43(1) of the draft Bill.

Opportunity¹⁰² and the similarity between the existing functions of the Equal Opportunity Commission, and these additional functions, we recommend that they be given to the Equal Opportunity Commission and the Commissioner for Equal Opportunity. We also recommend that the Equal Opportunity Commission be renamed the Western Australian Human Rights and Equal Opportunity Commission and that the office of the Commissioner be renamed the Commissioner for Human Rights and Equal Opportunity.

In addition to the conciliation function which we discussed earlier in this Chapter, we recommend the Equal Opportunity Commission or the Commissioner for Equal Opportunity (as appropriate) be given the additional functions discussed below.

(i) Conducting audits for compliance with human rights

Case study: *Finding a Place* inquiry

Over a period of two years (from the end of 2002 to the end of 2004), the Equal Opportunity Commission conducted an inquiry pursuant to section 80 of the Equal Opportunity Act 1984 into discriminatory practices in the provision of state housing services to Aboriginal people in Western Australia. The inquiry “arose out of a long history of allegations of race discrimination made to the Commission by Aboriginal tenants and applicants, living in or seeking State Housing Commission (‘Homeswest’) accommodation.”¹⁰³

The Final report of the inquiry, *Finding a Place* was released in December 2004 and contained “165 recommendations relating to waiting lists, priority transfers, tenant liability, anti-social behaviour, promoting cultural awareness, and management practices, amongst others.”¹⁰⁴

The report was tabled in Parliament and shortly afterwards a committee was established to oversee and monitor the implementation of its recommendations. “The intention behind the implementation program was to work in partnership with the Department of Housing and Works to ensure that discriminatory practices were removed, staff were trained in more appropriate ways of dealing with Aboriginal clients, and appropriate administrative processes were established and monitored. ... After initial caution, the Department is now committed to the program and progress has been made.”¹⁰⁵

As the example above illustrates, the power to conduct inquiries into, or audits of, agency practices and procedures to assess their compliance with legislative requirements can be a very effective tool for improving an agency’s understanding of its obligations, and identifying ways in which the agency could improve its practices and procedures in the future.

The grant of an audit power which permits a supervisory body to conduct systemic inquiries, of its own volition, is not unknown in Western Australia. As noted above, such a power exists under section 80 of the *Equal Opportunity Act 1984*. In addition, we note that under the *Information Privacy Bill 2007*, which is presently before the Western Australian Parliament, it is proposed that the functions of the Privacy and Information Commissioner should include the conduct of audits or reviews of the documents or procedures of government organisations to examine their compliance with various aspects of the

¹⁰² Clause 45 of the draft Bill.

¹⁰³ Submission 337.

¹⁰⁴ Submission 337.

¹⁰⁵ Submission 337.

Information Privacy Act.¹⁰⁶ The conduct of these audits or reviews would not depend on any complaint being made about the organisation's conduct. It is also proposed that the Privacy and Information Commissioner would have power to make recommendations that particular action be taken by an organisation following an audit or review,¹⁰⁷ and would be required to report to Parliament on the outcome of such audits or reviews, including any recommendations made as a result of an audit or review and any response by an organisation to those recommendations.¹⁰⁸

A further consideration, which supports the grant to the Equal Opportunity Commission of the power to conduct human rights audits of a government agency, is that the need for an audit of a particular agency may become apparent from the number or kind of complaints about breaches of human rights involving the agency coming before the Commissioner for Equal Opportunity in his or her conciliation role. These complaints may be indicative of some wider systemic problem within the government agency, which warrants a wider analysis than that which could be undertaken in the context of conciliation of an individual complaint.

We consider that the power to conduct audits of government agencies' practices and procedures would be an effective means of ensuring compliance with a WA Human Rights Act, and for measuring compliance with that Act on an ongoing basis, which would not involve extensive additional government resources. We therefore recommend that a WA Human Rights Act grant to the Commissioner for Equal Opportunity the power to conduct audits of a government agency to determine the extent to which its practices and procedures are compatible with human rights. We recommend that the power to conduct an audit should not depend upon an invitation from an agency to do so (as is the case under the Victorian Charter) or depend upon a complaint in relation to a particular agency.

Some of the submissions we received suggested that the courts might be given the power to make "systemic orders" which might include "an order that managers of the public authority and key staff undergo approved human rights capacity-building and awareness training, that the public authority implement a human rights strategy, or that the public authority report at appointed times on measures it has taken to address the systemic problem identified as a result of the individual's complaint".¹⁰⁹ For the reasons outlined earlier in this Chapter, it would not be appropriate to give this power to courts and tribunals. However, we agree that the Commissioner for Equal Opportunity should have power to make recommendations to an agency about changes to its practices and procedures to improve compliance with a WA Human Rights Act. If an agency does not propose to comply with such recommendations it should be required to provide the Commissioner for Equal Opportunity with reasons for its refusal to do so.

(ii) Reviewing existing legislation for compatibility with human rights.

Clause 40(4) of the draft Bill recognises that, sometimes, a government agency would not reasonably be able to act in a way that is compatible with human rights, or to give proper consideration to human rights in making a decision because the legislation under which it operates requires the agency to act incompatibly with human rights or to make a decision which is incompatible with human rights. The capacity of government agencies to act compatibly with human rights is dependent upon the legislation pursuant to which they act being compatible with human rights.

¹⁰⁶ Clause 120 of the *Information Privacy Bill 2007*.

¹⁰⁷ Clause 123 of the *Information Privacy Bill 2007*.

¹⁰⁸ Clause 125(2) of the *Information Privacy Bill 2007*.

¹⁰⁹ Submission 272: Public Interest Advocacy Centre Ltd.

In Chapter 6 we discussed the mechanisms in the draft Bill which are designed to ensure that the Parliament considers the compatibility of proposed legislation with human rights. The compatibility with human rights of the legislation under which an agency operates might arise in a proceeding in which a question of interpretation arose in relation to that legislation. Alternatively, the compatibility of the legislation might arise for consideration in the course of a challenge to an agency's act or decision on the grounds of unlawfulness (including unlawfulness under clause 40 of the draft Bill). However, the draft Bill does not contain any mechanism for an ongoing or systematic review of existing legislation to determine its compatibility with human rights.

Many submissions raised concerns of this kind with us, either in the context of legislation generally, or by reference to particular legislation which was perceived to be incompatible with human rights. A number of submissions argued that a WA Human Rights Act should contain some provision for the systematic review of existing legislation.¹¹⁰ For example, Gay and Lesbian Equality (WA) Inc stated:

We note that [the] three-tiered system will be very proactive at identifying human rights deficiencies in proposed laws, but only reactive in identifying existing laws which may be inconsistent with human rights principles enshrined in any proposed Human Rights Act.¹¹¹

In their joint submission, Professor Andrew Byrnes of the University of New South Wales and Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham of the Australian National University state that the power to review laws "is vital to ensure monitoring of the government's ongoing commitment to a bill of rights".¹¹²

We accept that permitting the Equal Opportunity Commission to conduct a review of existing legislation would assist in the identification of legislation which is incompatible with human rights, for further consideration by the Executive government and the Parliament. A review by the Equal Opportunity Commission would not affect the validity of the legislation. Whether or not legislation considered to be incompatible with human rights was ultimately amended would remain within the exclusive province of the Parliament.

However, we do not consider that the Equal Opportunity Commission should be subject to a requirement to review all existing legislation for its compatibility with human rights. Such an obligation would be resource intensive and expensive. Instead, we propose that the power to review existing legislation should focus on legislation of primary relevance to the actions and decisions of government agencies. Identifying whether this legislation is compatible with human rights is likely to result in the greatest benefit in ensuring government agencies act and make decisions compatibly with human rights in the future. Accordingly, we recommend that under a WA Human Rights Act, the Equal Opportunity Commission should have the power to review the legislation under which a government agency operates or from which it derives its powers and obligations, to determine whether that legislation is compatible with human rights. This power might be used in conjunction with an audit of a government agency's practices and procedures.

...WE PROPOSE THAT THE POWER TO REVIEW EXISTING LEGISLATION SHOULD FOCUS ON LEGISLATION OF PRIMARY RELEVANCE TO THE ACTIONS AND DECISIONS OF GOVERNMENT AGENCIES.

¹¹⁰ For example, submission 304: Centre for Human Rights Education, Curtin University; submission 369: Association for Services to Torture and Trauma Survivors Inc; submission 131: George Sulc; submission 245: Community Vision Inc.

¹¹¹ Submission 270.

¹¹² Submission 320: Professor Andrew Byrnes, Professor Hilary Charlesworth, Gabrielle McKinnon and Kim Pham.

In addition, there may be occasions when the Executive government wishes to have particular legislation reviewed for its compatibility with human rights. We therefore recommend that the Attorney General also be permitted to request the Equal Opportunity Commission to conduct a review of the compatibility of particular legislation with human rights, and to report to the Attorney General on the outcome of that review.

(iii) Reporting to Parliament

In order to develop a culture of human rights in Western Australia, it is essential that any systemic deficiencies in complying with human rights by government agencies, serious issues of compliance by individual agencies, or existing legislation which is incompatible with human rights, be drawn to the attention of the Parliament. Legal Aid Western Australia Inc submitted that:

The detail of the processes and reporting relationships for any human rights framework and independent statutory agency are also critical. They must be as open, public and transparent as possible, so that they actively promote informed broad community discussion and minimise the opportunity for processes to be controlled, censored or delayed by bureaucracies or partisan politics.¹¹³

In our view, it is essential that a WA Human Rights Act contain reporting obligations for individual government agencies (which we discuss below) and for the Commissioner for Equal Opportunity.

We therefore recommend that the Commissioner for Equal Opportunity be required to include in her annual report to the Parliament¹¹⁴ the following information:

- The number of complaints about breaches of human rights which the Commissioner was asked to conciliate, and the percentage of complaints resolved through conciliation.
- Details of any audit of a government agency conducted during the year, any recommendations made as a result of that audit and the agency's response to those recommendations.
- The results of any review of legislation conducted by the Equal Opportunity Commission during the year, including (if necessary) any recommendations for amendment of that legislation to make it compatible with human rights.
- An outline of the steps taken by the Commissioner during the year to promote public knowledge of and respect for human rights. (We discuss this aspect of the Commissioner's functions further in Chapter 9.)

We also recommend that if ESC rights are included in a WA Human Rights Act (as we recommended in Chapter 4), the functions of the Commissioner for Equal Opportunity and the Equal Opportunity Commission should be exercisable with respect to those ESC rights, as well as with respect to the rights presently included in the draft Bill.

¹¹³ Submission 223.

¹¹⁴ See Part 5 of the *Financial Management Act 2006* and section 95(1) of the *Equal Opportunity Act 1984*.



8.6.2 Agency reporting requirements

One submission we received suggested that when an audit of a government agency's practices and procedures is conducted by a Human Rights and Equal Opportunity Commissioner, the government agency should also be required to set out in its annual report information relevant to that audit, including:

- (a) figures for all complaints referred to the authority by the HR Commissioner
- (b) any recommendations made by the HR Commissioner
- (c) the authority's response to those complaints
- (d) if the authority decides against taking action in response to a recommendation, the reasons for that decision.¹¹⁵

As we noted above, we consider it essential that a WA Human Rights Act contain reporting obligations for individual government agencies as well as for the Commissioner for Equal Opportunity.

In Chapter 6, we recommended that government agencies be required to include a human rights compliance report in their annual reports under the *Financial Management Act 2006 (WA)*. We recommended that that human rights compliance report address the following matters:

- Details of any cases before courts or tribunals in which a WA Human Rights Act has been relied upon to support a cause of action against the agency, or in which a court or tribunal has concluded that a provision in a law administered by the agency is incompatible with human rights.
- Details of any measures implemented by the agency to ensure its practices and procedures are compatible with the requirements of a WA Human Rights Act.
- Any training or education undertaken by staff during the year in relation to human rights.

In addition to that information, we recommend that a WA Human Rights Act require government agencies to include the following information in their annual reports:

- The number of complaints the agency received during the year which alleged a failure by the agency to act, or make a decision, compatibly with human rights.
- The internal complaints process which the agency established, the number of complaints received through that process during the year, and the proportion of complaints which were resolved through that internal process.

¹¹⁵ Submission 72: Human Rights Law Resource Centre Ltd.

- The number of complaints against the agency which were the subject of conciliation by the Commissioner for Equal Opportunity and the percentage of those complaints resolved through conciliation.
- The number of occasions during the year on which a failure by the agency to act, or make a decision, compatibly with human rights was relied upon as a ground for the unlawfulness of the agency's conduct in an action before a court or tribunal, and the result of any such litigation completed during the year.
- Details of any audit of the agency's practices and procedures conducted by the Equal Opportunity Commission during the year, any recommendations made as a result of that audit, the agency's response to those recommendations, and, if the agency determined not to implement a recommendation, the reasons for that decision.

We note that similar reporting requirements are imposed on agencies under other legislation.¹¹⁶ We do not consider that this reporting obligation will constitute an unreasonable burden on agencies.

We also recommend that if ESC rights are included in a WA Human Rights Act (as we recommended in Chapter 4), that these reporting requirements apply with respect to those ESC rights, as well as with respect to the rights presently included in the draft Bill.

8.6.3 Monitoring role for the Ombudsman

A number of submissions suggested that in addition to, or instead of, giving the Commissioner for Equal Opportunity (or a newly created Human Rights Commissioner) a role in monitoring compliance with a WA Human Rights Act, the Ombudsman should be given such a role. For example, submission George Sulc stated:

I am of the belief that there is no need to appoint a Human Rights Commissioner – a simple expansion of the role and office of the Ombudsman should suffice. However, the Ombudsman should have the powers to ensure that the findings of that office are enforceable rather than limited to recommendations as is the case now.¹¹⁷

Dr Ben Saul of the University of Sydney also submitted that it would be appropriate to give the Ombudsman a role with respect to monitoring compliance with a WA Human Rights Act as:

providing this alternative to judicial enforcement would help to alleviate pressure on the courts, and potentially resolve a large number of human rights complaints in the matter characteristic of the Ombudsman – speedy, informal, cheap, and based on 'cooperative compliance' rather than an adversarial approach.¹¹⁸

The Ombudsman is currently empowered under the *Parliamentary Commissioner Act 1971 (WA)* to investigate complaints about the administrative decisions, recommendations, actions or omissions of State government agencies, local governments and universities.

¹¹⁶ Under section 111 of the *Freedom of Information Act 1992* the Information Commissioner is required to submit an annual report to Parliament which includes, in relation to each agency subject to that Act, information such as the number of access applications received and dealt with, the number of decisions to give access to documents and to deny access to documents, the number of applications for internal review and external review, and the number of appeals to the Supreme Court. Each agency is required to provide the Commissioner with such information as the Commissioner requires for the purpose of preparing this report.

¹¹⁷ Submission 131.

¹¹⁸ Submission 2.



The Ombudsman is also able to initiate investigations into issues of his own motion. Dr Saul noted that following an investigation, the Ombudsman is empowered to form a number of opinions, including that a particular action:

- appears to have been taken contrary to law;¹¹⁹
- was unreasonable, unjust, oppressive or improperly discriminatory;¹²⁰
- was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory;¹²¹ and
- was wrong.¹²²

Dr Saul recommended that the *Parliamentary Commissioner Act 1971* should be amended to specifically empower the Ombudsman to form the opinion that a particular action “was inconsistent with the enjoyment of a human right”. He noted that a similar consequential amendment to the *Ombudsman Act 1973 (Vic)* had been included in the Schedule to the Victorian Charter.

The Committee also received a submission from the current Western Australian Ombudsman, Chris Field, who was of the view that his office could perform an important role in monitoring compliance with a WA Human Rights Act. He noted that a number of the Ombudsman’s existing functions cover areas such as corrective services, child protection, policing and housing, which are often associated with breaches of human rights. He further noted:

The office of the Ombudsman is now widely accepted as an essential component of administrative law review and redress that has been developed to safeguard the rights and interests of individuals and maintain the balance between fair dealing with citizens and the administration of government’s programs and policies.

...The Ombudsman’s office generally represents both an efficient and effective option for the investigation of human rights compliance. This is so as the office of the Ombudsman is well-known to members of the public and provides a simple, free avenue of resolution and redress. Additionally it draws upon the Ombudsman’s longstanding relationship with public sector agencies, and makes use of the Ombudsman’s wide powers to obtain information in the course of an investigation and the expertise and experience of staff available at the Ombudsman’s office.

...The Ombudsman’s current powers to make findings and recommendations and report directly to Parliament mean that a new range of human rights specific remedies would be unnecessary. Recommendations made by the Ombudsman carry considerable weight and are almost invariably accepted by agencies.¹²³

In our view, the Ombudsman’s scrutiny of a government agency’s conduct for its compatibility with human rights would be a useful additional mechanism for ensuring compliance with a WA Human Rights Act. It is arguable that under the provisions of the *Parliamentary Commissioner Act 1971*, the Ombudsman would already be able to investigate actions of a government agency, and to express a view as to whether those actions were contrary to the obligation on the government agency to act compatibly with human rights, and therefore were contrary to law. However, in order to avoid any doubt

¹¹⁹ Section 25(1)(a).

¹²⁰ Section 25(1)(b).

¹²¹ Section 25(1)(c).

¹²² Section 25(1)(g).

¹²³ Submission 344.

about this issue, we recommend that section 25(1) of the *Parliamentary Commissioner Act 1971* be amended to make clear that the Ombudsman can express an opinion that the action of a government agency was contrary to the agency's obligation to act compatibly with human rights under a WA Human Rights Act.

RECOMMENDATIONS

- A multi-layered system for dealing with breaches of human rights, comprising the following layers, should be included in a WA Human Rights Act:
 - (a) internal processes within government agencies and contractors for trying to resolve human rights complaints;
 - (b) a conciliation process run by an independent agency; and
 - (c) limited rights to take legal action against government agencies in courts and tribunals for a breach of human rights.

(Recommendation 61)
- If it is alleged that a government agency or a contractor has breached the human rights set out in the draft Bill, then that breach should be subject to each of the three layers of the enforcement system outlined above. *(Rec 62)*
- If economic, social and cultural rights are included in a WA Human Rights Act and are dealt with in the same way as civil and political rights, then a breach of any of the rights in a WA Human Rights Act should be subject to each of the three layers of the enforcement system outlined above. *(Rec 63)*
- If economic, social and cultural rights are included in a WA Human Rights Act, but those rights are implemented using the alternative model recommended above, then those additional economic, social and cultural rights, (together with the economic, social and cultural rights presently included in clause 20 of the draft Bill) should be subject to the informal complaint processes outlined in (a) and (b) above, but should not be able to be pursued through litigation (as outlined in (c) above). *(Rec 64)*
- A WA Human Rights Act should require each government agency and contractor to establish an informal complaints process for receiving, considering and responding to, complaints about human rights, and which incorporates the following elements as a minimum:
 - (a) it should identify one or more designated officers to whom complaints can be made that a decision or action of the agency or contractor was incompatible with human rights;
 - (b) it should make provision for that officer to receive written complaints, both in paper and electronic form and, where reasonably practicable, to receive complaints in alternative forms (eg orally, for complainants who are visually impaired, or have language or literacy difficulties);
 - (c) no fees should be permitted in relation to complaints;
 - (d) the designated officer should be required to provide the complainant with a response to the complaint on behalf of the government agency or organisation as soon as practicable, and in any event within 14 days of receiving the complaint;
 - (e) the government agency or contractor should be required to make widely available a statement explaining its informal complaints system, which sets out how to make a complaint, and the time frame in which complaints will be addressed;

- (f) complaints should be able to be made by an individual whose human rights have been breached, or by a person on behalf of that individual. In the latter case, complaints should be permitted to be made without identifying the person whose rights have been breached where it is practicable to do so having regard to the nature of the complaint; and
- (g) in any communications between the agency or contractor and the complainant, the complainant should be entitled to receive the assistance of another individual.

(Rec 65)

- A WA Human Rights Act should permit an individual who claims that their human rights have been breached (or someone else on behalf of the individual), to request that the Commissioner for Equal Opportunity endeavour to conciliate their complaint against the government agency or contractor. *(Rec 66)*
- A WA Human Rights Act should provide that a complainant is entitled to be accompanied during the conciliation by a third party. *(Rec 67)*
- A WA Human Rights Act should provide that no party should be permitted to be legally represented during a conciliation, unless the complainant agrees to this course of action. *(Rec 68)*
- A WA Human Rights Act should expressly provide that no fees should apply to conciliations. *(Rec 69)*
- A WA Human Rights Act should expressly provide that nothing said by a party in a conciliation may be used in any proceedings in a court or tribunal. *(Rec 70)*
- A WA Human Rights Act should provide that a person cannot apply for conciliation by the Commissioner for Equal Opportunity unless they have first tried to resolve their complaint through the internal complaints process of the agency or contractor the subject of the complaint. *(Rec 71)*
- A WA Human Rights Act should focus on preventing breaches of human rights and not on compensation-based litigation. A WA Human Rights Act should therefore contain a provision in the terms of clause 41 of the draft Bill. *(Rec 72)*
- Clause 41 of the draft Bill should be amended to indicate that a person may not pursue a remedy for a breach of their human rights through a court action if that breach has been resolved to the satisfaction of both parties, through an internal complaint process or by conciliation. *(Rec 73)*
- If economic, social and cultural rights are included in a WA Human Rights Act, but those rights are implemented using the alternative model recommended above, then a WA Human Rights Act would need to make clear that clause 41 does not apply to breaches of economic, social and cultural rights. *(Rec 74)*
- The definition of “human rights question” in clause 32 of the draft Bill should be amended to include proceedings of the kind contemplated in clause 41 of the draft Bill. *(Rec 75)*
- A WA Human Rights Act should confer the following additional functions and powers on the Commissioner for Equal Opportunity and the Equal Opportunity Commission in addition to the functions conferred in clause 45 of the draft Bill:
 - (a) the power to conduct audits of a government agency to determine the extent to which its

practices and procedures are compatible with human rights. The power to conduct an audit should not depend upon an invitation from an agency to do so, or upon the existence of a complaint in relation to a particular agency;

- (b) the power to make recommendations to an agency about changes to its practices and procedures to improve compliance with a WA Human Rights Act, following an audit. If an agency does not propose to comply with such recommendations it should be required to provide the Commissioner for Equal Opportunity with reasons for its refusal to do so;
- (c) the power to review the legislation under which a government agency operates or from which it derives its powers and obligations, to determine whether that legislation is compatible with human rights;
- (d) the power to conduct a review of the compatibility of particular legislation with human rights, following a request by the Attorney General to do so, and to report to the Attorney General on the outcome of that review.

(Rec 76)

- A WA Human Rights Act should require the Commissioner for Equal Opportunity to include in his or her annual report to the Parliament the following information:
 - (d) the number of complaints about breaches of human rights which the Commissioner was asked to conciliate, and the percentage of complaints resolved through conciliation;
 - (c) details of any audit of a government agency conducted during the year, any recommendations made as a result of that audit, and the agency's response to those recommendations;
 - (c) the results of any review of legislation conducted by the Equal Opportunity Commission during the year, including (if necessary) any recommendations for amendment of that legislation to make it compatible with human rights; and
 - (d) an outline of the steps taken by the Commissioner during the year to promote public knowledge of and respect for human rights.

(Rec 77)

- If economic, social and cultural rights are included in a WA Human Rights Act (as recommended above), the functions of the Commissioner for Equal Opportunity and the Equal Opportunity Commission should be exercisable with respect to those rights, as well as with respect to the rights presently included in the draft Bill. (Rec 78)
- If a WA Human Rights Act is enacted, the Equal Opportunity Commission should be renamed the Western Australian Human Rights and Equal Opportunity Commission and the office of the Commissioner should be renamed the Commissioner for Human Rights and Equal Opportunity. (Rec 79)
- A WA Human Rights Act should contain a provision requiring government agencies to include a human rights compliance report in their annual reports under the *Financial Management Act 2006*, which addresses the following matters:
 - (a) the number of complaints the agency received during the year which alleged a failure by the agency to act, or make a decision, compatibly with human rights;

- (b) the internal complaints process which the agency established, the number of complaints received through that process during the year, and the proportion of complaints which were resolved through that internal process;
- (c) the number of complaints against the agency which were the subject of conciliation by the Commissioner for Equal Opportunity and the percentage of those complaints resolved through conciliation;
- (d) the number of occasions during the year on which a failure by the agency to act, or make a decision, compatibly with human rights was relied upon as a ground for the unlawfulness of the agency's conduct in an action before a court or tribunal, and the result of any such litigation completed during the year;
- (e) details of any audit of the agency's practices and procedures conducted by the Equal Opportunity Commission during the year, any recommendations made as a result of that audit, the agency's response to those recommendations, and, if the agency determined not to implement a recommendation, the reasons for that decision.

(Rec 91)

- If economic, social and cultural rights are included in a WA Human Rights Act (as recommended above), these reporting requirements should apply with respect to those economic, social and cultural rights, as well as with respect to the rights presently included in the draft Bill. *(Rec 93)*
- A WA Human Rights Act should make a consequential amendment to section 25(1) of the *Parliamentary Commissioner Act 1971* to make clear that the Ombudsman can express an opinion that the action of a government agency was contrary to the agency's obligation to act compatibly with human rights under the Human Rights Act. *(Rec 80)*
- If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):

(a) whether compensation should be payable for a failure to act compatibly with human rights.

(Rec 90)



Committee member Lisa Baker (right), discusses the draft Bill with interested members of the public.



CHAPTER 9: IMPLEMENTING A WA HUMAN RIGHTS ACT AND PROMOTING A CULTURE OF HUMAN RIGHTS

During our community consultations, the Committee asked Western Australians what wider changes would be necessary to implement a WA Human Rights Act in this State and what else the government and the community could do to encourage a culture of respect for human rights. It became apparent from the responses we received that there was a substantial amount of overlap between these issues and consequently they are discussed together in this Chapter of the Report. Notwithstanding this overlap, the range of specific suggestions we received was extremely broad. This is illustrated by the following extract from the submission of the Ethnic Communities Council of Western Australia:

Achieving a human rights culture

The following broad principles would contribute to the realisation of a human rights culture that informs practices and behaviour in the community, to:

- Strengthen, change and develop relationships in the community that promote and protect the equality of all people and to build relationships based on equality between diverse groups.
- Inform people about their responsibilities to initiate, implement and monitor social change.
- Educate and encourage the community to take positive action to weave a human rights way of life.
- Involve people in making decisions on issues which directly affect their lives.
- Have a Human Rights Act as a major backstop in order to seek recompense is a vital ingredient in this mix.
- Enforce Human rights compliance and achievements as a mandated component of all government agencies' annual reports.
- Enforce Human Rights education as part of the core school curriculum and adult community education.
- Launch a public educational campaign and facilitate funding for related projects that promotes Human Rights education. This should be attended with similar concern as other high profile promotions such as anti-smoking and road safety.¹

¹ Submission 297.

A number of the suggestions made by the Ethnic Communities Council have been discussed elsewhere in this Report. However, the importance of education, as highlighted by the Council, is discussed below, together with issues such as the importance of leadership and resources. This Chapter also considers implementation issues such as the commencement and review of a WA Human Rights Act.

9.1 Leadership

[R]eal change can only come from effective LEADERSHIP in human rights ...

Submission 170: Dennis Grimwood²

If the Government is to achieve its objective of creating a human rights culture in Western Australia, the Government itself has a critical role to play in providing leadership through its words and, even more importantly, its actions. There can be no doubt that the culture of departments and agencies is largely influenced by the leadership of those departments and agencies, both political and bureaucratic. Without an obvious commitment to respect for the rights of all Westerners Australians at that level, it is unlikely that the rest of the system would change in the way the Government hopes.

In a practical sense, this puts a particular burden on both the political and bureaucratic leadership to ensure that actions are consistent with words. As all those who have led cultural change in significant organisations and agencies will know, there is no escaping the important role of leadership. This can give rise to real difficulties in an adversarial political system which, at times, encourages something less than respectful engagement, and where important issues impacting on the enjoyment of rights by Western Australians are the subject of strong political conflict.

As we understand the notion of a culture of human rights, it includes the widespread acceptance of a responsibility by all elements of society to treat every person with respect. The need for people to show respect for one another was frequently raised during our community consultations by those who felt that their human rights had been infringed. Government itself must lead in showing respect, including respect for human rights, to encourage the flourishing of respect in the community at large. As S Levy told us, the Government needs to:

SET AN EXAMPLE! Treat people the way they would expect to be treated. Show respect for others. Make a real effort to understand their differences and difficulties. Treat people as people, not numbers, or objects that present problems they can't be bothered trying to solve.³

9.2 Education and training

[O]f all actions following the enactment of the law, education is the most important. ... Youth for Human Rights Australia, believes that education in human rights and responsibilities will lead to greater peace, tolerance and respect for others in society. The mistake of the UN and the member nations that signed the UN Declaration, was that they failed to educate.

Submission 225: Michael Rokich, member of Youth for Human Rights Australia

² Emphasis in original.

³ Submission 203.



9.2.1 The importance of education

An extremely strong theme to emerge from our consultations with the community was the importance of education to the proper implementation of a WA Human Rights Act and to the promotion of a human rights culture within this State. This was also a strong theme to emerge from the devolved consultation with the disadvantaged.⁴

Education was seen to be important on two levels. First, it was recognised by many people that education in a general sense was necessary to promote a culture of human rights within Western Australia. A participant in our Bateman public forum noted that “education is empowerment” and Melissa Jones, an Educator and Assessor with the Western Australia Adult Literacy Council observed in her personal submission that:

lack of a basic level of education is a barrier to the goals being pursued via the development of a Human Rights Act, one aim of which is to educate citizens about human rights. An inadequate level of literacy will prevent citizens from being able to access the materials and legislation being created. They will be unable to engage with both the process and outcomes at a satisfying level.

Inadequate literacy also makes this group in our society vulnerable. People without a basic education are more likely to be unemployed or under employed. They are too frequently the victims of abuse, in poor health or, in our prisons. Improving a person’s education also improves their self esteem, involvement in the community, relationships and employment prospects. Most importantly, it improves their freedom and choices.⁵

Secondly, it was recognised that in order for a WA Human Rights Act to be effective, people would need specific education about human rights and the operation of the Act. For example, a participant in one of our Busselton public forums told us that there is a “need to ensure that, in its implementation, the Bill is accessible and people are educated about it. ... There is a need to get information and knowledge about the Bill out there so it doesn’t just sit on a shelf somewhere.” Amnesty International Australia also pointed out that public education about a WA Human Rights Act would need to include an explanation “of the relevance of the ... Act, to all aspects of civil society and the rights and responsibilities it entails”.⁶

The need for specific education about human rights was highlighted by the Constitutional Centre of Western Australia in its submission to the Committee:

The Constitutional Centre of Western Australia provided a venue for some of the public consultations to determine whether a WA



⁴ Human Rights Solutions, *Human Rights 'at the Margins'*, August 2007, 81 (see Appendix F).

⁵ Submission 209.

⁶ Submission 311.

Human Rights Act should be put in place. During this period the Centre was host to a number of public forums and also canvassed the topic in the Western Australian Schools Constitutional Convention with around 170 Year 11 students. In addition, we are often the first port of call when people do not understand an issue.

What became evident during this period was the need to provide education programs for both students and adults on rights and responsibilities. Understanding of the Constitution was limited and appears to have been confused by exposure to television programs touting the American Bill of Rights. At times, the lines have become somewhat blurred in the minds of the young and not so young.”⁷

A NUMBER OF THE
SUBMISSIONS WE RECEIVED
APPEARED TO BE BASED
ON MISUNDERSTANDINGS
ABOUT EXISTING RIGHTS...

In this regard, the Centre's observations were consistent with our own.

A number of the submissions we received appeared to be based on misunderstandings about existing rights or how a WA Human Rights Act in the form of the draft Bill would operate. In addition, a number of people attending our public forums indicated that they believed that Australia already had a Bill of Rights. This was not particularly surprising given the results of the survey commissioned by Amnesty International Australia in 2006, which found that a large majority of respondents were under the false impression that Australia already had a Charter or Bill of Rights.⁸

When discussing the need for education about a WA Human Rights Act, some people expressed concern that the draft Bill, as written, would not be understandable to a large number of people. The Department of Health noted in its submission that:

For a significant number of public health clients/patients (Indigenous Australians, low socio economic groups and culturally and linguistically diverse groups) the unsaid assumption is that these groups (who may not use or understand Standard Australian English) will have equal access to the provisions of a Human Rights Act. An individual who has not acquired literacy and numeracy competencies equivalent to exiting year 12 schooling will be disadvantaged by the text within the Act.⁹

Accordingly, a number of people highlighted the importance of ensuring that information about a WA Human Rights Act would be as accessible as possible. A participant in one of our Geraldton public forums noted that “there is a need for an education process that is culturally relevant to Aboriginal people, people with disabilities etc.”¹⁰ Similarly, Legal Aid Western Australia Inc suggested that:

Any community education and engagement strategy would need to ensure education about human rights is accessible in a range of formats and languages, is appropriate for different age groups, and is available and accessible to people in rural, regional and remote Australia.¹¹

⁷ Submission 217.

⁸ Roy Morgan research, *Anti-Terrorism Legislation Community Survey*, 10 August 2006, prepared for Amnesty International Australia.

⁹ Submission 353.

¹⁰ Participant in Geraldton public forum.

¹¹ Submission 223.

9.2.2 Education in schools

A consistent suggestion throughout our public consultations was that human rights education should begin at an early age. For example, a participant in one of our Geraldton public forums told us that “education should not just focus on adults. We need to imbibe the spirit of the Act in young people. Packages should be sent out to schools. We need to raise awareness of respect for human rights at an early age. Children are open to things that adults aren’t because of cynicism.”

A number of people specifically recommended that human rights education become part of the core curricula taught in schools. For example, the Shire of Derby/West Kimberley stated that they “would strongly support legislation requiring human rights forming part of all education systems in WA and beyond so, as the next generation grows, it fully comprehends what human rights mean.”¹² Similarly, the Western Australian Council of Social Service suggested that:

the WA Government incorporate human rights material into the State’s education curriculum. Teaching about respect, fairness, justice and equality would be an effective way of developing a human rights culture in WA. Respect for human rights helps build strong communities, based on equality and tolerance in which everyone has an opportunity to contribute.¹³

On the other hand, there was some concern that schools may be “overburdened” and that having to teach human rights may “detract from teaching the core curriculum”.¹⁴ A number of the people voicing such concerns, however, noted that topics such as human rights and anti-bullying were already covered to a certain extent in schools.

In addition to incorporating human rights into school curricula, a number of people recommended the creation of interactive learning opportunities for children. A young participant in one of our Busselton forums noted that “dignity and respect are learned through experience – contact and exposure to people who are different ... It is not enough to simply lecture people about being respectful.” Geoff Bridger further suggested that school students should be provided with:

an understanding of the need for compassion and extra care of those who are unable to do the things in life that they take for granted. Perhaps a visit to a migrant centre, disabled care facilities, Aboriginal social group or a minority religious gathering to gain the hands on experiences they need to be better and more understanding citizens.¹⁵

The Committee agrees that human rights education in schools would be essential to the creation of a human rights culture in Western Australia. Our understanding is that schools are already involved in teaching what is variously described as “civics” or “values education”. We see education about human rights as becoming an integral part of what is already being taught. As discussed earlier in Chapter 5 of this Report, we consider that the Preamble to a WA Human Rights Act could serve as a useful tool in the education process.

¹² Submission 37.

¹³ Submission 315.

¹⁴ For example, participant in Geraldton public forum.

¹⁵ Submission 38.

9.2.3 Broader community education

Educate and encourage the community to take positive action to weave a human rights way of life.

Submission 297: Ethnic Communities Council

Many people participating in the consultation process recognised that the issue of education was broader than simply educating children in schools. For example, a Kalgoorlie public forum participant observed that the issue “is about educating people at all levels. It is important to educate across the community.” The Public Interest Advocacy Centre Ltd further noted that the community:

has an important role to play in making the WA Human Rights Act a living document ... If members of the community are not aware of it and the mechanisms that are created to support it, the potential benefit of the WA Human Rights Act and associated mechanisms will be diminished.¹⁶

People had a range of suggestions as to how to educate, or raise the awareness of, the community. Some of these suggestions included:

- Create “an information/help line ... Increase community education through grass roots community campaigns and community development”.¹⁷
- “Community agencies should work hand in hand with government bodies in the delivery of community education”.¹⁸
- “There is a definite role for welfare and not for profit agencies to play a part in the community's understanding of human rights. ... The role would be educational and back up support. Some training may be needed for this ‘army’ ...”.¹⁹
- “Promotion via media and radio plus tabloid exposure, these are the most accessed information sources. Media has been proven to be very successful in promoting reforms etc”.²⁰
- Launch “a public educational campaign and facilitate funding for related projects that promote human rights education. This should be attended with similar concern as other high profile promotions such as anti-smoking and road safety”.²¹
- “Education campaigns to explain the whole thing to people in language they can understand, and also in languages other than English”.²²
- “It would ... be easy to run a few forums for the general public and consider the job done. However, this will need to be an ongoing program that could take a number of years to bear significant dividends”.²³
- Engage in “awareness raising”, be “very clear and consistent in the use of words describing human rights”, and use examples “to illustrate how conflict over rights ... can be worked out”.²⁴
- “An information resource and advisory service would help members of the public in a similar way to the Citizen's Advice Bureau”.²⁵

¹⁶ Submission 272.

¹⁷ Submission 19: Anonymous.

¹⁸ Submission 275: Loftus Community Centre.

¹⁹ Submission 284: St Vincent de Paul Society (WA).

²⁰ Submission 30: Suzanne Wickham.

²¹ Submission 297: Ethnic Communities Council of Western Australia.

²² Submission 203: S Levy.

²³ Submission 217: The Constitutional Centre of Western Australia.

²⁴ Submission 322: Women's Electoral Lobby (WA) Inc.

²⁵ Submission 322: Women's Electoral Lobby (WA) Inc.

- Create “capacity building initiatives through a human rights resources centre or respective addition to volunteer resource centres as well as public libraries that are accessible to all population groups”.²⁶
- “We have TV adverts anyway - they may as well be about human rights”.²⁷

The Committee accepts that a key element in creating a human rights culture in Western Australia would be educating the broader community about a WA Human Rights Act. We note that clause 45 of the draft Bill provides for the *Equal Opportunity Act 1984 (WA)* to be amended so as to expand the functions of the Commissioner for Equal Opportunity to include promoting public knowledge of, and respect for, the human rights set out in the draft Bill. A number of submissions expressly approved of the Commissioner being given such an educative function. For example, Legal Aid Western Australia Inc stated:

The WA EOC [Equal Opportunity Commission] has an excellent track record for providing education in relation to discrimination and harassment issues and is therefore well placed to develop and provide an education program concerning human rights. The WA EOC could also work in conjunction with other agencies to develop materials and seminars for people throughout the community. For example, the WA EOC could work with the Department of Education to develop materials appropriate for school children.²⁸

We agree that the Commissioner for Equal Opportunity is well placed to promote public knowledge and respect for human rights in Western Australia. In our view this educative function would sit side by side with the conciliation and audit functions we have recommended be allocated to the Commissioner in Chapters 6 and 8 of this Report. Indeed, it could be expected that the Commissioner would be better placed to deliver community education and promote awareness of human rights as a result of these additional functions.

9.2.4 Education and training for government agencies, the judiciary and the legal profession

It would also be important to ensure education for the public service on the proposed draft Act. Training of those involved in enforcing the law, such as police, magistrates and judges, is also essential.

Submission 311: Amnesty International Australia

In addition to broad-based community education, many submissions noted that public servants working within government agencies, the judiciary and the wider legal profession would all need specialised education and training about a WA Human Rights Act.

The Chamber of Commerce and Industry Western Australia noted that if a WA Human Rights Act was introduced, individual government officials would “ultimately be tasked with its day-to-day implementation.”²⁹ It would therefore be imperative that these government officials were “educated about the content of those rights and made aware of the impact their decisions can have on members of the community.”³⁰ In this regard, Legal Aid Western Australia Inc suggested that:

²⁶ Submission 305: The Greens (WA).

²⁷ Participant in Bunbury public forum.

²⁸ Submission 223.

²⁹ Submission 339.

³⁰ Submission 339.

A specific program for government departments and agencies should be developed concerning the State legislation and international Conventions to which Australia is a party which are relevant to the operations of the agency. In this way public servants can be made aware of human rights relevant to their work.³¹

The Department of Child Protection further recommended that a “whole of government approach to the training of public servants” be taken if a WA Human Rights Act was introduced. In this regard, the Department favoured “a training model where the Equal Opportunity Commission is funded to deliver training across all government agencies. This would ensure a consistent message is delivered across government by an agency with suitably qualified staff.” It also noted that one initiative being implemented in Victoria was the use of “e-learning” tools and suggested that these could “be a useful, flexible and cost-effective element in training [the] public sector”.³²

With respect to the judiciary, Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University recommended that Western Australia should undertake:

extensive training of the judiciary and quasi-judicial bodies (including administrative tribunals) before any rights instrument comes into force, and its approach could be modelled on the British experience. Extensive training was undertaken for the judiciary by the British Judicial Studies Board.³³

Moreover, the submission from Civil Liberties Australia presented advice regarding the education and training of public servants, the judiciary and the wider legal profession which was based on the experience in the ACT following the introduction of its human rights legislation. This advice included:

With hindsight, a thorough education program throughout the PS departments and agencies would have been useful in the first six months following the Act becoming operative.

The public service education program run in the 6 months prior to commencement of the Human Rights Act focused on mid level policy staff who would be preparing and advising on the statements of compatibility for legislation. It would have been great to be able to educate more broadly within the public service, including at senior levels.

... The [ACT Consultative Committee] found it difficult to engage the profession. One of the best things done prior to implementation was to bring across a New Zealand lawyer who actually ran human rights litigation for the New Zealand Government. He spoke their language and it was one of the few times that a strong connection was created with the profession. Academics and public servants are not good at getting litigators excited.

Even now, after three years, magistrates and some legal people on tribunals miss the point on core principles of the legislation. Three years on, more education is still needed in the legal profession at all levels.

There was a little judicial training in 2004...such training obviously has to be ongoing, with annual updates.

³¹ Submission 223.

³² Submission 176.

³³ Submission 267.

A more formal education process, possibly involving the mandatory continuing education program of the Law Society and the local Bar, would be a useful addition to any WA proposal.³⁴

Clearly, it would be imperative to the proper implementation of a WA Human Rights Act for public servants within government agencies, judges and the legal profession to receive specialised human rights education and training. To the extent that a WA Human Rights Act should also cover contractors who provide services on behalf of government, such contractors would also need to receive education and training about their obligations under the Act. In this regard, the Department of Child Protection noted in its submission:

The Department currently contracts a number of Funded Agencies to deliver services on its behalf. ... The Department believes that to achieve the goal of developing a culture of respect for human rights in the public sector in WA, those agencies which deliver services on behalf of the government must also be trained to act in accordance with human rights. As some funded agencies may deliver a wide range of services on behalf of a number of government departments, the Department considers that funded agencies would benefit from centrally-delivered training through either the Equal Opportunity Commission or the WA Council of Social Service.³⁵

Other submissions also suggested that the Commissioner for Equal Opportunity might play a role in the provision of education and training to the public sector, including contractors providing services on behalf of government.³⁶

In his submission to the Committee, the Western Australian Ombudsman, Chris Field, noted that the Government's preferred approach was to give the Commissioner for Equal Opportunity responsibility for promoting public knowledge of, and respect for, human rights. He suggested, however, that it may be appropriate "for government to consider whether the Ombudsman has an educational and audit role direct with government agencies as has occurred in other Australian jurisdictions." In this regard, he suggested that a "cooperative relationship could readily be established with the EOC through a Memorandum of Understanding to facilitate this process efficiently and effectively".

We do not consider it necessary to make any recommendations with respect to who should be responsible for the provision of specialised education and training for the public service, judiciary and the legal profession. If a WA Human Rights Act were introduced, it would be a matter for the Government to determine how, and through whom, any public sector education and training was delivered.

9.3 Resourcing a WA Human Rights Act

Whatever the theory of human rights, if the resources aren't there, forget it!

Participant in Broome public forum

An extremely strong theme to emerge from the Committee's community consultations was that support for the introduction of a WA Human Rights Act was largely conditional upon the implementation of the Act being properly resourced. For example, Geoff Bridger told us in his submission that, if the Government were to introduce such an Act, "it needs to adequately fund and back the proposal."³⁷

³⁴ Submission 91.

³⁵ Submission 176.

³⁶ For example, submission 38: Geoff Bridger.

³⁷ Submission 38.

Similarly, a participant in our Bateman public forum stated that, if the Government were to introduce human rights legislation it would need to “put its money where its mouth is.”

9.3.1 Resources for government agencies

The specialised education and training necessary to inform public servants about their obligations under a WA Human Rights Act would clearly require resources. In terms of the obligations themselves, as discussed in Chapter 6, government agencies would generally be required to review the existing legislation and policies under which they operate. The purpose of such review would be to identify which of their existing powers, discretions, policies and practices may impinge upon human rights and to develop strategies for bringing them into compliance with human rights (where legally possible and appropriate to do so). Obviously, this review process would have financial implications for agencies.

To the extent that government agencies would be required to prepare statements of compatibility, human rights impact statements, human rights actions plans, report annually on their human rights compliance and establish and participate in informal human rights complaints mechanisms (as we have recommended earlier in this Report), there would be some ongoing costs to agencies. The Committee anticipates, however, that the level of ongoing day to day funding that would be required would be less significant than the initial “start up” costs referred to above.

If the Government were to establish a Human Rights Unit or Human Rights Office within a department to take up the role of “lead” government agency on human rights this would also require “start-up” and ongoing resources.

We received a number of submissions from government agencies confirming that, in their view, additional resources would be required in order for them to meet their obligations under a WA Human Rights Act. For example, the Office of Multicultural Interests within the Department for Communities submitted that the Government would need to make appropriate “financial and resource commitments” to enable government agencies to implement a WA Human Rights Act.³⁸

Some agencies expressed concern about the costs that would be associated with implementation of an Act. The Western Australian Local Government Association indicated that local government was “concerned about the issues relating to the funding and costs associated with the education and training required by local government to enable a holistic incorporation of the quintessence of this proposed legislation”.³⁹ The Association referred to the guiding principle set out in clause 10 of the Inter-governmental Agreement Establishing Principles to Guide Inter-Governmental Relations on Local Government Matters which provides that:

Where the Commonwealth or a State or Territory intends to impose a legislative or regulatory requirement specifically on local government for the provision of a service or function, subject to exceptional circumstances, it shall consult with the relevant peak local government representative body and ensure the financial implications and other impacts for local government are taken into account.⁴⁰

The most strongly expressed concerns about the administrative burden and associated costs of a WA Human Rights Act were raised in the submission we received from the Western Australian Commissioner of Police, Karl O’Callaghan APM. He suggested to us that judging from the experience in

³⁸ Submission 374.

³⁹ Submission 375.

⁴⁰ Submission 375. The Inter-governmental Agreement is available from: www.alga.asn.au/policy/finance/costshifting/iga/IGA.pdf



Victoria, compliance with a Human Rights Act would require the WA Police to assess the compatibility of any new legislation or regulations against a WA Human Rights Act, and to review existing legislation, policies and procedures in light of a Human Rights Act. In addition it would also require the Police to promote a WA Human Rights Act by encouraging general awareness and providing education and training about the Act, and to support related agencies and entities that perform public functions on behalf of the Government. This would have considerable funding and staffing resource implications.⁴¹

The Commissioner suggested that the money likely to be allocated to these matters could be better spent on a range of other more pressing initiatives.⁴² He also pointed out that compliance with a Human Rights Act would create a resource strain because staff would need to be allocated to the project and new positions would have to be created. In addition, the Commissioner indicated that reviewing existing legislation and policies for compliance with a WA Human Rights Act and providing education and training about the Act would be particularly labour intensive.⁴³

The Committee notes that the Commissioner's concerns reflect broader concerns about resourcing, with which we agree. We accept that additional resources would be required by government agencies to educate their staff about a WA Human Rights Act and to enable them to comply with the Act. We have earlier recommended that the draft Bill be extended to apply to contractors providing services on behalf of government and we note that, if this recommendation is adopted, contractors would also require additional resources for education and training to ensure that they are able to manage their new obligations.

Whether the State's financial resources should be allocated to such purposes is a matter for political judgment. In so far as the enactment of a WA Human Rights Act would have financial implications for government agencies, including the Police, we recommend that the legislation should not be pursued without a commitment from Government to ensure that agencies are adequately resourced to comply with it.

9.3.2 Resources for the Director of Public Prosecutions and the courts

The Committee also received submissions from the Director of Public Prosecutions, Robert Cock QC, and the Honourable Wayne Martin, Chief Justice of Western Australia, which considered the potential for increased litigation costs as a result of the introduction of a WA Human Rights Act.



⁴¹ Submission 301.
⁴² Submission 301.
⁴³ Submission 301.

The Director of Public Prosecutions anticipated that the biggest impact of a WA Human Rights Act on his office would be “increased litigation”, which would have “adverse resource implications for the ODPP”.⁴⁴ He noted that:

The past financial year has been the first year in which the ODPP has been able to operate with the increased resources provided by the Government in 2005. The ODPP is now adequately resourced and staffed with prosecutors, paralegals and support staff. Any noticeable increase in litigation at trial and appellate levels will strain the current level of funding and resources ...

Therefore, adequate government resourcing in dealing in the practical outcomes of the Bill is considered imperative to the proper functioning of the ODPP, and enabling it to properly present respectable and responsible arguments in those cases in which issues will arise.⁴⁵

The Chief Justice further considered that increased litigation could potentially have an impact on the resources of the Supreme Court. His submission observed that:

There can be little doubt that legislation of this nature will have an impact on the resources of the Court. What is not clear is the extent of the increase in the short and long term.

... The Director of Public Prosecutions has said there might be greater scope for additional arguments to be presented in criminal trials. Anything that prolongs trials obviously has cost implications. I am not saying it is a concern. It is a matter of identifying it and being prepared for it.

The experience in Victoria would not indicate that longer and more expensive trials will be the norm. However, whilst the jurisprudence in this area evolves, it is likely that provisions of the legislation will be raised in both civil and criminal matters.

... Pursuant to cl 36 of the Bill, declarations of incompatibility can only be made by the Supreme Court. Thus, any applications in this area will have resource implications. It is likely that a number of applications of this type will be made by applicants in person and that fact alone has an impact both on the registry and court time.

... It is anticipated that any increase on the resources of the Court in the General Division will be able to be absorbed without any significant reduction in the disposition of cases in the longer term, but in the short term, the impact is likely to be more significant.

Another aspect of the draft legislation that might impact upon the resources of this Court is the limitation upon the jurisdiction to make a declaration under the Act to this Court. While I do not disagree with that limitation, because such a declaration can only be granted as an adjunct to other proceedings, it would seem quite likely that the effect of the limitation will be to encourage litigants who seek to raise human rights issues, and whose cases are proceeding in other courts or tribunals, to seek the transfer of those cases to the Supreme Court or to initiate them in the Supreme Court. Once seized of the case, it is likely that the Supreme Court would be required to dispose of it in its entirety. Accordingly, if that situation did evolve, the work load implications would not be limited to the determination of human rights issues but would extend to the determination of the other substantive issues in the cases transferred or commenced.⁴⁶

⁴⁴ Submission 296.

⁴⁵ Submission 296.

⁴⁶ Submission 263.

As discussed in Chapter 3 of this Report, the Committee does not anticipate that a WA Human Rights Act would result in a significant increase in the number of cases coming before the courts or in the length of existing cases. Under the draft Bill, breaches of human rights do not give rise to an independent cause of action. A person can only complain of a human rights breach by a government agency to a court or tribunal if they can “piggy-back” the complaint onto an existing cause of action against the agency for acting unlawfully.

Moreover, as discussed in Chapter 3, arguments based on human rights, which require consideration of their scope and content, are already raised in, and considered by, the courts. A WA Human Rights Act would not require judges to look at a whole new set of issues.

With respect to litigation in the Supreme Court in particular, we note that the draft Bill provides that proceedings cannot be commenced in the Supreme Court purely to seek a declaration of incompatibility. Such a declaration can only be sought in the course of existing proceedings. We also note that the draft Bill is different from the Victorian Charter in that it does not provide for proceedings to be referred by lower courts and tribunals to the Supreme Court for the purpose of determining whether to issue a declaration of incompatibility.

The anecdotal evidence that we received during our community consultations further suggests that people with human rights complaints would not be encouraged to commence proceedings in the Supreme Court simply because it was the only court empowered to issue a declaration of incompatibility. Many of the people that we spoke to viewed action in the Supreme Court as prohibitively expensive and as unlikely to be a useful means for enforcing human rights for a large proportion of Western Australians.

The Committee does not, therefore, anticipate that a WA Human Rights Act would result in a significant increase in costs associated with litigation. In line with our comments above, however, to the extent that an Act would lead to increased costs, we recommend that the Office of the Director of Public Prosecutions and the Supreme Court should be adequately resourced to deal with them.

9.3.3 Resources for the Equal Opportunity Commissioner and the Ombudsman

With respect to the educative role of the Commissioner for Equal Opportunity, a participant in our Bateman public forum also pointed out that it is “all very well to give an educative function to the Commissioner for Equal Opportunity, but there is a need to fund them to do it”. Similarly, Murdoch University noted in its submission that “the Government needs to provide adequate resources to support the proposed WA Human Rights Commission in its functions of promoting the culture of human rights in the community.”⁴⁷

In addition to the educative function of the Commissioner for Equal Opportunity currently provided for in the draft Bill, the additional conciliation and audit functions we have recommended for the Commissioner in this Report would require additional funding if they were to be implemented.

In Chapter 8, we recommended that the Ombudsman’s empowering legislation be amended to make it clear that his role extends to investigating complaints about the decisions and actions of government agencies in terms of their compliance with human rights. In his submission to the Committee, the Ombudsman observed that:

⁴⁷ Submission 280.

Following the introduction of human rights legislation, it is possible that the number of complaints involving human rights issues might increase and that investigations might become more complex. However, on the basis that the experience of Ombudsmen in other jurisdictions is that there is only a minor increase in work after acquiring a more proactive role in human rights protection, it is likely that only a very modest increase in resources would be required.

It is anticipated that any additional resources would be utilised primarily in the education, audit and reporting areas ... [and] to establish a small human rights 'audit' section within the office.⁴⁸

9.3.4 Lessons from interstate and the Committee's conclusion regarding resources

A clear message which emerged from the Committee's discussions with officers in Victoria and the ACT related to the importance of ensuring that adequate resources are provided for the implementation of human rights legislation, including for education of public service officers and of the community, and for establishing and operating offices established under the legislation, including the Office of a Human Rights Commissioner.

We understand that, in the ACT, limited resources were allocated for initial training of public service staff about the obligations of the *Human Rights Act 2004* (ACT) (ACT Act) and that education is still needed for the legal profession, legal students, public servants (particularly staff who could train other staff), and high school students.⁴⁹

The Human Rights Unit within the ACT Department of Justice and Community Safety employs three officers who deal with all human rights issues which arise across the ACT government. The limited resources of the Human Rights Unit mean that it has little opportunity to provide education about the ACT Act for public service officers in the ACT.⁵⁰ The Office of the ACT Human Rights Commissioner also has limited resources with which to perform its functions under the ACT Act. As a consequence, that Office's capacity to provide education for the public and for students about the ACT Act has been limited.⁵¹

THE LIMITED RESOURCES OF THE HUMAN RIGHTS UNIT MEAN THAT IT HAS A LITTLE OPPORTUNITY TO PROVIDE EDUCATION ABOUT THE ACT ACT FOR PUBLIC SERVICE OFFICERS IN THE ACT.

We were advised that approximately \$6 million was allocated to initial implementation and training costs across the Victorian government for the first two years of operation of the *Charter of Rights and Responsibilities 2006* (Vic) (Victorian Charter). Substantial portions of this funding were allocated to key government agencies on which the Victorian Charter was likely to have the greatest impact, including the Victorian Police (allocated \$1.8 million over two years), the Department of Human Services (allocated \$524,000 over two years) and the Department of Corrections (allocated \$1 19,000 for the first year).

In addition, the Victorian Equal Opportunity and Human Rights Commission was allocated \$2.33 million over three years. It also receives ongoing funding for reporting in the sum of \$402,000 per year, to cover its community education and scrutiny functions.⁵² It is anticipated that after this initial two year funding increase, funding for compliance with the Victorian Charter will be wound back.

The extent to which a culture of respect for human rights would develop as a result of the enactment of

⁴⁸ Submission 344.

⁴⁹ Discussions with representatives of the ACT Department of Justice and Community Services on 24 August 2007.

⁵⁰ Discussions with representatives of the ACT Department of Justice and Community Services on 24 August 2007.

⁵¹ Discussions with Dr Helen Watchirs, ACT Human Rights Commissioner and officers from the Office of the ACT Human Rights Commissioner, on 24 August 2007.

⁵² Figures provided by the Victorian Department of Justice.

a WA Human Rights Act would be greatly influenced by the extent to which the bureaucracy, the courts and the community were educated about human rights and the extent to which they were able to fulfil their obligations under the Act. The experience in the ACT and Victoria confirms that a critical aspect of the success of a Human Rights Act in creating a culture of respect for human rights is the resources allocated to education about the Act and to cover the costs of compliance with the requirements of the Act. Education of public sector staff, and not just those involved in the development of legislation and policy, is essential if human rights are to have an impact on the manner in which public services are delivered on a day to day basis. While it is beyond the scope of the Committee's brief to try to "cost" the implementation of a WA Human Rights Act, we recommend that the Government proceed with the legislation only if it is prepared to adequately resource its implementation.

9.4 Other initiatives to implement a WA Human Rights Act and create a human rights culture

In addition to the matters discussed above, the Committee received a wide range of suggestions as to what should be done in order to implement a WA Human Rights Act and encourage a culture of respect for human rights, including:

- "The government may also consider establishing a fund for supporting community based human rights initiatives. This fund may also include annual awards in recognition of community members or public officers who demonstrate excellent human rights practice. The government could consider inviting business to partner with them in these initiatives as a collaborative way of including the private sector in the growth of a human rights culture."⁵³
- Make use of "film and sports celebrity human rights ambassadors to further mainstream a human rights culture".⁵⁴
- "CCI [Chamber of Commerce and Industry] acknowledges that there are voluntary steps individuals and businesses can take to promote human rights in the broader community. ... Businesses are increasingly aware of their social and environmental impacts and many CCI members have voluntarily adopted social charters or developed policies under 'Corporate Social Responsibility (CSR) programmes that acknowledge the value of human rights and promote their protection. ... CCI recognises the value of CSR programmes as a direct way that the business community can encourage a culture of respect for human rights in WA."⁵⁵
- "Enforce better standards in the media and advertising. Current media and advertising regulators are either industry controlled and/or so biased in favour of freedom of expression they take little or no real account of the effects of violent, sexist and exploitative media images on the community. The result is a media-dominated cultural attitude of indifference/desensitisation to suffering and sexual exploitative-ness towards women and children which pervades our culture."⁵⁶

⁵³ Submission 304: Centre for Human Rights Education, Curtin University.

⁵⁴ Submission 354: International Human Rights Lawyers' Working Group.

⁵⁵ Submission 339: Chamber of Commerce and Industry Western Australia.

⁵⁶ Submission 226: Gail Gifford.



- “The rights to legal representation, equality before the law and a fair hearing are human rights in and of themselves, and are critical aspects of the promotion, protection, fulfilment and enforcement of other human rights. Recognising this, the availability of advice, assistance and advocacy about human rights must be an integral component of the strategy for the implementation of the Human Rights Act. It is particularly important that human rights advocacy and legal services be available to marginalised and disadvantaged individuals and groups, many of whose human rights are particularly vulnerable to violation and for whom legal services are often largely inaccessible.”⁵⁷

9.5 Commencement of a WA Human Rights Act

A further issue related to the implementation of a WA Human Rights Act is the time permitted for preparation of the public service, the courts and the community for its commencement.

In the UK, there was a two year “lead-in” period between the passage of the *Human Rights Act 1998* (UK) and its commencement. In contrast, the ACT Act commenced operation just over three months after its enactment. It was suggested to us that this was not sufficient time to prepare for the operation of the Act.⁵⁸

The Victorian Charter provides for staggered commencement. Apart from Divisions 3 and 4 of Part 3 (which deal with the requirement to interpret laws compatibly with human rights and the obligation on public authorities to act compatibly with human rights respectively) the Victorian Charter commenced operation on 1 January 2007. Divisions 3 and 4 of Part 3 are set to commence operation on 1 January 2008.

Although the substantial period of time prior to the commencement of the Victorian Charter appears to have been appropriate, the staggered commencement dates of the various Parts of the Charter have caused some confusion as to its intended operation. For example, it has been argued that when Part 2 of the Victorian Charter (which sets out the human rights recognised in the Charter) commenced operation on 1 January 2007, those rights became operative from that date and public authorities were required to act compatibly with them. This argument has been made despite the fact that Part 3 of the Victorian Charter has not yet commenced. In one case, it was argued that the Supreme Court was required to observe the right to a fair trial in section 25 of the Victorian Charter despite the fact that Part 3 was not in effect. In particular, it was argued that the court could not limit an accused’s right to counsel of his or her choice by refusing to adjourn a trial because counsel was unavailable on the listed

⁵⁷ Submission 72: Human Rights Law Resource Centre.

⁵⁸ Discussion with Ms Gabrielle McKinnon, Director of the ACT Human Rights Research Project, Centre for International Governance and Justice, Regnet, ANU on 24 August 2007.

trial dates.⁵⁹ While the application for adjournment was unsuccessful in that case, the better approach would be to ensure that there was no scope for arguments of this kind to arise as a result of staggered commencement for different parts of a WA Human Rights Act.

In its submission to the Committee, the Department for Child Protection recommended that there be a “lead-in” period of at least one year and possibly two years for a WA Human Rights Act.⁶⁰ The Southern Communities Advocacy Legal and Education Service Inc recommended there be a period of two years.⁶¹ Community Vision Inc on the other hand suggested that the Act should be phased in over a period of time in a similar fashion to the Victorian Charter.⁶²

Taking into account the experience in the ACT and Victoria, and the submissions we have received, we consider that the preferable course would be to commence the substantive provisions of a WA Human Rights Act, in their entirety, at least one year, (but preferably 2 years), after its enactment. That would permit time for education of the community, government, and the courts about human rights and the operation of the Act, and would permit government agencies to ensure that their policies and procedures were compatible with the requirements of the Act so far as legally and reasonably possible.

9.6 Review of a WA Human Rights Act

Clause 43 of the draft Bill currently provides for the Attorney General to review the operation and effectiveness of a WA Human Rights Act after three years. Following this initial three year review, the Act is to be reviewed every four years. The review is required to consider whether a WA Human Rights Act should be amended to (a) include additional human rights; (b) require additional persons to act compatibly with human rights; or (c) provide additional remedies for any failure to act compatibly with human rights. Whenever a WA Human Rights Act is reviewed, the Attorney General is required to prepare a report of the review and present it to Parliament.

As indicated in earlier Chapters of this Report, the Committee endorses the concept of reviewing and evaluating a WA Human Rights Act after a certain period of time and then periodically after that. Such reviews would enable the Government and the community to assess whether the Act was working effectively and would allow the Act to be developed in line with community values. A number of submissions highlighted that periodic reviews would help to ensure the “flexibility and adaptability” of a WA Human Rights Act.⁶³

We received numerous suggestions for specific amendments to the draft Bill during our community consultations, many of which appeared to have merit and warrant further consideration. While such consideration was beyond the scope of our consultation process, we agreed that the review provision of the draft Bill should serve as a tool for ensuring that these suggestions were given the further attention they deserve. In our view, this would, in fact, be the preferable way for incorporating additional measures to protect human rights into a WA Human Rights Act as there is something to be said for “hastening slowly” with respect to the introduction of human rights legislation. Accordingly, throughout this Report we have made numerous recommendations as to matters which should be specifically listed as issues for review in

⁵⁹ *The Queen v Williams* [2007] VSC 2.

⁶⁰ Submission 176.

⁶¹ Submission 372.

⁶² Submission 245.

⁶³ For example, submission 312: Aboriginal Legal Service of Western Australia (Inc).



clause 43 of the draft Bill. These matters are collated and set out below as part of our recommendations in this Chapter.

In terms of the timing of the reviews, we received a number of different suggestions. While some submissions expressly endorsed clause 43 in its current form, other suggestions included:

- a review after one year and periodic reviews every five years after that;⁶⁴
- a single review after two years;⁶⁵
- reviews every three years;⁶⁶
- a review after four years and periodic reviews every five years after that;⁶⁷
- a single review after five years;⁶⁸ and
- a single review after 10 years, if at all.⁶⁹

Some of those who suggested a single one-off review considered that ongoing reviews were probably unnecessary in Western Australia given that human rights legislation now exists in other Australian jurisdictions.⁷⁰ From a different perspective, Dr Julie Debeljak stated:

Whether or not additional reviews will be needed is less clear. The sense that our human rights compact is open to review periodically may send the wrong message about human rights – that human rights are not that fundamental as to be immune from the whims of the government and the majority of the day.⁷¹

For the reasons outlined above, we believe that, it is important to provide for periodic reviews of a WA Human Rights Act. We do not agree that such reviews are unnecessary in Western Australia because human rights legislation exists in other jurisdictions. In various places in this Report we have recommended that a WA Human Rights Act take a slightly different approach to that taken by the ACT Act, the Victorian Charter and the proposed Tasmanian Charter. If these recommendations are adopted it will be important to review their practical effects over time. We also recognise that political, economic and social conditions are not necessarily the same in Western Australia as they are elsewhere. It cannot be assumed that a WA Human Rights Act would necessarily work in precisely the same way as the human rights legislation in other states and territories.

In our view, and based on advice we have received from the ACT (where a review of the ACT Act was conducted after one year), a review after one or even two years would simply be too soon.⁷² On the other hand, we consider that a review after five years may be leaving things too long. Accordingly, we believe that the preferable timing is that already provided for in the draft Bill – an initial review three years after the Act is brought into operation and periodic reviews every four years after that.

Given that a WA Human Rights Act is the Government's proposal, the Government would be responsible for implementing it and the biggest impact of the Act would arguably be on government agencies, we do not agree with the suggestion put to us that the reviews of the Act be conducted by an

⁶⁴ For example, submission 305: The Greens (WA).

⁶⁵ Submission 341: Women's Council for Domestic & Family Violence Services (WA).

⁶⁶ For example, submission 312: Aboriginal Legal Service of Western Australia (Inc).

⁶⁷ Submission 72: Human Rights Law Resource Centre.

⁶⁸ Submission 267: Dr Julie Debeljak.

⁶⁹ Submission 91: Civil Liberties Australia.

⁷⁰ For example, ACT source quoted in submission 91: Civil Liberties Australia.

⁷¹ Submission 267. Emphasis in original.

⁷² Submission 91: Civil Liberties Australia.

independent committee or agency.⁷³ We do, however, agree with the suggestion made in a number of submissions that reviews of the legislation should involve consultation with all stakeholders, including the community.⁷⁴

RECOMMENDATIONS

- There is a critical role for political and bureaucratic leadership if a culture of human rights is to be created in Western Australia. *(Recommendation 81)*
- Human rights education in schools would be important to the creation of a human rights culture in Western Australia. Education about human rights should be incorporated into existing courses which deal with the obligations of citizenship and our system of government. The Preamble to a WA Human Rights Act could serve as a useful tool in the education process. *(Rec 82)*
- A key element in creating a human rights culture in Western Australia would be educating the broader community about a WA Human Rights Act. A WA Human Rights Act should therefore contain a provision in the terms of clause 45 of the draft Bill which provides for the Equal Opportunity Act 1984 to be amended to expand the functions of the Commissioner for Equal Opportunity to include promoting public knowledge of, and respect for, the human rights set out in the draft Bill. *(Rec 83)*
- If a WA Human Rights Act is enacted, it would imperative to its proper implementation that public servants within government agencies, judges and the legal profession receive specialised human rights education and training. It would be a matter for the Government as to how, and through whom, any public sector education and training was delivered. *(Rec 84)*
- To the extent that a WA Human Rights Act also covers contractors, they would need to receive education and training about their obligations under the Act. *(Rec 85)*
- In so far as the enactment of a WA Human Rights Act would have financial implications for government agencies, including, in particular, the Police, the Office of the Director of Public Prosecutions, the Supreme Court, the Commissioner for Equal Opportunity, the Equal Opportunity Commission, and the Ombudsman, a WA Human Rights Act should not be pursued without a commitment from Government that it is prepared to ensure that agencies are adequately resourced to comply with it. *(Rec 86)*
- Consideration should be given to the following additional proposals for encouraging a culture of respect for human rights which were raised during the consultations:
 - (a) Establishing a fund for supporting community based human rights initiatives, which may also include annual awards in recognition of community members or public officers who demonstrate excellent human rights practice. This could be done in partnership with business as a collaborative way of including the private sector in the growth of a human rights culture.
 - (b) Making use of film and sports celebrity human rights ambassadors to further mainstream a human rights culture.
 - (c) Encouraging individuals and businesses to take voluntary steps to promote human rights in the broader community, such as social charters or corporate social responsibility programmes.
 - (d) Enforcing better standards in the media and advertising.

⁷³ Submission 312: Aboriginal Legal Service of Western Australia (Inc).

⁷⁴ For example, submission 312: Aboriginal Legal Service of Western Australia (Inc); submission 72: Human Rights Law Resource Centre.

(e) Ensuring the availability of advice, assistance and advocacy about human rights, and ensuring that human rights advocacy and legal services are available to marginalised and disadvantaged individuals and groups.

(Rec 87)

- The provisions of a WA Human Rights Act should commence operation, in their entirety, at least one year (but preferably 2 years), after the enactment of that Act. *(Rec 88)*
- If a WA Human Rights Act is enacted, it should contain a provision in the terms of clause 43 of the draft Bill. A WA Human Rights Act should not require that reviews of the Act be conducted by an independent committee or agency. However, clause 43 of the draft Bill should be amended to require that such reviews should involve consultation with all stakeholders, including the community. *(Rec 89)*
- Subclause 43(2) of the draft Bill should be amended to expressly include the following in the list of issues to be considered in those reviews (in addition to those issues already identified in clause 43(2)):
 - (a) whether economic, social or cultural rights, or additional economic, social or cultural rights, should be included in the Act;
 - (b) whether a right to self-determination for Indigenous people should be included in the Act;
 - (c) whether a right to cultural security for Indigenous people should be included in the Act;
 - (d) whether a right for Indigenous people to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs should be included in the Act;
 - (e) whether a freedom to establish, maintain, protect and access places of worship and religious or spiritual significance and a freedom from desecration or damage to such places should be included in the Act;
 - (f) whether specific rights for children and people with disabilities should be included in the Act;
 - (g) whether rights to environmental protection should be included in the Act;
 - (h) whether internal limitations on human rights in the Act can or should be removed;
 - (i) whether statements of compatibility should be required for subsidiary legislation;
 - (j) the operation of override declarations, and whether override declarations should be subject to a sunset clause;
 - (k) whether courts and tribunals should be included within the definition of “government agency” when performing their judicial functions; and
 - (l) whether compensation should be payable for a failure to act compatibly with human rights.*(Rec 90)*



APPENDIX A STATEMENT OF INTENT



A WA HUMAN RIGHTS ACT



STATEMENT OF INTENT BY THE WESTERN AUSTRALIAN GOVERNMENT

ISSUED BY:
JIM MCGINTY, MLA
ATTORNEY GENERAL
WESTERN AUSTRALIA
MAY 2007



INTRODUCTION

All too frequently we see, on the evening TV news bulletin or in the newspapers, the basic human rights of people around the world being trampled on by governments. On an international level, many people live in societies which neither recognise nor respect human rights. Governments are required to deal with difficult issues and balance competing interests on behalf of the people they serve, but it is important that their actions and decisions respect human rights.

The Western Australian Government believes that human rights will only be adequately protected if a human rights culture prevails in our community, in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community.

In Western Australia we take for granted many civil and political rights without stopping to appreciate that they have little or no legal protection. Australia's *Constitution* does not contain a bill of rights.

In fact, Australia is the only common law country in the world without a national bill of rights.

The common law does not comprehensively recognise or protect the human rights of Western Australians and existing State and Commonwealth laws provide only fragmented protection.

Although existing Western Australian laws, such as the *Equal Opportunity Act 1984*, provide some protection for human rights, Western Australia needs to avoid the complacency which has seen human rights diminished or abrogated elsewhere. We cannot assume that governments will always have regard to the human rights that we know and respect. We need to do more to protect human rights in this State.

In recognition of the inadequacies in existing legal protections for human rights, the Victorian and ACT Parliaments introduced the *Charter of Human Rights and Responsibilities Act 2006* and the *Human Rights Act 2004* respectively.

These laws are similar to the *Human Rights Act 1998* in the UK.

THE WESTERN AUSTRALIAN
GOVERNMENT BELIEVES
THAT HUMAN RIGHTS
WILL ONLY BE ADEQUATELY
PROTECTED IF A HUMAN
RIGHTS CULTURE PREVAILS
IN OUR COMMUNITY...

The Western Australian Government believes that introducing a WA Human Rights Act would help to establish a human rights culture in this State because it would create a political and administrative culture in which the need to respect human rights is understood and acted upon.

Given the importance of a WA Human Rights Act, the Government wants to consult the Western Australian community about the matters which should be included in such a law and, more broadly, about what the Government and the community can do to encourage a human rights culture. This community consultation will itself be an important foundation for establishing a human rights culture.

... THE GOVERNMENT WANTS TO CONSULT THE WESTERN AUSTRALIAN COMMUNITY ABOUT THE MATTERS WHICH SHOULD BE INCLUDED IN A HUMAN RIGHTS ACT.

In order to provide a focus for the community's consideration of the question of a WA Human Rights Act, the Government has prepared a draft Human Rights Bill which draws on the Victorian and ACT models. The purpose of the Draft Bill is to provide an indication of the types of provisions a WA Human Rights Act *might* contain, if one is introduced, and to incorporate the Government's preferred model for such a law.

THE CONSULTATION COMMITTEE FOR A PROPOSED WESTERN AUSTRALIAN HUMAN RIGHTS ACT

The Government considers that the community consultation should be led by an independent committee of people who are leaders in their fields and respected in the community. Accordingly, the Government has appointed the following people to be members of a Consultation Committee for a Proposed Western Australian Human Rights Act:

- Mr Fred Chaney AO (Chairman), Director of Reconciliation Australia Ltd, former Deputy President of the National Native Title Tribunal and former Chancellor of Murdoch University;
- Ms Lisa Baker, Executive Director of the Western Australian Council of Social Service;
- The Most Revd Dr Peter Carnley AO, former Anglican Archbishop of Perth and former Primate of the Anglican Church of Australia; and
- Associate Professor Colleen Hayward, Manager, Kulunga Research Network, Telethon Institute for Child Health Research.



The Committee's role is to:

- consider and consult with Western Australians about the ways in which greater awareness of, respect for, and observance of, human rights can be achieved at all levels of the State government and throughout the Western Australian community;
- ask the community what it thinks about the Government's preferred model for a WA Human Rights Act which is set out in the Draft Bill;
- identify a human rights framework that will serve the needs of Western Australians in the future rather than to look at past and present policies and actions; and
- make recommendations to the Government about the matters which should be addressed in a WA Human Rights Act in order to create a human rights culture in this State.

The Government intends that the Committee will consult widely with individuals, community groups and organisations, and government departments and agencies through forums, public meetings and written submissions.

THE SCOPE OF THE CONSULTATION

This Statement of Intent identifies five issues that the Government believes are essential to consider when talking about a WA Human Rights Act. The Government would like the issues identified in this Statement of Intent and the Draft Bill to form the basis for the Committee's community consultations, submissions from the community and the Committee's final report to the Government. The five essential issues are set out below.

1. The human rights to be recognised in a WA Human Rights Act

The Committee should consider which human rights should be recognised in a WA Human Rights Act.

The Government's preferred approach is that a WA Human Rights Act should focus on the civil and political rights set out in the *International Covenant on Civil and Political Rights*. These rights include, for example, the right to be free from discrimination, freedom of speech, freedom of religion, the right to vote and the right to a fair trial. The rights recognised in Victoria and the ACT are drawn from the International Covenant. The Government considers it preferable that, at least initially, a WA Human Rights Act does not include economic, social and cultural rights; for example, the right to work, the right to social security and the right to housing. The possible extension of a WA Human Rights Act to address those rights could, however, be considered at a later stage.

It is also the Government's preferred approach that the human rights set out in a WA Human Rights Act only apply to individual members of the community and not to corporations. Again, this is the approach which has been adopted in Victoria and the ACT.

...A WA HUMAN RIGHTS ACT SHOULD FOCUS ON THE CIVIL AND POLITICAL RIGHTS SET OUT IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.



2. Human rights and Parliament

The Committee should consider the form that a WA Human Rights Act should take and how human rights should be taken into account when new laws are made by Parliament.

The Government considers that a WA Human Rights Act should take the form of an ordinary Act of Parliament rather than a constitutionally entrenched bill of rights such as the one in the US. This

would preserve parliamentary sovereignty, which is a key feature of the Westminster system of government in Western Australia. The human rights laws in the UK, New Zealand, Victoria and the ACT all take the form of an ordinary Act of Parliament. Despite the fundamental importance of human rights, there may be situations in which Parliament believes it is necessary or appropriate in the public interest to make laws which restrict the human rights recognised in a WA Human Rights Act or to make changes directly to the Act itself. It is up to democratically elected politicians, rather than the courts, to make these decisions. Ultimately, the Government will be accountable to the public through the ballot box for any restrictions or changes it introduces.

PARLIAMENT SHOULD BE REQUIRED TO CONSIDER THE IMPACT ON HUMAN RIGHTS OF ANY NEW LAW WHICH IT MAKES...

The Government believes that an important step in establishing a human rights culture in Western Australia is to encourage greater awareness and discussion of human rights when laws are being made. A WA Human Rights Act should require the Government to consider the impact on human rights of any new law that it submits to Parliament and explain and justify any proposed law that is incompatible with human rights. In turn, the Parliament should be required to consider the impact on human rights of any new law which it makes and, where possible, should ensure that written laws are not incompatible with human rights. Similar procedures are used in the UK, Victoria and the ACT.





3. Human rights and the Government

The Committee should consider how a WA Human Rights Act could create greater understanding of, and respect for, human rights within government departments and agencies.

If the Government is required to publicly consider the impact on human rights of every new law that it proposes to introduce, this will help to increase understanding and observance of human rights by its departments and agencies.

Further, the Government's view is that government departments and agencies should be required to comply with the human rights recognised in a WA Human Rights Act in their actions and decision-making. This will mean that government departments and agencies must respect the human rights of the people with whom they deal. The Act should also allow people to seek a remedy where their human rights have been breached by a government department or agency.

The Government wants a WA Human Rights Act to focus on preventing breaches of human rights rather than compensation-based litigation. Accordingly, the Government's preferred approach is for a WA Human Rights Act not to provide for compensation, but to allow the courts to examine the actions and decisions of government departments and agencies which are incompatible with human rights and, where necessary, "correct" those actions and decisions.

4. Human rights and the courts

The Committee should consider the role to be played by the courts in increasing awareness of, respect for, and observance of, human rights in the Western Australian community under a WA Human Rights Act.

The courts have an important role to play in interpreting the law and determining how laws affect human rights. In the Government's view, one way to ensure that human rights are respected and protected is therefore to require the courts to interpret all laws, where possible, consistently with human rights.

THE COURTS HAVE AN IMPORTANT ROLE TO PLAY IN INTERPRETING THE LAW AND DETERMINING HOW LAWS AFFECT HUMAN RIGHTS.

The Government's preferred approach is that the Supreme Court should also contribute by identifying written laws that are incompatible with human rights, and by alerting the Government and the Parliament to the existence of the incompatibility so that they may consider whether the laws should be changed. Under this approach the Supreme Court would not be able to declare that a law is invalid because it is incompatible with human rights. Rather, it would be up to the democratically elected Parliament to decide what should happen to the law. This is similar to the approach used in Victoria, the ACT and the UK.

5. Human rights and the community

The Committee should consider whether anyone other than government departments and agencies should be required to comply with a WA Human Rights Act and how community awareness of, and respect for, human rights should be promoted.

The Government's view is that, at least initially, the obligation to comply with the human rights set out in a WA Human Rights Act should only apply to government departments and agencies and not to members of the community or private sector bodies. The possible extension of a WA Human Rights Act to require members of the community to comply with human rights could, however, be considered at a later date.

DEADLINE FOR THE COMMITTEE'S REPORT TO THE GOVERNMENT

The closing date for submissions to the Committee is 31 August 2007.

The Government has asked the Committee to report back to it by 16 November 2007.

After the Government has had an opportunity to consider the Committee's report, it will make the report available to the public.





Department of the Attorney General
Government of Western Australia

MORE INFORMATION

Copies of the Statement of Intent, the Human Rights community discussion paper, the Human Rights draft Bill and human rights reference material are now available.

Electronic copies can be downloaded from:

www.humanrights.wa.gov.au

Hard copies can be obtained by contacting:

Human Rights Secretariat
C/- Public Affairs Branch
Department of the Attorney General
GPO Box F317
PERTH WA 6841
Telephone: (08) 9264 1712
Fax: (08) 9264 1836
Email: humanrights@justice.wa.gov.au

Mail submissions to:

Chairman
Consultation Committee for the Proposed Human Rights Act
C/- Public Affairs Branch
Department of the Attorney General
GPO Box F317
PERTH WA 6841

Send electronic submissions to:

Fax: (08) 9264 1836
Email: humanrights@justice.wa.gov.au

THE CLOSING DATE FOR WRITTEN SUBMISSIONS IS 31 AUGUST 2007



APPENDIX B THE DRAFT BILL

DRAFT BILL FOR PUBLIC COMMENT

The Government proposes to introduce into Parliament a Bill to respect, protect and promote human rights and for related purposes.

This draft Bill has been prepared for public comment but it does not necessarily represent the Government's settled position.

Human Rights Bill 2007

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DRAFT

Western Australia

Human Rights Bill 2007

**A draft for public comment of
A Bill for**

An Act to respect, protect and promote human rights and for related purposes.

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary matters

1. Short title

This is the *Human Rights Act 2007*.

2. Commencement

5 This Act comes into operation as follows:

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Terms used in this Act

10 In this Act, unless the contrary intention appears —

“**act**” includes an omission;

“**child**” means a person under 18 years of age;

“**discrimination**” has the meaning given in section 4;

15 “**human rights**” means the rights, freedoms and entitlements in Part 2.

4. “Discrimination”, meaning of

(1) In this Act, “**discrimination**” means discrimination on a ground referred to in the *Equal Opportunity Act 1984*.

20 (2) Any measure taken for the purpose of assisting or advancing people or groups of people who are disadvantaged because of discrimination does not constitute discrimination for this Act.

Part 2 — Human rights

Division 1 — Preliminary matters

5. Who has human rights

Only natural persons have human rights.

5 6. Other rights not limited by this Part

(1) In this section —

“law” includes international law, the common law, the Constitution of the Commonwealth, any law of the Commonwealth, and any written law.

10 (2) An entitlement, right or freedom that is not in this Part but that arises or is recognised under any other law is not abrogated or limited only because it is not in, or is only partly in, this Part.

Division 2 — Life and security

7. Right to life (Art 6.1)

15 Every person has, after he or she is born —

- (a) the right to life; and
- (b) the right not to be arbitrarily deprived of life.

8. Torture, cruelty etc., protection from (Art 7)

A person must not —

- 20
- (a) be tortured; or
 - (b) be treated or punished in a cruel, inhuman or degrading way; or
 - (c) be subjected to medical or scientific experimentation unless he or she has given full, free and informed
- 25 consent to it.

9. Forced work, freedom from (Art 8)

(1) In this section —

“**court order**” includes an order made by a court of another jurisdiction;

5 “**forced or compulsory labour**” does not include —

(a) work or service normally required of a person who is in lawful detention; or

10 (b) community work or service normally required of a person who is conditionally released from lawful detention; or

(c) community work or service required under a court order; or

(d) work or service required because of an emergency threatening the community or a part of it; or

15 (e) work or service that forms part of normal civil obligations.

(2) A person must not be held in slavery or servitude.

(3) A person has the right not to perform forced or compulsory labour.

20 **Division 3 — Civil and democratic rights**

10. Movement, freedom of (Art 12)

(1) A person lawfully in Australia has the right to move freely within, and to enter and leave, Western Australia.

25 (2) A person lawfully in Australia has freedom to choose where to live in Western Australia.

11. Privacy and reputation, protection of (Art 17)

A person has the right —

- 5
- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
 - (b) not to have his or her reputation unlawfully attacked.

12. Thought, conscience, religion and belief, freedom of (Art 18)

- 10
- (1) Every person has the right to freedom of thought, conscience, religion and belief, including —
- 15 (a) the freedom to have or adopt a religion or belief of his or her own choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

13. Expression, freedom of (Art 19)

- 20
- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, both within and outside this State,
- 25 whether orally, in writing, in print, by way of art, or by any other means he or she chooses.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to restrictions imposed by law that are reasonably necessary —
- 30 (a) to respect the rights and reputations of other people; or

- (b) for the protection of national security, public order, public health or public morality.

14. Peaceful assembly, right of (Art 21)

Every person has the right of peaceful assembly.

5 **15. Association, freedom of** (Art 22)

Every person has the right to freedom of association with others, including the right to form and join trade unions.

16. Families, status and protection of (Art 23)

10 The family is the natural and fundamental group unit of society and is entitled to be protected by society and the State.

17. Children, protection of etc. (Art 24)

- (1) Every child has the right, without discrimination, to such protection as he or she needs because of being a child.
 - (2) Every child must have a name and his or her birth must be registered with the State according to law.
- 15

18. Public affairs, right to participate in (Art 25)

Every person has the right, and is to have the opportunity, without discrimination —

- (a) to participate in the conduct of public affairs, directly or through freely chosen elections; and
 - (b) if eligible according to law, to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
 - (c) to have access, on general terms of equality, to the public service of the State and to public office.
- 20
- 25

Division 4 — Non-discrimination and minority rights

19. Human rights, right to enjoy without discrimination (Art 2)

Every person has the right to enjoy his or her human rights without discrimination.

5 **20. Minorities, rights of** (Art 27)

- (1) A person whose cultural, religious, racial or linguistic background is that of a minority of people in this State must not be denied the right, in community with others with that background, to enjoy his or her culture, or to declare and practise his or her religion, or to use his or her language.
- 10
- (2) Aboriginal people have distinct cultural rights and must not be denied the right, with other members of their community —
- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- 15 (c) to maintain their kinship ties.

Division 5 — Liberty and the law

21. Liberty and security, rights to (Art 9 & 11)

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- 20 (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.
- (5) A person who is arrested or detained —
- 25 (a) must be informed at the time of arrest or detention of the reason for the arrest or detention; and
- (b) must be promptly informed about any proceedings being brought against him or her.

- 5
- (6) A person who is arrested or detained on a criminal charge —
- (a) must be promptly brought before a court with jurisdiction to deal with the person; and
 - (b) has the right to be brought to trial within a reasonable time having regard to all of the circumstances; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (7) A person awaiting trial must not be detained in custody except in accordance with law.
- 10 (8) A person deprived of liberty by arrest or detention is entitled to ask a court to decide whether his or her detention is lawful and to have the court decide the question, and order his or her release if the detention is unlawful, without delay.

22. Detained people, treatment of (Art 10)

- 15 (1) In this section a person is detained if he or she is being deprived of his or her liberty.
- (2) A detained person must be treated with humanity and with respect for the dignity of all persons.
- 20 (3) A person who is detained other than to serve a sentence of imprisonment must be segregated from people who are serving sentences of imprisonment, except where it is not reasonably practicable to do so.
- (4) A person who is detained other than to serve a sentence of imprisonment must be treated in a way that is appropriate for an unconvicted person.
- 25 (5) A detained child must be segregated from all detained adults unless the law permits otherwise.

23. The law and legal proceedings (Art 16 & 14.1)

- 30 (1) Every person has the right to recognition as a person before the law.

- (2) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and to equal and effective protection against discrimination.
- 5 (3) Every person has the right to have his or her legal rights and obligations and criminal liability decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (4) Despite subsection (3), a court or tribunal may exclude a person from all or part of a hearing if authorised or required by law to do so.
- 10 (5) Every judgment or decision of a court or tribunal in criminal or civil proceedings must be made public unless —
- (a) the best interests of a child require otherwise; or
 - (b) the proceedings are civil proceedings about —
 - 15 (i) the guardianship of a child; or
 - (ii) a dispute between spouses or de facto partners;
 - or
 - (c) the law permits or requires otherwise.

24. Criminal process, rights in (Art 14.2, 3 & 5)

- 20 (1) A person charged with an offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with an offence is entitled, without discrimination, to these minimum rights —
- 25 (a) to be informed promptly and in detail, in a manner that he or she understands, of the nature and reason for the charge;
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her;
 - 30 (c) to be brought to trial within a reasonable time having regard to all of the circumstances;

- 5
- (d) to be present at his trial unless the law permits him or her to be excluded;
- (e) to have the free assistance of an interpreter in court if he or she cannot understand or speak the language being used in court;
- (f) to defend himself or herself personally or with the help of a lawyer chosen by him or her or, if eligible, a lawyer provided under the *Legal Aid Commission Act 1976*;
- 10 (g) if he or she does not have a lawyer, to be informed about the right in paragraph (f);
- (h) if he or she does not have a lawyer and is eligible under the *Legal Aid Commission Act 1976*, to be provided with a lawyer under that Act without payment by him or her;
- 15 (i) to examine, or have examined, any witness against him or her, unless the law provides otherwise;
- (j) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
- 20 (k) not to be compelled to testify against himself or herself or to confess guilt.
- (3) A person convicted of an offence has the right to ask a higher court, in accordance with law, to review the conviction and any sentence imposed in respect of it.

25. Children in the criminal process (Art 10 & 14.4)

- 25 (1) A child arrested for or charged with an offence has the right to a procedure, and to be treated in a way, that is appropriate for an unconvicted child and for the child's stage of development.
- (2) A child charged with an offence must be brought to trial as quickly as possible.
- 30 (3) A child convicted of an offence has the right to be treated in a way that is appropriate for a convicted child and for the child's

stage of development and that promotes the child's rehabilitation.

26. Right not to be tried or punished more than once (Art 14.7)

5 A person must not be tried or punished more than once for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

27. Retrospective criminal laws (Art 15.1)

- 10 (1) A person must not be convicted of an offence because of an act or omission that was not an offence when it occurred.
- (2) A penalty imposed on a person for an offence must not be greater than the penalty that applied to the offence when it was committed.
- 15 (3) If the penalty for an offence is reduced after a person commits the offence and before the person is sentenced for the offence, the person is eligible for the reduced penalty.

Part 3 — Observance of human rights

28. Who is required to observe human rights

This Act does not require a person to act or make a decision compatibly with human rights, except as provided in Part 6.

5 **29. Breaches do not give rise to cause of action, except as provided by this Act**

- 10
- (1) This section does not affect the operation of section 36.
 - (2) A breach of a human right does not create any enforceable right or any cause of action, except to the extent provided by section 41.
 - (3) A person is not entitled to damages or any other pecuniary remedy because of a breach of a human right.

Part 4 — Written laws' compatibility with human rights

30. Written laws may be incompatible with human rights

- 5
- (1) A written law may state that it, or any part of it, operates despite being incompatible with one or more human rights.
 - (2) If a written law contains a statement made under subsection (1), this Act does not apply to the written law to the extent that the statement provides.

31. Bills for Acts to have statement of compatibility

- 10
- (1) This section applies to a Bill for an Act even if the Bill contains a statement made under section 30(1).
 - (2) If a Bill for an Act is before a House of Parliament, a written statement of compatibility about the Bill must be laid before the House before the Bill receives its second reading.
 - 15 (3) The statement of compatibility must be made —
 - (a) in the case of a Bill introduced on behalf of the government, by the Attorney General;
 - (b) in any other case, by the member introducing the Bill.
 - 20 (4) The statement of compatibility about a Bill must state —
 - (a) whether, in its maker's opinion, the Bill is compatible with human rights; and
 - (b) if the opinion is that the Bill is not compatible —
 - 25 (i) the nature and extent of the incompatibility; and
 - (ii) why the Bill should nevertheless be considered by the House.
 - (5) A contravention of this section in respect of a Bill that is enacted does not affect the validity, operation or enforcement of its provisions or any other written law.

s. 31

- (6) A statement of compatibility laid before a House under this section —
- (a) is not binding on any court or tribunal; and
 - (b) is material that may be considered under the *Interpretation Act 1984* section 19.

5

Part 5 — Interpreting written laws

32. Terms used in this Part

In this Part —

5 “**declaration of incompatibility**”, in respect of a written law,
means a declaration that the written law cannot be
interpreted in a way that is compatible with human rights in
so far as it possible to do so consistently with the purpose
or object underlying the written law;

10 “**human rights question**” means a question of law about —
(a) the interpretation of this Act; or
(b) whether a written law other than this Act can be
interpreted in accordance with section 34.

33. Interpreting a human right

(1) In this section —

15 “**international jurisprudence**” includes the following —

- 20 (a) the *International Covenant on Civil and Political Rights*;
- (b) any treaty or other international agreement about the
rights of people to which Australia is a party;
- (c) international law;
- (d) any judgment of a foreign or international court or
tribunal;
- 25 (e) general comments and views of the United Nations
bodies that monitor treaties about the rights of
people;
- (f) declarations and standards adopted by the United
Nations General Assembly that are relevant to the
rights of people.

30 (2) This section is in addition to and does not limit the operation of
the *Interpretation Act 1984* section 19.

s. 34

(3) In interpreting a human right, any international jurisprudence that is relevant to the human right may be considered in addition to any judgment of an Australian court or tribunal.

5 (4) In deciding under subsection (3) whether to consider any international jurisprudence, and the weight to be given to it, the following matters must be taken into account —

- 10 (a) the desirability of being able to interpret a human right by reference to the ordinary meaning of its text taking into account this Act's underlying purpose or object and without reference to the jurisprudence;
- (b) the undesirability of prolonging proceedings without compensating advantage;
- (c) the accessibility of the jurisprudence to the public.

15 **34. Unclear written laws to be interpreted compatibly with human rights**

(1) This section applies to a written law whether it commenced before or after this section commenced.

(2) This section is in addition to and does not limit the operation of the *Interpretation Act 1984* section 18.

20 (3) If the meaning of a provision of a written law, as conveyed by the ordinary meaning of its text and taking into account its context in the written law and the purpose or object underlying the written law —

- 25 (a) is ambiguous or obscure; or
- (b) leads to a result that is manifestly absurd or is unreasonable,

the provision must be interpreted —

30 (c) in a way that is compatible with human rights in so far as it possible to do so consistently with the purpose or object underlying the written law; and

(d) taking into account the extent to which Part 6 requires persons to act compatibly with human rights.

(4) A written law of this State that limits a human right is not incompatible with the right if the limitation is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom after taking into account all relevant factors including —

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means that are reasonably available to achieve the purpose of the limitation.

35. Human rights questions in courts and tribunals

(1) If a human rights question arises in a case in a court or tribunal —

(a) the court or tribunal may require a party to the case to give the Attorney General a notice, in the prescribed form, of the question; and

(b) the Attorney General is entitled to make submissions to the court or tribunal about the question, even if notice has not been given under paragraph (a); and

(c) if the Attorney General makes such a submission, the Attorney General is to be taken to be a party to the case.

(2) Only the Supreme Court can make a declaration of incompatibility.

36. Declaration of incompatibility, Supreme Court may make

(1) Despite the *Supreme Court Act 1935* section 25(6), proceedings cannot be commenced in the Supreme Court that seek only a declaration of incompatibility.

s. 37

- (2) If a human rights question arises in a case in the Supreme Court, whether in its original or appellate jurisdiction, the court, taking section 34 into account, may make a declaration of incompatibility.
- 5 (3) The Supreme Court must not make a declaration of incompatibility unless the Attorney General —
- (a) has been notified under section 35(1); and
 - (b) has had a reasonable opportunity to make submissions about the question and any declaration of
- 10 incompatibility that the Court might make.
- (4) The Supreme Court must give a copy of any declaration of incompatibility to the Attorney General within 7 days after the date of the declaration.

37. Declaration of incompatibility, consequences of

- 15 (1) In this section —
- “final judgment date”** for a declaration of incompatibility, means the date on which —
- (a) the time for appealing in the proceedings in which the declaration was made expires; or
 - 20 (b) any appeal in those proceedings is decided, dismissed or discontinued,
- whichever is the later.
- (2) A declaration of incompatibility made about a written law does not —
- 25 (a) affect the validity or operation or enforcement of the written law; or
 - (b) create any enforceable right or any cause of action.
- (3) If the Attorney General receives a declaration of incompatibility made about a written law, the Attorney General must give a
- 30 copy of it to the Minister who is administering the written law,

as soon as practicable after the final judgment date for the declaration unless —

- (a) the Minister is the Attorney General; or
- (b) the declaration has been cancelled on appeal.

5 (4) Within 6 months after the final judgment date for a declaration of incompatibility made about a written law, the Minister who is administering the written law must —

- (a) prepare a written response to the declaration; and
- (b) cause a copy of the declaration and the response to be —

- 10 (i) laid before each House of Parliament or, if a House is not sitting, given to the Clerk of the House; and
- (ii) published in the *Gazette*,

unless the declaration has been cancelled on appeal.

15 (5) A document given to the Clerk of a House under subsection (4) is to be laid before that House on its next sitting day.

Part 6 — Duties of government agencies

38. Terms used in this Part

In this Part —

5 “government agency” means a person that is a government agency under section 39.

39. “Government agency”, meaning of

(1) This section operates for the purposes of this Part.

(2) Each of the following is a government agency —

- 10 (a) a department referred to in the *Parliamentary and Electorate Staff (Employment) Act 1992* section 3(2);
- (b) a department of the Public Service;
- (c) an organisation listed in the *Public Sector Management Act 1994* Schedule 2 column 2;
- (d) the Police Force of Western Australia;
- 15 (e) a local government;
- (f) a regional local government;
- (g) a body or office that is established for a public purpose under a written law;
- (h) a body or office that is established by the Governor or a Minister.
- 20

(3) None of the following is a government agency —

- (a) the Governor;
- (b) a House of Parliament or a Parliamentary committee;
- 25 (c) a court or tribunal when performing its judicial functions;
- (d) a person holding a judicial or other office pertaining to a court or tribunal, being an office established by the written law that establishes the court or tribunal.

40. Government agencies to act compatibly with human rights

(1) This section does not apply to an act done or a decision made before the commencement of this Part.

5 (2) This section does not apply to an act done or a decision made by a department referred to in the *Parliamentary and Electorate Staff (Employment) Act 1992* section 3(2) in connection with proceedings in Parliament.

(3) It is unlawful for a government agency —

10 (a) to act in a way that is incompatible with a human right; or

(b) in making a decision, to fail to give proper consideration to a relevant human right.

(4) Subsection (3) does not apply if, as a result of —

15 (a) a written law; or

(b) a law of the Commonwealth; or

(c) any other law,

the government agency could not have reasonably acted differently or made a different decision.

41. Breach of s. 40, consequences of

20 (1) If —

(a) a person may ask a court or tribunal for any remedy in respect of an act or decision of a government agency on the ground that the act or decision is unlawful; and

25 (b) the unlawfulness of the act or decision is not because of section 40,

the person may ask for the remedy on grounds that include any unlawfulness of the act or decision that is because of section 40.

(2) A person is not entitled to damages or any other pecuniary remedy in respect of any injury or loss suffered as a result of an

s. 41

act or decision of a government agency that is unlawful because of section 40.

- 5 (3) Subsection (2) does not affect a person's entitlement to any remedy in respect of an act or decision of a government agency that is unlawful otherwise than because of section 40.

Part 7 — Miscellaneous matters

42. Regulations

5 The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

43. Reviews of this Act

- 10 (1) The Minister must review the operation and effectiveness of this Act as soon as practicable after —
- (a) the third anniversary of the commencement of this section; and
 - (b) every fourth anniversary of the commencement of this section after that third anniversary.
- 15 (2) Each such review must consider whether this Act should be amended —
- (a) to include additional human rights; or
 - (b) to require additional persons to act compatibly with human rights; or
 - (c) to provide additional remedies for any failure to act
- 20 (3) On the basis of each such review the Minister must prepare a report and cause it to be laid before each House of Parliament as soon as practicable after the report is prepared (and in any event within 12 months after the relevant anniversary).

Part 8 — *Equal Opportunity Act 1984* amended

44. Act amended in this Part

The amendments in this Part are to the *Equal Opportunity Act 1984*.

5 [* Reprint 5 as at 2 March 2007.]

45. Section 80A inserted

After section 80 the following section is inserted —

“

80A. Human rights functions

10 The Commissioner’s functions include —

- (a) promoting public knowledge of and respect for the human rights in the *Human Rights Act 2007*; and
- 15 (b) doing anything conducive or incidental to the performance of the Commissioner’s functions under this section.

”.

=====



APPENDIX C
CONSULTATION MEETINGS
AND FORUMS

APPENDIX C

Consultation meetings and forums

1	Meeting with WA Police Union	19 April 2007
2	Meeting with Editor of <i>The West Australian</i>	19 April 2007
3	Meeting with Editor of <i>The Sunday Times</i>	20 April 2007
4	Law Society of Western Australia Forum	8 May 2007
5	Meeting with Departments of Corrective Services, Child Protection, Health and Police	17 May 2007
6	Meeting with Director of the Constitutional Centre of Western Australia	17 May 2007
7	Meeting with Ethnic Communities Council of Western Australia	17 May 2007
8	Meeting with Director of Public Prosecutions for Western Australian	17 May 2007
9	Meeting with Chamber of Commerce and Industry Western Australia	29 May 2007
10	Meeting with Aboriginal Legal Service of Western Australia Inc	29 May 2007
11	Meeting with Anglicare, Centrecare, Uniting Carewest, Association for Services to Torture and Trauma Survivors and Salvation Army	29 May 2007
12	Meeting with St Vincent de Paul Society (WA)	30 May 2007
13	Meeting with Anglican Archbishop	30 May 2007
14	Meeting with Deputy Commissioner of Police, Western Australia	31 May 2007
15	Meeting with Greens WA	31 May 2007
16	Meeting with Shadow Attorney General	31 May 2007
17	Meeting with Country Women's Association of Western Australia	1 June 2007
18	Meeting with Catholic Women's League (WA)	1 June 2007
19	Meeting with Uniting Church of Australia, Synod of Western Australia – Social Justice Board (WA)	1 June 2007
20	Meeting with Centre for Human Rights Education, Curtin University	12 June 2007
21	Meeting with Catholic Archbishop	13 June 2007

22	West Perth public forum	13 June 2007
23	West Perth public forum	14 June 2007
24	Broome public forum x 2	26 June 2007
25	Derby public forum x 2	27 June 2007
26	Meeting with Shire of Derby/West Kimberley	27 June 2007
27	Kununurra public forum	28 June 2007
28	Kununurra public forum	29 June 2007
29	Meeting with Alan Stewart	6 July 2007
30	Mandurah public forum	10 July 2007
31	Fremantle public forum	10 July 2007
32	Meeting with Finlay McRae, Director of Legal Services for the Victorian Police Department, and Mmaskepe Sejo, Project Leader for the Human Rights Project within the Department	13 July 2007
33	Meeting with Catherine Dixon, Manager of the Human Rights Unit of the Victorian Department of Justice, and Mathew Carroll of the Victorian Equal Opportunity and Human Rights Commission	13 July 2007
34	Meeting with Paul Mullett, Secretary of the Police Association of Victoria and Bruce McKenzie, Assistant Secretary of the Police Association of Victoria	13 July 2007
35	Bateman public forum	18 July 2007
36	Midland public forum	19 July 2007
37	Armadale public forum	19 July 2007
38	Meeting with Western Australian Local Government Association	20 July 2007
39	Meeting with the Chief Justice of Western Australia	20 July 2007
40	Meeting with Western Australian Commissioner of Police	23 July 2007
41	Meeting with Director General of Department of Education and Training	23 July 2007
42	Karratha public forum	24 July 2007
43	Meeting with Shire of Roebourne	24 July 2007

44	Port Hedland public forum	26 July 2007
45	Meeting with Shire of East Pilbara	27 July 2007
46	Newman public forum	27 July 2007
47	Albany public forum x 2	30 July 2007
48	Chamber of Commerce and Industry Western Australia Policy Forum	31 July 2007
49	Western Australian Council of Social Service forum	3 August 2007
50	Workshop with Department of Corrective Services	31 July 2007
51	Meeting with Department of Treasury and Finance	3 August 2007
52	Law Society of Western Australia forum	6 August 2007
53	Merredin public forum x 2	8 August 2007
54	Kalgoorlie public forum x 2	9 August 2007
55	Meeting with CEO of City of Kalgoorlie-Boulder	9 August 2007
56	Meeting with Inspector of Custodial Services	10 August 2007
57	Meeting with Western Australian Ombudsman and Deputy Ombudsman	10 August 2007
58	Meeting with Shadow Attorney General	10 August 2007
59	Sorrento public forum	13 August 2007
60	Wanneroo public forum	13 August 2007
61	WA Schools Constitutional Convention	14 August 2007
62	Meeting with Legal Aid Western Australia	15 August 2007
63	WA Schools Constitutional Convention	15 August 2007
64	Bunbury public forum x 2	15 August 2007
65	Busselton public forum x 2	16 August 2007
66	Meeting with Shire of Busselton	16 August 2007
67	Meeting with Commissioner for Equal Opportunity	17 August 2007

68	Geraldton public forum x 2	20 August 2007
69	Meeting with City of Geraldton-Greenough	20 August 2007
70	Meeting with National Council of Jewish Women Natanya	20 August 2007
71	Carnarvon public forum x 2	22 August 2007
72	Meeting with Shire of Carnarvon	22 August 2007
73	Meeting with Victorian Solicitor General	22 August 2007
74	Meeting with Victorian Law Reform Commission and Victorian Human Rights and Equal Opportunity	22 August 2007
75	Meeting with Victorian Department of Justice	22 August 2007
76	Mental Health forum organised by Department of Health	23 August 2007
77	Meeting with Commissioner of Corrective Services	23 August 2007
78	Meeting with Director of Human Rights Act Research Project at Australian National University	23 August 2007
79	Meeting with Human Rights Unit, Victorian Department of Justice	22 August 2007
80	Meeting with Human Rights Unit, ACT Department of Justice	23 August 2007
81	Meeting with ACT Human Rights Commissioner	23 August 2007
82	Meeting with Aboriginal Legal Service of Western Australia Inc	27 August 2007
83	University of Western Australia student lawyers forum	27 August 2007
84	Meeting with Leader of National Party	27 August 2007
85	East Perth public forum	27 August 2007
86	Northam public forum x 2	28 August 2007
87	Narrogin public forum x 2	29 August 2007
88	Meeting with Principal Advisor on Aboriginal Issues, Department of the Attorney General	3 September 2007
89	Meeting with Western Australian Property Owners Association (WAPRA) Inc	4 September 2007
90	Meeting with Acting Director General of Department of Child Protection	4 September 2007

- | | | |
|-----------|---|-------------------|
| 91 | Meeting with Director of University of Western Australia Centre for Muslim States and Societies | 4 September 2007 |
| 92 | Esperance public forum | 6 September 2007 |
| 93 | Meeting with Shire of Esperance | 7 September 2007 |
| 94 | Esperance public forum | 7 September 2007 |
| 95 | Meeting with UnionsWA | 11 September 2007 |



APPENDIX D
LIST OF PEOPLE,
ORGANISATIONS AND
AGENCIES WHO MADE
SUBMISSIONS

APPENDIX D

List of people, organisations and agencies who made submissions

Submission No.	Name/Organisation
1	Suzanne Cash
2	Dr Ben Saul
3	Lukas Simba
4	Dr Jeremy Gans
5	Peter Davidson
6	Stephanie Nazer
7	Brian Hills
8	Michael Cardy
9	Paul Stow
10	D & M McCarthy
11	Coalition for the Defence of Human Life
12	Anonymous
13	Allan Payne
14	Gordon Greenacre
15	Anonymous
16	John Keenan
17	Office of the Auditor General
18	Rani Klubal
19	Anonymous
20	Anonymous
21	Democratic Audit of Australia, Australian National University
22	Amour
23	Nola (McDermott) Kitto
24	Stephen Sprigg
25	Erin Statz
26	Diane Niyati
27	Harold Blakley
28	Peter Evans
29	Peter Valentine
30	Suzanne Wickham
31	Julie Hollett
32	Peter Lochore
33	Janet Maguire
34	Festival of Light Australia
35	Anonymous
36	Jane Eacott
37	Shire of Derby/West Kimberley
38	Geoff Bridger
39	Jan Currie
40	Anonymous
41	Sven Sorenson
42	Linda Paisley
43	Emeritus Professor Laksiri Jayasuriya AM
44	T & D Lyra
45	Dr Peter Johnston
46	Mike Sultanowsky
47	Chris Melville
48	Rob Gardner

49 Office of the Public Sector Standards Commissioner
50 Blodwyn Timms
51 Christopher Lawson-Smith
52 Dr Andrew Hunt
53 Anonymous
54 Michelle Barrett
55 Anonymous
56 Chris Limb
57 G Lee
58 John & Sara Clothier
59 The Arab Australian Friendship Society Inc
60 Atheist Foundation of Australia Inc
61 Grant
62 D & A Cosgrove
63 Bill Thurlow
64 Anonymous
65 Brian Marsh
66 Geoffery Sanfelieu
67 Anonymous
68 Dion Giles
69 Isla Sharp
70 John Plummer
71 Owen Loneragan
72 Human Rights Law Resource Centre Ltd
73 Jean Allen
74 H Van Venetien
75 John Langford
76 Department of Sport and Recreation
77 The Woman's Christian Temperance Union of Western Australia Inc
78 Andrew Smart
79 Ray Briggs
80 Carolyn Tan
81 WestAus Crisis & Welfare Services
82 Barbara McAllister
83 Brian Tennant JP
84 Dr Jennifer Binns
85 Anonymous
86 Office of the Public Advocate
87 Colleen Vukomanovic
88 Robert Sonnenklar
89 Anonymous
90 D Lewis
91 Civil Liberties Australia
92 Tony O'Donnell
93 Richard Waddy
94 Deborah Delahunty
95 Paul Burke
96 Gareth Davies
97 John McSweeny
98 Cecil Stone
99 Linda du Bouby
100 Michael Johnston
101 Gordon Payne
102 M McPhee
103 P Farley

104 Anonymous
105 Professor George Winterton
106 S MacFarlane
107 R MacFarlane
108 Ruth Heady
109 Phil Noble
110 Paul
111 Dina Fernandez
112 Mr Foden
113 Professor Richard Harding, Inspector of Custodial Services
114 Anonymous
115 B Leicester
116 D Koch
117 Water Corporation
118 Jerome Keightley
119 Anonymous
120 Anonymous
121 Chris Tingley
122 Robin Cullen
123 Ben Caradoc-Davies
124 Kevin Mullen
125 Chris Somers xxy
126 Lynley Bromwell
127 David Cleal
128 Anonymous
129 Pregnancy Assistance Inc (WA)
130 Rev Dr Walter Black
131 George Sulc
132 Andrew Macdonald
133 Colin Duffy
134 Jonathon Graham
135 Michael Warren
136 Ray Redner
137 Ruth Watson
138 Coleen Grundy
139 Health Consumers' Council WA (Inc)
140 Mervyn & Thelma Callow
141 Australian Family Association Western Australian Division
142 Joy Renisch
143 Anonymous
144 W Morris
145 Gemmel Scholz
146 Noel Sharp Snr
147 Michael Walton
148 John Chopping
149 Susan Thorman
150 Shire of Boddington
151 David & Karolyn Bromwell
152 A Taylor
153 LJ Goody Bioethics Centre
154 Dot Price
155 G Baker
156 Steve Watters
157 E Birt
158 Robin Faulkner

159	C Wiggins
160	Andrew & Jody van Burgel
161	Paul Slyth
162	Carmel Callaghan
163	H van der Linden
164	Lorretta Rollinson
165	David Hutchinson
166	M Dale
167	Helen Chomley
168	Dr Patrick Shanahan
169	Marie Slyth
170	Dennis Grimwood
171	R Street
172	Ennis & Calum McCool
173	Candice
174	Helen Olivieri
175	Glenice Vladich
176	Department for Child Protection
177	State Administrative Tribunal of Western Australia
178	Jim Cabrera
179	June Hutchinson
180	K Froome
181	Names Withheld by request
182	Tony Overheu
183	Ethnic Disability Advocacy Centre
184	The Western Australian Farmers Federation Inc
185	"The Forgotten "
186	Don & Barbara Wilkie
187	Diane Smith
188	Dr Alan Tapper
189	Sean Reith
190	Anonymous
191	Robin Flowers & Ben Letchford
192	Sussex Street Community Law Service Inc
193	W Francis
194	Margaret Petrovich
195	Joan Hodsdon
196	Council for the National Interest Western Australian Committee
197	Women with Disabilities WA Inc
198	W Higginson
199	National Children's and Youth Law Centre
200	Renold & Rosa Hooker
201	Barbara Brook
202	John Button
203	S Levy
204	Yvonne Lawrence
205	Susan Howes
206	Australian Christian Lobby
207	David Jack
208	Peter Adams
209	Melissa Jones
210	Rosalie Miles
211	Ellie Young
212	Susan Clarke
213	Matthew Keogh

214 Vanessa Harris
215 Robert Roberts
216 Fire and Emergency Services Authority of Western Australia
217 Constitutional Centre of Western Australia
218 Margaret Wertheimen & Bethel Norton
219 A Mocatto, P Smythe, D Barnes & C Knox
220 Ingrid Hall
221 Community Legal Centres Association (WA) Inc
222 Archie Marshall
223 Legal Aid Western Australia Inc
224 Western Australian Aboriginal Education and Training Council
225 Michael Rokich
226 Gail Gifford
227 Western Australian Journalists' Association
228 Ruth Marold
229 Disability Services Commission
230 Lesley Versay
231 Aaron Raap
232 Environment Defender's Office Western Australia (Inc) & Conservation
Council of Western Australia Inc
233 Deborah Webster
234 H Wheatley JP & Margaret Wheatley
235 Vic & Laura Fullin – petition containing 79 signatures attached
236 E Coleman
237 Name withheld by request
238 Name withheld by request
239 Elliot Nicholls – petition containing 81 signatures attached
240 Western Australian Adult Literacy Council
241 Peter Booth & Kathleen Booth
242 Gary Lindberg
243 Uniting Church in Australia Synod of Western Australia – Social Justice
Board
244 Jenusz Zelski
245 Community Vision Inc.
246 Catholic Women's League of Western Australia
247 Lisa Coffey, Tiarne Crowther, Natalie O'Neill, Kieren Stewart-Roddis,
Matthew Lee & Dylan Boyd
248 Jamie Dimmack
249 Christina Mott
250 Anonymous
251 Anonymous
252 Anonymous
253 Australian Church Women - Western Australian Unit
254 Family Court of Western Australia
255 Denis O'Sullivan
256 West Australian Voluntary Euthanasia Society Inc
257 Anonymous
258 Mark & Linda Bovill
259 Ralph Prestage
260 John May & Patricia May
261 Judith Bryson
262 Rivers Christian Life Centre
263 The Honourable Wayne Martin, Chief Justice of Western Australia
264 Robert Coats & Georg Lazukic
265 George Larkman

266 Salt Shakers Inc
267 Dr Julie Debeljak
268 Mental Health Law Centre (WA) Inc
269 Goldfields Land & Sea Council Aboriginal Corporation
270 Gay & Lesbian Equality (WA) Inc
271 Mr & Mrs Hawk
272 Public Interest Advocacy Centre Ltd
273 Uffe Geysner
274 Malcolm Eady
275 Loftus Community Centre
276 Bilingual Families Perth
277 Jane Foreman
278 Fran Usher
279 National Council of Women of WA
280 Murdoch University
281 Geraldton Resource Centre Inc
282 Community and Public Sector Union/Civil Service Association
283 Social Responsibilities Commission - Anglican Province of Western
Australia
284 St Vincent de Paul Society (WA)
285 Shane & Jacki de Bie
286 Jacqueline Gardiner
287 Steve Fuhrmann
288 West African Women's Group WA Inc
289 Bruce Phillips
290 David Gould
291 Helena & Trudi Pollard
292 Steve Gadsby
293 Keith Jones
294 Minnawarra House
295 Rob Ferguson
296 Robert Cock QC, Director of Public Prosecutions for Western Australia
297 Ethnic Communities Council of Western Australia
298 Henry Schapper
299 Australian Lawyers for Human Rights
300 Lt General John Sanderson AC (Retd), Special Adviser on Indigenous
Affairs, Department of Premier and Cabinet
301 Karl O'Callaghan APM, Western Australian Commissioner of Police
302 Rajiv Singh
303 UnionsWA
304 Centre for Human Rights Education, Curtin University of Technology
305 The Greens (WA) Inc
306 Westralian Teachers of English to Speakers of Other Languages
307 Geoff Gilby
308 Robert Blackham
309 Commonwealth Human Rights and Equal Opportunities Commission
310 Western Australian Law Reform Commission
311 Amnesty International Australia
312 Aboriginal Legal Service of Western Australia Inc
313 Council of Official Visitors
314 Ministerial Advisory Council on Disability
315 Western Australian Council of Social Service
316 Colin Chapman
317 Brad Marron
318 Anonymous

319 Heather Dewar
320 Professor Andrew Byrnes, Professor Hilary Charlesworth, Kim Pham &
Gabrielle McKinnon
321 Homeless Persons' Legal Advice Clinic (WA) Steering Committee Inc
322 Women's Electoral Lobby (WA) Inc
323 Multicultural Services Centre of WA
324 West Perth sub-branch of the Australian Labor Party
325 Ben Wyatt MLA
326 Michelle Shave
327 Don
328 Noeline Jensen
329 Life Ministries Inc
330 Elisha Ladhams
331 Geoff Taylor
332 Ross Fraser
333 Merryn Van Bremen
334 Alan Wilson
335 Irra Wangga – Geraldton Language Programme
336 Mathys Max
337 Western Australian Equal Opportunities Commission
338 Corruption and Crime Commission of Western Australia
339 Chamber of Commerce and Industry Western Australia
340 Department of Local Government and Regional Development
341 Women's Council for Domestic and Family Violence Services (WA)
342 Edmund Barton
343 Kevin Cloghan
344 Chris Field, Ombudsman, Western Australia
345 Avril
346 Stella Hondros
347 Keith R Agar
348 Name withheld by request
349 Department of Education Services
350 Sue Plastow
351 H Brown
352 Janice Dudley
353 Department of Health
354 International Human Rights Lawyers' Working Group
355 Carrol Adams
356 S Wright
357 Oxfam Western Australia
358 Greg McIntyre SC, Dr Johannes Schoombee, David Goodman, Elizabeth
Needham, Carolyn Tan & Lisa Tovey
359 Professor Philip Alston, Techa Beaumont, Cherie Booth QC, Professor Robert
McCorquodale, Dr Sev Ozdowski OAM, Stephanie Palmer, Simon Rice
OAM, David Ritter, Geoffrey Robertson QC, Keir Starmer QC, Daniel
Stepniak, Professor Gillian Triggs
360 *No submission attached to this number*
361 Greater Region Action Body (GRAB) Inc
362 Name withheld by request
363 Daniel O'Sullivan
364 Vic & Helen Sampson
365 WA Property Rights Association (WAPRA) Inc
366 John Castrilli MLA
367 Department of Treasury & Finance
368 Mental Health Division - Department of Health

369	Association for Services to Torture and Trauma Survivors Inc
370	Malcolm Brandon
371	Alexandra Jones
372	Southern Communities Advocacy Legal & Education Service Inc
373	Lingiari Foundation (Inc)
374	Office of Multicultural Interests – Department for Communities
375	Western Australian Local Government Association
376	A/Professor Samina Yasmeeen
377	Pastoralists and Grazier's Association - Private Property Rights & Resources Committee
378	Department of Corrective Services

Note: The total number of submissions is 377 due to no submission being attached to number 360.



APPENDIX E
FLASHPOLL ASSESSMENT OF
COMMUNITY SUPPORT FOR
HUMAN RIGHTS LEGISLATION,
PATTERSON MARKET RESEARCH,
AUGUST 2007

*FLASHPOLL ASSESSMENT OF
COMMUNITY SUPPORT FOR
HUMAN RIGHTS LEGISLATION*

PREPARED FOR: THE ATTORNEY GENERAL'S OFFICE

CLIENT CONTACT: AIMEE BRESLAND

PATTERSON CONTACT: KEITH PATTERSON

DATE: AUGUST 2007

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Appendix A – Questionnaire

Appendix B – Data Analysis Tables

1.0 FLASHPOLL FINDINGS

The survey was conducted over the evenings of August 6 – 8 2007. See Section 2, “Survey Details” for a description of the survey method.

1.1 DO WE NEED HUMAN RIGHTS LEGISLATION?

Respondents were introduced to the topic with a read out of:

“I would like to ask a few questions about human rights in WA. Human rights are about fair treatment, guaranteeing people freedom of speech, the right to a fair trial, and other basic rights that revolve around respecting every individual in our community”.

Respondents were then asked to indicate if they thought that we should have a law that aims to protect the human rights of people. As Table T1.1 below indicates, effectively nine out of 10 (89%) of respondents believe that we should indeed have a law that aims to protect the human rights of people. The young people were slightly more of this view than their older counterparts, and females were more likely than males to be of this opinion. Interestingly, country respondents were slightly more likely than their metropolitan counterparts to support the human rights legislation.

Table T1.1 Should we have human rights legislation?

TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME			
	UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +	
	N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %	N=150 %
Yes	89	92	88	87	91	87	94	93	88	88
No	9	6	11	11	7	11	5	7	10	10
Don't know	2	2	2	2	2	2	1	1	2	2
Totals	100	100	100	100	100	100	100	100	100	100

Further details may be found in Table 2 in the appendix which examines the level of support by household structure (single, young couple, parents or empty nesters).

However it is evident that the very great majority of respondents are of the view that we should have a law to protect human rights.

Amongst the 45 respondents who did not think that we needed such a law, we found one respondent that did not support the law of human rights law at all, and the residual were of the view that the current laws “are quite adequate” though a few were unable to provide a response to this question (for details see Table 3 in the Appendix).

Effectively then, nine out of 10 respondents support the notion of having a law to protect the human rights of people, and 10% believe that the current laws are adequate for this purpose.

1.2 THE RIGHTS THAT SHOULD BE PROTECTED

Respondents were asked to indicate if Western Australia did create a human rights law, to what extent would they support or oppose that law protecting political and civil rights, and economic and social rights.

As Table T1.2 below indicates, there is strong support for the notion of a human rights law that protected the political and civil rights “such as freedom of speech, the right to a fair trial, and the right not to be tortured”.

Table T1.2 Support or oppose law to protect political and civil rights

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +
		N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %
Strongly oppose	1	2	1	1	1	1	-	1	-	1
Oppose	2	2	2	3	1	2	2	2	1	1
Mixed feelings	5	3	6	5	6	5	6	5	10	4
Support	40	37	41	43	37	41	39	41	42	39
Strongly support	51	56	49	47	55	50	52	49	47	55
Don't know	1	-	1	1	0	1	1	2	-	-
Totals	100	100	100	100	100	100	100	100	100	100
NET OPPOSE	3	4	3	4	2	4	2	3	1	3
NET SUPPORT	91	93	90	91	92	91	91	90	89	93

It is clear that there is strong support for this proposition. 51% indicated that they “strongly support” the notion, and 40% “supported it”, with just 5% reporting “mixed feelings” 2% opposed, and 1% strongly opposed.

1.2.1 SUPPORT FOR HUMAN RIGHTS PROTECTION OF ECONOMIC AND SOCIAL RIGHTS

Respondents were also asked to indicate the extent to which they would support or oppose the new human rights law protecting economic and social rights, such as “the right to work, the right to housing, and the right to an education”.

As Table T1.2.1 below indicates, almost nine out of 10 (88%) either strongly support or support this proposition, only 7% have mixed feelings and 4% recorded some opposition to it (the residual being unsure).

Table T1.2.1 Support or oppose social and economic rights

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +
		N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %
Strongly oppose	1	2	1	1	1	1	-	1	-	1
Oppose	3	2	3	4	2	3	1	3	2	2
Mixed feelings	7	5	8	7	7	7	8	5	10	8
Support	39	35	41	43	36	39	41	42	35	42
Strongly support	49	56	45	45	53	48	50	47	52	47
Don't know	1	-	1	0	1	1	-	2	2	-
Totals	100	100	100	100	100	100	100	100	100	100
NET OPPOSE	4	4	4	5	2	5	1	4	2	3
NET SUPPORT	88	91	87	87	89	87	91	89	87	89

1.3 ORGANISATIONS THAT SHOULD BE REQUIRED BY LAW TO RESPECT PEOPLE'S HUMAN RIGHTS

Respondents were asked to indicate the extent to which they agreed or disagreed that a range of organisations/individuals should be required by law to respect people's human rights.

1.3.1 THE GOVERNMENT DEPARTMENTS AND AGENCIES

91% agree with the proposition that the government departments and agencies should be required by law to respect people's human rights. As Table T1.3.1 overleaf indicates, 57% strongly agree with this proposition, a further 35% agree, with 6% having mixed feelings and 1% in aggregate disagree with the proposition.

Table T1.3.1 Agree/Disagree that human rights laws be observed by government departments and agencies

	TOTAL N=401 %	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K- \$70K	\$71K +
		N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %	N=150 %
Strongly disagree	0	1	-	1	-	0	-	-	-	1
Disagree	1	1	1	2	0	2	-	1	-	2
Mixed feelings	6	9	6	6	7	5	10	5	9	6
Agree	35	34	35	38	31	34	37	38	32	33
Strongly agree	57	55	58	52	61	58	53	55	59	57
Don't know	1	-	1	1	-	1	-	2	-	-
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	1	2	1	2	0	2	-	1	-	3
NET AGREE	91	90	92	90	93	92	90	92	91	91

1.3.2 BUSINESS AND CORPORATIONS

93% agree that business and corporations should be required by law to respect people's human rights. See Table T1.3.2 below.

Table T1.3.2 Agree/Disagree that human rights be observed by business and corporations

	TOTAL N=401 %	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K- \$70K	\$71K +
		N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %	N=150 %
Strongly disagree	1	2	-	1	-	1	-	-	-	2
Disagree	1	2	1	2	1	1	2	-	1	2
Mixed feelings	4	4	5	4	5	4	6	3	7	4
Agree	37	37	37	42	32	37	39	41	39	36
Strongly agree	56	55	56	50	61	57	52	55	52	57
Don't know	1	-	1	1	0	1	1	2	-	-
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	2	4	1	3	1	2	2	-	1	3
NET AGREE	93	92	94	93	94	94	92	96	92	93

Note from the above that 56% strongly agree that businesses and corporations should be required by law to respect people’s human rights. Just 2% disagree with the proposition and 4% had mixed feelings.

1.3.3 SHOULD INDIVIDUALS BE REQUIRED BY LAW TO RESPECT PEOPLE’S HUMAN RIGHTS?

When asked to indicate if they felt that individuals should be required by law to respect people’s human rights, we found a profound difference in opinion. Note that 80% disagree with this proposition, and only 7% agree.

Table T1.3.3 Agree/Disagree that individuals should observe human rights

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K- \$70K	\$71K +
		N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %
Strongly disagree	43	45	42	37	49	44	41	38	45	45
Disagree	37	34	38	42	32	37	36	35	43	38
Mixed feelings	9	9	9	9	9	7	14	10	5	11
Agree	6	8	5	7	5	6	5	8	7	3
Strongly agree	2	1	2	3	0	2	1	2	-	2
Don't know	4	4	4	3	5	4	2	6	-	1
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	80	79	80	79	81	81	78	74	88	83
NET AGREE	7	9	7	9	5	8	6	10	7	5

The difference in attitude regarding the need for government and businesses and corporations to respect people’s human rights and the requirement on individuals is quite dramatic. There is almost as much opposition to the notion of individuals having to respect other people’s human rights as there is support for the notion of governments and businesses/corporations having to do so.

1.4 POSSIBLE REMEDIES

Respondents were asked to indicate if they agreed or disagreed with a series of possible actions that an aggrieved person could take if their human rights had been infringed. There is almost universal agreement with the notion of there being a right of a hearing by an independent umpire, and there was also strong, if somewhat lesser, support for the right of legal action. There was widespread disagreement with the proposition that there should be no right of formal recourse available.

1.4.1 AN "INDEPENDENT UMPIRE"

As Table T1.4.1 below indicates, there is strong support (effectively nine out of 10) for the notion that the aggrieved person should be able to take the matter to an independent umpire.

Table T1.4.1 Agree/Disagree with access to "umpire"

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +
		N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %
Strongly disagree	1	2	1	1	1	1	-	1	2	1
Disagree	2	3	2	3	1	2	3	2	4	2
Mixed feelings	5	6	5	5	6	4	8	3	9	5
Agree	53	53	53	54	52	53	53	61	50	50
Strongly agree	37	35	38	36	39	38	36	31	35	43
Don't know	1	1	1	1	1	1	-	2	-	-
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	3	5	3	4	3	4	3	4	5	3
NET AGREE	90	89	91	90	91	91	89	92	85	93

1.4.2 ABILITY TO TAKE LEGAL ACTION

71% of respondents agree with the prospect of the person whose rights have been infringed being able to take legal action. Note however that the strength of agreement has dissipated quite dramatically from the previous table. Only 28% strongly agree, though 43% agree overall, creating a net of 71% in agreement, compared to an overall 90% in agreement with the notion of being able to have access to an independent umpire.

Table 1.4.2 Agree/Disagree with legal recourse

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +
	N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %	N=150 %
Strongly disagree	1	1	2	2	1	1	2	3	-	1
Disagree	6	7	6	10	3	6	6	4	9	8
Mixed feelings	19	15	21	14	24	17	26	16	17	23
Agree	43	48	41	45	41	44	40	44	47	42
Strongly agree	28	27	29	27	29	29	25	30	27	25
Don't know	2	1	2	2	1	2	-	4	-	-
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	8	8	8	11	4	8	9	7	9	10
NET AGREE	71	76	69	73	70	74	65	74	74	67

1.4.3 THE NOTION OF NO RECOURSE BEING AVAILABLE

Respondents were asked to indicate if they agreed or disagreed that a person whose rights had been infringed would have no right of action or other form of recourse available to him. As Table T1.4.3 below indicates, there is strong disagreement with this proposition. It is clear that there is a strong presumption in the community that the establishment of a human rights legislation will include a right of recourse for people whose rights have been infringed.

Table T1.4.3 Agree/Disagree with no formal action being available

	TOTAL	AGE		GENDER		REGION		HOUSEHOLD INCOME		
		UP TO 35 YRS	36 YRS +	MALE	FEMALE	METRO	COUNTRY	UP TO \$50K	\$51K-\$70K	\$71K +
	N=401 %	N=105 %	N=296 %	N=199 %	N=202 %	N=300 %	N=101 %	N=156 %	N=56 %	N=150 %
Strongly disagree	43	45	42	37	49	44	41	38	45	45
Disagree	37	34	38	42	32	37	36	35	43	38
Mixed feelings	9	9	9	9	9	7	14	10	5	11
Agree	6	8	5	7	5	6	5	8	7	3
Strongly agree	2	1	2	3	0	2	1	2	-	2
Don't know	4	4	4	3	5	4	2	6	-	1
Totals	100	100	100	100	100	100	100	100	100	100
NET DISAGREE	80	79	80	79	81	81	78	74	88	83
NET AGREE	7	9	7	9	5	8	6	10	7	5

The strength of opinion is pretty consistent across the age and gender and regional demographics, to the effect that there is very strong and wide spread disagreement with the proposition that the aggrieved person would not have any right of recourse available to them.

1.5 OTHER SUGGESTIONS

When asked if they had any other suggestions for the recourse that should be available for a person who has had their human rights infringed, we found 73% unable to think of any other suggestions. However there were comments to the effect of:

- 3% be able to seek advice from independent parties/ombudsmen
- 3% provide mediation/arbitration (preferably free)
- 3% provide legal aid

- 2% provide compensation/prosecute the offender
- 2% counselling sessions for both parties
- 1% “name and shame” the offender/public apology.

For full details see Table 12 in the Appendix.

1.6 OVERVIEW

In overview, we find that the community strongly supports the notion of human rights legislation, and is strongly of the view that these rights should cover both political & civil rights as well as economic & social rights. They strongly support the notion that government departments and agencies should be required by law to respect people’s human rights, and they are the same though perhaps not quite so stridently held view, that businesses and corporations should also be required by law to respect people’s human rights.

There is a very strong difference of opinion when it comes to individuals. Eight out of 10 do not believe that individuals should be required by law to respect other people’s human rights.

It is assumed that any human rights legislation would have some form of recourse or sanction built into it. Eight out of 10 respondents overall disagree with the proposition that an aggrieved person would have no form of recourse available to them. There is very strong support for the notion of the matter to be able to be taken to an independent umpire and almost the same level of support (generally strong but not as firmly held view) that the aggrieved person should be able to take legal action.

2.0 SURVEY DETAILS

The survey was conducted by telephone. The sample was drawn from the Perth and regional White pages (on CD Rom).

Interviewing was conducted between the hours of 4.30pm and 9pm each evening from a central phone room. The sample composition was carefully monitored as the survey was in progress, and any sample aberrations corrected by quota sampling.

The data was carefully weighted to an 8 cell age/gender/region weights matrix to replicate the ABS profile of the Western Australian adult population.

For details on the survey method, go to www.marketresearch.com.au.

3.0 SAMPLE RELIABILITY

Any survey is subject to sample error. We apply stringent quality control to our sample selection, call-back procedures, and interviewing technique.

Nonetheless, at the proportions we are estimating in this series, (sample error is reduced as the estimate moves away from the 50% level) a simple random sample of 400 voters will be within 2.5% of the "real figure" in about 7 out of 10 cases.

APPENDIX A - QUESTIONNAIRE

APPENDIX B – DATA ANALYSIS TABLES

Section 2 – All WA

Now I would like to ask a few questions about Human rights in WA. Human Rights are about fair treatment, guaranteeing people freedom of speech, the right to a fair trial and other basic rights that revolve around respecting every individual in our community.

We would like to ask you a few questions about what you think of Human Rights and how or if they should be protected.

Q2.1 Do you think we should have a law that aims to protect the human rights of people?

YES	1 >Q2.3
NO	2
Don't Know	90

(NB Q2.2 IS ONLY ASKED OF PEOPLE RESPONDING "NO OR Don't Know to Q2.1)

Q2.2 Do you not support the idea of such a law, or do you think our current laws are sufficient protection of basic Human Rights?

Not support idea of H Rights Law	1
Think Current Laws are adequate	2
Don't Know	90

Q2.3. If WA had did create a human rights law, to what extent would you (READ OUT SCALE – ROTATE DIRECTION) a new law that protected the following rights:

NB RANDOM ROTATE	Strongly Oppose	Oppose	Have Mixed Feelings	Support	Strongly Support	Don't Know
Political & civil rights such as Freedom of speech, the right to a fair trial and the right not to be tortured	1	2	3	4	5	90
Economic and social rights such as the right to work, the right to housing, and the right to an education?	1	2	3	4	5	90

Q2.4 Do you (READ OUT SCALE ROTATE DIRECTION) that the following should be required by law to respect people's human rights?

NB RANDOM ROTATE	Strongly Disagree	Disagree	Have Mixed Feelings	Agree	Strongly Agree	Don't Know
Government departments and agencies	1	2	3	4	5	90
Businesses and corporations	1	2	3	4	5	90
All individuals	1	2	3	4	5	90

Q2.5 If a person's human rights are infringed, would you support or oppose the following possible options for the aggrieved person?

NB RANDOM ROTATE	Strongly Disagree	Disagree	Have Mixed Feelings	Agree	Strongly Agree	Don't Know
Have available no formal recourse at all	1	2	3	4	5	90
Be able to take the matter to an independent "umpire"	1	2	3	4	5	90
Be able to take legal action over it.	1	2	3	4	5	90

Q2.6 Do you have any other suggestions of the recourse that should be available for a person who has had their human rights infringed?

No	1
Other (Specify)	87
Don't Know	90



APPENDIX F
HUMAN RIGHTS 'AT
THE MARGINS', HUMAN
RIGHTS SOLUTIONS,
AUGUST 2007

WA

HUMAN RIGHTS ACT

WA Human Rights Act

Client Consultation

Human Rights At 'The Margins'

Final Report

West Pace Pty Ltd, Human Rights Solutions

West Pace Pty Ltd, Human Rights Solutions was commissioned by the Attorney General's Office to assist the activities of the WA Human Rights Committee on a Proposed Bill of Human Rights. The mandate of Human Rights Solutions was to consult as widely as possible with members of the community who are, as defined by the project brief, 'hard to reach; ie. marginalised, isolated and at-risk.'

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Introduction

For three months Human Rights Solutions, in collaboration with the WA Human Rights Committee, facilitated the inclusion of just over 405¹ participants from specified themes in a human rights discussion about the possibility of a WA Human Rights Act.

Consultation activities were predominantly conducted in face-to-face settings with a significant number participating in online activities.

Participants:

- recognised the need to create a human rights culture in Western Australia and to protect the human rights of sections of the community who are most vulnerable and 'at-risk',
- supported the adoption of a WA Human Rights Act that adequately reflects a shared set of common values and aspirations for the kind of society people want to live in,
- overwhelmingly called for the inclusion of a much broader range of human rights than those currently included in the draft WA Human Rights Act:
 - inclusion of economic, social and cultural rights,
 - inclusion of **all** civil and political rights, in particular those relating to the right of individuals to seek an effective remedy,
 - inclusion of rights other than economic, social, cultural, civil and political that protect areas requiring specialised attention: the environment, indigenous and other ethnic groups, women, children, ex-offenders and people with mental health concerns, alcohol and other drug addictions or a disability.
- unreservedly called for the WA Human Rights Act to include a bolder set of consequences for breaches of human rights,
- stressed the need for oversight of the WA Human Rights Act in the form of a Human Rights Commissioner, Ombudsman or other entity to monitor compliance, scrutinise new and existing legislation, investigate complaints, broker solutions, evaluate, monitor and report on the impact of the WA Human Rights Act and finally,
- emphasised the importance of a broad, non-jargonistic, human rights education campaign to sufficiently bring the WA Human Rights Act to 'life' and fulfill the objective of creating a culture of human rights.

¹ Across a variety of activities: see *Commentary on Process p. 10* below.

Background

The WA Human Rights Project was launched by Jim McGinty, the Attorney General, on 2nd May 2007. The project included an announcement that a four-person independent panel of community leaders, the WA Consultation Committee on a Proposed Human Rights Act, would consult widely with the Western Australian community on a Draft WA Human Rights Act and Discussion Paper.

The Committee recognised that, given the enormity of the task and time limitations, the assistance of specialists with expertise in engaging with community groups would be required.

Human Rights Solutions has a particular interest and expertise in consulting with community, in particular individuals and groups who are historically hard to reach; ie. generally referred to as 'marginalised, isolated and at-risk'. Human Rights Solutions also has a unique focus on the issue of human rights, civic participation and community engagement. Because of this the Committee accepted the assistance of Human Rights Solutions to play a consultative role in the process.

The mandate of Human Rights Solutions was to consult as widely as possible with specified of the community who were, as the WA Committee suggested, 'hard to reach'.

Acknowledgments

Human Rights Solutions wishes to sincerely thank the WA Human Rights Consultation Committee and supporting staff, the West Australian Council of Social Services, and the nominated Reference Group. These groups provided valuable direction, support and access to an extensive network of Government and non-government individuals and groups.

Most importantly, this project would not have been possible without the support and patience of many individuals, community groups, Government and non-government agencies. Hundreds of participants shared their time and personal stories in order to explore complex human rights issues, 'un-pack' the draft WA Human Rights Act, and make valuable contributions to the discussion.

Without this input, this report would not have been possible.

Commentary on Process

Human Rights Solutions promoted a range of consultation activities and actively sought the participation of clients from mandated themes². In total, 405 individuals participated in consultation activities between June and August 2007.

Timeline

Task	June 07	July 07	August 07
Consultation preparation.			
Consultations and data collection.			
Analysis, evaluation and draft report.			
Final report.			

Consultation Activities

The following consultation activities were widely promoted and offered to client groups relevant to the project's mandated themes:

Activity	Type	Description
Face to Face	Focus Groups	Small to medium sized groups of individuals from mandated themes: ie. patrons of St Patrick's Community Support Centre, juveniles from Banksia Detention Centre, clients of Workability etc.
	Agency Consults	Small to medium sized groups of agency representatives (typically non-government, often including clients) who were either direct services providers or representative of other agencies relevant to the project's mandated themes.
	Agency Meetings and Information Sessions	Predominately small to medium sized groups of agency representatives (typically non-government).
Online	Survey	A questionnaire providing a range of options to assist decision-making.
	Feedback Form	A questionnaire that mirrored the Government's eight questions.
	Web Log	An online discussion forum.
Written Submission	Written versions of the online Survey and Feedback Form	Survey and Feedback forms could be downloaded and submitted via fax or mail.
	Email	Email submissions.
Mobile	SMS	A mobile number was dedicated to receive SMS comment.

² See *Project Scope* p.17 below.

Face-to-Face

317 participants were actively engaged in one of three face-to-face processes: Focus Groups, Agency Consults and Agency Meetings/Information Sessions.

Participants allocated between 30 minutes and 3 hours depending on the type of activity requested, client requirements and client capacity.

The purpose of face-to-face consultation was threefold:

1. educate on the draft WA Human Rights Act and human rights in general,
2. consult with the client group on the draft WA Human Rights Act and,
3. link to 'Next Steps' ie. human rights activities organised by the WA Human Rights Committee.

The consultation process was dialogical with an emphasis on capturing 'real-life' accounts in order to bring issues of human rights into focus. As such there is an over-arching emphasis on the personal as opposed to the legal.

Most sessions were recorded and transcribed.

Face-To-Face Activities		
	Group No.	Participants
Focus Groups	16	187
Agency Consults	7	64
Agency Meetings & Information Sessions	6	66
Total	29	317

A general consultation format was used, however each consultation was tailored to suit the needs of the client group ie. reformatting of worksheet questions (see below), translation and interpreting services, carers and support personnel etc.

Face to Face - Worksheet Questions	
1	Should WA have a Human Rights Act?
2	Which human rights should be protected and why?
3	Examples that bring human rights into focus.
4	How should the WA Human Rights Act work? <i>Who should be responsible for protecting human rights in WA?</i> <i>What should happen if there is a breach of a person's human rights?</i>
5	What else should be done to protect and promote human rights in WA?
6	If the WA Human Rights Committee were here today, what would you like to say to them?

Consultation Statement

Groups were offered the option of creating a Consultation Statement: a summary of proceedings and comments made during the consultation.

These statements were validated by a nominated representative of the group as an accurate account of comments made during the consultation. Agencies who gave consent had their statement posted on the project website: www.humanrightssolutions.com.au

Survey & Feedback Forms

162 individuals completed the Survey form and 8 completed the Feedback Form.

Survey & Feedback Forms			
Type	Online	During Face-To-Face Activities	Total
Survey	76	86	162
Feedback Form	8		8
			170

Participation Data

The following participation data indicates the name of the agency consulted, the consultation activity and numbers of participants.

Focus Groups		
Group		Participants
Ethnic Youth Advisory Group (1)		12
YACWA (1)	<ul style="list-style-type: none"> ▪ TAFE Thornlie Campus ▪ Metropolitan Migrant Resource Centre ▪ Youth Pathways ▪ Office for Children and Youth ▪ Youth Health ▪ City of Perth 	21
Sevenoaks Senior College (2)		30
Workability (2)		19
Refugee & Migrant Community (1)	<ul style="list-style-type: none"> ▪ Metropolitan Migrant Resource Centre ▪ Ethnic Communities ▪ Edmund Rice Mirrabooka ▪ Ethnic Communities Council ▪ Multicultural Services Centre ▪ City of Wanneroo ▪ Anglicare 	35
WAAHM (2)	<ul style="list-style-type: none"> ▪ Richmond Fellowship ▪ St John of God Health Care, Mental Health ▪ Uniting Church Community Services ▪ Consumers & Carers 	7
Prisons & Detention Centres (3)	<ul style="list-style-type: none"> ▪ Bandyup Prison (8) ▪ Bunbury Regional Prison (12) ▪ Banksia Hill Detention Centre (12) 	32
St Patrick's Community Support Centre, Fremantle (1)		6
Christian Centre for Social Action (2)		15
University of Western Australia, Social Work Students (1)		10
Total		187

Agency Consults		
Group		Participants
Housing (1)	<ul style="list-style-type: none"> ▪ Tenants Advice Service (6) ▪ Community Housing Coalition WA (1) 	7
Streetwork Program, WA Youth Workers (1)		5
Office of the Public Advocate (1)		22
Outcare (1)		7
West Australian Substance Users Association (1)		8
BIG Issue – Vendors (1)		12
ST Vincent de Paul WA (1)		3
Total		64

Agency Meeting & Information Session		
Agency		Participants
Disabilities Services Commission (1)		5
Tele-Centre Support Network (1)		2
WACOSS (2)	<ul style="list-style-type: none"> ▪ Peaks Forum (6) ▪ Community Forum (30) 	36
Children, Youth and Families (1)	<ul style="list-style-type: none"> ▪ Agencies Association ▪ CREATE ▪ Mercy Care ▪ Parkerville Children's & Youth Care ▪ WACOSS ▪ Wanslea ▪ Yorganop 	8
St Patrick's Community Support Centre, Fremantle (1)		15
Total		66

Online Participants: Survey & Feedback

Agency*

- | | |
|--|---|
| <ul style="list-style-type: none"> ▪ Anglicare ▪ Arafmi Broome ▪ Armadale Information and Referral Service (Inc) ▪ Brunswick Community Resource Centre ▪ Disability Services Commission ▪ Department of Housing ▪ Department for Child Protection ▪ Dongara Telecentre ▪ Dream Weaver Consultancy ▪ Cane River Telecentre ▪ Catholic Migrant Centre ▪ City of Fremantle Warrawee Women's Refuge ▪ City of Perth ▪ Centrecare ▪ Community Housing Coalition of WA ▪ Jobs West Youth Pathways ▪ Mingenew Community Telecentre | <ul style="list-style-type: none"> ▪ Narrogin Financial Counselling Service ▪ Ngarangga Ngurra Aboriginal Corporation ▪ Perth Inner City Youth Service ▪ Pingrup Telecentre ▪ Pingelly Telecentre & Resource Facility Inc ▪ Ruah Community Services ▪ Shark Bay Telecentre ▪ Social work student UWA (Placement Communicare Cannington) ▪ Swan TAFE ▪ Tenants Advice Service ▪ The Big Issue ▪ The Salvation Army ▪ The Salvation Army - Balga ▪ Welfare Rights & Advocacy Service ▪ Youth Affairs Council of WA Yaandina HACC |
|--|---|

* Individuals also completed the online Survey. Their details have been withheld.

Other

	No.	Participants
Written Submissions	3	3
SMS	1	1
Total	4	4

Commentary on Data

Quantitative Data

- Most graphics have been generated from Survey data representing a pool of 162 participants.
- On occasion, some graphics represent questions that were only asked via online Survey. Graphics generated from this data represent a pool of 76 participants.
- To ensure clarity, the total number of participants represented by graphics (ie., 162, 76 or other) is displayed alongside the graphic heading.

In Part 2, quantitative data falls under the heading 'Survey Results'.

Qualitative Data

Qualitative data was collected from all sources:

- transcribed consultation discussions,
- worksheets questions and,
- open-ended questions contained in Survey and Feedback Forms.

In Part 2, qualitative data falls under the heading 'Further Observations'.

Material presented under the heading 'Further Observations' represents a selection chosen from qualitative data using a frequency and intensity analysis³. This section highlights major themes and attempts to capture the common sentiment of the group as a whole.

The author has also highlighted individual comments of importance; particularly in relation to the intersection of the WA Human Rights Act on existing policies, procedures and items of law.

The author acknowledges that many individual comments are absent from this selection and wishes to stress that their absence in no way diminishes the importance of participant testimony. An expanded picture of individual concerns can be observed by referring to client Consultation Statements.

In this regard, the reader is reminded that each Consultation Statement was issued to the WA Human Rights Committee as a stand alone document and, with consent, posted on the project website: www.humanrightssolutions.com.au.

³ **Frequency:** a) the appearance of particular rights expressed as important and, b) emergent patterns and themes among stories that could be presented as 'typical' of participant experiences. **Intensity:** the degree of impact (personal, social, economic, immediate and/or long term) expressed by the individual client or group.

Project Scope

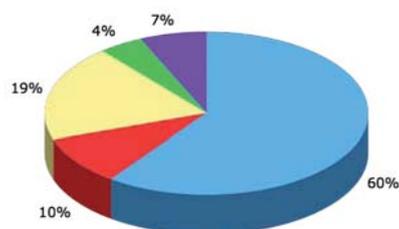
The mandate of Human Rights Solution was to consult as widely as possible with members of the community who are 'hard to reach'; ie. 'marginalised, isolated and at-risk groups'.

A list of mandated 'themes' provided scope and consultations occurred with individuals, community groups, Government and non-government agencies whose work activities or personal life situations fell within the scope.

Client Status

The following options were selected as 'best describing' the clients 'current status':

- An individual
- An individual who assists others who are, 'marginalised, isolated or at-risk'
- An employee/volunteer for a social service or welfare organisation
- A social service or welfare organisation that represents individuals or other organisations
- Other (please specify)



Graphic 1 (405)

Other: Online Survey participants were provided an opportunity to add categories to their submission:

- Community program for fitness and sport
- A Christian concerned for the marginalised
- Local Government employee
- Independent mental health consumer activist /practicing artist
- Telecentre Coordinator (x3)
- Heritage consultant
- Employee in justice system
- Community development officer

Client Themes

Participants made a selection from the following themes that they felt best described their personal situation or the situation(s) of those they assist.

Note: Only Survey participants were required to make an individual selection from the list of themes. Representatives of focus groups and agencies involved in consultation activities indicated a generalised assessment of the life situations of clients.



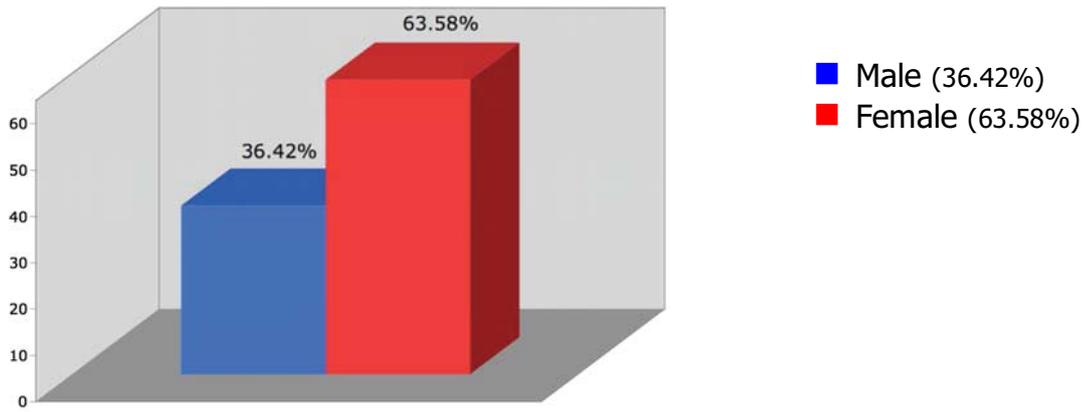
Graphic 2 (405)

Mandated Themes					
No		Description	No		Description
T1	18%	Criminal record	T10	22%	Homeless and/or street present
T2	17%	Lesbian, gay, bisexual, transgender	T11	14%	Long term job seeker
T3	20%	Disability or special need	T12	26%	Receiving income support
T4	25%	Culturally and linguistically diverse	T13	20%	Domestic violence
T5	12%	Refugee	T14	26%	Indigenous
T6	12%	Recent migrant	T15	22%	Rural/remote
T7	19%	Child or young person	T16	25%	Single parent
T8	30%	Mental health problem	T17	29%	Women
T9	33%	Alcohol and/or other drug dependent	T18	10%	Male
			T19	10%	Other (please specify)

Other: Online Survey participants were provided an opportunity to add themes to their submission:

- Children’s fitness education/sport participation
- At risk of becoming homeless
- Aged Care
- Dispossessed father
- Carers: Family of those with a mental illness
- Student
- Family members/connections of above
- A person recovering from a drug addiction

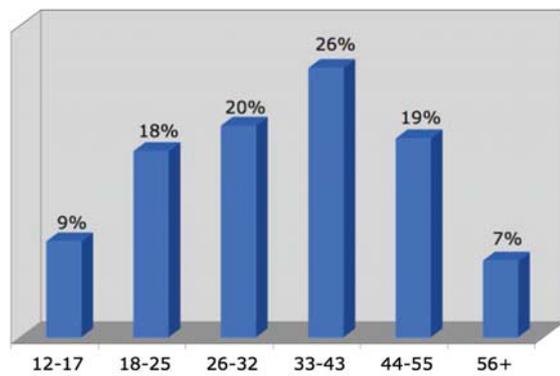
Gender



Graphic 3 (405)

Age

- 12 – 17 (9%)
- 18 – 25 (18%)
- 26 – 32 (20%)
- 33 – 43 (26%)
- 44 – 55 (19%)
- 56+ (7%)



Graphic 4 (162)

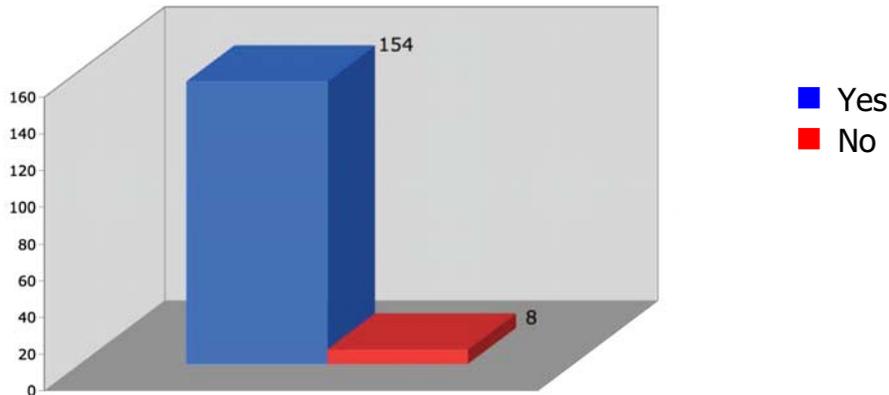
Part 2

Target Questions

1. Should WA have a Human Rights Act?.....	21
2. What rights should be protected in a WA Human Rights Act?	25
3. How should a WA Human Rights Act require human rights to be protected?.....	67
4. Who should be required to comply with the human rights recognised in a WA Human Rights Act?	71
5. What should happen if a person's human rights are breached?.....	74
6. If WA introduced a Human Rights Act what wider changes would be needed?	77
7. What else can the Government and community do to encourage a culture of respect for human rights in WA?	80
8. Do you have further comments about human rights laws for WA?	84

1 Should WA have a Human Rights Act?

Survey Results



Graphic 5 (162)

Further Observations

Overwhelming Support for a WA Human Rights Act

Graphic 5 also reflects the sentiment of face-to-face participants: ie. participants expressed overwhelming support for better state protection of people's human rights in the form of a WA Human Rights Act.

"Human rights in WA, about time!"

Former homeless & street present person

"We are definitely at a stage where there needs to be some form of human rights protection which covers the full range of a person's life and that all Australians can claim equally."

NGO

"Yes, without this protection individual freedoms can be quickly taken away."

Young person CaLD

"I am glad it is happening. I assumed we already had human rights in WA. As long as it is accessible to all and especially for those that need it I think it will be positive."

NGO

"Yes, it will raise human rights in the minds of Government and the public: educative and attitudinal."

NGO

"Yes, because we need a reminder for regulators and Government of those basic human rights that the community holds dear."

NGO

"I am not a highly educated women, however I don't feel that I need to be to notice that human rights are lacking in Australia as a whole."

Individual

Assumptions that Human Rights are Already Protected

Many participants expressed surprise that protection of the full range of human rights articulated in the WA Draft Act and those contained in international covenants and treaties that Australia is currently signatory to were not already protected.

These assumptions are further elaborated in Question 2: Community Perceptions.

"I assumed that Australia had signed human rights treaties and that these were already protected."

Youth Worker

"What are these rights going to add to? Surely similar rights are already in place."

Street Work Team, Youth Worker

A Criticism of the Process

Among non-English speaking groups the point was made that the draft WA Human Rights Act, Discussion Paper and supporting material were not made available in a language other than English.

Similar comments regarding the accessibility of Government material were made by individuals with a visual impairment. In this regard, when asked the question, 'Should WA have a Human Rights Act?' participants initially answered with uncertainty.

"How can I tell? I have no idea what it contains. There is no copy in my language."

Muslim women articulated via interpreter

"I have no access to this document so how can I say?"

Visually impaired participant

It should be noted that issues concerning language, levels of literacy, cognitive ability, visual impairment etc. were expected due to the project's mandated themes ('marginalised, isolated and at-risk'). Because of this a range of strategies were employed to maximise inclusion.

For example, the dialogical approach of face-to-face activities combined with interpreter services overcame access barriers relevant to non-English speaking CaLD groups.

Consequently, despite some criticism of the *overall process* made by some participants, it remains true that the majority of those consulted during face-to-face activities (including CaLD groups and those with a disability and/or impairment) remain in favour of a WA Human Rights Act.

'Yes, if...'

While levels of support for a WA Human Rights Act were high a wide range of qualifying statements accompanied this sentiment.

"Yes, if it (the Act) is enforceable."

Young person CaLD

"In principle we agree to having a WA Human Rights Act."

Youth Worker

"Only if there is a genuine intent to provide for the protection of human rights – this includes a genuine consultative process."

Council Worker City of Wanneroo

"We should have a Human Rights Act that includes economic, social and cultural rights."

NGO

"Yes, and it should complement federal – if any - human rights legislation."

NGO

"If a WA Human Rights Act means that we'll be able to better address all those issues faced by our clients and patients then 'Yes', we should [have one]."

Social Worker

"Yes, provided to:

- (i) Ensuring that the proposed Act does not inadvertently or otherwise take away existing rights in common law and other acts.
- (ii) The rights of those in detention (either in prison, hospital or elsewhere) can access the Act and are entitled to dignified treatment."

NGO

The Purpose of the WA Human Rights Act

Finally, it was also suggested that the WA Human Rights Act should specifically refer to, and protect, sections of the community that are most at risk.

This sentiment is also explored in Question 2: Additional Rights and Question 7: Preamble.

Interviewee: "You need a new colour for us!"⁴

Interviewer: "What do you mean?"

Interviewee: "You need a new colour. You have blue and green and yellow on the table but you need a new colour. You need red. For 'emergency rights'! People here are poor, poverty stricken, have no home; people need immediate help, not a number for a waiting list!"

Former homeless, currently at risk of homelessness

"[The Act should] protect those who need protecting the most."

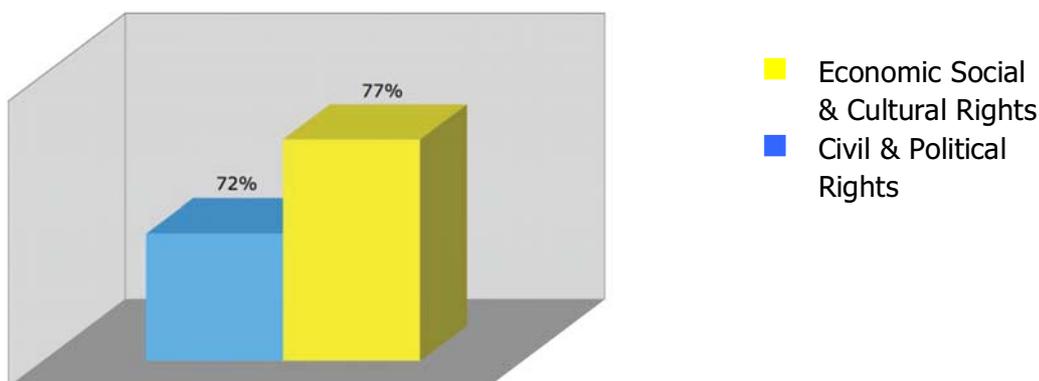
NGO

⁴ A human rights education activity presented human rights on coloured cards: yellow = economic, social and cultural rights, blue = civil and political, and green = a selection of additional rights.

What rights should be protected in a WA Human Rights Act?

2

Survey Results



Graphic 6 (162)

Graphic 6 represents the percentage of votes cast for human rights included in the Survey. The human rights included in the Survey were drawn from the International Covenant on Civil and Political Rights (CP) and the International Covenant of Economic, Social and Cultural Rights (ESC).

The Survey question asked, 'Of the following [human rights], which are most important to you and should be included in a WA Human Rights Act?'

- 77% of votes were allocated to ESC rights,
- 72% allocated to CP rights,
- The frequency of votes attributed to specific human rights varied greatly (*see Survey Results for Economic, Social and Cultural Rights, Civil and Political Rights and Additional Rights*),
- **All human rights listed in the questionnaire received votes.**

The ten highest ranked human rights according to votes and frequency have been articulated in two 'Top 10' lists (see below).

Commentary On 'Top 10' Lists

Two 'Top 10' lists have been generated.

1. **Top 10 according to Survey Votes (only):** this list of human rights was created by counting the number of votes participants attributed to particular human rights contained in the Survey (162).
2. **Top 10 according to Survey Votes and Frequency:** this list of human rights was generated by combining Survey votes with qualitative data.

Why Separate the Two?

- Two 'Top 10' lists were created to maintain the integrity of qualitative and quantitative data.

For example, Survey Question 4 did not include all civil, political, economic, social and cultural rights. The table below lists those rights that that were not included.

- However, face-to-face discussions and open-ended questions contained in the Survey and worksheet questions allowed for 'other rights' to be mentioned.
- Because of this, 'other rights' were awarded a vote according to the frequency and intensity of their appearance in qualitative data and have been included in Survey Results for ESC rights, CP rights and Additional rights.
- Finally, the combination of two sets of data: quantitative and qualitative, resulted in a discrepancy between the two Top 10 lists of human rights nominated for inclusion in the WA Human Rights Act.

Human Rights Not Listed In The Survey	
Civil & Political Rights	
Article 4 & 5	Derogation from State obligations is to be strictly limited.
Article 9.5	Right to compensation for unlawful arrest or detention
Article 10.3	The purpose of the penitentiary system is reform and rehabilitation.
Article 11	No one shall be imprisoned merely for failing to pay a debt.
Article 14.6	Right to compensation for a miscarriage of justice
Article 26	Everyone is equal before the law and has the right to equal protection of the law, without discrimination of any kind.
Economic, Social & Cultural Rights	
Article 4	Limitations may be placed on these rights only if compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.
Article 5 & 6	No person, group or Government has the right to destroy any of these rights.

'Top 10' List

Survey Votes (only)

Voting Pool: 162

Economic Social & Cultural			Civil & Political		
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 11	125	Right to adequate standard of living including adequate food, clothing, housing, and to be free from hunger	Art 14	118	Right to equality before the law, a fair trial and the presumption of innocence
Art 13 & 14	104	Right to education	Art 9	110	Right to personal safety and to not be detained without reason
Art 3	93	Gender equality	Art 10	99	To be treated with respect if detained
Art 10	93	Special rights for children and young people	Art 3	96	Gender equality
Art 7	92	Right to minimum wage, safe and healthy working conditions, promotion, rest and leisure	Art 20	95	Banning of 'hate speech' that incites discrimination or violence
Art 1	89	Right to self determination	Art 21	94	Right to peaceful assembly (to gather)
Art 12	86	Right to the highest attainable standard of physical and mental health	Art 7	94	Freedom from torture and cruel, inhuman or degrading treatment or punishment
Art 9	80	Right to social security (income support)	Art 12	91	Freedom of movement and to choose where to live
Art 2	78	Non-discrimination and the progressive realisation of human rights in this treaty	Art 27	90	Minority rights to culture, religious practice and language
Art 10	77	Prevention of exploitative child labour	Art 24	89	Specific rights for children and young people
			Art 18	89	Freedom of thought, conscience and religion

'Top 10' List

Survey & Frequency

Pool: 405

The author wishes to stress that during discussion all human rights articles from both covenants (CP or ESC) were acknowledged as personally important, necessary to the WA Human Rights Act and in most cases validated by personal story.

For example the average vote rating for human rights listed in the Survey is:

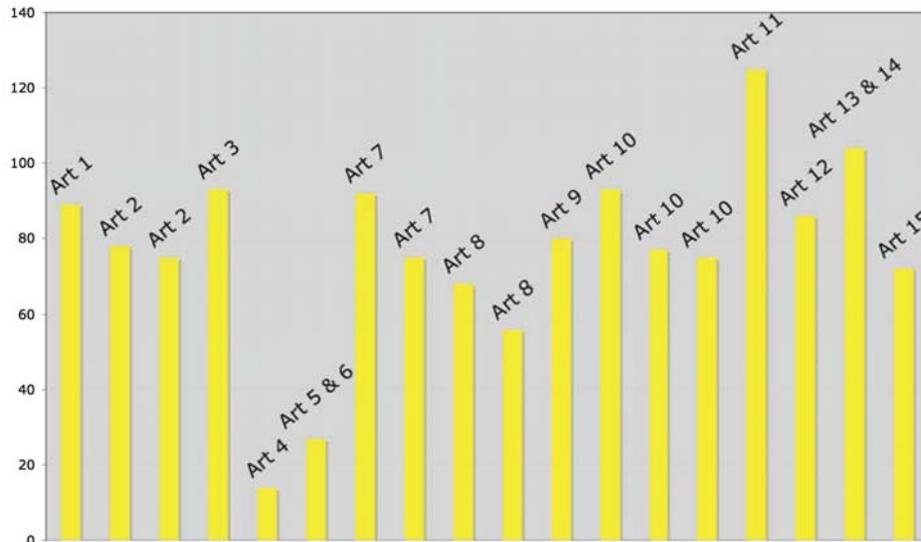
- Economic, Social & Cultural Right: 84
- Civil & Political Rights: 80

The following list of human rights are discussed in greater detailed under 'Further Observations' in this section in order to acknowledge the rationale for participant selection and to provide a 'snap-shot' of the range of stories shared during discussion.

Top 10 List – Survey Data and Consultation Frequency		
Article	FRQ	Human Right
Art 14 CP Art 10 ESC	200	Special rights for children and young people
Art 2 ESC/CP	190	Freedom from discrimination*
Art 11 ESC Art 12 CP	145	Right to adequate standard of living including adequate food, clothing, housing, and to be free from hunger. Freedom of Movement and to choose where to live*
Art 14 CP Art 26 CP	126	Equality before the law, fair trial, presumption of innocence, compensation for miscarriage of justice. Equal protection of the law
Art 9	125	Right to personal safety, freedom from arbitrary arrest or detention. Compensation for unlawful arrest
Art 13 & 14	115	Right to education
Art 10	111	To be treated with respect if detained
Art 12	105	Right to the highest attainable standard of physical and mental health*
Art 7	104	Freedom from torture or cruel, inhuman or degrading treatment or punishment*
Art 20	101	Banning of 'hate speech' that incites discrimination or violence
Art 21	101	Right to peaceful assembly

* These human rights generated high intensity ratings.

Survey Results for Economic, Social & Cultural Rights



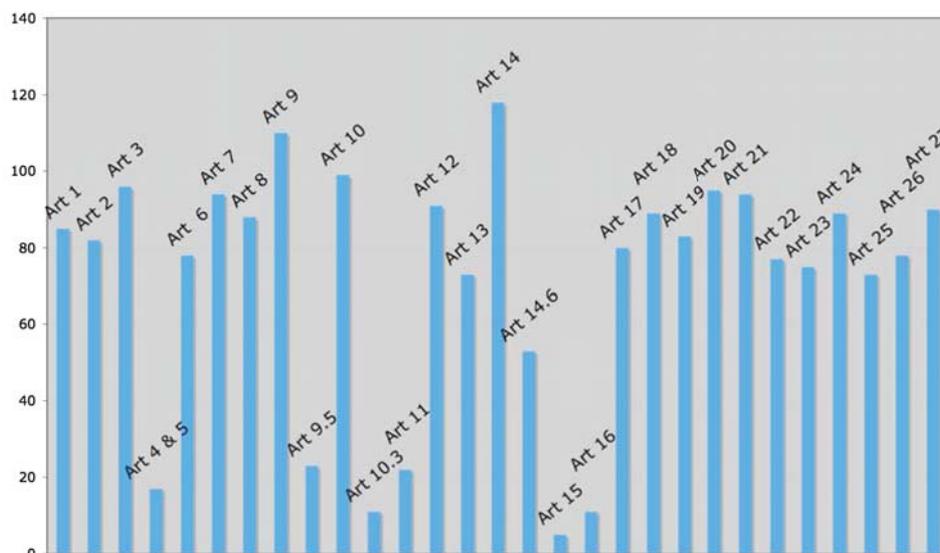
Graphic 7 (162)

Economic Social & Cultural Rights					
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 1	89	Right to self determination	Art 8	56	Right to strike
Art 2	78	Non-discrimination	Art 9	80	Right to social security (income support)
Art 2	75	An obligation on Government to secure the progressive realisation of human rights in this treaty according to its means	Art 10	93	Special rights for children and young people
Art 3	93	Gender equality	Art 10	77	Prevention of exploitative child labour
Art 4	14	<i>Limitations may be placed on these rights for promotion of the general welfare of society</i>	Art 10	75	Right to family
Art 5 & 6	27	<i>No person, group or Government can destroy these rights. (Art 5/6)</i>	Art 11	125	Right to adequate standard of living including adequate food, clothing, housing, and to be free from hunger
Art 7	92	Right to minimum wage, safe and healthy working conditions, promotion, rest and leisure	Art 12	86	Right to the highest attainable standard of physical health
Art 7	75	Right to work	Art 13 & 14	104	Right to education
Art 8	68	Right to form and join trade unions	Art 15	72	Right to take part in cultural life and enjoy the benefits of scientific progress

Bold font indicates a vote frequency of 90+

Italic font indicates human rights not included in Question 4 of the online Survey

Survey Results for Civil & Political Rights



Graphic 8 (162)

Civil & Political Rights					
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 1	85	Right to self determination	Art 14.6	53	<i>Right to compensation for a miscarriage of justice</i>
Art 2	82	Freedom from discrimination	Art 15	5	<i>No one shall be guilty of a criminal offence when the act was not a criminal offence at the time it was committed.</i>
Art 3	96	Gender equality	Art 16	11	<i>Everyone has the right to be recognised as a person before the law</i>
Art 4 & 5	17	<i>Ability of Government to deviate from its human rights obligations is strictly limited</i>	Art 17	80	Right to privacy
Art 6	78	Right to life	Art 18	89	Freedom of thought, conscience and religion
Art 7	94	Freedom from torture and cruel, inhuman or degrading treatment or punishment	Art 19	83	Freedom of opinion and expression
Art 8	88	Freedom from slavery and forced labour	Art 20	95	Banning of 'hate speech' that incites discrimination or violence
Art 9	110	Right to personal safety and to not be detained without reason	Art 21	94	Right to peaceful assembly (to gather)
Art 9.5	23	Right to compensation for unlawful arrest or detention	Art 22	77	Freedom of association and right to join trade unions
Art 10	99	To be treated with respect if detained	Art 23	75	Right to form family

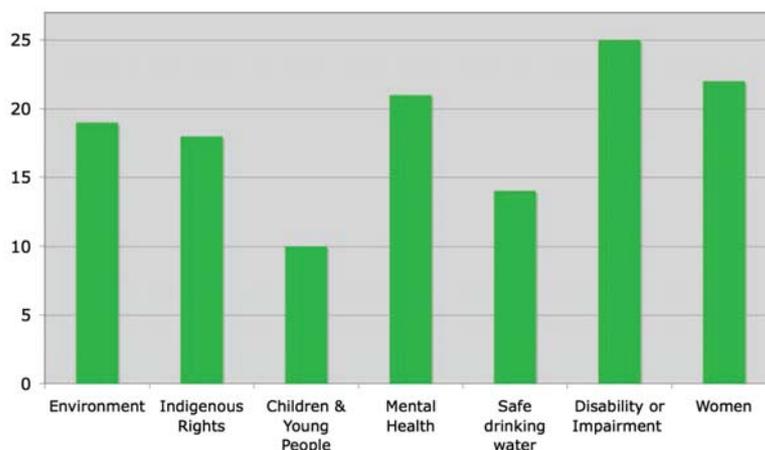
Civil & Political Rights					
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 10.3	11	<i>The purpose of the penitentiary system is reform and rehabilitation</i>	Art 24	89	Specific rights for children and young people
Art 11	22	<i>No one shall be imprisoned merely for failing to pay a dept</i>	Art 25	73	Right to take part in public affairs and to vote
Art 12	91	Freedom of movement and to choose where to live	Art 26	78	<i>Right to recognition and equality protection before of the law</i>
Art 13	73	Protection of refugees against arbitrary expulsion	Art 27	90	Minority rights to culture, religious practice and language
Art 14	118	Right to equality before the law, a fair trial and the presumption of innocence			

Bold font indicates a vote frequency of 90+.

Italic font indicates human rights not included in Question 4 of the online Survey.

Survey Results for Additional Rights

The Survey allowed individuals to nominate other human rights of importance and make comment.



Graphic 9 (162)

A Selection of Additional Comments

Disabilities

"People with disabilities have an equal right to access places and services as people without disabilities."

environment. We need to protect the environment."

"Every person has a right to clean water and air."

Women

"Women's rights to paid maternity leave (for an extended period) and affordable child care."

Indigenous

"There should be specific rights for Aboriginal and Torres Strait Islander people covering customary law, heritage, spirituality, environmental sustainability, land, education, housing, economic, etc. - as per those laid out in the Draft Declaration on the Rights of Indigenous Peoples."

Mental Health

"There needs to be specific rights for people with a mental illness."

"The right for people experiencing mental illness to have a say in their 'treatment'."

"The right for people experiencing mental illness to be treated with respect and dignity by service providers."

"There should be rights included in the WA Act that specifically promote indigenous people's wellbeing. Land Rights."

The Environment

"Right to have the environment protected for the benefit of the ecosystems and for the health of the planet for future generations."

"The Right of future generations to inherit a sustaining and sustainable natural

Children

"We should include reference to the Convention on the Rights of the Child in the section about the protection of children."

Concluding Remarks on 'What Rights?'

By the end of each consultation participants were familiar with the range of human rights contained in both international covenants (ESC & CO) and to a lesser degree, aware of the international human rights⁵ conventions that Australia is signatory to. Participants were also aware of the human rights included in the draft WA Human Rights Act.

During face-to-face activities participants were asked to reflect on the possibility of a WA Human Rights Act and to make a 'concluding statement' regarding what human rights should be included in the WA Human Rights Act.

In all respects the majority of participants reflected conclusions drawn from the Survey: ie. that all human rights are, at some level, important and the entire complement of human rights, especially economic, cultural and social rights, should be considered for inclusion in the WA Human Rights Act.

Common themes among 'concluding statements' were:

Recognition of the Interdependence of Human Rights:

"I don't understand how you can separate these rights from one another. The right to participate in community life (CP Art, 25) seems impossible if a person does not have a house (ESC Art, 11) and has poor health (ESC Art, 12)."

CaLD person

"Why are we picking and choosing? Surely all of them are fundamental."

Mental Health consumer

"All or most of these rights are in the one document, The Universal Declaration of Human Rights. So why are we separating them and excluding certain rights?"

Young CaLD person

Questioning the Rationale for Making a 'Choice':

"Why are we even asking for rights? Don't we just have them?"

Young person

"Add economic, social and cultural rights to the Act and give people these rights. These are the rights we *have*, not what the Government thinks we should be allowed."

Young 'at risk' person

⁵ CRoC, CEDAW, CERD, CAT, CDMW

Recognition of the Absence of Some Civil & Political Rights:

"The Bill has been 'cherry picked'."

Young CaLD person

"Compensation for unlawful arrest or a miscarriage of justice and appropriate remedies are rights. As is self-determination; that's the most important one! Without these rights the Act lacks credibility and it lacks 'teeth'. It will not be taken seriously. WA cannot re-write international human rights law by picking and choosing what it thinks are necessary human rights and what are not. What kind of statement is that?"

Individual

"All civil and political rights, especially those that have been excluded by Government; and economic, social and cultural rights."

NGO

"The full convention of civil and political rights should be included and not just those rights that the Government has indicated."

NGO

Acknowledgement of Western Australia's Unique Ability to Secure all Human Rights

Many recognised an opportunity in Western Australia's unique ability to secure the full complement of human rights protections: ie. a wealthy State currently experiencing an unprecedented 'economic boom'.

"Please think laterally and make the Human Rights Act innovative and different by including parts not in other States'. After all we should make this State a "maverick State" that others want to copy!"

NGO

"We need to add ESCR to protect and help people. Open up the Government's wallets, they're full."

Young 'at risk' person

"Most certainly the Human Rights Act as drafted fails to meet the potential. WA currently has the ability to offer its citizens a greater range of rights (civil and political and economic, social and cultural); more so than most other western nations. We have a chance to lead the way, not just follow blindly."

NGO

"WA has the opportunity to lead, not follow. To use as a reason for not including economic, social and cultural rights, the fact that very few other jurisdictions have these rights, is a poor excuse. Australia seeks to hold itself out as a fair democracy – with our own Human Rights Act we can show this in practice."

NGO

Unanimous Support for Economic, Social & Cultural Rights

"Include all of these rights! Especially economic, cultural and social rights."

NGO

"All of them, civil and political and economic, social and cultural. If we wish to enshrine these in law it would make sense that in order to build a better society we should take up the challenge and enshrine both sets of rights."

NGO

"It is disappointing that the Government is only willing to consider looking at civil and political rights, as social, cultural and economic rights cover many important issues. They are the foundation of basic human rights which can create a culture of community and individual stability."

Youth Worker

"Economic, social and cultural rights look like basic human needs. We should include all of them."

Prisoner

"If you are going to be serious about human rights you may as well include the entire set of rights."

Young CaLD person

"Human rights are about a belly full of food you sourced yourself and a place to sleep where you have the key to the door. Hundreds of people in Perth cannot claim this! Those rights called economic, cultural and social rights are crucial to a person being able to secure a life like this, a decent life."

Former homeless person

Why are these rights important to you?

The following comments represent a selection of comments made by online Survey participants in relation to the question, 'Why are these rights important to you?'

"Because it isn't good to hear when people are getting beaten in detention centres."

"Because the security and well-being of society depends on having a foundation laid in justice and harmony."

"Because they are the very foundations of a society that is built on inclusion and allows for a society that lives without fear and rejection."

"We live in a prosperous State and yet many people do not have an adequate standard of living or equal access to be comfortable like the rest of us."

"Every person has the right to be treated with dignity and respect."

"Rights are important as they make a statement about what kind of society we have."

"Because even when I had a mental illness I was still a person."

"I believe there should be equal rights for everyone and they need to be protected by law. We are a democratic country and our rights are the foundation on which a democracy has to be built. None should have more rights than any other due to social, economic or cultural differences."

"Because I have seen them denied and because I have seen the lack of opportunity and subsequent consequences."

"I was a drug addict for 12 years and now I am a paralegal at a CLC. However from my drug abuse I committed crimes, I performed restoration. However I still find that my record affects my everyday life from employment to obtaining insurance for my car and new home."

"Because I see these rights being compromised on a daily basis."

"I believe many of these rights are ignored in our society, as it is presumed that all Australians have access to shelter, food, education and health care. However some of these basic fundamental needs are not met for marginalised people, and these are the people whose voices are not heard and have the least impact upon policy decisions."

"Everyone has the right to feel safe."

"Australia has no Bill of Rights, but we take for granted that we will always have them. This current Federal Government has done a lot to reduce our rights through legislation. I believe it's important to enshrine our rights before it is too late."

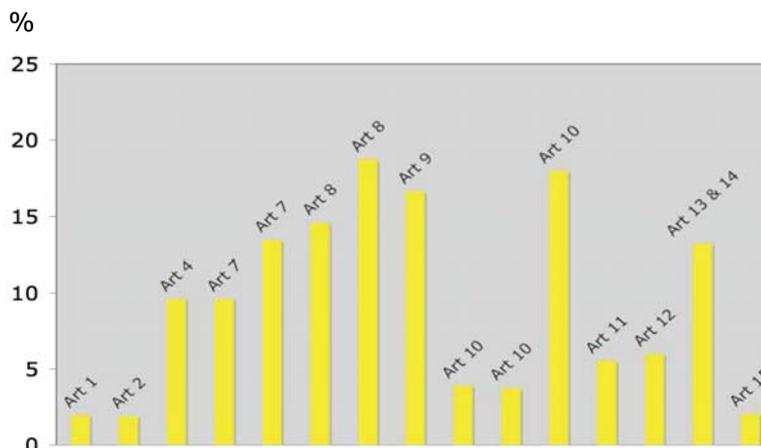
"Because we need a yardstick to hold Governments accountable."

Community Perceptions of Human Rights Protection

The online Survey allowed participants to affirm that a human right was **not** needed in the WA Human Rights Act because State or Federal law already covered it.

Note: The reader is reminded that these results are generated using online Survey only. Percentages indicate a portion of this group (76) and not the total number of participants surveyed (162).

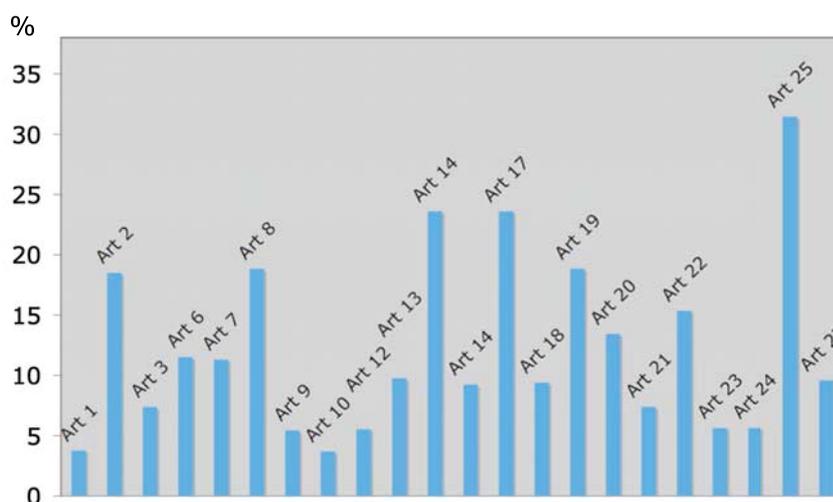
Economic Social & Cultural Rights



Graphic 10 (76)

Economic Social & Cultural Rights					
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 8	19%	Right to strike	Art 12	6%	Right to the highest attainable standard of physical and mental health
Art 9	17%	Right to social security (income support)	Art 11	6%	Right to adequate standard of living including adequate food, clothing, housing, and to be free from hunger
Art 10	18%	Prevention of exploitative child labour	Art 10	4%	Right to family
Art 8	15%	Right to form and join trade unions	Art 10	4%	Special rights for children and young people
Art 7	13%	Right to minimum wage, safe and healthy working conditions, promotion, rest and leisure	Art 15	2%	Right to take part in cultural life and enjoy the benefits of scientific progress
Art 13	13%	Right to education	Art 1	2%	Right to self determination
Art 3	10%	Gender equality	Art 2	2%	An obligation on Government to secure the progressive realisation of human rights in this treaty according to its means
Art 7	10%	Right to work			

Civil & Political Rights



Graphic 11 (76)

Civil & Political Rights					
Article	FRQ	Human Right	Article	FRQ	Human Right
Art 25	31	Right to take part in public affairs and to vote	Art 13	10	Protection of refugees against arbitrary expulsion
Art 17	24	Right to privacy	Art 14	9	Right to recognition and equality before the law
Art 14	24	Right to equality before the law, a fair trial and the presumption of innocence	Art 18	9	Freedom of thought, conscience and religion
Art 19	19	Freedom of opinion and expression	Art 21	7	Right to peaceful assembly (to gather)
Art 2	19	Freedom from discrimination	Art 3	7	Gender equality
Art 8	19	Freedom from slavery and forced labour	Art 12	6	Freedom of movement and to choose where to live
Art 22	15	Freedom of association and right to join trade unions	Art 23	6	Right to form family
Art 20	13	Banning of 'hate speech' that incites discrimination or violence	Art 24	6	Specific rights for children and young people
Art 6	12	Right to life	Art 9	5	Right to personal safety and to not be detained without reason
Art 7	11	Freedom from torture and cruel, inhuman or degrading treatment or punishment	Art 10	4	To be treated with respect if detained
Art 27	10	Minority rights to culture, religious practice and language	Art 1	4	Right to self determination

Further Observations: Top 10 Human Rights In Detail

The reader is reminded that material presented in 'Further Observations' represents a selection chosen using a frequency analysis.

Quotations selected are typical of participant responses.

The author acknowledges that many individual comments are absent from this selection and wishes to stress that their absence in no way diminishes the importance of participant testimony. An expanded picture of individual concerns can be observed by referring to client Consultation Statements.

In this regard, the reader is reminded that each Consultation Statement was issued to the WA Human Rights Committee as a stand alone document and, with consent, posted on the project website: www.humanrightssolutions.com.au.

Special Protection for Children, Young People & Families

Economic Social & Cultural Rights, Article 10
Civil & Political Rights, Article 24

International Covenant on Economic, Social and Cultural Rights

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or

leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

International Covenant on Civil and Political Rights

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

The issue of human rights protections for children and families was common. Within this section common themes include:

International Obligations: CRC

"We should include reference to the Convention on the Rights of the Child in the section about the protection of children."

Indigenous Families & Children

"Systematic and chronic abuse and neglect of children on a variety of levels;

- sexual abuse of Aboriginal children in remote communities and the intergenerational issues that have created this situation.
- lack of resources respond to these issues over the long term.
- lack of Aboriginal consultation on these issues.
- lack of support, including monetary, to those who do work in these areas eg. chronic staff turnover at the Department of Child Protection.
- lack of support for carers, parents and foster carers, particularly those who care for children with special needs.
- lack of children's voice in political and social processes including the delay in the appointment of a Children's Commissioner."

Academic

Enjoyment of Family

"Prisoners are being transferred – for reasons that I do not understand - miles away from their home and family. Eg. a person from up north is being transferred to Albany! Surely this is breach of a person's **right to family** and it could even be a breach of a person's **right to participate in one's culture** if the place where they live is of cultural significance."

NGO

"A mum with four children was released from hospital with her new baby to find that she had been evicted from her house! The situation was simply dreadful. St Vincent de Paul was called and we had to find her a place to stay in a hotel. These situations are not isolated."

NGO

"I was arrested for a warrant and stealing and I was taken to East Perth Police Station. Before I was taken there I asked for a phone call to arrange for someone to pick up my son from school. But it was much later that day that I was allowed to call. By that time DCD got involved and now I might or might not be able to have my son under my care."

Prisoner

Broader Definition of Family

"What is the definition of family? The Family Law Act has now been changed to reflect 'relationship' and it is very sad that same sex couples are not recognised. In other countries these unions are legally recognised and they are a family in my book."

Young person

"Also, marriage should not by itself constitute a family either; there are some 21 year olds looking after refugee cousins and this too constitutes a family."

Young CaLD person

"Homosexual and de facto couples require the same rights as heterosexual couples."
Individual

'Best Interests' of the Child

"Children taken from parents and put in inadequately supported placements; and parents of children in care not given many chances to rectify their 'inappropriate behaviour'."
Social Worker

"A child was taken away from her mother who was imprisoned. My family and I were taking care of the child and he was happy to stay with us. Yet, on a day at school the acting principle decided to report to DCD that we had a criminal record for drug possession and the child was taken into 'care', removed from WA to NSW and has now not seen his mother for over three months."
Individual

"Children who have 'druggy' parents should be helped. I hate seeing children's lives go down the drain because their parents have stuffed it up for them and not given them a good standard of living. Sometimes the kids end up down the same road as the parents and get in trouble with the law."
Young 'at risk' person

"I moved out of home because I fell pregnant and my mother was abusive and a drug addict. Centrelink would not provide me with money or find a place to live because I was too young; even though I couldn't be at home and had no one to support me. Also, on the same day, Homeswest refused me a place because of my age."
Young 'at risk' person

"Young people who receive many travelling fines for not paying fares on trains or buses cannot commute these fines to "labour" as in the 'community justice fines'.
NGO

"If young people at risk are not treated with dignity and respect their alienation will deepen, their anger and resentment will consolidate, their sense of social exclusion will be reinforced, their vulnerability to suicidal ideation will escalate."
Reverend

Freedom from Discrimination

Civil & Political Rights, Article 2
Economic Social & Cultural Rights, Article 2.2

"Discrimination is the biggest problem today."

CaLD youth

Freedom from discrimination generated the highest intensity rating. The extent, range and scope of discrimination reported during consultation was broad and complex.

The range of violations described during face-to-face discussion cut across all categories currently tagged to the mandate of the WA Equal Opportunity Act 1984. However, the range of violations reported went **beyond** the WAEOC Act (see table below).

For example, with the exception of discrimination based on race, discrimination based on appearance, language, and against individuals with a criminal record appeared in greater frequency than claims of discrimination currently covered by the WAEOC Act.

Dominant themes were:

Broaden the Definition of Discrimination

"Freedom from ALL forms of discrimination, not just the EOC definition of it."

NGO

Participants frequently observed that the draft WA Human Rights Act had defined discrimination to that referred to in the *Equal Opportunity Act 1984*.

Overwhelming, participants requested that the definition of discrimination be broadened to include **all** forms of discrimination.

Discrimination	
WA Equal Opportunity Act 1984	New categories of Discrimination
<ul style="list-style-type: none"> ▪ age ▪ family responsibility or family status ▪ gender history ▪ impairment ▪ marital status ▪ pregnancy ▪ race ▪ religious or political conviction ▪ sex ▪ sexual orientation 	<ul style="list-style-type: none"> ▪ appearance ▪ economic status ▪ homeless and street present ▪ individuals with alcohol and other drug addictions (including recovery from addictions) ▪ individuals with mental health problems ▪ ex-offenders ▪ language

Racial Discrimination

Throughout the three-month consultative process the level of racial discrimination reported was acute. Of the range of issues presented, racial discrimination surfaced as the single most over-represented human rights violation claimed by participants within this category.

Accounts of racial discrimination against Muslim people (in particular, Muslim women who wear the hijab) and against non-Caucasians: predominantly African and indigenous groups were persistent.

Reports of verbal and some physical abuse, in particular against Muslim women wearing the hijab were also common.

Participants from CaLD and indigenous groups reported:

- having to walk in groups to ensure personal safety,
- being denied service at shopping centres,
- racial profiling in public spaces and public transport,
- being denied employment opportunities because of dress (hijab) and/or race,
- verbal abuse for speaking in a language other than English,
- being denied the right to pursue a career of choice,
- differential treatment of friends and relatives who chose to migrate or seek refugee status in other jurisdictions.

"A girl who was Lebanese and on the first day of school didn't wear the headscarf and she was treated well by the other girls. But on the second day she wore the scarf and it was the complete opposite. She was harassed and abused verbally."

Young Muslim person

"Three Aboriginal children walked into a corner shop owned by an Asian gentleman and he told them to get out immediately or he would call the police. I was in the store watching in disbelief. Then he turns to me and a friend and apologises to us saying, "Aboriginals are disgusting and should have all been executed; they are thieves, drunks and smell bad."

Young CaLD person

"On the train someone hit me on my back because I had different clothes (hijab). The second time they swore at me. The third time the person shouted at me to, 'go back to your country'. As a result I left TAFE in the City and enrolled in Balga TAFE to avoid travel by train."

Young Muslim woman

"I was putting an Asian family through my checkout and there was a man waiting for them to finish. The family was having problems understanding what I was saying. The man waiting started to swear and verbally abuse the family. He was being a racist. The Asian family didn't understand what the man was saying. I thought he was really offensive."

Young CaLD person

"My child wanted ice cream at the shopping centre. The shop owner or Manager told the sales assistant not to sell ice cream to me because, 'she is Muslim'."

Muslim mother

"I came to Australia. My friends went to the USA and Canada. Their experience was completely different to mine. They do not suffer like me. Within weeks they had access to services and had found employment. Why?"

Muslim woman

"I went for a job interview and the employer said 'you'll be given the job if you take off your scarf'."

Young Muslim person



Reported Bumper Sticker

I've seen this bumper sticker, it says, "Fuck off We're Full". It scared me, made me very sad and angry. I have to deal with this kind of thing most days."

Young refugee

Prisoners & Ex-Offenders

Offenders (currently in prison), ex-offenders and juvenile offenders (currently in detention facilities) were interviewed as part of the consultation process. This activity revealed several forms of discrimination that affect a broad (an increasing) demographic of the West Australian population.

'Official prison figures are 3822 adults currently being detained across 13 facilities across the State; a further 150 juveniles are confined in two detention facilities.'

Statistics provided by Corrective Services

Discrimination among this client group took various forms:

1. Offenders and ex-offenders not being able to secure employment because of their police record⁶:

"Someone should be able to get a job if they have a conviction in the past."

Prisoner

"My criminal record follows me forever."

Young offender

⁶ Instances reported here are those where the criminal offence did not exclude an employment opportunity because of the offence.

"I was denied a job because of my criminal record. You do your time and then you can't even get on with your life."

Prisoner

"When they ask for a Police Clearance I just don't bother anymore."

Ex-Offender

"I am tried once by the system and forever by the public."

Prisoner

2. Discrimination in access to rental housing and denial of parole if a permanent address cannot be nominated:

"The landlord makes the ultimate choice of tenants and I am not one of their favourites."

Ex-Offender

"If you are up for parole and you have no permanent address then you just don't leave."

Prisoner

3. Denial of Health Services Available to the General Community:

The denial of access to health services to prisoners that are afforded to the general community was a human rights concern that also presents as a public health issue of importance. In particular, access to safe injecting equipment.

NGOs reported that prisoners, despite stringent prison search procedures, were accessing drugs in prison and that evidence of contraction of blood borne viruses was occurring.

"Prisoners should have access to services, especially health services, that are available within the general community (70% of prisoners are there for drug related offences)."

NGO

"Almost 30% of prisoners have a mental health or physical addiction problem and there are not enough services to help them."

NGO

"Prisoners have a right to clean injecting equipment in jails. This is a controversial matter but research suggests that drugs *are* being used in jails and injected. Because of the absence of clean injecting equipment people are coming out of jail having contracted BBVs (Blood Borne Viruses) that they did not have on entry. There are about 10 other countries that provide clean equipment in jails and our prisoners are entitled to this necessary health service."

NGO

"Prisons are a key link in the spread of Blood Borne Viruses (BBV) largely because of the lack of access to public health services that would enable people to protect themselves from BBV eg. HIV Hep B + C, ie. needle syringe programs."

NGO

Appearance

Many participants, in particular young people and Muslim women wearing the hijab, reported being denied access to public places, employment opportunities, 'moved on' by security personnel and police and verbally abused because of their appearance.

Issues relevant to appearance are also raised in relation to Public Space (see below).

"I have been abused for talking in a language other than English. Abused for listening to Indian music in the car. Abused for having a henna tattoo on my hand. I was run off the road and verbally abused because I am Muslim. The police would not take my statement and when I insisted, they ended up losing it. After going to the Commissioner on Investigations I found out that, by law, we could not charge him."

Young Muslim woman

Minorities Within Minorities

Frequently participants discussed the hardship of being a minority within a minority:

"Combine a disability with a police record and you have no chance. I know the record says that the details cannot be used to discriminate, however in practice discrimination happens all the time."

Person with a disability

"It is not enough simply to afford rights to minority groups without exploring this issue deeper. There are minorities *within* minorities eg. refugee people who also have a disability or special need."

CaLD person with a visual impairment

Drug Use & Disability

"If the Act protects people from discrimination it should use the International Covenant's definition which includes drug dependence as a disability."

NGO

Sec 20 Sub 1

The following comments were unique.

'A person whose cultural, religious, racial or linguistic background is that of a minority...'

"I would like to see the term race changed to ethnicity or ethnic group. I mean we are one race, the human race, but we are from many ethnicities."

Young CaLD person

"Minority is not really a word that we use today to describe people from different ethnic and cultural groups."

Young CaLD person

International Covenant on Civil and Political Rights

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

International Covenant on Economic, Social and Cultural Rights

Article 2.2

2. The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Right to an Adequate Standard of Living & Freedom to Choose Where to Live.

Economic Social & Cultural Rights, Article 11

Civil & Political Rights, Article 12

"Of great importance is the right to housing; without a stable place to live, the health and general well-being of people is not assured and as a result a person can not exercise effectively their civil and political rights."

NGO

The right to an adequate standard of living, in particular the right to housing and to be free from hunger, recorded the second highest intensity rating:

- Arguments for the necessary inclusion of ESC Article 11 and CP Article 12 were raised by all client groups without exception.
- Accounts of individuals unable to access housing; being denied or evicted from premises due to lack of money, mental health concerns, an addiction (including recovering from addiction), race discrimination (in particular Muslim or indigenous) were numerous.
- Participants highlighted increasing levels of squatting among homeless and street present groups.
- Many participants testified to being at risk of homelessness.
- Evidence of prolonged waiting times for public housing (in excess of five years) and expressions of desperation, anger and resentment were recorded.
- Stories of families permanently dwelling in tents were heard.

Racial Discrimination & Housing

"Muslim tenants being refused a lease to a house because the owner found out that they were Muslim after all the negotiations were done."

CaLD young person

"Aboriginal people ... they aren't even on the list (housing list)! If you and my cousin applied for a house at the same time there is no way my cousin would get the place. He's big and he's black. Heck! They'd even take XXX here before my cousin!"

Person at risk of homelessness

"Daily, low income groups, indigenous people, refugees etc. are discriminated against by owners and managers of private housing. This is putting many at risk of homelessness and, sadly, in a number of cases results in actual homelessness."

Individual

Private Housing Market

"Do the real-estate agencies have the right to put up the rent like they do? And if they can, what can Government do to either prevent this or increase rent assistance to be able to get into a safe home."

"My rent is now \$250 a week and it goes up every six months. Now can they do that? My pension does not go up! Now my pension is \$700 a fortnight (35.7% of the benefit) and I have got to pay bills out of that, groceries, rent. I haven't got anything hardly left."

Person at risk of homelessness

Homelessness

"I mean a number of years ago I read that there were around 6,000 squatters in Perth. Now with all these places being demolished and people being turfed out, where are they staying? Why don't we see this as a national disaster and feel obliged to build a 'tent-land' for them somewhere?"

Former homeless and mental health consumer

"In Perth it is a crime to sleep on the streets but what is the option if you are homeless?"

Homeless person

"We had a guy sleeping in the doorway. He has an alcohol addiction and a gambling problem. There were four people sleeping rough in the doorway at one stage. Local businesses pressured the local politicians to do something and they eventually called Bentley Hospital. They got hold of the Exec Director; we don't ever get this kind of response! The mental health nurse comes, picks him up and takes him to hospital. He's really in a bad way; the nurses say he might not even make it through this winter. But when he is 'better' they deliver him back to the doorstep! There is nowhere to take him. The police pick people like him up and deliver them here because there is **nowhere else to go!** They sleep on the porch in small groups because they feel safer."

NGO

"One of those we know was going through the bins late in the evening. A car pulls up and out jumps a bunch of young people. They pick him up and throw him through the window of 868 coffee shop! They then take his belt and his glasses! His glasses! On another occasion he was sleeping rough and had two bottles smashed over his head. There is nowhere safe to go."

Homeless person

Waiting Lists

"A client was offered a house after being on the Homeswest list for five years. She said the house was not fit for an animal to live in and refused to live there. Because of this she was put on the bottom of the list and is still waiting for accommodation."

NGO

Residential Tenancies ACT

Housing NGOs presented a range of statistical data reflecting the extent and scope of the current 'housing crisis'.⁷ They also pointed toward areas of conflict with regard to the Residential Tenancies Act:

"Clients: eviction of public housing tenants under S.64 of the Residential Tenancies Act – a clause which does not require the owner/landlord to specify a reason for the eviction. This is often used when Department of Housing and Works believes that tenants are breaching their tenancy agreement but find it difficult to assemble evidence that would be acceptable in court. Usually these tenants are disadvantaged with few other housing options."

NGO

"The Commonwealth Welfare to Work legislation has unfairly and unjustly impacted on many people, especially due to its definition of 'homelessness.'"

NGO

Housing As A Justicable Human Right

Finally, housing NGOs submitted arguments for the capacity of the legal system to include economic, social and cultural rights in general, and the right to housing in particular, as justicable human rights.

"We read that part of the Government's reason for not including economic, social and cultural rights includes the absence of other jurisdictions. However, over 150 countries have ratified the International Covenant on Economic, Social and Cultural Rights (including Australia) and therefore have accepted the obligation to make the economic, social and cultural rights of their people substantive rights. In addition, many countries have articulated their commitment to economic, social and cultural rights by enacting domestic law and national constitutions."

"Economic, social and cultural rights are just as justiciable/admissible in a court of law as civil and political rights (see below) and as such should be given equal standing in the WA Human Rights Act."

Basic criteria for admissibility of ESC rights:

- An allegation must be made against a real entity ie. claims cannot be made against 'all of Government'.
- The claim must clearly define the specifics of a breach.
- There must be a clearly identified violation of a particular human right.

NGO

⁷ Readers are referred to Consultation Statement: *Housing* [available online] www.humanrightssolutions.com.au

International Covenant on Economic, Social and Cultural Rights

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. General comment on its implementation.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the

measures, including specific programmes, which are needed:

a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

International Covenant on Civil and Political Rights

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are

provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Individuals & the Law

Civil & Political Rights, Articles 11, 14, 15, 16 & 26

Miscarriage of Justice

Article 14.4

Participants frequently raised the issue of compensation for miscarriages of justice, noted that this was absent from the WA Human Rights Act and called for its inclusion.

This issue is explored in greater detail in Question 5: What should happen if a person's rights are breached?

"I was accused of a crime I did not commit and became mentally ill due to the stress. I was too sick to go to court so I was incarcerated until a set date when it would be considered again. I was kept in jail for 18 weeks, until the next available court date. For approx 6 of those 18 weeks I was held in solitary confinement, strip searched constantly and slept between two canvas sheets. When I eventually got to court the case was dropped and I was told to go home, but with a life in ruins. I lost all my assets due to high cost of the court system, and my health deteriorated terribly, I was never compensated or apologised to. It was seen as the system working, I was not afforded the opportunity to be hospitalised until well. But no one acknowledged the cost, both personal and financial, to me. I was just left on the street to start again, no support or assistance offered."

Individual

Access

"No one gets a fair go in court if you don't have any money."

Individual

Imprisonment for Failing to Pay a Debt

CP Article 11

"I know a young boy, 21 years old. He went to prison for failing to pay fines. He was abused on the inside and is out now. He hit the drugs, heroin, cause he could not handle it; he'll be dead soon."

Prisoner

"No one shall be imprisoned merely for failing pay a fine! Now that would empty the prison a bit!"

Prisoner

"Young pretty blokes go to prison for failing to pay a fine. They go to prison and they get abused and now you know you are going to see them come back to prison again. Or they 'neck' (hang) themselves because they have been raped."

Prisoner

3 Strikes!

"Mandatory sentencing is clearly in breach of a person's human rights."

NGO

"I should get more than 'three strikes'."

Young person in detention

International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him,

in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Right to Liberty & Security of Person

Civil & Political Rights, Article 9

The right to liberty/freedom and personal safety was raised repeatedly across client groups. The right was interpreted to include:

- adequate policing to ensure community safety
- associated with freedom of expression and other freedoms (CP Art 19)
- freedom from arbitrary arrest (ie., Dr Hanif)
- safer roads and
- personal safety

"I know an old lady who used to love coming inside (Prison). She sleeps on a park bench and coming inside means she got a warm bed, hot meal and a shower. It's pretty sad when the only safe place for a person is in prison."

Prisoner

"On this occasion the Government system did not make allowances for cultural circumstances and because of this a women's safety was put at risk. This woman, who was a victim of domestic violence, was desperate to find alternative accommodation. She was turned away from refuges because they were full and would not be helped by DCD because the woman had not filed a police report. The problem here was that filing a police report would be culturally inappropriate and in her close-knit community, could make her situation worse."

Social Worker

"Young adult male who had a head injury displayed aggressive behaviour in a rehabilitation hospital. A Worksafe order was put on him to protect the staff. Because there were no facilities the person was left in Graylands hospital secure ward as a 'voluntary patient' under the Mental Health Act. However, the person did not have a mental illness. Simply put, you cannot detain someone under the Mental Health Act unless they are an 'involuntary'. What happened to this person was false imprisonment under the WA Criminal Code."

Government Agency

International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be

the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Right to an Education

Economic Social & Cultural Right Articles 13 & 14

In general, the right to an education was universally considered by all client groups as necessary to the WA Human Rights Act. The right was interpreted to include:

- education that is appropriate and relevant to the individual, including cultural appropriateness
- education that is of high quality
- education afforded to individuals without discrimination including, accessible to prisoners
- rights of children with special needs to be included in mainstream schools
- necessity to address teacher shortages
- necessity to address the quality 'gap' between public and private schooling
- education that is affordable.

"One client has a spent conviction and is unable to receive a certificate for a course that he has completed because he has a criminal record! The offence occurred eight years ago!"

NGO

International Covenant on Economic Social & Cultural Rights

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

International Covenant on Economic, Social and Cultural Rights

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

To be Treated with Respect when Deprived of Liberty

Civil & Political Rights, Article 10

The right to be treated with respect when deprived of liberty is also explored in the Right to Health (see below).

In prisons

"On many occasions the treatment of prisoners is not what it should be."

Prisoner

"I have witnessed people given treatment (damaging treatment) against their wills; people subjected to unnecessary force and violent restraint and treated as less than human."

Individual

The Purpose of the Prison System Is Reform and Rehabilitation

Article 10.3

Art 10.3: "There has to be an expectation that jail leads to rehabilitation. That a job (apprenticeships) that a person starts while in jail is there for them when they get out."

NGO

"If you have a history of being in the 'can'; not if it's your first time and you're a 'mummy's boy'. But if you have been there before and you can surrender yourself to the system then you can welcome it. I been on the streets since I was 10½. I been in boys homes that were harsher than prison. In jail you get 6 months sober, bed, roof and three meals a day. You look at XXX, he could use the 'can' right now ... he ain't got nothing else but misery. In the 'can' you do your chores and you sit back. The only problem with being in the 'can' is you're away from your people ... if you have them. Me I was placed with a 'legal guardian' they called it. They loved me. Gave me whatever I wanted but they hated my people. My mum visit once but she wasn't allowed through the gate."

Individual

International Covenant on Civil and Political Rights

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Right to Health

Economic Social & Cultural Right, Article 12:

“These people (people with a disability, impairment or mental health problem) are among the most defenceless and vulnerable people in our community. This should be in the Bill and reflected in the preamble. This Bill is for everyone and most importantly, those who are most at risk.”

Former homeless person & mental health consumer

The third highest intensity rating was achieved by Article 12, the right to the 'highest attainable standard of physical and mental health'.

This right was raised predominantly within the context of people with mental health concerns, however most client groups recognised this as fundamental to all members of the community.

Participants spoke of denial of services, lack of affordable access to services, discriminatory and degrading treatment from Government and non-government service providers.

International Covenant on Economic, Social and Cultural Rights

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Dual Diagnosis

"By promoting the idea of **human dignity** the Act might help to demonstrate the need for non-discrimination when a person who is trying to access a service and/or accommodation and who has a mental health problem or an alcohol and other drug issue (dual-diagnosis or co-morbidity).

At present drug and alcohol services won't help if there is a mental health problem and mental health services won't help if a drug or alcohol issue is involved. Accommodation services are also denying access if a person has both of these issues...this is **discriminatory**."

Youth Worker with street present young people

Degrading & Inhumane Treatment

"I had a nervous breakdown and fell victim to a dysfunctional mental health service. It was dysfunctional in its delivery of services and in its conduct. I was sick but I was not hapless and I spoke up over treatment. I spoke up and got locked up. In this system I lost my house, my family and my livelihood. I suffered under this system; post traumatic stress. I now speak as a former consumer (although I don't like this term), and as a carer."

Mental Health consumer

"People are medicated in order to restrain and change/modify their behaviour simply to suit nursing home staff."

Government Agency

Discrimination in Health Service Delivery

"I have seen people with mental illness have their voices ignored by service providers. I know a woman who had tardive dyskinesia and her doctor, when asked to consider changing the medication, dismissed her concerns. She could hardly drink from a cup because the shaking was so severe. I know another man who was on THREE times the recommended maximum dosage of an antidepressant. It had been established that more is not better with medicine."

Individual

Housing & Health

"Hospitals have discharged patients who have no accommodation due to bed shortages."

Government Agency

"People being "detained" in Graylands due to lack of appropriate accommodation and support services in community."

Government Agency

"Of great importance is the right to housing; without a stable place to live, the health and general well-being of people is not assured and as a result a person can not exercise effectively their civil and political rights."

NGO

Threshold Issues as Human Rights Concerns

Frequently, consultations revealed 'cracks in the system'; areas where an individual's particular situation or condition resulted in their inability to source assistance.

"One young boy with ADHD had some aggressive behaviour issues and comes from a fairly dysfunctional family. He was also deemed 'too intelligent' by DSC. He clearly needed assistance but could not get any from Government. He is now homeless and no one will help because he does not fit the criteria."

NGO

"They say that my disability is 'not severe enough'."

Individual at risk

"I try to rent. I can afford it but they won't take me because I don't have a job. They told me, 'you must have a job to get a unit'. They see I have a pension, maybe also because of my race, and they say, 'No'. Homeswest won't help me because I don't fit the criteria.

I've done 'independent living' training with Westcare and they give you a place while you are training. Then you have to get your own place. But I can't get one. I am now living in shared accommodation. I am slowly losing those skills."

Mental Health consumer

"There are not enough resources for those in need. People get lost in this system or forgotten by it. And if your case is borderline there can be no help at all."

Person with a disability & a mental health concern

Mental Health Act

Of particular relevance to NGOs concerned with mental health issues or individuals with a mental health concern was the Mental Health Act. In particular, the section dealing with 'involuntary detention' and the need for the Mental Health Act, as a whole, to require observance of the WA Human Rights Act.

"The Mental Health Act should be reviewed in light of the WA Human Rights Act to prevent violations of human rights that it currently allows."

NGO

"The Mental Health Act should refer directly to the WA Human Rights Act."

NGO

"I am sceptical that a human rights act can help because it's the Mental Health Act itself that takes people's human rights away from them!"

Mental Health consumer

"The Mental Health Act needs to be revised within the requirements of the Human Rights Act. At the moment there are a number of opportunities where human rights are violated, and it would be nonsensical to have a Human Rights Act that doesn't underpin all other existing acts. For example CTO's, ECT, depot injections and the right to own beliefs/lifestyle choices."

NGO

Mentally Accused Impaired Act

During discussion one prisoner mentioned that 'mandatory sentencing' was a breach of a person's human rights and mentioned the case of the 'ice-cream boy'. It was suggested that this person, who also displayed aggressive behaviours and had a mental illness, fell under the 'Mentally Impaired Accused Act' (MIA) which resulted in the boy's indefinite detention.

Right to Peaceful Assembly

Civil & Political Rights, Article 21

The final human right selected for inclusion in this section of Further Observations is the right of peaceful assembly.

Client groups of homeless and street present people (young and old) from the Perth CBD testified to congregating in specific locations because the locality is:

- a natural meeting place
- the site of essential services including health and short to long term accommodation
- a hub of activity
- an 'exciting' place to be.

Similar testimony was heard in relation to young people and malls in the eastern suburbs.

NGO's and numerous individuals (young people, homeless and street present, people with mental health concerns and a disability) reported being denied access to public places because of their economic situation, health status or appearance.⁸

Denial of Access

"The rights of people to access and use public space are violated on a regular basis."
Individual

"The Northbridge Curfew, Operation Clean Sweep, police move-on powers and the threatened Anti-Social Behaviour Orders are all examples of where individuals' rights to assemble peacefully and to move freely within public space are impinged upon, and not necessarily with good reason."
Individual

Youth Work

"A youth worker was sitting in an inner city park at lunch time and as he knew many of the homeless youths in the area, they came and sat with him. The police then asked him to move on as he was 'attracting' the 'the wrong sort of people'. He asked why, and in the end they gave him, the youth worker, a move on notice."
NGO

Appearance

"People not being allowed to enter places (expensive shops or high class places) because of the way they dress and how they choose to present themselves. I was told to leave the Gucci and Louis Vuitton store in the city because of the way I looked; they told me it was "store policy". Maybe I was loaded and wanted to buy a bag. It was pretty shit. I was also told to leave the vicinity of Wesley Church where I hang out with my people."
Young person

⁸ The reader is recommend to *Consult Statement: Street Work Team* [online available] www.humanrightssolutions.com.au

"It can be argued that the right of other members of the public to safety are also important, which they are, but the discretion that has been extended to police and other authorities to determine whether an individual is a danger or not is too great, and has resulted in the unfair targeting of individuals who do look different, and this is unjust. Young people, homeless people and indigenous people have been targeted by police in the inner city of Perth, and moved on for such innocuous 'offences' as sitting on the seats incorrectly. Anecdotal evidence has indicated that the business owners in the area request these move-ons as groups congregating allegedly put off families from going to their shops. This is why human rights are essential. You cannot justify moving out whole populations of people from an area because they are 'bad for business'."

Individual

"A small group of Goth young people were talking in Central Park, Perth CBD. The police sergeant strode across Hay Street and said. 'Move on please - we don't want Goths around here - we don't want people dressed in black around here'. Young person: 'We're just talking with our friends'. Officer: 'You are creating anxiety in the public - that is an offence and if you don't move on you will be banned from the city'."

Reverend

Right to Dissent

"Right to use nonviolent civil disobedience and organising of different forms of protest to help prevent oppression and exploitation of people and the environment."

Individual

International Covenant on Civil and Political Rights

Article 21

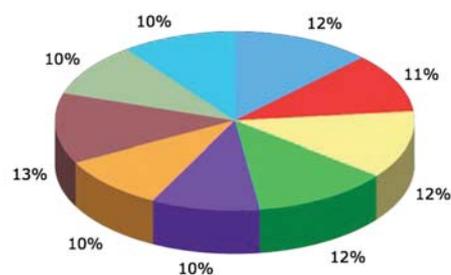
The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

3 How should a WA Human Rights Act require human rights to be protected?

Survey Results

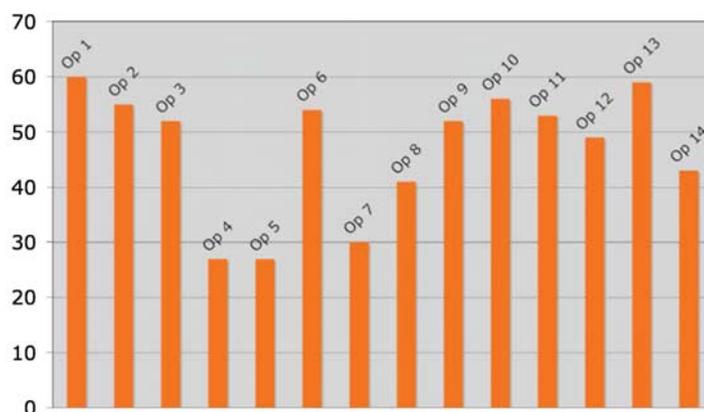
The Survey asked, 'Who is responsible for protecting human rights?' Respondents selected:

- **Option 1: Government Ministers 12%**
- Option 2: Local Government 11%
- **Option 3: Government agencies and contracts 12%**
- **Option 4: Judges (courts and tribunals) 12%**
- Option 5: Businesses and corporations 10%
- Option 6: An independent non-government group 10%
- **Option 7: A WA Human Rights Commissioner 13%**
- Option 8: Non-government organisations and community groups 10%
- Option 9: Me, my friends and family 10%



Graphic 12 (162)

The survey also offered a range of 'suggestions' under the heading, 'What else could be done to promote and protect human rights in WA?'



Graphic 13 (162)

Option	% of Total	Vote	Description
Op 2	34%	55	New laws and existing laws should comply with the WA Human Rights Act
Op 4	17%	27	Laws that restrict human rights should only operate for a limited time and only occur in exceptional circumstances.
Op 8	25%	41	Government contracts should include human rights protections.
Op 9	32%	52	All Government agencies should have policies that comply with the Act.

Further Observations

New Laws

"New laws should be made to conform to the WA Human Rights Act."
Individual

"New laws should be made to conform to the Human Rights Act."
NGO

"So the Government can get away with doing what it wants to do anyway. So what's the point?"
Young CaLD person

Laws that Breach Human Rights

Participants requested that legislation passed that breaches human rights should be reviewed or struck down.

"Review legislation (other Acts) where repeated breaches are identified."

Individual

"There should be a requirement that existing written law be modified or repealed if it breaches human rights."

Individual

"There needs to be the ability for law which is in breach of human rights to be struck down."

Individual

"It would be best if the court could declare the law invalid and then ask parliament to change it within a certain time frame."

Individual

A Sunset Clause for Laws that Breach Human Rights

Participants raised concerns that legislation that breaches human rights has no expiry date and carried no obligation on Government to monitor and evaluate the impact of the law.

"Any legislation that infringes on human rights 'in the public interest' should have a sunset clause, a review date and human rights impact statement obligations imposed on it."

NGO

"There needs to be a sunset clause included in the Act."

NGO

Accessibility

Participants noted that the only way a human rights issue could be raised was through judicial avenues and raised concerns that this effectively rendered the WA Human Rights Act inaccessible to many individuals and stifled 'dialogue'.

"How is this applicable to the ordinary person who would have to come up with so much money to cover legal fees?"

Individual

"The Human Rights Act is 'for the people' right; but no people can access it. This just seems contradictory. It's for 'natural persons' but hardly any natural person can access it."

Young CaLD person

"The courts and the judicial process are largely inaccessible to our clients. Having someone to complain to, a Human Rights Commissioner or a team of human rights people, would be essential."

NGO

Fears of possible Government Deference of Human Rights Issues

Participants raised the issue of the human rights 'dialogue' being hampered due to the requirement for human rights issues to only be raised via the judicial process. Because of this

requirement, participants suspected that Government agencies could simply defer a complainant to the processes of the Supreme Court and subsequently not deal with the issue at the source.

"The Act should ensure that the human rights process does not transfer from Government and bureaucrats to the Judiciary and the Courts."

NGO

Informal Process that Promotes 'Real' Dialogue

Frequent participants cited reasons for a WA Human Rights Act that does not necessarily involve the judiciary. There was a consistent sentiment that judicial protection for human rights does not, by itself, result in better human rights protection. Within this context participants called for informal processes of dealing with human rights breaches.

"The Act should allow for a person to seek 'discussion and redress' with an independent body in order to rectify a breach of their human rights without the need to go all the way to the Supreme Court. The time and cost will stop many from pursuing their human rights. An Ombudsman or grievance process should be available with the Act."

NGO

"A judicial process should be an option of last resort. The cost of the legal system is a major infringement of the rights of those who cannot afford it."

Individual

"I want the person who has violated my rights to *feel* the full weight of my experience; to know that what they have done to me, how they treated me, was wrong. I don't want the person to lose their job but I do want that person to understand what has been done was wrong. And I don't want it to happen again."

Person with a disability

"...Why should people have to resort to lengthy court battles to prove breaches of their rights? Also, the Act should apply equally to Government and private industry."

NGO

"Whatever form it takes it has to be immediate. If not, there simply is not enough time or physical resources for our clients to access it. They have too many competing interests/needs: secure a home, get treatment, find a job etc."

NGO

"As the draft reads, a person has to go all the way through the Supreme Court which is costly. Then at the end of the process, which could take a long time, even if there is a recognised human rights breach, there is no requirement for Government to change the law. So what's the point! Better to not involve the court at all and to have an informal process so a person can deal directly with their issue."

Individual

Complete Review of Existing Policies and Procedures

"Sometimes people act in a way that is within the rules within the law, but the practice or what they do to people is wrong; a breach of a person's human rights. These things should be re-read with a human rights focus."

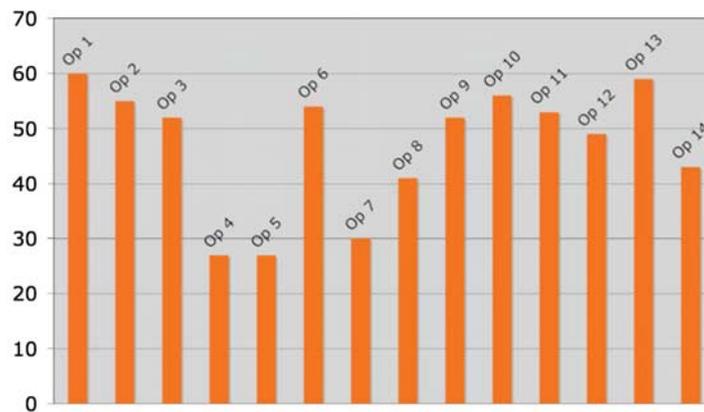
NGO

Who should be required to comply with the human rights recognised in a WA Human Rights Act?



Survey Data

There was strong support to expand the scope of the WA Human Rights Act to include all of Government (including Government contracts) and corporations.



Graphic 14 (162)

Option	% of Total	Vote	Description
Op 3	32%	52	Decisions of the State Government and WA judges should comply with the Act.
Op 5	17%	27	Government officials and Government agencies should write human rights statements when they make decisions and policies.
Op 6	33%	54	Corporations should have to comply with the Act.

Further Observations

In the main, face-to-face participants echoed Survey data (ie. all of Government, Government contracts and corporations) with an added emphasis on the need for Government contracted services (especially essential services and utilities) and corporations (especially providers of private housing) to be included in the scope of the WA Human Rights Act.

Government

"All Government departments, public sector standards, human resource practices etc. should acknowledge and comply to the Human Rights Act."

NGO

Corporations

"It should not be limited to Government, it should be expanded to include corporations and in particular, those corporations that provide Government services."

Young CaLD person

"A limited spectrum of corporations, namely those contracted by the Government such as those which provide utility services, should have human rights obligations written into their contracts."

NGO

"People from non-English speaking backgrounds (refugees and recent migrant families) are particularly vulnerable to phone companies who treat all people equally. Individuals within this group are receiving massive phone bills. They do not understand how they have accrued such a high debt nor, in some cases, do they have the ability to pay. The main problem is that they do not fully understand the implications of the contracts they are entering into and the company makes no provisions for this."

NGO

Essential Utilities

"The right of access to essential utilities: water, power, gas, telephone etc. [We are] concerned about the impact of the privatisation of essential utilities on those most vulnerable in our society. [We] consistently hear from families and individuals whose utilities are turned off without consideration of the person's social economic-status and current economic situation."

NGO

"[We] recognise that Western Australia has one of the highest 'cut-off' rates for utilities. We are becoming seriously concerned about this and would like to see a different approach to utilities considered; one that considers the humanity of the client and the particular socio-economic situation of the person."

NGO

Housing Providers

"In particular, the right to adequate shelter and housing that is secure ie. a tenant should not be evicted without due process and consideration of their human rights."
NGO

"One of our clients was paying \$100 per week rent and even this was tough. With the price of rentals increasing the landlord also decided to increase the rent to \$160 dollars! Not only this but the tenant also had to make up the shortfall in the bond."
NGO

Individuals

Some participants called for the Act to include citizens.

"Include all Government contracts and citizens."
Individual

Prisons

Finally, prisoners and NGOs who service the interests of prisoners, detainees, and ex-offenders requested that the Act include the operations of WA Prisons and Detention facilities, in particular those that are run by private companies.

"Prisons are largely inaccessible to independent review and accountability. They are governed by 'policies and procedures' not by a law and you can't take a 'policy' to court!"
NGO

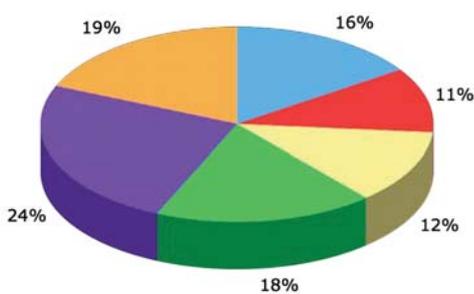
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What should happen if a person's human rights are breached?

Survey Results

The survey asked, 'What would you like to do if your rights were denied, infringed or breached?'. Respondents selected:

Apply to a court or tribunal for:

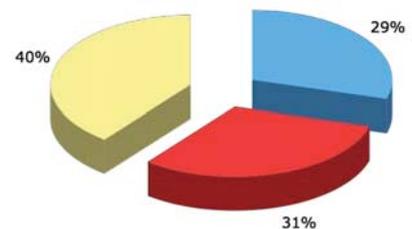


Graphic 15 (162)

- Option 1: An apology
- Option 2: An order that acknowledges that my rights have been affected
- Option 3: An order that protects my rights
- **Option 4: An order that cancels the law that violated my rights**
- **Option 5: An order that requires Parliament to investigate and consider changing the law**
- **Option 6: Money (compensation)**

Other Survey Options

- Option 7: Be able to go to a Human Rights Commissioner to ask Parliament to change the law even if you don't make a formal complaint
- Option 8: Community groups should be able to complain to the WA Parliament and Courts on my behalf
- **Option 9: The WA Parliament should investigate all complaints about human rights and either change the law or publicly explain why laws that affect my rights should stay**



Graphic 16 (162)

Further Observations

Overwhelmingly participants noted the absence of tangible 'consequences' or 'penalties' for breaches of human rights. Participants suggested that breaches of human rights should entail some form of penalty and that access to remedies and compensation should be made available to victims of human rights violations.

Tangible Consequences for Breaches of Human Rights

"There must be tangible consequences for victims of human rights abuses: access to a legal process, fines for the person who breached another person's human rights, a change to existing laws or policy."

Individual

"If there is no enforcement no one will take notice. I mean what is the point of a law if it is broken and nobody is held accountable?"

Young CaLD person

"As far as I can see there is no enforcement power in this draft. And if this is true then what is the point?"

Young CaLD person

"This Bill is of no point if there is no enforcement or consequences for breaching human rights."

Individual

Compensation & Remedies

"It needs to have a mechanism for remedies."

Individual

"In this Act there is no room for negotiation, mediation or compensation for breaches of human rights. We have remedies for other aspects of the law. By embracing this Act, and there not being any consequences for enforcement, are we saying that these human rights are not as important as other laws that we have?"

Young person

"There are no remedies! So the Government dangles this 'human rights' cookie for you...you starving people, and when you reach for it they are going to take it away."

Young CaLD person

"Compensation should be afforded."

Individual

"There should be allowance for the award of damages and compensation where there is a breach of human rights."

Individual

"The existence of a Human Rights Act seems pointless in my opinion if there is no group or division to enforce, monitor and police persons/organisations that breach the Human Rights Act. There also needs to be a clear avenue for persons to declare violations of the Human Rights Act; either those experienced by the individual first hand, or witnessed by a third party (because a person who has had their human rights violated may not be in the position to voice the breach of human rights). There should also be repercussions/penalties for breaching the Human Rights Act otherwise how will people who breach the Act amend their actions?"

NGO

Informal Processes

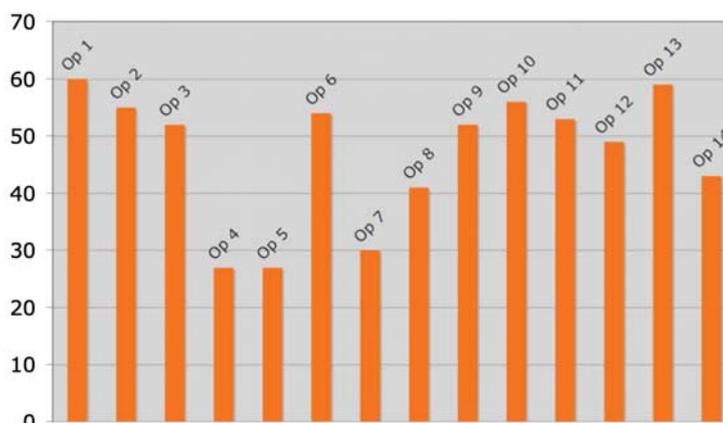
Also raised in Question 3.

"In the event of a perceived breach, the person should be able to talk to a Commissioner or go through a more informal resolution process before being forced to litigate in order to prove the breach has occurred."

NGO

6 If WA introduced a Human Rights Act what wider changes would be needed?

Survey Results



Graphic 17 (162)

Option	% of Total	Vote	Description
Op 11	33%	53	A properly funded independent non-government group should review the Act and make sure Government and corporations are complying.
Op 13	36%	59	An independent Human Rights Commissioner should be established to advocate and promote respect for human rights.

Further Observations

A Human Rights Commissioner

A majority of participants requested that an individual or suitably funded organisation or agency should have responsibility for monitoring compliance with the WA Human Rights Act.

"The Bill has 'no teeth'. There needs to be an oversight mechanism such as a Commissioner of Human Rights."

NGO

The form of this 'oversight' mechanism was shared between calls for a Human Rights Commissioner, expanding the mandate of the WA Equal Opportunity Commission, an Ombudsman and the creation of a wholly independent agency.

"The Equal Opportunity Commission should be enlarged to cover this new Act. We should be able to take a complaint to them and have our issues taken seriously."

Individual

"We need a WA version of HREOC that can monitor the observance of these rights and take action when they are breached."

Individual

"Have a Government department or agency oversee the Human Rights Act: monitor, investigate and promote. Perhaps under EOC or maybe a HR Commissioner."

NGO

"It should provide for someone who will take responsibility to check compliance."

Individual

"There should be a complaints mechanism that leads to Government having to review legislation/policy that breaches the Human Rights Act."

NGO

The functions attributed to this body were broad including powers to investigate claims, monitor Government and non-government agencies, evaluate implementation and compliance measures and report on progress. Other suggestions include:

Complaints

Receive complaints, investigate claims and where necessary, represent individuals. One example of an existing working model that 'works' was processes of the Disability Services Act.

"There needs to be a clear complaints process for resolving human rights breaches/disputes, especially when affecting disadvantaged individuals."

NGO

It was requested that complaints should be able to be lodged by a range of stakeholders: individuals, a legal representative, a Government or non-government agency either nominated by the victim or as part of a general claim made against a widespread or systemic human rights issue.

"I have a right to tell my story. I should be able to complain and we should get fast help. Maybe there could be two streams of assistance; a fast one for urgent matters and another for stuff that is not as urgent."

Young 'at risk' person

"As NGOs often we are witness to situations and practices that would constitute a human rights violation. We should be able to raise these matters as part of a preventative discourse."

NGO

Provision should also be made to adequately deal with 'at-risk' groups: ie. non-English speaking, young people, people with mental health problems etc.

"People with a disability or an acquired disability can suffer huge knocks to their self-esteem. They are unlikely to bring attention to themselves by taking up their own issues. They need assistance or an advocate."

NGO

Finally, it was imagined that the complaints process would afford levels of anonymity where required.

"If there is a complaints process it has to afford a level of anonymity. Prisoners will rarely speak up for fear of retribution."

NGO

Findings Accessible & Open To Review

"All findings should be made public and not kept confidential - I complained and was told it had been reviewed and no action was required, but I was not allowed to see the reports as they were confidential! How could I dispute something if I did not know what was said?"

Individual

Making a Complaint or Seeking Advice Should be Free

"You should be able to call for help. It should be free and the person on the other end of the phone should be in Australia!"

Young person

"A complaints process with no fees."

Mental Health consumer

Make Recommendations

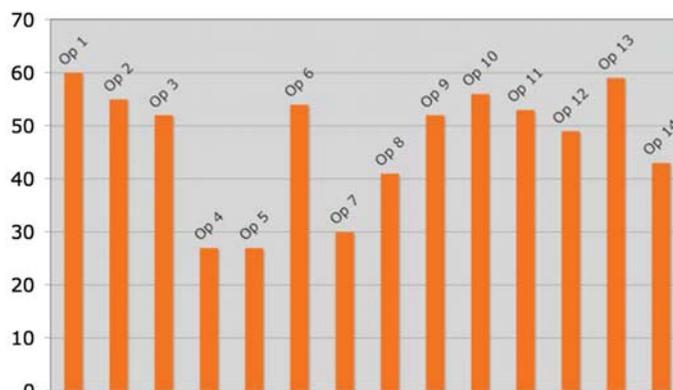
"Go to HR Commissioner to investigate claim and make recommendations to Government policy."

Individual



What else can the Government and community do to encourage a culture of respect for human rights in WA?

Survey Results



Graphic 17 (162)

Option	% of Total	Vote	Description
Op 1	37%	60	Human rights education for communities, schools, judges and all levels of Government.
Op 7	19%	30	Annual reports by all tiers of Governments and corporations should include human rights impact statements.
Op 10	35%	56	The Act should be regularly reviewed and updated.
Op 12	30%	49	Human rights left out of the Act should be discussed and over time, included. The public and community groups should be involved in this discussion.
Op 14	27%	43	The Government should develop a five-year plan to improve human rights.

Further Observations

Resources

"Almost all of our 'human rights' concerns require resourcing; it is inadequate resources that remains THE primary obstacle to the fulfilment of human rights, not the creation of a HR Act."

Government Agency

"Legislation has historically been a very easy way by Government of addressing an ill in society without having to take the responsibility of allocating meaningful resources in which to address the issue (eg. education and community development)."

Individual

Preamble

"These people (people with a disability, impairment or mental health problem) are among the most defenceless and vulnerable people in our community ... 'disability and mental health problems' This should be in the Bill and reflected in the preamble. This Bill is for everyone and most importantly, for those who are most at risk."

Former homeless person & mental health consumer

Education

Overwhelmingly participants recognised a need for human rights education on a wide range of issues and across a wide spectrum of clients.

"Unless the community is educated on these rights is there any point? Half the time we wouldn't know that these rights exist or that they could apply to situations we are going through."

Street Work Team Youth Worker

In Schools

"Education within schools to help a new generation acknowledge the importance of human rights in practice."

Individual

"Systems of law will never be able to legislate against hidden and underground prejudices, the Human Rights Act should be EDUCATIONAL AND PREVENTATIVE IN FOCUS, and work on rooting out these issues by educating the children."

Individual

General Public & Marginalised Groups

"If you are marginalised, not articulate then sometimes people don't take any notice of you anyway. I mean, these people miss out anyway. So how are you going to ensure that they don't miss out again by ensuring that the people who most need to know about their rights are made aware of them?"

Specialised Education for People with Cognitive Impairment

"The language of these documents is inaccessible to many people, especially those with a cognitive impairment or learning difficulty. Can these documents be written in plain English, using layman's terms? The pictorial version of the Disability Service Standards is a good model."

Person with a disability

"There will need to be significant efforts to educate and promote the Act, including what the interpretations of human rights within the Act mean."

NGO

All of Government

"This Act is going to be a very useful reference point for us but the problem is going to be when the person or agency we are dealing with does not understand the Act. This project requires a group or agency to deliver on an education strategy that covers: 1. Young people's knowledge of their human rights and 2. All of Government so they understand their obligations."

Youth Worker

"Training on human rights should be compulsory in Government agencies."

NGO

Police

"Police Academy and in-service training should address importance of dignity and respect for vulnerable young people without cultural assumptions and pre-judgment. Police culture needs addressing to regard such issues as significant rather than soft or cynicism and sneer fodder."

Advertising and Use of Media

Most participants also recognised the need to promote the existence of the WA Human Rights Act in creative and novel ways.

Visual & Public



Person 1 - "The information must be in a form that can be read by those with low levels of literacy. For example, indigenous campaigns are often put in pictorial format and the Disability Services Act is also in this format."

Person 2 - "Easy to read like international road signs."

"When you go to hospital there are signs that say, these are your rights but then this is also acted upon so when someone's rights are breached or aren't being addressed someone follows it up and does something about it. This is how the Act should work."

Individual

"Promotion advertisements on television, radio, papers."

Individual

Updated Over Time

Finally, most participants welcome the idea that the WA Human Rights Act could be changed and updated over time. Having said this, this sentiment was tempered with a clarification that 'change' over time does not mean lessening human rights protections.

"Community values change, needs change, the Act should move with these changes over time."

Individual

"Human Rights should be harder to change than ordinary law."

Individual

8 Do you have further comments about human rights laws for WA?

At the close of each session participants were posed a hypothetical, *"If the WA Human Rights Committee were here today, what would you like to say to them?"*

Concluding remarks were often profound, varied and in some instances humorous! Listed below is a small selection of notable comments.

"The truth is that we need protection. There is so much negativity towards different cultures and religions and it is causing so much hurt."

Young person

"Discrimination is the biggest problem today."

Young 'at risk' person

"We strongly encourage Government to create a Human Rights Act that reflects the full range of the human experience; one that incorporates civil and political rights as well as social, cultural and economic rights."

NGO

"The Act should be a statement that makes our community values, goals and aspirations explicit. At the same time I am mindful of the fact that if the Act only contains civil and political rights then there will be a large difference between the contents of the Act and the 'on-ground' reality of what people really care about."

Social Worker

"We have a legal system, let's make it a justice system. I would like clear action that will produce the result, not more legal entanglement."

Individual

"We need to look at what causes real and meaningful change in society and not focus simply on a law that will miraculously create change."

Individual

"We have all come here from countries which, in general, are meant to be abusing our rights.

We come here and this place (Australia) tells us that we are a Democratic society; that we are a model society; we are so fantastic.

We came here for a better life. That's what my parents chose for me. They came here so that we would not get abused on the streets. They came here for all the rights that Australia is supposed to have and protect. And after coming here we have discovered that it is not so fantastic. In fact, sometimes I wonder, are the rights better over there or here.

Yeah there is crime in South Africa but at the end of the day what really matters is that I get abused here in Australia more than I would ever have been abused in South Africa."

Young Muslim woman

"Get off your ass and do your job. What's up with all these rights we don't have yet! It's just not good enough."

Young 'at risk' person

"Good luck."

Individual

"Thanks for the opportunity to express my opinion."

Individual



APPENDIX G
DRAFT PREAMBLE

APPENDIX G

DRAFT PREAMBLE

The people of Western Australia are part of one of the longest surviving and most successful democracies in the world. Central to the future well-being of a stable, prosperous and peaceful community is the securing and upholding of the fundamental human values that are accepted as the rights of all. These include freedom of speech, equality before the law, freedom of association, equality of men and women, tolerance, mutual respect and compassion.

However, these values are largely taken for granted by many in the community, and are always vulnerable to being lost, particularly as the volume of legislation expands in response to demands for more government intervention, and bureaucracies become larger and more intrusive.

The Parliament of Western Australia believes that the Parliament itself, the Government and its agencies, and the courts, need to remain vigilant to ensure that, in their respective roles, they act in ways which are consistent with these values. Parliament is of the view that human rights will be preserved and enhanced by being made part of the law of Western Australia.

Accordingly, this law is enacted to protect the continuing enjoyment and enhancement of democratic values, rights and liberties by every person in Western Australia.

The enactment of this law is also intended to promote a culture of respect for human rights to the benefit of all Western Australians and to build mutual respect within the community. It requires Government itself and its agencies to act in accordance with the dignity of every human person, and encourages a sense of responsibility for everyone to act in ways which respect the rights of others, as an integral and continuing part of the fabric of our society.

This Act is founded on the following principles-

- Human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.
- Human rights are necessary for individuals to live lives of dignity and value, and belong to all people without discrimination.
- Human rights have a special importance for the Aboriginal people of Western Australia, as descendants of Australia's first peoples, with their diverse spiritual social, cultural and economic relationship with their traditional lands and waters.
- Human rights are set out in this Act so as to make clear what people's rights actually are.
- Setting out these human rights also makes it easier for those rights to be taken into consideration in the development and interpretation of legislation.

- Human rights come with responsibilities and must be exercised in ways that respect the rights of others.
- One individual's rights may also need to be weighed against the rights of others.
- Few rights are absolute, but rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society.
- Respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.



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